

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	
Future Development of SMR Systems	)	
in the 800 MHz Frequency Band	)	
	)	
Implementation of Sections 3(n)	)	
and 322 of the Communications Act	)	GN Docket No. 93-252
Regulatory Treatment of	)	
Mobile Services	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act	)	PP Docket No. 93-253
Competitive Bidding 800 MHz SMR	)	

To: The Commission

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COMMENTS  
OF  
UNITED STATES SUGAR CORPORATION

UNITED STATES SUGAR CORPORATION

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**SUMMARY**

The FCC has proposed that 800 MHz incumbents who are notified by several Economic Area ("EA") licensees of an intention to relocate may require that negotiations to relocate the incumbent include all EA licensees who have notified the incumbent. U.S. Sugar believes that this proposal should be expanded to permit one negotiation among all licensees interested in any portion of an incumbent's system.

The Commission plans to impose a rebuttable presumption of good faith upon any offer for comparable facilities which is made during the mandatory negotiation period. The Commission's proposal to apply a rebuttable presumption of good faith to any offer for comparable facilities presented by an EA licensee during the mandatory negotiation period is unfair to incumbents. Incumbents must not bear the onus of accepting an offer which may technically meet the parameters for comparable facilities but which, for very valid reasons, would be wholly inadequate for the incumbent's actual operating needs. In addition, any presumption should enure to the benefit of the offeror, whether that offeror is an incumbent or an EA licensee.

The Commission proposed that comparable facilities be defined as: (i) the same number of channels with the same bandwidth; (ii) relocation of the incumbent's entire system, not just those channels desired by a particular EA licensee; and (iii) providing the relocated incumbent with a 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of its original system. U.S. Sugar supports this proposal but urges the Commission to add a fourth element, serviceability, to the definition of comparable facilities. In those instances where analog equipment is being phased out by a manufacturer, digital equipment should be provided by the EA licensee.

U.S. Sugar believes that the reimbursable costs should include all reasonable expenses of relocation. The Commission should permit reimbursement of reasonable "premium costs", as well as those for attorneys' and consultants' fees incurred by incumbents during the relocation process. Indeed, the Commission should permit reimbursement of any and all fees which are reasonable and which are incurred by an incumbent as the direct result of the EA licensee's desire to relocate that incumbent.

U.S. Sugar believes that incumbent licensees: (1) must be able to operate "dual" systems during a six-month

transition period, with one system in the upper block and one in the lower block; and (2) should receive a "premium" payment above and beyond the actual moving costs, which amounts to 20% of the moving costs, as compensation for the very significant inconveniences caused by relocation.

U.S. Sugar urges the Commission to avoid auctions in the lower 80 channels block and the General Category channels in the event that incumbents can reach agreement for partitioning the EA among themselves. Furthermore, any auctions of the lower 80 channels and General Category channels should not proceed until after incumbents are successfully relocated from the upper 200 channel block.

U.S. Sugar supports a plan which was created by Nextel whereby auctions could be avoided in the lower 80 channels block and the General Category channels in the event that incumbents can reach agreement for partitioning the EA among themselves. Furthermore, U.S. Sugar believes that any auctions of the lower 80 channels and General Category channels should not proceed until after incumbents are successfully relocated from the upper 200 channel block.

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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 Second Further Notice of Proposed Rule Making ("Notice"), in which the FCC proposed to auction the upper block of two hundred (200) 800 MHz channels to wide area Specialized Mobile Radio (SMR) Service providers.<sup>1/</sup>

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<sup>1/</sup> FCC Report No. DC-95-150 (December 15, 1995), First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making.

I. PRELIMINARY STATEMENT

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

2. U.S. Sugar operates a 21-channel SMR system with coverage primarily in the Clewiston area. The system is used for internal communications to support general operations, including the dispatch of personnel, equipment and supplies required in the cane 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 agricultural businesses, law enforcement agencies, and small trucking and construction companies use the system predominately for dispatch services, employing almost 800 of the system's nearly 1,350 mobile units. Approximately 13% of this leased capacity is interconnected with the public

switched telephone network. U.S. Sugar's 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 is an existing participant in this proceeding, having filed Reply Comments with the Federal Communications Commission ("FCC" or "Commission") in this matter on March 1, 1995, that addressed issues raised in the Further Notice of Proposed Rule Making ("Further Notice") adopted by the Commission on October 20, 1994.<sup>2/</sup> In the Further Notice, the FCC proposed rules to implement regulatory parity while meeting the needs of small SMR systems. U.S. Sugar noted in that phase of the proceeding that the FCC seeks to treat wide-area SMRs in the same fashion as similar CMRS providers in order to meet the Congressional mandate for regulatory parity for all CMRS providers. The Third Report and Order,<sup>3/</sup> released by the FCC on September 23, 1994 in the Docket No. 93-252 matter,

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<sup>2/</sup> 59 Fed. Reg. 60111 (November 22, 1994).

<sup>3/</sup> Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services.

was adopted to satisfy requirements imposed by the Omnibus Budget Reconciliation Act of 1993<sup>4/</sup> that the FCC implement changes to its technical, operational and licensing rules to establish regulatory symmetry among similar CMRS providers. In that Third Report and Order, the FCC stated that 800 MHz SMRs compete, or have the potential to compete, with wide-area CMRS providers, but that the interests of small SMRs need to be considered.<sup>5/</sup>

4. U.S. Sugar's 800 MHz telecommunications system is the epitome of the traditional SMR system, designed to provide dispatch service to a single, well-defined locale. Congress did not instruct the FCC to restrict the growth and viability of the small SMR industry in order to create regulatory parity between wide-area SMRs, cellular, PCS, and other commercial mobile radio services.

5. U.S. Sugar continues to believe that mandatory relocation of small SMR incumbents will harm the public interest by placing an undue burden on small SMRs through imposition of an imbalanced bargaining structure, the unwarranted disruption of services, potential equipment

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<sup>4/</sup> Pub. L. No. 103-66, Title VI § 6002(b), 107 Stat. 317, 392 (1993).

<sup>5/</sup> Third Report and Order at 55.

difficulties, and placement in less desirable spectrum with limited potential for future growth.

6. Moreover, incumbent licensees that are forced to relocate must be able to operate "dual" systems during the transition period, one in the upper block and one in the lower block. Without the opportunity to operate dual systems a viable transition cannot occur. In instances where mandatory relocation is implemented, the EA licensee should be required to remit to the incumbent a premium payment above and beyond the calculable relocation costs.

## II. COMMENTS

### A. **Mandatory Relocation from the Upper 200 Channels**

#### 1. **Negotiation Rules Must Encourage System-wide Relocation**

7. In its Notice, the Commission proposed that incumbents who are notified by several EA licensees of an intention to relocate the incumbent may require that relocation negotiations include all EA licensees who have so notified the incumbent. Notice at ¶ 270. U.S. Sugar strongly supports this proposal, because it would enhance the ability of incumbents to negotiate with all concerned EA

licensees at one time. In addition, U.S. Sugar agrees with the Commission that this proposal would facilitate system-wide relocations. Notice at ¶ 270.

8. While U.S. Sugar applauds the intent behind this proposal, U.S. Sugar believes that the proposal must be expanded in order to meet the announced objective of system-wide relocations. Specifically, the proposal should address the many instances in which incumbent systems traverse EA boundaries. Incumbent systems do not normally follow the neatly drawn lines of EA boundaries; instead, incumbent systems often traverse boundaries and affect licensees in multiple EAs. Therefore, U.S. Sugar believes that an incumbent should have the right to require all auction winners that are interested in any portion of the incumbent's system to sit down and negotiate with the incumbent at the same time. In this way, the relocation costs of an incumbent link that is 75% in one EA and 25% in another EA, for example, could be proportionately divided among the relevant EA licensees.

9. This concerted negotiation framework is particularly necessary in light of the fact that incumbent systems include mobile transmitters. Where an incumbent system traverses EAs, the apportionment of the relocation

costs of mobile transmitters could become a particularly sticky issue among EA licensees, unless the Commission acts to require all interested parties to meet at the same bargaining table.

**2. The Commission Should Not Adopt A Rebuttable Presumption of Good Faith During the Mandatory Negotiation Period**

10. The FCC tentatively concluded that, for the purposes of the mandatory negotiation period, an offer by an EA licensee to replace an incumbent's system with comparable facilities constitutes a good-faith offer. Notice at ¶ 286. Incumbents who accept such an offer would presumably also be acting in good faith, whereas failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith. Notice at ¶ 286.

11. U.S. Sugar believes that an incumbent's rejection of an offer which is labelled "comparable facilities" by an EA licensee during the mandatory negotiation period may be a good faith act for a variety of valid reasons. For example, U.S. Sugar operates a sophisticated Motorola system which meets state-of-the-art public safety reliability standards and protocols. Because

the lower block likely does not have enough channels available, it is difficult to imagine that any other suitable, comparable spectrum is available in which similarly sophisticated systems may be operated. None of the 220 MHz equipment currently available is even remotely close to meeting the same public safety protocols, operating standards, and hand-held requirements as U.S. Sugar's current system. It will be very difficult to relocate U.S. Sugar's system to comparable assignments.

12. The Commission should not conclude that a party is acting in good faith or bad faith based upon such an arbitrary standard; incumbents are uniquely qualified to discern their needs and to judge the true comparability of an offer vis-a-vis their existing systems. Incumbents such as U.S. Sugar should not be coerced into accepting inferior facilities simply because an EA licensee has labeled them "comparable facilities".

13. Moreover, if the Commission does place the onus of acceptance upon the recipient of an offer, U.S. Sugar believes that the Commission's proposal should cut both ways: if an incumbent presents an offer or counteroffer for comparable facilities during the mandatory negotiation period, the rejection of that offer by the EA licensee

should be treated by the Commission as an act of bad faith on the part of the EA licensee. To treat incumbent offers differently from EA licensee offers is to predetermine that incumbents are more likely to negotiate in bad faith than EA licensees and EAs will consistently make bona fide offers of comparable facilities. This would be unfair to incumbents and would place them at a negotiating disadvantage throughout both the voluntary and the involuntary negotiation periods.

**3. The Definition of Comparable Facilities  
Should be Expanded**

14. The Commission proposed to define comparable facilities as: (i) the same number of channels with the same bandwidth; (ii) relocation of the incumbent's entire system, not just those channels desired by a particular EA licensee; and (iii) providing the relocated incumbent with a 40 dBu service contour that encompasses all of the territory covered by the 40 dBu contour of its original system.

15. U.S. Sugar generally supports this definition of comparability. However, U.S. Sugar reiterates its belief, discussed above, that "relocation of an incumbent's entire system" cannot be achieved in an equitable manner

unless all EA licensees are required to negotiate with the incumbent at the same time.

16. U.S. Sugar urges the Commission to adopt a fourth aspect of comparable facilities: serviceability. Incumbents currently maintain trained personnel, or rely on outside personnel supplied under contract, to service their existing equipment. In light of the fact that these service costs are substantial, and retraining will be necessary for in-house personnel, U.S. Sugar believes that EA licensees should be required to provide equipment which is comparable in serviceability.

**4. Reimbursable Costs Should Include All Reasonable Expenses**

17. In addition, the Commission proposed to limit reimbursement among EA licensees that benefit from a relocated system to "actual" costs, thereby excluding "premium costs" from reimbursement by subsequent EA licensees. Notice at ¶ 272. The Commission defined premium costs to include any payment above the cost of comparable facilities. Notice at ¶ 270.

18. U.S. Sugar believes that the Commission should include in its definition of reimbursable costs the

reasonable cost of attorneys' and consultants' fees incurred by incumbents during the relocation process. Indeed, the Commission should permit reimbursement of any and all fees which are reasonable and which are incurred by an incumbent as the direct result of the EA licensee's desire to relocate that incumbent. Otherwise, subsequent EA licensees would be rewarded for their dilatory approach to negotiations. Indeed, this proposal may create an incentive for EA licensees to avoid negotiations altogether. For example, an EA licensee could reach an agreement to relocate an incumbent system and pay the incumbent's "premium costs". The day after the agreement is reached, a second EA licensee could suddenly express an interest in its portion of that incumbent's system -- thus benefitting from its delay by not having to reimburse the first EA licensee for its payment of the incumbent's premium costs. U.S. Sugar believes that as long as an incumbent's costs are reasonable, they should be shared by all EA licensees that benefit from the relocation of the incumbent.

## **5. Analog versus Digital Equipment**

19. The Commission proposed to permit EA licensees to replace analog equipment with analog equipment. Notice at ¶ 284. U.S. Sugar believes that where analog

equipment is being phased out by a particular manufacturer, digital equipment should be provided by the EA licensee. In addition, the Commission should recognize the increased costs of operating analog equipment in what is quickly becoming a digital world.

**B. Relocation Policy Must Be Coordinated and Fair**

20. U.S. Sugar opposes forced relocation without proper safeguards. U.S. Sugar reiterates the position it advocated in Comments if filed in January 1995 in this same proceeding.<sup>6/</sup> Those Comments argued that incumbent licensees: (1) must be able to operate "dual" systems during a six-month transition period, with one system in the upper block and one in the lower block; and (2) incumbents should receive a "premium" payment above and beyond the actual moving costs, which amounts to 20% of the moving costs, as compensation for the very significant inconveniences caused by relocation.

21. It is troubling that the Commission has adopted a policy to relocate incumbent SMRs to the lower 80-channel

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<sup>6/</sup> United States Sugar Corporation; Development of SMR Systems in the 800 MHz Frequency Band; PR Docket No. 93-144; and Competitive Bidding for 800 MHz SMR; PP Docket No. 93-252.

SMR block and the General Category channels, because these channels are extremely congested and probably incapable of handling the expected volume of potentially dislocated licensees. For example, U.S. Sugar's operations are approximately 70 miles from West Palm Beach. The "lower block" channels in U.S. Sugar's operating area are extensively used. It is extremely unlikely that there is room in the lower block to accommodate relocation of U.S. Sugar's 15 upper block channel assignments. The FCC's Notice, however, failed to mention that there are over 10,000 private licensees currently located in the General Category channels and it did not offer a relocation plan for those incumbents.

**C. Auctions in the Lower 80 Channel Block and the General Category**

22. The Commission proposed to auction in the near future any vacant channels in the lower block of 80 SMR channels and the General Category channels. Notice at ¶ 323. U.S. Sugar opposes auctioning the lower 80 channel block and the General Category channels. Instead, U.S. Sugar supports a proposal offered by Nextel that incumbents in the lower 80 channel block and the General Category channels be permitted to voluntarily retune their systems in cooperation with each other in order to

meet the FCC's EA geographic service boundaries. Such cooperation among incumbents would allow the FCC to simply issue one EA license for each voluntary agreement. The parties to the agreement would share the EA license pursuant to their agreement. Only after all upper 200 channel block incumbents are relocated and after sufficient time has passed to enable voluntary agreements to be made in the lower 80 channel block and the General Category channels should the Commission even consider auctioning any remaining frequencies.

23. If the Commission does determine that auctions are genuinely in the public interest, then U.S. Sugar firmly believes that relocation of incumbents from the upper 200 channel block must be completed before any auction commences for the lower 80 channel block and the General Category channels. Incumbents in the upper 200 channel block would otherwise be deprived of relocation frequencies and bidders for the lower 80 and General Category channels would face considerable uncertainty concerning the frequencies available to them.

**D. Treatment of Existing Incumbents in the Lower  
80 Channel Block and the General Category Channel**

24. The Commission proposed to permit incumbent licensee on lower 80 and General Category channels to modify or add transmitters in their existing service area without prior notification to the Commission, so long as their 22 dBu interference contour is not expanded. Notice at ¶ 316. U.S. Sugar supports this flexible approach.

**III. CONCLUSION**

25. The Commission must continue to protect incumbents in the upper 200 channel block, the lower 80 channel block, and the General Category channels from becoming victims of the further development of the wide-area SMR industry. The Commission is correct to propose that all licensees of an EA should sit down to negotiate with an affected incumbent. U.S. Sugar believes that this worthy proposal should be carried one step further and that all licensees who are interested in an incumbent's system should be required to negotiate together with the incumbent, regardless of where that EA licensee is located.

26. U.S. Sugar generally supports the Commission's proposals to enable incumbents to receive equivalent or

superior facilities and to be relocated only after an extensive negotiation period. However, U.S. Sugar is concerned that the Commission is unduly giving EA licensees the upper hand in any negotiation process by enabling them to foist a "bad faith" determination upon incumbents during the mandatory negotiation period. U.S. Sugar urges the Commission to continue to take into account the needs of incumbents.

**WHEREFORE, THE PREMISES CONSIDERED,** United States Sugar Corporation respectfully submits the foregoing Comments and requests that the Federal Communications Commission take action in a manner consistent with the views expressed herein.

Respectfully submitted,

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