

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

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JUL 13 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

)  
Amendment of Part 90 of the )  
Commission's Rules To Provide )  
for the Use of the 220-222 MHz )  
Band by the Private Land Mobile )  
Radio Service )

PR Docket No. 89-552  
RM-8506

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

GN Docket No. 93-252

)  
Regulatory Treatment of Mobile )  
Services )

)  
Implementation of Section 309(j) )  
of the Communications Act -- )  
Competitive Bidding, 220-222 MHz )

PP Docket No. 93-253

To the Commission:

PETITION FOR RECONSIDERATION

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## SUMMARY

Over the last decade, the Commission has repeatedly revised its 220 MHz rules. Those rules, as they now exist, mirror in large part proposals presented by SunCom more than four years ago.

The Commission inappropriately denied SunCom the relief it requested, even as it revised its rules to effectively provide such relief to new applicants. While the Commission's denials of SunCom's requests have become final orders, the underlying proceeding associated with those requests, i.e., the licensing of non-nationwide 220 MHz, remains open. Accordingly, the Commission has it within its authority to revisit its denial of the SunCom requests and to permit SunCom and its associated licensees to revive their underlying licenses.

Both fundamental fairness and maintaining the integrity of the Commission's licensing mechanisms require that such relief be granted.

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To the Commission:

**PETITION FOR RECONSIDERATION**

SunCom Mobile & Data, Inc. ("SunCom"), by its attorney, and pursuant to Section 405(a) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 405(a), and Section 1.429(a) of the Commission's Rules (the "Rules"), 47 C.F.R. § 1.429(a), hereby petitions the Commission to reconsider its Order on Reconsideration<sup>1/</sup> in the referenced proceeding.

In its Order on Reconsideration, the Commission ruled on over twenty separate requests. Order at paras. 3 and 4. In doing so, however, the Commission served only to further muddy the already cloudy waters that have developed in the mere decade that the

<sup>1/</sup> Memorandum Opinion and Order on Reconsideration, 63 Fed. Reg. 325 (June 12, 1998) ("Order on Reconsideration").

Commission has been formulating 220 MHz rules.<sup>2/</sup> By this Petition for Reconsideration, SunCom urges the Commission to increase the consistency associated with its 220 MHz rules by providing to initial licensees that timely requested changes in their authorizations a further opportunity to revise their licenses and construct and operate their facilities.<sup>3/</sup>

### **I. Background**

1. SunCom's active involvement with 220 MHz dates back more than four years. 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: (a) a declaratory ruling that its acquisition of ownership of multiple 220 MHz systems constructed in a given geographic area would not contravene Section 90.739 of the Rules, 47 C.F.R. § 90.739; and (b) a waiver ("Wavier Request") of Section 90.725(f) of the Rules, 47 C.F.R. § 90.725(f), to afford adequate time for construction of its network.

2. The Commission decided that SunCom's Declaratory Ruling Request presented a question worthy of formal consideration. The Commission "incorporated" the request into a formal rulemaking

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<sup>2/</sup> The Commission's first substantive 220 MHz decision was rendered in 1988. Report and Order, Gen. Docket No. 87-14, 3 FCC Rcd 5267 (1988).

<sup>3/</sup> A listing of many of those entities was provided to the U.S. Court of Appeals for the district of Columbia Circuit, and to the Federal Communications Commission, in pleadings submitted in SunCom Mobile & Data, Inc., v. Federal Communications Commission, Case No. 95-1478. (Supplemental Brief for Petitioner), submitted on May 20, 1996.)

docket and solicited public comments on the merits of the Declaratory Ruling Request. See, Further Notice of Proposed Rule-making 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.

3. The Commission also noted SunCom's request for a rule waiver. See, id. at 2872 n.61. However, it did not invite public comment on that request. Nevertheless, comments were filed on the issues raised by SunCom's Waiver Request, as well as its Declaratory Ruling Request.<sup>4/</sup>

4. When it acted earlier in this rulemaking, the Commission explicitly denied both matters brought by SunCom. Third Report and Order, 9 FCC Rcd 7989, 8056 (1994). However, after compiling a substantial record on SunCom's declaratory ruling request, the FCC failed to address the specific question that SunCom posed--whether channels could be aggregated after licensees had constructed their 220 MHz facilities. Although the Commission agreed with SunCom that there is a "potential benefit in allowing local 200 MHz licensees to aggregate more than five channels in a given market," it denied the declaratory ruling request "[b]ecause Suncom seeks to aggregate channels assigned to licensees who have not yet completed

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<sup>4/</sup> By SunCom's count, nine other parties submitted comments on the need for extended construction schedules generally, and seven of these parties addressed SunCom's proposals directly. See, Reply Comments of SunCom Mobile & Data, Inc., GN Docket No. 93-252, at 3 & n.6 (July 11, 1994).

construction." Third Report, at 8056. The Commission also denied the SunCom Waiver Request but provided no basis for its denial.

5. SunCom timely challenged both of the FCC's errant rulings. With respect to its Declaratory Ruling Request, SunCom petitioned for reconsideration on the basis that the FCC, after publicly inviting comments on the request, failed even to address the very question that SunCom had posed. SunCom challenged the FCC's initial ruling on its Wide-Area Waiver Request on the basis that it received only perfunctory treatment, rather than the "hard look" required by applicable law, and that the denial was inconsistent with controlling precedent and applicable law.

6. In its 220 MHz Second MO&O, the FCC attempted to explain its prior rulings.<sup>5/</sup> With respect to SunCom's wide-area waiver request, it argued that there were several separate bases for affirming its prior denial. First, while conceding that one of the prior waiver requests that the FCC granted, which SunCom's mirrored, was intended to put parties on notice as to how future waiver requests would be treated and to prevent discriminatory treatment of waiver requests, the FCC observed that such pronouncement was not intended to constitute a waiver policy that would last "into perpetuity." 220 MHz Second MO&O, at para. 95. (J.A. 234). It next proclaimed that "220 MHz service is not 800 MHz SMR service," without elaboration. Id. It then decreed that its prior waiver policy is "not governing," because in the CMRS

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<sup>5/</sup> Amendment of Part 90 of the Commission's Rules to Provide for Use of 220-222 MHz Band, 78 Rad. Reg. 2d 1355 (1995).

Third Report and Order, the FCC determined that waivers of construction periods would only be granted "if the licensee can demonstrate unique circumstances beyond its control that justify an extension." Id.

7. In attempting to justify its prior ruling on the SunCom declaratory ruling request, the FCC relied upon prior "guidance" it had offered as to how a licensee could justify its need for additional spectrum in a given geographic area.<sup>6/</sup> While denying SunCom's Declaratory Ruling Request,<sup>7/</sup> it made findings of fact in paragraph 63 of the same document that 220 MHz "[r]egional licensees, who will be offering communications services to a much larger population of users, should be authorized a larger number of channels and therefore proposed that regional licensees be assigned in 10- 15- and 20-channel blocks."<sup>8/</sup>

8. SunCom submitted to the United States Court of Appeals for the District of Columbia Circuit a Petition for Review of the Commission's actions regarding SunCom's prior requests. The Court denied SunCom's petition, for procedural but not substantive reasons.<sup>9/</sup>

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<sup>6/</sup> Id., at para. 91.

<sup>7/</sup> Id., at para 186.

<sup>8/</sup> Id., at para. 34.

<sup>9/</sup> SunCom Mobile & Data, Inc. v. Federal Communications Commission, 87 F.3d 1386 (1996).

II. Argument

A. The FCC Acted Arbitrarily and Unlawfully When It Denied the SunCom Wide-Area Waiver Request

1. The FCC's Action in Denying SunCom's Wide-Area Waiver Request in the Same Order Where It Proposed Similar Extended Construction Periods for New 220 MHz Licensees Was Arbitrary and Capricious

In the very decision in which the FCC denied SunCom's wide-area waiver request, it proposed new rules for 220 MHz that provide construction periods for new regional licensees that are longer than that sought by SunCom.<sup>10/</sup> In proposing considerably longer construction schedules for wide-area systems, the FCC recognized that, when it determines the appropriate construction requirements for wide-area systems, it "must" take into consideration the size and complexity of system construction and the treatment afforded to wide-area licensees in other frequency bands--two more arguments that were focal to SunCom's Wide-Area Waiver Request.

The FCC's determination to apply one standard to SunCom--even while at the same time proposing a new regulatory framework for 220 MHz that parallels in many ways the very network that SunCom proposed--contravened the Act, as well as core administrative regulations by which the FCC is obligated to abide. In an era when regulatory parity is the law, it is difficult to design a clearer violation: in a single decision, the FCC proposed one set of

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<sup>10/</sup> Id., at para. 47. The FCC proposed that new licensees be required only to provide coverage to one-third of their population within five years, and to two-thirds within ten years.

rules for "new" 220 MHz licensees and pontificated at length as to why such rules would further the public interest; then it denied SunCom the same relief without explaining why that makes any sense. The FCC was utterly silent as to why licensees in the same service and frequency band are to be made to play by vastly disparate rules.

Even holding aside the Congressional mandate for regulatory parity, the FCC's rulings were arbitrary. The FCC's action undermines the equity<sup>11/</sup> that is at the core of the administrative process. It also violated the common sense--and judicially recognized--principle that similarly situated parties must be accorded equal treatment. As Judge Mikva eloquently explained in addressing inconsistent FCC action in similar proceedings:

[A] sometimes-yes, sometimes-no, sometimes-maybe policy ... cannot ... be squared with our obligation to preclude arbitrary and capricious management of [an agency's] mandate.

Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235, 237 (D.C. Cir. 1985), citing NLRB v. Washington Star Co., 732 F.2d 974, 977 (D.C. Cir. 1984). See, also, Melody Music, Inc. v. FCC, 345 F.2d 730, 732 (D.C. Cir. 1965), where Chief Judge Bazelon chastised the FCC for treating two similarly-situated applicants completely different, especially when both "were considered by the Commission at virtually the same time", and where he warned the FCC that

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<sup>11/</sup> See, Charles H. Koch, Jr., Administrative Law and Practice, West Publishing Co. (St. Paul, 1985), sect. 1.11.

"whatever action the Commission takes on remand, it must explain its reasons ... [and] the relevance of those differences to the purposes of the Communications Act." Melody Music, supra, 345 F.2d at 733. Here, where different treatment of the same spectrum is provided for in the very same decision, the FCC's denial of the SunCom Declaratory Ruling Request must be overturned.

**2. The FCC Did Not Give the SunCom  
Wide-Area Waiver Request the  
"Hard Look" Required By Law**

Non-frivolous requests for rule waivers are not subject to perfunctory treatment, but must be given a "hard look." P&R Temmer v. FCC, 743 F.2d 918, 929 (D.C. Cir. 1984); KCST-TV, Inc. v. FCC, 699 F.2d 1185, 1191-92 (D.C. Cir. 1983); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The FCC must "articulate with clarity and precision its findings and the reasons for its decisions." Id., at 1156. It is obvious from the FCC's treatment of the SunCom Wide-Area Waiver Request that no hard look was given to it.

The FCC's disposition could hardly have been more perfunctory. The FCC devoted a scant two paragraphs to the decision. See 220 MHz Second MO&O, slip op., at 94-96 (J.A. 233-235). Moreover, in that brief treatment, the FCC failed to apply any coherent standard to the Wide-Area Waiver Request. No findings were made. The FCC merely concluded that SunCom had not demonstrated the "prescribed circumstances necessary to justify an extended construction schedule." 220 MHz Second MO&O, slip op., at 96 (J.A. 235). Those "prescribed circumstances" are not clearly identified in the 220

MHz Second MO&O, and previously they were identified only as being "extraordinary circumstances." CMRS Third Report and Order, 9 FCC Rcd at 8056.

Because it clearly did not engage in reasoned decisionmaking, the FCC's summary action can stand only if SunCom's Wide-Area Waiver Request had insufficient merit to warrant reflective consideration. See, WAIT Radio, supra, 418 F.2d at 1157-58. However, FCC action in granting a multitude of virtually identical waivers and in affirmatively incorporating the Wide-Area Waiver Request into its rulemaking proceeding remove any question regarding the bona fides of the request. By providing no reasoned analysis, the FCC "crossed the line from the tolerably terse to the intolerably mute." Id., at 1153.

**B. The FCC's Action in Denying SunCom's Declaratory Ruling Request Was Arbitrary and Capricious**

The FCC's 220 MHz Second MO&O consisted of two discrete components. In one, the FCC denied the requests of SunCom--and all other waiver requests presented by other parties and ruled upon by the FCC. In the other, the FCC proposed sweeping changes to its regulatory framework for 220 MHz. The proposed changes bear a striking resemblance to the SunCom proposed network. In fact, the FCC's discussion of why changes in its processes appear to be necessary included argument presented by commenters in a prior proceeding. Among those portions of comments that the FCC deemed so significant as to quote were the Suncom statements that "multiple license capacity and effectiveness are required for a

competitive and cost-effective 220 MHz system," and that multiple licenses are "required to assure competitive 220 MHz coverage." 220 MHz Second MO&O, at paras. 29-30. The FCC also chose to highlight the statement of another commenter who supported the very concepts championed by SunCom, when it suggested that:

[G]iven the extremely small amount of spectrum granted each 220 MHz licensee and the economic realities of competition in today's communications marketplace, the only potential for successful utilization of a five-channel commercial narrowband license is as part of a multi-site system offering full market coverage, feature-rich equipment and a depth of channel capacity.... [G]enerally, a 5-channel stand-alone system is simply not economically feasible.<sup>12/</sup>

And when the FCC proposed revised rules, it provided for several arrangements that virtually mirrored the SunCom proposal, including the following:

- a. Wide-area systems that are licensed on the basis of Economic Areas and Regions, rather than on single sites;
- b. Frequency assignments that are as high as 20 channels, with no limit to the number of 220 MHz assignments an entity can have;
- c. Construction periods that span five- and ten-year periods, rather than the twelve-month construction periods that govern single-site systems.

The FCC's rationale for proposing these changes was instructive. In proposing larger channel assignments, the FCC expressly acknowledged that a mere five-channel assignment may not serve the needs of wide-area licensees and that larger channel

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<sup>12/</sup> 220 MHz Second MO&O, at para. 29, citing comments of US Mobilcomm, Inc.

assignments are necessary to permit licensees to provide a variety of services--the very argument that SunCom presented long before. 220 MHz Second MO&O, at paras. 33-34. The FCC's action in denying SunCom's Declaratory Ruling Request while, in the very same decision, granting similar or greater relief to new wide-area 220 MHz licensees suffers from the same fundamental problems as discussed in Section II.A., above. In addition, such action is contrary to Congressionally mandated regulatory parity and violative of the FCC's obligation to treat similarly-situated entities in a similar fashion.

**C. The D.C. Circuit's Action Denying the SunCom Petition Presents no Bar to this Petition**

Based upon the above, it is clear that the Commission erred in not granting to SunCom and its associated licensees the relief they requested. The U.S. Court of Appeals did not independently obtain the Commission's ruling when, on the basis of lack of standing only, it denied the SunCom Petition for Reconsideration.

The fundamental failings that were present in the Commission's handling of the SunCom requests in this proceeding, and are discussed above, are most significant for several reasons. First, they show the nature of the injustice presented to SunCom. Further, they provide the Commission with a clear reason to correct the injustice. Unquestionably, a tribunal has the authority to set aside a decision that was simply wrong when made.<sup>13/</sup> Although finality is a cornerstone to the administrative process, the

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<sup>13/</sup> Cord v. Smith, 370 F.2d 418, 423 (9th Cir. 1966).

Supreme Court has recognized that even such a deep rooted policy as finality may be superseded as necessary to correct "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from finality.<sup>14/</sup> As Judge Leventhal observed two decades ago in Greater Boston:<sup>15/</sup>

The spirit of the 'fraud on the court' rule is applicable whenever the integrity of the judicial process or functioning has been undercut.

Id.<sup>16/</sup>

Although dismissal of SunCom's request has been by final order, the underlying proceeding, i.e., to license 220 MHz in a manner that serves the public interest remains open. Thus, the Commission is empowered to correct its mistake and process it through to a final grant. In reaching this conclusion, Greater Boston is again instructive.<sup>17/</sup>

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<sup>14/</sup> Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244, 64 S. Ct. 997 (1944).

<sup>15/</sup> Greater Boston Television Corporation v. FCC, 463 F.2d 268, 278 (D.C. Cir. 1971), cert. denied sub nom. WHDH, Inc. v. FCC, 406 U.S. 950, 92 S. Ct. 2042, 32 L.Ed.2d 338 (1972).

<sup>16/</sup> Although the Greater Boston proceeding at least arguably involved a fraud, and this one does not, the two proceedings share a core element: an errant decision was made, and when that error is recognized, the error can be corrected, notwithstanding otherwise valid concerns about finality.

<sup>17/</sup> In Greater Boston, the Court declined to recall its mandate where the Commission had, subsequent to the mandate's issue, awarded a construction permit to an applicant in a comparative hearing case, which award became a final order. Notwithstanding the ultimate decision, several pertinent legal principles worthy of consideration derive from Greater Boston.

In Greater Boston the Court made it clear that if a proceeding has not reached finality, the Commission has plenary authority to reopen the record and deal with changed circumstances or newly discovered facts. 463 F.2d at 289-90. Here, the underlying proceeding, i.e., to license non-nationwide 220-222 MHz licensees, remains open. Accordingly, the Commission may reasonably take the position that, since it has not issued authorization in any of the markets where SunCom licensees were dismissed by a final order, the Commission may revisit SunCom's pleas to determine if further proceedings concerning them are warranted.

The Greater Boston Court also left the door open to recalling a mandate wherever there exist "differences of result for cases pending at the same time." 463 F.2d at 278-79. In the instant proceeding, where the Commission has revised its rules to mirror in many ways the relief SunCom sought, the disparate treatment that has been afforded to various licenses to date presents a good candidate for reversal.<sup>18/</sup>

Finally, and most importantly, Greater Boston empowers a court to withdraw its mandate, or to otherwise act to prevent an injustice or to preserve the integrity of the judicial process. In

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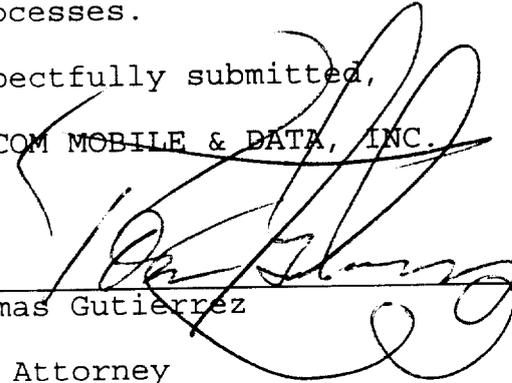
<sup>18/</sup> The need for the Commission to act consistent with a recently released federal district court ruling is analogous to the Commission's decision to revise its Designated Entity rules several years ago when the Supreme Court released its Adarand decision. Adarand Constructors, Inc. v. Pena, 315 US 200, 115 S. Ct. 1097 (1995); see, also, Scott v. Singletary, 38 F.3d 1547, 1551 (11th Cir. 1994) ("[C]ourt does have the power to recall its mandate if there has been a supervening change in the law.").

Coleman v. Turpen, 827 F.2d 667, 670 (10th Cir. 1987), the court recalled its remand where its review of the record raised serious questions as to whether its decision was based upon a misunderstanding of the information that was furnished to the court.

**IV. Conclusion**

For all the foregoing reasons, SunCom requests that the Commission revisit its actions in response to the SunCom requests and permit the relevant licenses to be revised. Such action is wholly within the Commission's authority and would serve both to correct past errors and to enhance the integrity of the Commission's overall licensing processes.

Respectfully submitted,  
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