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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 7, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

ATTN: Rosalind K. Allen, Esq.

Re: Gen. Docket No. 93-252
PR Docket No. 89-553

Dear Mr. Caton:

This is to bring to your attention an apparent inaccurate statement in the <u>Third Report and Order</u> in the referenced proceeding, FCC 94-212, __ FCC Rcd __ (rel. September 23, 1994), and respectfully to request correction.

Your attention is directed to paragraph 129 of the <u>Third Report and Order</u>, a copy of which paragraph is enclosed herewith, for your convenience. At para. 129, the Commission states that it is denying the request of SunCom Mobile & Data, Inc. ("SunCom") for a declaratory ruling regarding Section 90.739 of the Commission's rules because "SunCom seeks to aggregate channels assigned to licensees who have not yet completed construction...." Yet the SunCom request for declaratory ruling was specifically designed such that relief was sought only in instances when facilities at issue had been constructed. (A copy of the SunCom letter requesting a Section 90.739 ruling is enclosed, and your attention is directed to the first paragraph on page 2 of that request, where the post-construction nature of the relief requested is made clear.) Accordingly, the above statement that was included in para. 129 of the <u>Third Report and Order</u> appears to be in error.

SunCom submits that review of its request, in conjunction with the Commission's policies as enunciated in the <u>Third Report and Order</u>, at para. 129, where the Commission states that it "will

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permit licensees who have already constructed and commenced operation to aggregate channels based upon an appropriate showing under Section 90.739," strongly suggests that the Commission should have granted the SunCom request. At the very least, the Commission should have postponed any decision on the request, and in no event should it have denied a request different from the one actually made.

Your attention to correcting the misstatements addressed above, via erratum, is very much appreciated.

Very truly yours,

Thomas Gutierrez

Enclosure
TG/bad

128. Because we have incorporated the SunCom declaratory ruling petition into this proceeding, however, we will address some of the issues raised in the petition and responding comments. Unlike SunCom and certain other commenters, we believe it is premature to assume that 5-channel stand-alone 220 MHz service is not viable at the local level. To the contrary, we believe that the potential exists for local systems to prosper by using spectrum efficient narrowband technologies and offering a competitively priced alternative for mobile customers who do not require more costly services offered by other CMRS providers. We agree with SunCom, however, that there is potential benefit in allowing local 220 MHz licensees to aggregate more than five channels in a given market in order to meet the particular mobile communications needs of that market.

129. We note that our existing rules already provide 220 MHz licensees with flexibility to establish multi-market regional systems in this service where demand exists. Section 90.739 of our rules states that no local 220 MHz licensee will be licensed for more than one 220-222 MHz system in a given category (*i.e.*, trunked or conventional) within 40 miles of another system authorized to that licensee in the same category. Thus, this rule ordinarily limits an individual trunked system licensee to operating "stand-alone" 5-channel systems at least 40 miles apart. The rule does permit additional channels to be licensed within the 40-mile limit, however, if the licensee can "demonstrate that the additional system is justified on the basis of communications needs." In the *220 MHz Order*, we indicated that such a showing should normally be supported by documentation of the need for additional channel capacity and/or an expanded service area, based on customer demand or other technological or economic factors.[235] We also noted that any applicant seeking to invoke this exception *prior* to the construction of an initial system in the relevant area would face a heavy burden of proof.[236] We believe this continues to be an appropriate standard for requests for exemption from the 40-mile limit under Section 90.739. We therefore will generally not allow aggregation of channels by 220 MHz licensees who have not completed initial construction of their facilities, but will permit licensees who have already constructed and commenced operations to aggregate channels based on an appropriate showing under Section 90.739. Because SunCom seeks to aggregate channels assigned to licensees who have not yet completed construction, we deny its request for declaratory ruling. We also conclude that SunCom has not demonstrated the existence of extraordinary circumstances that would justify grant of an extended construction period to licensees who agree to become part of SunCom's network. Accordingly, SunCom's request for waiver of our construction rules is also denied.

b. Co-Channel Interference Protection

(1) *Background and Pleadings*

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[235] *220 MHz Order*, 6 FCC Rcd at 2364, 2375 (para. 59 n.126).

[236] *Id.* at 2364 (para. 59).

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February 1, 1994

Ronald F. Netro
Engineering Advisor to the Chief
Private Radio Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Dear Mr. Netro:

SunCom Mobile & Data, Inc. ("SunCom" or "the Company"),[1/] by its attorneys, hereby requests a determination that its contemplated holding of multiple 220-222 MHz licenses in a given geographic area will comply fully with Section 90.739 of the Commission's rules. For the reasons given below, and in the concurrently filed SunCom waiver request (the "Waiver Request"), which is incorporated herein by reference, a grant of both the Waiver Request and the approval sought herein will allow SunCom and many of the Commission's serious 220 licensees to proceed in development of the Network's planned innovative, competitive, wireless communication services.

1/ SunCom, a California Corporation, controls 220 Net, a start-up project that led to the Network proposed herein. The Company, its principals, financing, proposed extended construction schedule, and other aspects are set forth fully in the Waiver Request. Among the other public interest efforts of SunCom is its commitment to dedicate at least six percent of its profits to educational programs. (See the Waiver Request, at n. 6, where this program is more fully explained.) This program clearly constitutes a public interest commitment far beyond that offered by most licensees. It is also fully consistent with numerous recent statements made by Vice President Gore, explaining that educational programs should be major beneficiaries of the communications superhighway and other deregulatory developments in the sphere of communications.

I. Introduction

SunCom intends to operate a multi-market network of multiple commercial trunked 5-channel 220-222 MHz ("220") licenses serving most of the top 75 Metropolitan Statistical Areas and certain other strategic areas (the "Network"). The planned Network is described further in Suncom's Waiver Request and the attachment thereto. At the very core of the Network is the ability of a single entity to hold multiple licenses in each market. SunCom will obtain title to these licenses/systems only after they are constructed, in exchange for equity in the Company ("Equity Exchange Plan"), and upon receipt of all applicable FCC approval.

SunCom does not now have ownership, directly or indirectly, in more than one 220 license in a given area, and is not here presenting a request for consent to acquire such. Rather, SunCom is seeking a ruling that its holding of multiple licenses under the circumstances set forth herein complies with Section 90.739 of the rules. This request is being presented at this time because both SunCom and its potential shareholders who are 220 licensees need assurance that this key Equity Exchange Plan component complies with Section 90.739 prior to making commitments to the Network.[2/]

II. Support for Declaratory Ruling

There are two primary reasons that SunCom's planned Network complies fully with Section 90.739. The first (set forth below in Sections A, B, and C) involves system capacity and efficiencies, coverage, user confidence, and other external competitive needs requiring more than one 5-channel license/system per market. The second (set forth in Section D) involves operational efficiency, asset security, tax advantages, and other vital internal needs requiring direct ownership of the multiple licenses, rather than sustained use of management agreements.

2/ SunCom has expended considerable resources in assessing the feasibility of its Network. Based upon such efforts, SunCom is confident that its Network is viable, assuming that all required Commission consent can be obtained. SunCom has conducted a several-month survey of most of the 220 licensees and found that only a small percent of them will independently construct their one or several licenses. However, the majority surveyed (hundreds) would commit their licenses, and many also would commit substantial cash investments, to the Network. Such commitment reflects licensees' agreement with the arguments given here as to what is required in order for 220 licenses to be commercially viable.

A. System Capacity and Efficiencies: Multiple License Capacity and Efficiencies are Required for a Competitive and Cost-Effective 220 MHz System

SunCom submits that multiple 5-channel licenses are required to meet its bona fide communications requirements for a host of critical reasons. First and foremost, in nearly all of the markets that the Network has targeted, five narrowband channels simply do not provide sufficient capacity to obtain enough subscribers and revenue to justify the high costs of establishing and operating a quality system that can compete in today's marketplace and serve the public well.[3/] As the industry has evolved over the last several years, it has become clear that a stand-alone 5-channel 220 system will be at a fatal competitive disadvantage because the principle competition (e.g., SMR, ESMR, cellular, PCS, etc.) all have far more capacity due to the greater number and width of their channels.[4/]

As explained in the accompanying Waiver Request, the Network Plan involves, on average, ten or more 5-channel licenses per

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3/ The costs of constructing, and then engineering, staffing and implementing the administrative, sales, customer service, legal, finance, and other business functions would be nearly the same on an absolute basis, and far less on a per-channel/per-capacity basis for handling a system with multiples of five channels per market, versus only one five channel system.

4/ Larger SMR companies, such as Nextel and CenCall, typically have over 100 channels per market. Cellular carries have far more. SMR and cellular channels have greater bandwidth: 30 kHz for cellular, 25 kHz for 800 MHz SMR, and 12.5 kHz for 900 MHz SMR. A 5 kHz channel cannot provide nearly the capacity of these wider channels. With 220, via current technology and into the (commercially foreseeable) future, five channels will provide for only five simultaneous circuits. However, with cellular, via its TDMA and CDMA; with ESMR, via its MIRS; with 900 MHz, via its FDMA (per Geotek, P.S.I.); etc., each channel can accommodate multiple simultaneous circuits. In general terms, a 5-channel 220 system has the effective or potential capacity of approximately only one cellular or 800 MHz SMR channel (before even considering the frequency-reuse/multiple cell multiplier in these cellular and SMR services). Likewise, the SunCom 220 Network's targeted average of 50 channels per market is generally comparable in total capacity to roughly only 10 channels of cellular or 800 MHz SMR. This equates to a very minor percentage of these services' total channels.

market.[5] This volume of channels is necessary to approach the capacity and economies of scale of the noted competition. With 50 channels, the Company expects to be able to serve between 5,000 to 15,000 mobile units in a market, the actual numbers depending mostly on the mix of dispatch and interconnected, voice and data, and types of data (short bursts versus longer messages, etc.). The Company expects to begin with a high percentage of dispatch voice, evolving gradually to higher or majority percentages of dispatch data, as the latter is more spectrum- and cost-efficient.[6] Unless the Company obtains close to this 5,000 minimum of subscribers per market, it cannot project sufficient economies to achieve competitive viability.

B. Coverage: Multiple Licenses are Required to Assure Competitive 220 MHz System Coverage

Another significant drawback of stand-alone 5-channel systems is coverage. Coverage is the essential product being sold by mobile communication services. It is at the top of every list of user demands, often being more important than price. SMR, ESMR, and cellular companies generally have excellent coverage throughout most important areas, with the few significant "holes" in coverage. Increasingly, this means consistently high-quality, coverage affording crisp voice and "robust" data transmissions with a low percentage of blocked calls even during peak hours. While 220 can achieve greater coverage per site than these other mobile services, it will nevertheless require multiple sites per market to achieve competitive coverage.[7]

5/ As noted in the Waiver Request, the Company would construct a minimum of 20 channels per market, or the total number it holds at the time, whichever is less, in meeting the milestones in the proposed extended construction schedule.

6/ Although SunCom has not verified the extensive data and conclusions presented by United Parcel Service ("UPS"), the Company sees great potential in commercial application, especially for short-burst transmissions (that could handle most dispatch needs, and some interconnect data) of the UPS 220 MHz FM digital radio and packet data system technology. See, e.g., Reply Comments of UPS in FCC Docket 92-235, and its appended IEEE article.

7/ Based on real-world 220 MHz propagation studies, SunCom submits that several RF base stations will be required in most of the markets targeted for the Network. SunCom has studied propagation of mobile RF engineers who used 220 extensively for amateur radio. SunCom also reviewed with UPS its (continued...)

C. User Confidence: Capacity and Coverage are Needed to Demonstrate Viability and <u>Sustainability to Prospective Subscribers</u>

Without the levels of capacity and coverage obtainable only via multiple licenses per market, the 220 industry, will not be able to project itself as a long-term successful alternative to SMR, ESMR, cellular, etc. Thus, many companies with dispatch needs will not risk making the substantial investment in this new industry needed for them to use 220. This would especially apply to the prime dispatch users, who are already SMR subscribers. They not only would have to buy or lease 220 mobile units, but also would have to sell for little residual value their existing SMR radios.[8] To justify this, they would have to be convinced that the 220 alternative is a solid, viable, long-term alternative, such as the proposed SunCom's Network, and not a "Mom and Pop" 5-channel/25 kHz operation. This is especially the case now that their current SMR service providers are (in most major MSAs) presenting an impressive array of strength, growth, and new services, via consolidation, wide-area and digital developments. If the 220 alternative isn't also relatively impressive, it simply will not be taken seriously, regardless of initial pricing.

7/ (...continued) experiences as reported in its Reply Comments in PR Docket 92-235. There, UPS explained that in its Portland, Oregon extended 220 MHz field tests three base stations provided high quality (94% average block success) coverage over a 3,000 mile surrounding area. In most of its markets, SunCom intends to cover more than 3,000 square miles in terrain that is, on average, as difficult to cover as that included in the Portland test area, and with quality as high as UPS achieved.

8/ SunCom's Network will be operating in scores of markets, most of which have unused 800 MHz (as well as 900 MHz) SMR capacity (even before implementation of digital ESMR in many of these areas). In such cases, SunCom cannot expect to find new users who desire dispatch but could not be accommodated by the SMRs. Rather, they will most often have to compete head-to-head with established SMRS and cellular carriers, with a substantial portion of such competition being to attract users away from these established entities. This will require such users to invest in new 220 mobile units and decommission for modest residual value their SMR radios. This costly switch will not occur without the 220 alternative being (1) as attractive in price (at least in price/performance) and (2) clearly a solid, major, long-term alternative of the nature proposed herein.

Potential users of 220's primary application, basic dispatch,[9] will have operations spread over many markets, regions, or the entire nation. To obtain their business, it will often be necessary to provide services throughout most of their areas, to provide one account for all markets in which the client desires servicing and to have reliable standards across the whole multi-market network in terms of coverage quality, dispatch and interconnection features, roaming, mobile radio brands and pricing, user plans fees, options, etc. All of this can be achieved only if the carrier has a multiple of 25 kHz of spectrum per market.

D. Direct Ownership: Required for Vital Business Needs

SunCom's vital interests in having direct (post-construction) ownership of multiple licenses per market, rather than sustained use of management agreements, is in many ways even more straightforward than the capacity and coverage issues. Simply put, direct ownership, rather than the sustained use of management agreements, is a requisite for any efficient business. The former provides far more security, and hence financial viability, than is available through any contractual arrangement. It also avoids probable conflicts and litigation, both before civil forums and possibly before the FCC. It is necessary to allow for post-construction system collateralization (once value is established via operational success) needed for favorable expansion financing. Finally, it saves substantial time and expense that would be involved in multiple diverse contract negotiations, and the subsequent management and accounting of hundreds of management contracts. Rather than imposing an enervating conflict of interest between the operating company and the licensees, direct ownership, via the Equity Exchange Plan, would create an efficient commonality of interest. All of the above would significantly increase the viability and competitiveness of the Network.

Without approval of this direct ownership plan from the inception, it will not be possible for SunCom to obtain nearly the level of licensee participation in its Network that it otherwise projects. Surveys of hundreds of 220 licensees have confirmed that direct ownership and its diverse benefits, are the most important elements of SunCom's proposal to prospective licensee participants.

9/ Initially, the primary and 220 market will be voice dispatch. With its long-range propagation characteristics and resultant low cost per coverage, 220 also lends itself to basic dispatch, which must be priced well below enhanced mobile telephone services, such as ESMR and cellular.

Finally, without the direct ownership provided by the Equity Exchange Plan the Company and the participating licensees will lose major tax advantages provided under recent changes in federal (and some states') tax laws designed to stimulate investment in new, smaller companies. The changes permit major reductions in taxes on capital gains on shares held in recently-created "C" corporations. Under such laws and the Company's plan, licensees will benefit significantly by such savings and, to achieve the maximum tax advantages, the Company will reinvest profits to build Company value (rather than making distributions) and thereby expand and improve service to the public. Such major tax advantages will stimulate initial and ongoing investments in SunCom at terms more favorable than would otherwise be obtainable. This will, in turn, lead to a more efficient and competitive operation.

III. Public Interest Considerations

Mobile communications is rapidly becoming a major component of the nation's economy, as well as an area of increasing importance in international trade. The 220-222 allocation can and should play a significant role by pioneering narrowband radio and lower-cost "macrocell" systems, and generally by increasing competition. While in previous times, 5-channel systems found utilization for certain local, private applications, the unabated trend and current standards and plans for commercial systems involve scores or more channels per market over entire regions, as well as rapid progress towards national end-user standards. For 220 to compete in this arena, it also must involve a scope such as proposed in the Network. This Network can only be securely and efficiently developed upon the foundation of direct ownership of the multiples of 5-channel licenses per the various markets that it plans to construct and operate.

For all the foregoing reasons, the relief requested herein is fully consistent with both the intent and letter of Section 90.739 of the rules, and should be granted.

Respectfully submitted,

Thomas Gutierrez
Counsel for SunCom Mobile & Data, Inc.

Enclosure
cc: Beverly Baker, Esquire
Kent Nakamura, Esquire
Martin Liebman, Esquire