

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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JUN 20 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Implementation of )  
Sections 3(n) and 332 of the )  
Communications Act )  
)  
Regulatory Treatment of )  
Mobile Services )  
)

GN Docket No. 93-252 ✓

In the Matter of )  
)  
Further Forbearance )  
from Title II Regulation )  
for Certain Types of )  
Commercial Mobile Radio )  
Service Providers )  
)

GN Docket No. 94-33

To: The Commission

COMMENTS  
OF  
UNITED STATES SUGAR CORPORATION

United States Sugar Corporation (U.S. Sugar), by its attorneys, hereby respectfully submits these Comments in response to the Further Notice of Proposed Rule Making ("FNPRM") adopted by the Federal Communications Commission ("FCC or Commission") on April 20, 1994, in GN Docket

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SUMMARY

United States Sugar Corporation (U.S. Sugar) operates a 21-channel Specialized Mobile Radio (SMR) system from a single transmitter site in Clewiston, Florida. The system serves U.S. Sugar's agriculture operations as well as local businesses, law enforcement agencies, farmers, truckers and construction companies. The system is used predominantly for dispatch services by both U.S. Sugar and unaffiliated subscribers.

On August 10, 1996, U.S. Sugar's private land mobile radio system will be reclassified as a commercial mobile radio service (CMRS) by dint of its fit with Congress's statutory elements of a CMRS. U.S. Sugar is concerned that Congress and the Federal Communications Commission will overlook a special class of CMRS that will be adversely affected by the current proposals to effectuate regulatory parity among traditional common carriers and newer breeds of wireless communications service providers.

U.S. Sugar maintains that "small" CMRS licensees are not part of the CMRS providers Congress intended to regulate like common carriers. U.S. Sugar proposes that CMRS providers that meet certain qualifications with respect to

subscriber profile, geographic coverage area, degree of interconnection with the public switched telephone network, and availability of alternative comparable services be categorized separately from the general class of CMRS providers. Specifically, this separate class should be termed "small" CMRS and treated differently than the rest of the CMRS providers.

Small CMRS should not be required to comply with the common carrier-oriented regulations proposed in GN Docket No. 93-252 or adhere to any Title II common carrier provisions not already forborne. Small CMRS providers are not "substantially similar" to the services Congress contemplated when it directed the Commission to formulate comprehensive regulations governing the realm of common carriers. It is U.S. Sugar's proposal, therefore, that small SMRS remain subject to the current Private Land Mobile Radio Service rules after their reclassification on August 10, 1996.

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COMMENTS  
OF  
UNITED STATES SUGAR CORPORATION

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Dated: June 20, 1994

No. 93-252,<sup>1/</sup> and in the Notice of Proposed Rule Making in GN Docket No. 94-33<sup>2/</sup> (hereinafter "Further Forbearance").

I. PRELIMINARY STATEMENT

1. U.S. Sugar is America's largest producer of sugar cane, and one of the country's leading diversified, privately-held agricultural firms. Its primary business interests, other than sugar cane production, include citrus fruits, vegetables and, to a lesser extent, plastics. All of the company's operations are situated in South Central Florida. From its headquarters in Clewiston, Florida, U.S. Sugar maintains 180,000 acres of sugar, citrus and vegetables in Hendry, Glades and Palm Beach Counties.

2. U.S. Sugar operates a 21-channel Specialized Mobile Radio (SMR) system with coverage limited to the Clewiston area. The system is used for internal communications to support general operations, including the

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<sup>1/</sup> In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making, GN Docket No. 93-252 (released May 20, 1994).

<sup>2/</sup> In the Matter of Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, Notice of Proposed Rule Making, GN Docket No. 94-33 (released May 4, 1994).

dispatch of personnel, equipment and supplies required in the cane and vegetable fields, and citrus groves. Excess capacity on the SMR system is leased to small businesses and public safety entities in the Clewiston area. Approximately 88 paying subscribers comprised of local agriculture businesses, law enforcement agencies, and small trucking and construction companies use the system predominantly for dispatch services, employing 700 of the system's approximately 1300 mobile units. Approximately 13% of this leased capacity is interconnected with the public switched telephone network; a testament to the existence of several alternatives to U.S. Sugar's SMR system for mobile access to the local and interexchange telephone services. The U.S. Sugar SMR system generates an annual revenue of approximately \$155,000 from the provision of service to local entities. This revenue is of virtually no significance to the financial interests of the corporation, but U.S. Sugar makes service available because it has the excess capacity and it benefits the community.

3. U.S. Sugar's 800 MHz telecommunications system is the epitome of the traditional SMR system, designed to provide dispatch service in a single, well-defined locale. It is unfortunate that on August 10, 1996 this small system will be reclassified as a commercial mobile radio service

(CMRS) provider simply because it marginally, but literally, meets the criteria presented in Congress' three-prong test for determining CMRS status.<sup>3/</sup>

4. U.S. Sugar is submitting this combined set of Comments responsive to both of the recent proposals concerning CMRS providers because the issues relevant to U.S. Sugar are so fundamentally related that, from this licensee's point of view, it is the most efficient means to present its views to the Commission. The Commission's fullest consideration of the ramifications of its proposals on small CMRS providers requires that the technical, operational, and licensing issues be discussed and weighed in relation to the proposed methods for the legal characterization of certain CMRS providers. U.S. Sugar is deeply concerned that it faces unjustified regulatory burdens with the advent of its reclassification. It appreciates this opportunity to provide the Commission with these Comments and to explain why the conversion is such an unnecessary burden and how it can be avoided.

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<sup>3/</sup> Section 332 defines CMRS as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public." Communications Act of 1934, as amended, § 332(d)(1), 47 U.S.C. § 332(d)(1).

## II. COMMENTS

### A. **Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services**

1. **Including small CMRS providers in these proposed rules does not further Congress's purpose for creating the CMRS classification**

5. Private land mobile services developed to provide service tailored to the needs of defined users, such as public safety entities and businesses whose needs were not met by available common carrier services. Over time, the Commission authorized some licensees to provide service to limited groups of third parties, for a profit, on a private carrier basis. The principal private carriers are SMRs.

6. The profile of SMR service has changed dramatically over the years, however, from small, geographically well-defined analog facilities to proposed digital, mega-channel, wide-area systems that cover large regions of the country and rival cellular common carriers in service capabilities and quality. Part of the reason for this flurry of SMR development is the ability of these large

systems to accommodate subscribers as private, rather than common carriers, with no obligation to abide by burdensome Title II common carrier regulations.

7. The emergence of an SMR competitor to cellular and common carrier paging coupled with the imminent arrival of Personal Communications Services (PCS) might justify Congress's inquiry into the state of the regulations governing these various providers. Among those entities that truly offer similar services to consumers there should be comparable regulation. The Commission should recognize, however, that the three-prong test used to define CMRS is too broad.<sup>4/</sup> The test is too expansive because it brands limited systems like U.S. Sugar's system as a competitor for common carriers when, in fact, it is not.

8. U.S. Sugar does have its system interconnected with the public switched telephone network, and it does make excess capacity available to third parties on a for-profit basis. Its similarity with the CMRS providers Congress was contemplating when it devised the classification scheme ends there. U.S. Sugar and similarly situated licensees that operate SMR systems primarily for

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<sup>4/</sup> 47 U.S.C. § 332(d)(1).

the purpose of serving themselves fall into this new CMRS category almost by default. Pursuant to the statutory test, it takes as little as one interconnected subscriber who pays for access to an SMR system to subject that system to myriad new regulations designed to protect the viability of large common carriers.

9. U.S. Sugar respectfully submits that it was not Congress' intent to saddle small SMR systems with the same regulatory obligations required of multi-channel, wide-area SMRs. The U.S. Sugar system and others like it will never be comparable to cellular, PCS, or Expanded Mobile Service Provider (EMSP) systems. Accordingly, these small SMRs should be removed from this new regulatory category and continue to be regulated after August 10, 1996 as PMRS providers.

**2. The Commission should provide for a category of CMRS providers that are not substantially similar to common carriers**

10. The Omnibus Budget Act of 1993<sup>5/</sup> requires the Commission to amend its rules "as may be necessary and practical to assure that licensees in such service are

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<sup>5/</sup> Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993)[hereinafter "Budget Act"].

subjected to technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar common carrier services."<sup>6/</sup> The Commission declared the first step in the process of creating regulatory symmetry to be the task of defining "substantially similar" services. The undeclared second step needs to be a determination of how dissimilar service should be regulated. No direction was given to the Commission for how to treat CMRS providers that are not similar to common carrier services.

11. "Substantial similarity" should be determined by reference to a system's geographical coverage, system architecture, user and service characteristics, and future service plans. Large SMR systems that cover multiple states or large, contiguous regions, and cater to the personal communications needs of individuals appear substantially "similar" to common carriers. The same is true of systems with a greater percentage of interconnected service than dispatch service. Those SMRs in the process of amassing large numbers of channel assignments with the intention of providing digital, wide-area service on a for-profit basis in the future could one day be similar to cellular carriers

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<sup>6/</sup> Id., § 6002(d)(3)(B).

and PCS providers. Any of these "substantially similar" SMR systems might justify the implementation of regulations comparable to those imposed on common carriers.

12. U.S. Sugar, on the other hand, is quite dissimilar to common carriers. Its 800 MHz analog system is employed predominantly for dispatch services by both its internal users and subscribers. All 21 of its channel pairs are utilized in the vicinity of Clewiston, Florida, where it serves law enforcement agencies, farmers, truckers and construction companies with its excess capacity. Of the approximately 700 non-U.S. Sugar units on the system, only 13% are interconnected with the public switched telephone network. U.S. Sugar is very satisfied with the operation of this 21-channel analog system, and has no intentions in the foreseeable future of expanding its operating territory, or even applying for more frequency assignments. It may, based on relevant economic analysis, consider installing digital equipment in the future, but presently it has no requirement to replace the analog system.

13. The issue, then, is whether a system as dissimilar to common carriers as is the U.S. Sugar facility should be subject to the same technical, operational and licensing regulations as EMSPs, PCS, and cellular companies.

Clearly the answer is "No". Congress neglected to advise the Commission on how it should handle an entity like this -- neither a strictly PMRS, nor a common carrier-like CMRS. U.S. Sugar proposes that it remain regulated as a PMRS after the conversion date of August 10, 1996.

**3. Eliminating the differences in the technical and operational rules in Part 90 and Part 22 will create serious negative consequences for small CMRS**

14. Changing the technical and operational rules governing private land mobile radio services to conform to the Part 22 rules may promote competition among substantially similar services, but CMRS providers like U.S. Sugar will suffer. Small CMRS providers do not need to be aligned with common carriers from a regulatory standpoint because the two entities do not compete.

15. U.S. Sugar recommends that the Commission retain its existing channel assignment rules for traditional SMR systems while establishing an alternative mechanism for licensees who wish to provide multi-channel, wide-area service. A multi-channel assignment rule should take into consideration the expansion needs of traditional SMRs that are primarily providing a dispatch service and serving

themselves. There should be expansion channels available for small SMRs. A corporation like U.S. Sugar should not have to take service from a common carrier simply because one or two EMSPs have acquired all the SMR channels in a given location.

16. The Commission noted the differences in "emission mask" rules for Part 90 services and cellular licensees. SMR licenses are assigned small numbers of channels within discrete geographic areas, frequently adjacent to other 800 MHz licensees. The proximity of unaffiliated licensees requires the imposition of tight standards on transmitter emissions in order to prevent interference. Cellular licensees that acquire large numbers of contiguous channels spread out within wide but defined areas have less concern about interfering with unaffiliated entities and, therefore, have lower emission mask standards.

17. It is impractical to compromise these standards. Lowering the standard to the acceptable level for cellular providers would jeopardize the integrity of SMR and other PMRS systems operating in the 800 MHz band. Restricting cellular operators to an output similar to SMRS would be unnecessary in many cases. Therefore, no

regulatory symmetry should be sought here, but rather, the rules should remain as they are.

18. Similarly, it is impractical and detrimental to traditional SMRs to force a compromise on antenna height and transmitter power. SMRs that primarily provide dispatch service from a single transmitter site require high-power base stations to communicate with small groups of users over fairly large areas. Cellular systems, on the other hand, do not require high-power transmitters because the "reach" from cell to cell is ordinarily smaller than the distance from SMR base stations to SMR mobile units.

19. Traditional SMRs like U.S. Sugar should not be required to lower their power to conform with Part 22 cellular services. The costs of equipment modification and antenna re-installation for small CMRS providers would be quite expensive and provide no commensurate economic gain. Because small CMRS providers are not similar to cellular providers, the functionality of their systems would be reduced or lost if they were required to lower transmitter power and reduce antenna heights.

20. A similar economic burden would be imposed if small CMRS providers become subject to mandatory

interoperability requirements. U.S. Sugar, for instance, already provides adequate interconnection to the public switched telephone network for those who desire it. There is no need for U.S. Sugar to achieve interoperability with either the neighboring SMRs or cellular services in the Clewiston area. Subscribers who desire access to those other systems can simply switch service providers. As a traditional SMR, most of the service provided by U.S. Sugar is for dispatch, so requiring interoperability has no bearing on competition.

21. Proposed conformity of user eligibility rules is a critical issue for small CMRS providers. The reclassification of PMRS as CMRS subjects traditional SMRs to Sections 201 and 202 of the Communications Act, which requires common carriers to offer service to the public on a nondiscriminatory basis. The limited number of channels and limited scope of available service provided by traditional SMRs like U.S. Sugar may make it impossible to serve all those who make reasonable requests for carriage.

22. In U.S. Sugar's case, there are four alternative carrier services available in the Clewiston area capable of accommodating any potential subscriber U.S. Sugar may need to turn away. U.S. Sugar's system was not designed

to handle common carriage, and merely changing its classification from PMRS to CMRS will not change that fact. Small CMRS providers need the ability to continue to choose who they will serve with their excess capacity.

4. **Regardless of whether spectrum caps are devised, there should be a maximum number of frequencies for defined geographic areas below which a CMRS is presumed not to exercise market power**

23. The reason underlying the proposal to adopt spectrum caps -- that is, the prevention of undue concentrations of market power that could stifle competition -- has no basis in the realm of traditional SMRS. Issues raised by the Commission's proposal, such as "service area overlap," do not occur with respect to small, single site systems like that of U.S. Sugar.

24. Regardless of whether the Commission decides to impose a cap on multi-channel, wide-area CMRS, it should also adopt separate attribution standards for small CMRS that ensure for them fair regulatory treatment commensurate with their character. U.S. Sugar proposes that any CMRS that operates 40 or fewer channels from a single transmitter site for the primary purpose of dispatch rather than interconnected service should be relieved of all obligation

to adhere to the uniform rules proposed in this docket, as well as those Title II provisions applicable to CMRS licensees that compete with PCS and cellular providers.

25. There are 280 SMR frequencies. A CMRS that is supporting its internal operations and serving some subscribers on up to 40 channels within a moderately-sized geographic area is not a threat to other similar traditional SMRs seeking frequencies in the area, or to larger entities like EMSPs or cellular companies. A 40-channel maximum provides enough flexibility for most traditional SMRs to accommodate internal communications requirements, including expansion needs. The addition of a digital capability to a traditional system would practically guarantee that its spectrum requirements were totally satisfied.

26. This 40-channel limit can be used to identify the "dissimilar" class of CMRS providers that do not wield market power or compete for common carrier business, and therefore deserve to be regulated like PMRSs instead of like EMSPs.

**B. Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers**

1. For purposes of further forbearance, CMRS providers should be defined by subscriber characterization, geographic area served, degree of interconnection, and availability of alternative communications sources

27. Not all CMRS providers deserve to be regulated in accordance with their service classification. There needs to be a defined class of "small" CMRS providers for Title II forbearance as well as for the application of fair technical, operational, and licensing regulations. U.S. Sugar applauds the Commission's recognition of a separate class of CMRS providers that will be unduly burdened, financially and technically, if they are obligated to conform to the uniform regulations proposed in GN Docket No. 93-252 and comply with Title II common carrier provisions.

28. U.S. Sugar agrees with the Commission that the Small Business Administration (SBA) definition of a small entity is not the best definition for forbearance and regulatory purposes. U.S. Sugar is less concerned with the \$6 million cap on net worth being too overreaching than it is with the administrative difficulties of separating the

net worth of a traditional SMR system from the overall net worth of the licensee that operates the system. For instance, U.S. Sugar's annual revenue from the lease of excess capacity on its SMR system is approximately \$155,000. To say that this amount is insignificant to the Corporation's annual revenue from its true business interests is an understatement. Yet, any calculation of net worth for forbearance purposes that could attribute revenue from the main business to the income from the SMR system would be wholly inappropriate and a misrepresentation in terms of establishing a rational basis for regulation.

29. Small CMRS providers should be identified by their similarity to "traditional" SMRs, which the Commission recognizes as local conventional or trunked 800 MHz systems with only a moderate number of channels used primarily for dispatch service, and secondarily for interconnected service.

30. These traditional systems typically serve the dispatch and communications needs of other small businesses rather than the personal communications needs of individuals. In U.S. Sugar's case, the 88 paying subscribers on its system are comprised of law enforcement agencies, farmers, truckers, and construction companies.

This customer base makes U.S. Sugar's system dissimilar to the local common carriers who predominantly serve individuals.

33. The CMRS providers at which Congress aimed its legislation maintain numerous blocks of spectrum in contiguous regions. U.S. Sugar's SMR coverage area is limited to the extremely rural environs of Clewiston, Florida, which has a small population and much wide-open space. U.S. Sugar has no plans in the foreseeable future to expand its SMR coverage beyond the area it now serves, and therefore is neither now nor later likely to present competition to typical CMRS providers.

31. Unlike the CMRS systems that rival cellular offerings, small CMRSs provide limited interconnected services and primary one-way paging and dispatch services. U.S. Sugar, for instance, has approximately 1,300 mobile units on its system, 700 of which belong to paying subscribers. Only 13% of those subscribers are interconnected with the public switched network, and only 106 of U.S. Sugar's mobile units are interconnected. The low percentage of interconnection is attributable to the nature of the service. U.S. Sugar's traditional SMR system is designed to support dispatch communications, and little

more. Entities that require more sophisticated services may obtain them from common carriers or large CMRS providers. The degree to which a system is interconnected is a good indication of its "substantial similarity" to common carriers, and should be considered when making a size determination.

32. Congress's main concern with the emergence of EMSPs and PCS is the establishment of a level playing field among common carriers so that the public can enjoy the benefits of competition. Because small, traditional SMRs like U.S. Sugar's system cannot provide the types of service afforded by large CMRS providers, entities requiring wide-area capabilities or interconnection must usually turn to alternative providers. When adequate carriage alternatives exist within the geographic area served by a traditional SMR, it can be presumed that the SMR does not exercise inordinate market power. There are four carrier alternatives to U.S. Sugar's system in Clewiston; two other SMR entities, and two cellular companies. Those entities seeking service on U.S. Sugar's network do so for a reason, not because they have no choice. The number of competitors available to a potential user, therefore, is a final indication of an SMR's "size" for purposes of comparing it to other CMRSs.

**2. "Small" CMRS providers merit further forbearance for practical and financial reasons**

33. U.S. Sugar admits that despite the "size" of its traditional SMR system, none of the Title II provisions being considered for further forbearance pose tremendous compliance burdens. U.S. Sugar naturally cannot speak for other small CMRS providers that may face technical and financial hardships if forced to submit to these common carrier regulations.

34. U.S. Sugar is more interested in the establishment of a "small" CMRS category for the purpose of drawing a legal distinction between traditional SMRs that cannot compete with traditional common carriers and PCS, and the emerging breed of SMRs that may warrant the CMRS classification and comparable regulation.

35. U.S. Sugar's compliance with Section 225 of the Communications Act, which requires common carriers to make provisions for Telecommunications Relay Services (TRS) and contribute a percentage of interstate gross revenues to a TRS fund, will not be problematic. It will be, however, adversely affected by the imposition of the proposed common

carrier-type technical, operational and licensing regulations.

36. The definition of "small" CMRS that derives from the "Further Forbearance" docket will necessarily influence the regulatory treatment imposed upon CMRS providers at the conclusion of GN Docket No. 93-44. Therefore, U.S. Sugar encourages the Commission to adopt its criteria for defining a "small" CMRS and exempt those entities from burdensome common carrier regulation.

### III. CONCLUSION

37. Traditional SMR systems that provide themselves and third parties with dispatch service and some interconnection with the public switched telephone network meet the statutory definition of a CMRS, but there the similarity with other CMRS providers ends. These small CMRS providers are not substantially similar to other common carriers, nor do they provide similar service.

38. Regulating small CMRS in conformity with common carriers will not further the congressional goal of promoting competition among SMR, cellular, and PCS providers. It does, however, burden these systems beyond