

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the matter of )  
)  
Implementation of Sections )  
3(n) and 332 of the )  
Communications Act )  
)

GN Docket No. 93-252

To: The Commission

DOCKET FILE COPY ORIGINAL

PETITION TO SEVER

SunCom Mobile & Data, Inc. ("SunCom"), by its attorney, hereby petitions the Commission to sever its request for a declaratory ruling<sup>1/</sup> and request for a waiver of the Commission's rules<sup>2/</sup> from the above-captioned proceeding. In support of this Petition, the following is respectfully submitted:

I. Background

1. By companion filings made on January 28 and February 1, 1994, SunCom sought two specific rulings on issues critical to the implementation of its proposed multi-market, 220-222 MHz network. SunCom requested a declaratory ruling that its acquisition of ownership of multiple 220 MHz systems constructed in a given geographical area would not contravene Section 90.739 of the Rules, 47 C.F.R. § 90.739. See Declaratory Ruling Request, at 2. SunCom

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<sup>1/</sup> See Letter of Thomas Gutierrez to Ronald F. Netro (Feb. 1, 1994) ("Declaratory Ruling Request").

<sup>2/</sup> See SunCom, Request for Rule Waiver (Feb. 1, 1994) ("Waiver Request").

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also requested a waiver of Section 90.725(f) of the Rules, 47 C.F.R. § 90.725(f), to afford adequate time for construction of its network. See Waiver Request, at 9-11.

2. SunCom sought declaratory relief to remove uncertainty as to whether the 40-mile limit of Section 90.739 would be triggered by the acquisition of licenses for constructed systems. While such acquisitions are permitted,<sup>3/</sup> and seemingly outside the plain meaning of Section 90.739,<sup>4/</sup> SunCom sought a declaratory ruling to allay the concerns of potential investors.

3. The Commission "incorporated" both of SunCom's requests into the above-captioned docket, and solicited public comment on the merits of the Declaratory Ruling Request. See Further Notice of Proposed Rulemaking in GN Docket No. 93-252, 9 FCC Rcd 2863, 2872 (1994). Comments were invited specifically on the question of whether allowing "regional licensing" of 220 MHz systems would promote regulatory symmetry in the mobile services marketplace. See id. Comments were not invited on the Waiver Request. The Commission explicitly denied both matters brought by SunCom. Third Report, slip op. at 69, 180.

4. This date SunCom filed its Petition for Reconsideration, a copy of which is attached hereto and incorporated herein by

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<sup>3/</sup> See 47 C.F.R. §§ 90.153, 90.709(a). See also Report and Order in PR Docket No. 89-552, 6 FCC Rcd 2356, 2367 (1991).

<sup>4/</sup> The rule states that no "additional system" will be "authorized" without adequate justification. See 47 C.F.R. § 90.739. The rule cannot be read to apply when a licensee of an authorized -- and already constructed -- system seeks Commission consent to assign the license for that system.

reference in order to obviate the need to restate substantive arguments made therein.

## II. Argument

### A. SunCom's Declaratory Ruling Request And Waiver Request Are Adjudicatory Matters And Properly Severed From This Proceeding

5. It is well accepted that a declaratory ruling is an adjudicative ruling. Chisolm v. FCC, 538 F.2d 349, 364 n.30 (D.C. Cir.), cert. denied, 429 U.S. 981 (1976). When the Commission decided to give SunCom's two requests substantive consideration, it took on the role of an adjudicator, notwithstanding that it consolidated the requests into a rule making proceeding.

6. When considering whether to entertain an action for declaratory relief, the determinative factor is whether a declaratory ruling will result in a just, expeditious and economical determination. See C. Wright, Law of Federal Courts § 100, at 671 (4th ed. 1983). In this case, the Commission apparently concluded that SunCom's Declaratory Ruling Request and Waiver Request could be considered most efficiently in the context the captioned docket. Then, after the parties and the Commission expended their resources on the matter, the Declaratory Ruling Request was denied on the erroneous belief that SunCom proposed

pre-construction aggregation of channels<sup>5/</sup> and the Waiver Request was given two sentences of perfunctory and conclusory analysis.

7. As detailed in its Petition for Reconsideration, the uncertainty raised by the Commission's Third Report is not insubstantial. By filing the two requests more than ten months ago, SunCom sought expeditious action and an adjudicatory resolution. Yet, as of this date, SunCom has yet to receive any reasoned response to its two requests. Thus, administrative economies often associated with including specific requests into a pending rulemaking proceeding clearly have not been achieved. Nor can they be expected to be received prior to the April 4, 1995 scheduled expiration date for the authorizations at issue. Moreover, in view of the fact that public comment has already been submitted on the SunCom requests, there is no longer a need for these matters to remain within the docket.

8. SunCom simply seeks to be treated like others who have successfully pursued large scale, spectrally efficient mobile radio networks through the waiver or declaratory ruling process. See, e.g., Fleet Call, Inc., 6 FCC Rcd 1533 (1991); American Mobile Data Communications, Inc., 4 FCC Rcd 3802 (1989); Advanced Train Control System, 3 FCC Rcd 427, 428 (1988); IBM Research and Development, Inc., 53 RR 2d 675, 677 (1983). See also PowerSpectrum, Inc., 8 FCC Rcd 4452, 4454 (Pri. Rad. Bur., 1993). Those requests were all

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<sup>5/</sup> See Third Report, slip op. at 69. The Commission's ruling was clearly erroneous inasmuch as SunCom proposes post-construction aggregation. See Declaratory Ruling Request, at 2.

handled outside of rulemakings. Moreover, the Commission has expressly rejected argument urging that extended construction requests should be addressed in rulemakings. See American Data Communications, Inc., 4 FCC Rcd 3802 (1989).

**B. SunCom's Requests Must be Severed  
in Order to be Addressed Properly  
Prior to Expiration of the  
Underlying Authorizations**

9. Severance is also appropriate because of the substantial delay SunCom has already weathered and the need for prompt action. SunCom informally presented its plan to the Commission in meetings conducted in late 1993. Its formal requests were filed very early in 1994. In follow up meetings with the Commission staff, SunCom urged prompt action so that it could put together its system that will consist of licensees who were operating under a then-current November, 1994 construction deadline. After nearly one year, the Commission has not articulated a clear decision on the matters that it has "decided" and has "punted" the rest into another rule making. Third Report, at para. 127. Additional rulemaking proceeding will not conclude in time for SunCom to execute any substantial plan prior to expiration of the construction authorizations on April 4, 1995.

10. SunCom continues to pursue its overall plan, despite the complications placed upon it by the Third Report. In the absence of relief, SunCom will still be able to accomplish some of what it set out to do. But during this period of uncertainty, SunCom cannot undertake many aspects of its plan. Consequently, SunCom

urges the Commission to sever its Declaratory Ruling Request and Waiver Request from the above-captioned proceeding and expeditiously act upon its Petition for Reconsideration.

Respectfully submitted,

SUNCOM MOBILE & DATA, INC.

By: \_\_\_\_\_

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December 21, 1994

**CERTIFICATE OF SERVICE**

I, Barbara Davis, a secretary in the law firm of Lukas, McGowan, Nace & Gutierrez, Chartered, do hereby certify that I have on this 21st day of December 1994, caused to be delivered by hand copies of the foregoing Petition to Sever to the following:

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