

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

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In the matter of

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

GN Docket No. 93-252

REPLY COMMENTS OF SUNCOM MOBILE & DATA, INC.

SUNCOM MOBILE & DATA, INC.

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Summary.....	ii
I. Background.....	2
II. Reply to Opposition to the SunCom Proposal.....	4
A. 220 MHz Can Be a Service Similar to Cellular and Other CMRS.....	4
B. Grant of the SunCom Proposal is Necessary to Make 220 MHz Service Viable.....	6
C. SunCom Does Not Propose Any Allocation to Create a Defacto Nationwide Authorization.....	8
D. There is Nothing Speculative About the SunCom Proposal.....	9
III. Conclusion.....	11

## **SUMMARY**

SunCom's reply comments address only 220 MHz licensing. By these comments, SunCom demonstrates that 220 MHz service can become viable and competitive with other CMRS on a wide-scale basis only if relief such as it has requested in its Sections 90.725 and 90.739 filings is granted.

The only impediments preventing 220 MHz service from becoming competitive with other CMRS are regulatory ones. Technically, 220 MHz service is well suited for low-cost wide-area service to vehicular units.

The SunCom proposal does not constitute a de facto nationwide reallocation. Nor does it involve speculation of any type. Rather, the SunCom proposal constitutes the most efficient way to provide 220 MHz service on a competitive basis.

The Commission can grant SunCom the relief it needs simply by extending Section 90.629 of the rules, which currently permits extended construction authority, to SunCom 220 MHz systems. SunCom has already submitted the type of application set forth in Section 90.629, and the Commission's adoption of an order in this proceeding should include a grant to SunCom.

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**REPLY COMMENTS OF SUNCOM MOBILE & DATA, INC.**

SunCom Mobile & Data, Inc. ("SunCom"), by its attorneys, hereby submits its reply comments in response to the Commission's Further Notice of Proposed Rulemaking in the captioned rulemaking proceeding.<sup>1/</sup>

In its Further Notice, the Commission addressed a host of issues generally associated with regulatory parity. SunCom's comments focused on a single component of the Commission's regulatory agenda: the treatment of 220 MHz narrowband systems.<sup>2/</sup> These reply comments also focus on that issue and, specifically, on the need to grant SunCom the extended coordinated construction and Section 90.739 authority requested in its

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<sup>1/</sup> Further Notice of Proposed Rulemaking in General Docket 93-252, FCC 94-100, released May 20, 1994, 59 Fed. Reg. 28042 (1994) ("Further Notice").

<sup>2/</sup> By its comments, SunCom demonstrated, inter alia, that 220 MHz narrowband systems can provide service that is substantially similar to other mobile services and thus must be afforded an opportunity to compete with them on a level playing field. Significantly, based upon discussions with various parties in the industry, SunCom also modified its initial request for extended construction authority. See SunCom comments, at 3-4.

February 1 submission, both of which have been incorporated into this proceeding.

**I. Background**

More than five months ago, SunCom presented to the Commission a request for waiver of Section 90.725 of the Commission's rules proposing an extended construction period in order to permit implementation of a commercial, trunked 220 MHz narrowband mobile radio service system in most of the top 75 Metropolitan Statistical Areas, as well as in certain areas with sufficient projected potential for such operation.<sup>3/</sup> At that same time, and in a related request, SunCom also sought permission, pursuant to Section 90.739 of the rules, to aggregate non-nationwide 220 MHz five-channel blocks on a regional basis so that it may provide multiple market service on a single system.<sup>4/</sup>

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<sup>3/</sup> In presenting its requests, SunCom demonstrated that it sought to compete in the provision of Commercial Mobile Radio Service ("CMRS") and sought such relief as is necessary in order to permit 220 MHz licensees to be competitive with such mobile service providers. SunCom also demonstrated that the relief it sought is consistent with that afforded to many SMR applicants and operators in the 800 MHz and 900 MHz bands. Finally, SunCom pointed out to the Commission that its proposal obviates the need for the comprehensive, long-term management agreements pursuant to which many SMR operators "build and operate" their systems only with the financial, technical and operational assistance of third parties who often obtain both significant percentages of system profits and rights to eventually acquire the systems at issue. See, generally, SunCom's Request for Waiver and associated request for Section 90.739 relief.

<sup>4/</sup> Under the SunCom proposal, SunCom would obtain direct ownership of more than one five-channel 220 MHz system in any given geographic area only after all such licenses have been constructed.

The Commission invited comment on the SunCom proposals by including them in the Commission's Further Notice.<sup>5/</sup> Based upon review of the Commission's files, SunCom understands that nine parties commented on the use of extended construction schedules generally, and seven of these parties addressed SunCom's proposals directly.<sup>6/</sup>

The majority of those commenters accepted generally the concept that regional licensing and extended, coordinated construction would serve the public interest, if properly structured.<sup>7/</sup> Many of the commenters also lent support to grant of the SunCom proposal, albeit with certain modifications.<sup>8/</sup>

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<sup>5/</sup> See Further Notice at para. 38.

<sup>6/</sup> The National Association of Business and Educational Radio, Inc. ("NABER") and PCC Management Corp. ("PCC") commented on coordinated, extended construction schedules to facilitate regional licensing. Smartlink Development Limited Partnership ("Smartlink"), SEA, Inc. ("SEA"), Simron, Inc. ("Simron"), Global Cellular Communications, Inc. and Jean M. Warren ("Global"), U.S. Mobilecomm, Inc. ("U.S. Mobilecomm"), E.F. Johnson Company ("E.F. Johnson"), and the American Mobile Telecommunications Association, Inc. ("AMTA") filed in response to SunCom.

<sup>7/</sup> See, e.g., the comments of Smartlink, NABER, PCC, Simron, U.S. Mobilecomm, AMTA, E.F. Johnson, and SunCom.

<sup>8/</sup> See, e.g., Simron, U.S. Mobilecomm, and AMTA, join SunCom in support of its proposal, with certain modifications specified in the comments. As noted in note 2, supra, after speaking with industry representatives, immediately prior to filing comments, SunCom revised its proposal significantly, after listening informally to the various concerns of interested parties. Those revisions accommodate many, but not all, of the modifications raised by various parties.

**II. Reply to Opposition to the SunCom Proposal**

**A. 220 MHz Can Be a Service Similar to Cellular and Other CMRS**

Not surprisingly and, no doubt, due to the varied private interests of the parties filing comments in this proceeding, not all parties supported SunCom's proposal. Smartlink, E.F. Johnson, and SEA, all of which are equipment manufacturers, argued that 220 MHz licensees will not be able to provide service similar to cellular, ESMR, and SMR in the near term, all in an effort to undermine the foundation of the SunCom request.<sup>9/</sup> SunCom submits that the assertions of the equipment manufacturers<sup>10/</sup> that 220 MHz service will not soon be similar to cellular, SMR, and PCS illustrates the lack of forward thinking on their part and, in the case of at least one manufacturer, represents something of a self-fulfilling prophecy due to shortcomings in its equipment design.<sup>11/</sup>

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<sup>9/</sup> See comments of Smartlink, at 3, SEA, at 6-9. At the same time, Smartlink concedes that systems such as that proposed by SunCom may well eventually prove desirable. Smartlink, at 3.

<sup>10/</sup> These commenters also show their "true colors" -- and their personal profit sources -- by arguing that early construction and deployment of 220 MHz systems is necessary for there to be a "critical mass" of suppliers and users. Smartlink at 6; see also SEA at 14. Were there any question with respect to why these entities now urge there to be no extension of construction authority, one need only remember that these very same parties urged construction extensions when the previously unsettled nature of the Evans case made it appear that relatively few licensees would timely commit to acquire equipment from them.

<sup>11/</sup> SunCom understands, through discussions with SEA officials, that SEA's equipment has been designed almost solely with dispatch service in mind.

Even assuming that 220 MHz technology will operate primarily only on a push-to-talk basis in the near future, it does not follow that 220 MHz service, if properly structured, will not be seen as a viable, low-cost substitute for cellular and other mobile service. The simple fact of the matter is that the spectrum contemplated for use under the SunCom proposal is capable of providing mobile customers with the two components of mobile service they value most: wide-area service and clear communications.<sup>12/</sup> The fact that such service may well be offered only on a push-to-talk basis is more than offset by the operational economies of the service.<sup>13/</sup> The 220 MHz frequency, especially when used in a "macrocell" approach as envisioned by SunCom, provides good coverage over much greater and more difficult areas than cellular, ESMR, and SMR. (See attached exhibit.) As such, 220 MHz will excel in providing in-vehicle service, since vehicular mobile radios operate at higher power and achieve acceptable quality service in areas with lower signal levels than handheld radios.<sup>14/</sup> Thus, for the many persons for whom cost is a

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<sup>12/</sup> SunCom's principals, many of whom have owned and operated cellular systems for years, know from first-hand experience that many SMR users switched to cellular for wider area service, rather than to avoid the need to utilize push-to-talk methodology.

<sup>13/</sup> These economies include, inter alia, a capability to operate with fewer, higher-powered transmitting sites.

<sup>14/</sup> For serving users of handheld units, smaller, more closely spaced "cells" or transmitters are required by urban cellular, ESMR, and PCS to accommodate the lower power and the battery limitations of such units. Such smaller -- or "mini-cell" --  
(continued...)

consideration, SunCom appears to offer a viable substitute for cellular.<sup>15/</sup>

One component of E.F. Johnson's comments best illustrates the flaws in the argument that 220 MHz cannot be similar to other CMRS: E.F. Johnson's argument that 220 MHz will not be competitive with cellular due to the amount of spectrum allocated and the narrow service areas that are currently permitted. E.F. Johnson comments, at 6. These are, of course, exactly the regulatory obstacles from which SunCom has sought relief. SunCom submits that it is inappropriate to argue that regulatory (not technical) barriers keep 220 MHz services from becoming competitive, and then oppose any removal of them!

**B. Grant of the SunCom Proposal is Necessary to Make 220 MHz Service Viable**

SunCom submits that these equipment manufacturers<sup>16/</sup> conveniently overlook key considerations, including the fact that very few 220 MHz systems, out of the thousands of licenses issued,

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<sup>14/</sup> (...continued)

systems involve more expensive switching and control technology to accomplish cell-to-cell hand-off. With the exceptionally large 220 MHz "macrocells," several of which will cover well all but a handful of markets, hand-off is not a requirement.

<sup>15/</sup> Chairman Hundt has spoken directly of the need for such a lower-priced service and suggested that he and his family may be candidates for such service. See comments of Chairman Hundt, at the Commission's open meeting of June 9, 1994.

<sup>16/</sup> One of these equipment companies, SEA, has organized and is developing its own 220 MHz management company, competing with SunCom to secure rights to build and manage five-channel trunked 220 MHz licenses.

are being built. SunCom's dialogue with the majority of 220 MHz licensees causes SunCom to estimate that only 3-6 percent will be built by December 2, the current construction deadline. Moreover, persons who have operated commercial mobile radio services, such as SunCom's principals, know that the relevant "critical mass" is founded on licensees being able to design, build, and offer high quality, wide-area services. This, in turn, rests upon competitive regulatory structure (including sufficient construction time and quality of spectrum) and the capital this attracts and justifies. Only then will there be plenty of equipment sales and end users.<sup>17/</sup>

It is easy to see through the self-serving comments of these two equipment providers: they naturally want to sell as much of their equipment as quickly as they can, and at the highest possible price. If there is a limited number of equipment providers, as is now the case, and if equipment can be sold both now and later, when systems are reconfigured to provide quality service, such conditions serve only to enhance equipment manufacturers' profits. SunCom does not begrudge against a commenting party advocating its own financial interests.<sup>18/</sup> Rather, SunCom only urges the

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<sup>17/</sup> It is worth noting that United Parcel Service ("UPS"), once one of the foremost proponents of 220 MHz service, is utilizing cellular services nationwide to fulfill its mobile data needs. This illustrates that companies with critical mobile communication needs require cellular-like, i.e., widespread and technically integrated, service.

<sup>18/</sup> After all, SunCom's proposal is designed to further its own financial interest. SunCom submits, however, that its  
(continued...)

Commission to appreciate that, in the case of the equipment manufacturers which object to SunCom's proposal, there is virtually no overlap between the public interest and their financial interest. Under such circumstances, SunCom submits that the Commission cannot properly give credence to their comments. See e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 53 (D.C. Cir. 1977), where the D.C. Circuit made clear that the Commission's mandate is to solicit comment and then to apply its own independent judgment as to what best serves the public interest.<sup>19/</sup>

**C. SunCom Does Not Propose Any Allocation to Create a Defacto Nationwide Authorization**

The other primary objection to the SunCom proposal is that it would constitute a de facto reallocation of additional nationwide frequencies. See Global comments, at 2; SEA comments, at 19. The Commission should not give serious consideration to such a frivolous charge. Simply put, there is nothing in the SunCom proposal that would establish even a de facto allocation of additional nationwide channels. The sine qua non of a nationwide authorization is exclusive access to a uniform frequency block

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<sup>18/</sup> (...continued)

proposal is different in one very significant way: it also serves the public interest!

<sup>19/</sup> SunCom cites Home Box Office, not to suggest that there may have been any improper communications in this proceeding -- because, to SunCom's knowledge, there have not been -- but only to remind the Commission that its mandate is to rule as best serves the public, rather than to fashion a compromise from among the proposals of various private interests, regardless of how closely associated with the industry those sources may be.

across the entire nation. This is illustrated by review of the Global authorization for a nationwide commercial 220 MHz system. There, an entity is entitled to construct anywhere in the country on a common frequency. Moreover, Global can maintain this exclusivity into perpetuity by simply constructing a total of 70 base station over a five-year period. In contrast, SunCom has not requested authority to operate on a common frequency, nor has it requested any generic or perpetual exclusivity.<sup>20/</sup>

**D. There is Nothing Speculative  
About the SunCom Proposal**

Certain commenters have also alleged that the SunCom proposal may facilitate "speculation." Such a suggestion can be disposed of quickly, simply by reviewing the SunCom proposal and comparing it to other forms of "construction." First and foremost, under the SunCom proposal, no one benefits from "speculation," in that no licensee would receive any cash from contributing its authorization under the SunCom equity exchange program. Rather, there is only an exchange of equity, whereby one transfers 100 percent ownership in a single, stand-alone five-channel system for a far lower percentage equity in a far larger system. Moreover, while in

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<sup>20/</sup> Because Global has not yet constructed its system -- and is believed to have requested an extension of time in which to construct, it cannot serve as a useful example of the benefits of having exclusive access to a uniform frequency block nationwide. Nevertheless, SunCom submits that it is self-evident that considerable benefits stem directly from end users having access to a uniform frequency block. Indeed, it is for that very reason that the Commission's grants of nationwide authority have provided for common spectrum throughout the nation.

theory a licensee could immediately sell its new equity, it is unlikely that there will be any established market for such equity in the immediate future, and tax laws proposed by the current administration and recently enacted provide significant incentives not to sell immediately.<sup>21/</sup> In any event, contrary to cash, the value to be received by licensees who join the network will be wholly dependent on the network having value.

In contrast to SunCom, many of the other 220 Mhz licensees who are constructing and operating are doing so through long-term management agreements that provide for a non-licensee party to construct, finance and operate the system, and to obtain a substantial portion of the revenue. The licensee has no risk, no genuine involvement, and receives only a portion of the profits. While such agreements may well be the norm for the industry, they many well also constitute defacto transfers of control. Recent D.C. Circuit rulings<sup>22/</sup> suggest that the Commission cannot ignore the possibility that these constitute transfers, and SunCom submits that review of such cases will demonstrate them to be far more speculative than the SunCom proposal.

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<sup>21/</sup> See, e.g., 26 U.S.C. 1202(a), which provides that "[I]n the case of a taxpayer other than a corporation, gross income shall not include 50 percent of any gain from the sale or exchange of qualified small business stock held for more than 5 years."

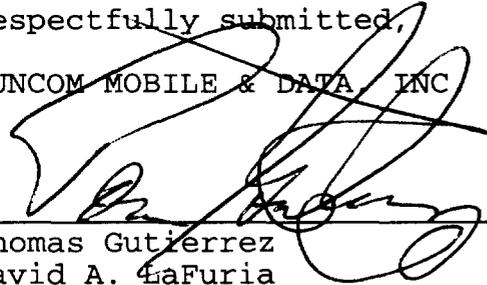
<sup>22/</sup> Telephone and Data Systems, Inc. v. FCC, 19 F.3rd 42 (1994).

**III. Conclusion**

The relief sought by SunCom is necessary to make 220 MHz service viable on a widespread basis. Those who argue that 220 MHz service is not similar to other CMRS simply miss the point that only regulatory, and not technical, roadblocks prohibit it from becoming competitive.

The Commission can grant SunCom the relief it needs simply by extending Section 90.629 of the rules, which currently permits extended construction authority, to SunCom 220 MHz systems. SunCom has already submitted the type of application set forth in Section 90.629, and the Commission's adoption of an order in this proceeding should include a grant to SunCom.

Respectfully submitted,  
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