

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

In the Matter Of:)
)
ACCESS 220, LLC) WT Docket No. _____
)
Request for Waivers To Provide Band)
Management Services Utilizing Licenses)
In the 220-222 MHz Band)

REQUEST FOR WAIVERS OF ACCESS 220, LLC

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EXECUTIVE SUMMARY

By this filing, Access 220, LLC and Access Spectrum, LLC (“ASL”) seek limited waivers of Sections 90.733, 90.725, and 90.769 of the Commission’s rules to extend ASL’s existing 700 MHz band management activities to ASL’s soon to be acquired 220-222 MHz licenses. ASL is a *bona fide* band manager for the 700 MHz guard band that is acquiring, subject to FCC approval, a nationwide footprint in the 220 MHz band. Operating exclusively as a band manager, ASL will comply with the band manager requirements for operation in the 220 MHz band and any waiver relief should necessarily be conditioned on such compliance. As discussed herein, by extending ASL’s authority to coordinate third party use of spectrum to these newly acquired licenses, the Commission will promote its original 220 MHz policy goals by both ensuring the limited spectrum available in the 220-222 MHz band is used efficiently and by enabling parties to more readily secure access to spectrum for varied communications solutions.

Allowing ASL to operate as a band manager in the 220-222 MHz band is also consistent both with the Commission’s broad licensing and spectrum management authority and with the FCC’s policies of allowing free market management of the spectrum. Because ASL’s proposed band management offering is not specifically contemplated in the Commission’s 220 MHz rules, however, a limited waiver of Section 90.733’s limitations on the permissible operations in the 220-222 MHz band and of the construction requirements of Sections 90.725 and 90.769 is warranted for ASL’s 220-222 MHz licenses. The strict application of these rules would fail to serve the underlying purpose of the rules, and the requested waivers will promote the public interest by ensuring the most flexible and efficient use of the 220-222 MHz spectrum. As such, the requested waivers are legally justified and manifestly in the public interest.

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Access 220, LLC and its parent, Access Spectrum, LLC, (collectively, “ASL”) hereby seek waivers, subject to conditions, of Sections 90.733, 90.725, and 90.769 of the Commission’s rules to permit ASL to conduct band management activities within the 220-222 MHz band. ASL is currently an FCC band manager licensee within the 700 MHz guard bands, holding twenty-one major economic area (“MEA”) licenses. As discussed herein, ASL is in the process of acquiring a number of 220 MHz licenses and seeks to extend its band management business to encompass those additional authorizations. Extending such authority will promote efficient and effective use of the 220-222 MHz band consistent both with the Commission’s 220 MHz allocation objectives and the band management policies.

I. INTRODUCTION

A. Access Spectrum’s Operations As a Bona Fide Band Manager Produce Significant Benefits for the Wireless Radio Community and the Public Generally

Access Spectrum is a private venture formed by the Industrial Telecommunications Association (“ITA”) to increase the spectrum options available to mobile radio users. To date,

Access Spectrum has made great strides towards fulfilling its purpose consistent with the commercial framework of the Commission's band management scheme. Access Spectrum acquired twenty-one MEA licenses in the FCC's Guard Band Manager auctions, providing it with an exclusive — but regional — geographic footprint. Access Spectrum has also developed a wholly new business plan to realize its band management objectives, developed exhaustive spectrum channelization plans and technical parameters to maximize efficient band usage, secured extensive third party financing, and is negotiating a significant number of spectrum use agreements ("SUAs")¹ with unaffiliated spectrum customers. Access Spectrum has also concluded a broad equipment development agreement with Motorola, Inc., which anticipates field deployable infrastructure and handsets for the 700 MHz band during the third quarter of 2002. Thus, Access Spectrum, in an exceedingly short period of time, has turned the band management concept into reality, and is now poised to efficiently offer new service options — in a new spectrum band — to radio users in need of voice and data solutions.

In furtherance of ASL's band manager business plan, Access 220, a wholly-owned subsidiary of Access Spectrum, was recently formed to acquire 220-222 MHz spectrum assets from aerwav, inc. ("aerwav"). While ASL has been able to deliver on the promise of band management in its licensed areas, existing spectrum encumbrances in the 700 MHz band, coupled with Access Spectrum's regional-only coverage, created barriers to fully addressing the spectrum needs of those potential customers who require nationwide or super-regional service footprints. Accordingly, Access Spectrum was investigating strategic alternatives and was fortuitously offered the opportunity to acquire the authorizations of aerwav, the largest spectrum

¹ ASL's written agreements with end users of band manager spectrum have been drafted as "spectrum use agreements." or "SUAs." to avoid any confusion with respect to the creation of property rights associated with a "lease."

holder in the 220-220 MHz band. Aerwav's 220 MHz holdings represent the consolidated licenses of RoamerOne, Securicor and Intek License Acquisition Corp. ("ILAC"). The aerwav licenses that will be assigned, subject to FCC approval, to Access 220 include: one Phase II nationwide license; two Phase I nationwide licenses; eight EAG licenses; and one hundred and four BEA licenses. In addition, aerwav has surrendered for cancellation approximately fifty-five other incumbent licenses in an effort to sanitize the FCC's licensing database. Through its proposed acquisition, Access Spectrum will also be funding a 220-222 MHz Equipment Development Agreement with Motorola to provide communication solutions within the 220-222 MHz band, with equipment expected to become available during the third quarter of 2002.

B. Access Spectrum's Band Management Proposal for Its 220-222 MHz Licenses

Providing ASL with flexibility to administer the use of its 220 MHz spectrum as a band manager is a conceptual outgrowth from the Commission's earlier decisions in the *700 MHz* proceeding and the recent *Service Rules* proceeding. In those decisions, the Commission recognized that band manager licensing is a mechanism that affords licensees the "maximum flexibility to promote efficient spectrum use and the development of more efficient spectrum markets."² The Commission's Orders express the view that the benefits of band management can only be realized if licensees act in a *bona fide* capacity as neutral spectrum brokers and, accordingly, the Commission has developed a series of requirements designed to ensure the acquiring band manager status is not an opportunity for abuse.

² *Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, Report and Order, WT Docket No. 02-8, FCC 02-152, at ¶ 39 (rel. May 24, 2002) ("*Service Rules Report and Order*"); see also *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 at ¶ 29 (2000) ("*700 MHz Second Report and Order*").

Because ASL fully intends to discharge its current band management responsibilities,

ASL fully expects that the FCC would – and believes it is appropriate to – condition any requested waiver relief on compliance with the band manager operating requirements.

Specifically, ASL will:

- Enter into written agreements regarding the use of ASL's licensed spectrum that contain the requirements and conditions listed in 47 CFR § 27.602, including the inclusion of provisions that apply all existing licensee obligations to the spectrum user and stipulate that if ASL determines that there is an ongoing violation of the Commission's rules or that the spectrum user's system is causing harmful interference, then ASL shall have the right to suspend or terminate operation of the spectrum user's system and will use all legal means necessary to enforce that suspension or termination.
- Not engage in unjust or unreasonable discrimination among spectrum users, nor unreasonably deny prospective spectrum users access to the ASL's licensed spectrum.
- Not impose unduly restrictive requirements on use of its licensed frequencies, including any requirement that is not reasonably related to the efficient management of the spectrum licensed to ASL.
- Utilize the predominant amount of its spectrum for non-affiliates.
- Resolve disputes with ASL's customers or disputes between multiple customers of ASL in the same manner that the parties would resolve other commercial disputes arising out of the spectrum user agreement.
- File an annual report providing the Commission with information about the manner in which their spectrum is being utilized, including: (1) the total number of spectrum users and the number of those users that are affiliates of ASL; (2) the amount of ASL's spectrum being used by ASL's affiliates in any part of the licensed service area; (3) the amount of ASL's spectrum being used pursuant to agreements with unaffiliated third parties; (4) the nature of the spectrum use of the ASL's customers; and; (5) the length of the term of each spectrum use agreement.
- File a separate station application and require end users to obtain all appropriate Commission approvals or authorizations prior to construction of stations that (i) require submission of an Environmental Assessment; (ii) require international coordination; or (iii) would affect the radio frequency quiet zones described in Part 90, Section 90.177.
- Require end users to register with the Commission, prior to station construction, any station antenna structure for which notification to the Federal Aviation Administration is required by Part 17.

- Require end users to comply with the notification and authorization requirements set forth in 47 CFR § 27.66 when a deletion, move or change of a station's operations constitutes a discontinuance, reduction, or impairment of service under that section, or results from an involuntary act subject to § 27.66(a).

These requirements and general safeguards will ensure that the benefits that ASL, as a band manager, will bring to the 220-222 MHz band will extend to the widest possible range of spectrum users and facilitate the most flexible and efficient use of the spectrum.

Consistent with the goal of providing users of the 220 MHz spectrum with optimal flexibility, however, the following 700 MHz band-specific Part 27 rules appear not to apply to band manager activities conducted in the 220 MHz band:

- Section 27.2(b)'s prohibition against employing a cellular system architecture;
- Section 27.601(d)'s requirement to notify public safety frequency coordinators;
- Section 27.604's limitations on licenses won at auction; and
- Section 27.605's restrictions on partitioning and disaggregation.
- Section 27.14(a)'s performance requirements.

ASL believes this limited departure from the requirements applied to band managers in the 700 MHz band is appropriate given the differences in the technical and coordination considerations between the 700 MHz and 220-222 MHz bands and the particular policy goals behind the Commission's 220-222 MHz regulations.

On the other hand, operations in the 220-222 MHz band are subject to certain technical requirements that should be applicable to facilities deployed under an SUA. Consistent with its obligations to ensure compliance with the technical 700 MHz rules, ASL would commit to ensuring that its 220-222 MHz users would comply with the applicable general technical standards of Subpart I of Part 90 and all relevant technical and operational requirements applicable to operations in the 220-222 MHz band, including:

- Compliance with the existing co-channel assignment criteria for 220 MHz stations set forth in Sections 90.723 and 90.763.
- Compliance with Section 90.729's limitations on power and antenna height.
- Compliance with Section 90.771's field strength limits.

In this manner, ASL would ensure that the utilization of 220-222 MHz frequencies under a band management scheme would not cause harmful interference to the operations of other licensed users.

II. THIRD PARTY BAND MANAGEMENT IS CRITICAL TO REVITALIZING THE 220-222 MHZ BAND

Permitting ASL to extend its band manager status to its 220 MHz licenses will help to fulfill the Commission's original policy goals of encouraging efficient use of the 220-222 MHz spectrum. To date, full development of the 220-222 MHz band has proven to be a substantial challenge, in part due to the 5 kHz channelization of the band and the interleaving of trunked channels. As the Commission recognized when establishing the 220 MHz service rules in 1991, it has "been hard pressed to accommodate the demand for private land mobile radio (PLMR) communications services within existing allocations."³ The Commission also recognized that "because of spectrum constraints, part of the solution to the continuing demand for additional PLMR communications services, especially in congested areas, would be the implementation of sophisticated higher-capacity communications systems."⁴ The Commission therefore "reserved

³ *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 Services*, Report and Order, 6 FCC Rcd 2356 at ¶ 6 (1991) ("200 MHz First Report and Order").

⁴ *Id.* at ¶ 7.

the 220-222 MHz band for narrowband usage to provide an incentive for users to develop narrowband technology to facilitate efficient channelization.”⁵

After reviewing the “largely undeveloped” status of 220 MHz services under the then current regulations, the Commission decided in 1996 to overhaul the regulatory scheme for 220 MHz band in an effort to promote the development and enhance the competitive potential of the “infant” 220 MHz services.⁶ From 1997 to the year 2000, the Commission continued to revise and refine the technical and service rules applied to 220 MHz services in an effort to promote development of this underutilized band.⁷ One key decision was the Commission’s authorization in the *220 MHz Third Report and Order* of transmission bandwidths in excess of 5 kHz through adjacent channel aggregation.⁸ While conceptually sound, the balkanized state of licensing in

⁵ *Id.* at ¶ 9.

⁶ See *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, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, and Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz*, Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 188 at ¶¶ 2, 21 (1995) (“*220 MHz Second Memorandum Opinion and Order*”).

⁷ See e.g., *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*, Fourth Report and Order, 12 FCC Rcd. 13453 (1997) (repealing the “40-mile rule of § 90.739(a) to promote competition in the band); *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, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, and Implementation of Section 309(j) of the Communications Act--Competitive Bidding, 220-222 MHz*, Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 14569 (1998) (adopting a variety of changes and clarifications in the 220 MHz rules to further spur development in the band); *ComTech Petition for Declaratory Ruling that Licensees of Nationwide 220 MHz Mobile Communications Systems Are Not Required to License Separately Each of the Systems' Base Stations*, Memorandum Opinion and Order, 14 FCC Rcd 16779 (1999) (removing the requirement for 220-222 MHz nationwide licensees to license specific sites); *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*, Memorandum Opinion and Order, 15 FCC Rcd 13924 (2000) (clarifying the construction requirements applicable to partitioned and disaggregated 220 MHz licensees to “to increase opportunities for a variety of entities to participate in the provision of 220 MHz service”).

⁸ See *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 Services*, Third Report and Order; Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943 at ¶ 57 (1997).

the 220-222 MHz band nonetheless left licensees with the inability to capitalize on this rule change and the 220-222 MHz band remained inefficiently utilized and underdeveloped.

ASL believes that it is finally in a position to realize the potential of the 220-222 MHz band. First, if the Commission permits ASL to operate as a band manager at 220 MHz and if ASL's financial projections for its 220 MHz business materialize, Access 220 intends to incrementally add to the amount of contiguous spectrum it holds through rational consolidation building from the aerway core of licenses. This strategy will facilitate channel aggregation to meaningful bandwidths for spectrum users.⁹ Second, band management practices are appropriate for use in the 220-222 MHz band because they will help fulfill the Commission's original policy goals for the band by facilitating the efficient use of spectrum and by expediting service to areas that otherwise would not receive it.

When adopting the 1996 overhaul of the 220 MHz rules, the Commission explicitly articulated its primary policy goal for the 220-222 MHz band: "Our primary goal in this proceeding is to establish a flexible regulatory framework that will allow for more efficient licensing of the 220-222 MHz band, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of the 220 MHz service in the mobile services marketplace."¹⁰ The Commission also indicated it was "seek[ing] to ensure that licenses are granted to those who value the [220-222 MHz] spectrum most highly and will maximize its

⁹ In addition, as indicated above, through rational consolidation building from the aerway core of licenses, Access 220 intends to incrementally add to the amount of contiguous spectrum it holds, thereby facilitating channel aggregation to meaningful bandwidths for private users. Therefore, ASL believes that in order to bring the benefits of band management to the 220-222 MHz band, any waiver relief granted here should be extended to include any after-acquired 220-222 MHz licenses, justified on the same basis and with the same obligations set forth herein.

¹⁰ *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd 188, at ¶ 2; see also, *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 Services*, Memorandum Opinion and Order, 15 FCC Rcd 13924 at ¶ 3 (2000).

use to provide the best quality and variety of service to consumers.”¹¹ Finally, the Commission noted that, “to compete effectively with the growing number of competing services in the mobile communications marketplace, ... 220 MHz licensees will need the ability to provide a wide array of communications services to the public.”¹²

A review of Commission decisions regarding band manager licensing shows that allowing ASL to operate as a band manager can help achieve the Commission’s policy goals for the 220 MHz band. With respect to increasing efficient use of the spectrum, the Commission has noted that, “[i]n the absence of market-based mechanisms to promote efficient [private radio] spectrum use ... users have little incentive to use that resource more efficiently because any privately initiated attempt to improve efficiency would confer benefits on all users of the shared spectrum, with only a fraction of these benefits accruing to the party undertaking the effort.”¹³ According to the Commission, band manager licensing, in contrast, is a market based mechanism that can promote efficient spectrum use by discouraging spectrum users from engaging in spectrally inefficient and low value uses, while at the same time retaining the financial incentive for the band managers themselves to maximize spectral efficiency and use.¹⁴

Extending band manager status for ASL to the 220-222 MHz band also beneficially alleviates regulatory burdens on spectrum users while affording them additional options to access spectrum to meet their particular communication service needs. As the Commission has

¹¹ *220 MHz Second Memorandum Opinion and Order*, 11 FCC Rcd 188 at ¶ 2.

¹² *Id.* at ¶ 77.

¹³ *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, Petition for Rule Making of The American Mobile Telecommunications Association*, Report and Order and Further Notice of Proposed Rule Making, 15 FCC Rcd 22709 at ¶ 38 (2000) (“*BBA Report and Order*”).

¹⁴ *See id.* at ¶¶ 38, 47.

recognized, compared to the transactional costs and time periods associated with acquiring a full-term license under the Commission's existing licensing regimes, band manager licensing "may be able to complete frequency coordination and authorize wireless operations with significantly lower transactional costs and in less time."¹⁵ ASL has, in fact, created an administrative process that permits it to fully respond to specific spectrum requests within 1-2 business days.

Band Manager licensees also have more flexibility than traditional licensees to "tailor" the use of the spectrum (*e.g.*, for short-term uses or specific geographic needs) in a manner that maximizes efficiency for the benefit of those able to make use of this spectrum.¹⁶ By "providing spectrum users with more flexibility to obtain access to the amount of spectrum, in terms of quantity, length of time, and geographic area that best suits their needs,"¹⁷ band manager licensing can maximize the use of the heretofore underutilized 220-220 MHz band.

In short, permitting ASL to act as a band manager in the 220-222 MHz band will help achieve the Commission's as yet unrealized goals for the band by "ensuring the limited spectrum resource is used efficiently,"¹⁸ by "enabling parties to more readily acquire spectrum for varied

¹⁵ *BBA Report and Order*, 15 FCC Rcd 22709 at ¶ 44; *see also id.* at ¶ 39 ("With a band manager, different types of spectrum users would have broad flexibility to satisfy their particular spectrum needs with fewer transactional costs and regulatory burdens than are associated with acquiring a full-term license under the Commission's existing license assignment and partial assignment procedures.").

¹⁶ *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299 at ¶ 29 (2000) ("*700 MHz Second Report and Order*").

¹⁷ *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 31.

¹⁸ *Id.* at ¶ 31.

uses”¹⁹ and by “streamlining the Commission’s spectrum management responsibilities”²⁰ while easing the regulatory burdens of spectrum users.²¹

III. THE COMMISSION HAS THE AUTHORITY TO GRANT ASL BAND MANAGER STATUS FOR ITS 220-222 MHZ LICENSES

Allowing ASL to operate as a band manager in the 220-222 MHz band is consistent both with the Commission’s broad licensing and spectrum management authority under the Communications Act of 1934 (“The Act”) and the FCC’s policies of allowing free market management of the spectrum. The FCC has repeatedly confirmed that use of band manager licensing for radio services is consistent with the FCC’s authority under Sections 301, 303(b), and 309(j) of the Act.²² The FCC has noted that, “because band managers are to be licensed and regulated by the Commission, the Commission fulfills its statutory obligation under Section 309(a) to determine whether licensing of spectrum will serve the public interest, convenience, and necessity.”²³

The Commission has also noted that the band manager concept is consistent with Section 310(d) of the Act, because band manager licensees retain ultimate *de facto* control of their licenses, have the full authority to take whatever actions are necessary to ensure third-party compliance with the Act and FCC Rules, and “will have a clear financial stake in the operation

¹⁹ *Id.* at ¶ 30.

²⁰ *Id.*

²¹ *BBA Report and Order*, 15 FCC Rcd 22709 at ¶ 44.

²² *See id.* at ¶ 42; *BBA Report and Order* 15 FCC Rcd 22709 at ¶ 42 (noting that “band manager licensing is fully consistent with our statutory spectrum management obligations.”).

²³ *BBA Report and Order*, 15 FCC Rcd 22709 at ¶ 42.

of their systems.”²⁴ Allowing ASL to operate as a band manager is also a proper delegation of the regulatory authority over use of the spectrum, because. “[b]and managers must operate and make spectrum available subject to the Commission’s rules and oversight.”²⁵ Allowing ASL, as a band manager, to make frequencies available to end users is analogous to the present frequency coordination process “by which many private land mobile radio services frequencies are assigned to individual applicants.”²⁶

Conferring band manager status on ASL for the 220-222 MHz band is also consistent with other areas in which the FCC has found it has the statutory authority to allow free market management of the spectrum. For instance, the FCC found band management consistent with its statutory authority to allow both ITFS and broadcast licensees to lease their excess capacity to non-licensees on a for-profit basis. The FCC stated that “we see no reason why it should make a difference to our analysis of our statutory authority that . . . [the band manager licensee] acquires its licenses for the principle purpose of leasing its capacity to others, rather than as an incident to its own use of the licensed frequency.”²⁷ The FCC also found band management consistent with its statutory authority to allow PLMRS licensees to share the use of their facilities on a for-profit basis pursuant to the licensee’s authorization. The FCC stated that it “sees no reason to distinguish between our authority to allow shared use of authorizations under Part 90 and our

²⁴ See *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 46; see also *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, WT Docket No. 00-230, FCC No. 00-402, ¶¶ 73-82 (rel. Nov. 27, 2000) (“*Secondary Markets NPRM*”) (proposing new standard for interpreting Section 310(d) with respect to spectrum leasing based on the requirements imposed on Guard Band Managers in the *700 MHz Order*).

²⁵ *Id.*

²⁶ See *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 45 (noting that a band manager “is, in a sense, a ‘next generation’ frequency coordinator.”); see also *BBA Report and Order*, 15 FCC Rcd 22709 at ¶ 42.

²⁷ *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 43.

authority to allow ... [band managers] to enter [into] agreements for use of their authorizations by non-licensees.”²⁸ Permitting band manager licensees in the 220-222 MHz band can be viewed as another instance of extending the benefits of free market spectrum management, an activity well within the Commission’s powers.

Finally, authorizing ASL to act as a manager in the 220-222 MHz band is consistent with the FCC’s authority to adopt reasonable rules in the public interest when establishing licensing criteria. The Commission has noted that it is not prohibited from adopting a licensing approach that it found to be in the public interest “merely because the Communications Act does not expressly provide” for the use of such an approach in licensing proceedings.²⁹ Having previously determined that band management licensing is clearly in the public interest for the 700 MHz band, the mere fact that the Act does not provide for band management in the 220-222 MHz band does not preclude the Commission from concluding that permitting ASL to operate as a band manager is in the public interest.

IV. THE FCC SHOULD GRANT ASL THE NECESSARY WAIVERS TO IMPLEMENT A BAND MANAGEMENT SCHEME FOR THE 220-222 MHZ BAND

ASL believes its proposed band management activities in the 220-222 MHz band are a unique opportunity to vitalize the band and bring a myriad of benefits to spectrum operators and the general public alike. Because band management is not specifically contemplated in Subpart T of Part 90, however, a limited waiver of several of the requirements applicable to licensees in

²⁸ *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 44.

²⁹ *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 42; *see also Amendment of Parts 2, 22 and 25 of the Commissions Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, Final Decision on Remand, 7 FCC Rcd 266 at ¶ 16 (1992).

the 220-222 MHz band is necessary to realize the benefits of such a scheme. As discussed below, the requested waivers are legally justified and manifestly in the public interest.

ASL would first like to emphasize that only minimal waiver relief is required for Access 220 to begin to bring the benefits of band management to the 220-222 MHz band. In addition, ASL notes that Access 220, as a band manager, will strictly adhere to a variety of requirements that do not apply to traditional licensees in the 220-222 MHz band, but perform many of the same functions as the 220-222 MHz rules. Specifically, ASL is seeking a limited waiver of:

- Section 90.733's limitations on the permissible operations in the 220-222 MHz band, which does not include band management among the permissible uses for the band;³⁰ and
- The construction requirements for Phase I licenses (Section 90.725) and Phase II nationwide licenses (Section 90.769),³¹ to permit alternative construction showings by band managers, which do not operate any facilities.³²

Pursuant to section 1.925 of the Commission's rules, a waiver may be granted if the petitioner establishes that "the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest."³³ Alternatively, under section 1.3 of the Commission's rules, the Commission has

³⁰ This waiver would be necessary for all the 220 MHz licenses that ASL is proposing to acquire from aerwav. See Appendix A for a list of the call signs requiring a waiver of Section 90.733.

³¹ These waivers are only necessary for some of the licenses that ASL is proposing to acquire from aerwav. See Appendix B for a list of the call signs requiring a waiver of either Section 90.725 or 90.769.

³² ASL is not seeking a waiver of the construction requirements for EA and Regional licenses (Section 90.767) as this class of licenses has the ability to meet the requirements by submitting an alternate construction showing demonstrating an appropriate level of "substantial service" by the applicable deadlines. See § 90.767(2)(b). ASL believes that this "substantial service" showing affords licensees the flexibility to include third party construction under an SUA agreement for purposes of meeting the requirement. If the Commission believes this understanding to be in error, ASL would request additional necessary waiver relief, as appropriate.

³³ 47 C.F.R. § 1.925(3). In the alternative, Section 1.925 permits a waiver to be granted if unique or unusual factual circumstances exist causing the application of the rule to be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative." See *id.*

authority to waive its rules if there is “good cause” to do so.³⁴ The waiver process allows the Commission to “maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility.”³⁵ In deciding whether or not to grant specific waiver requests, the Commission has indicated it must “take into account considerations of hardship, equity, or more effective implementation of overall policy” in its broader quest for regulation in the “public interest.”³⁶ As discussed herein, ASL submits that the strict application of the requirements listed above would fail to serve the underlying purpose of those requirements, and the requested waivers would promote the public interest by ensuring the most flexible and efficient use of the 220-222 MHz spectrum.³⁷

A. A Waiver of the Use Restrictions of Section 90.733 To Permit ASL to Act as a Band Manager is Justified

Section 90.733 limits the permissible uses in the 220-222 MHz band to private land mobile operations, and certain one-way or two-way paging operations and fixed operations.³⁸ The clear underlying purpose of this rule, as expressed in the previously discussed FCC allocation orders, is to ensure the availability – and efficient use – of spectrum for users that cannot be accommodated on commercial consumer networks. Obviously, the use restrictions in Section 90.733 pre-dated the FCC’s implementation of band management, and thus did not

³⁴ 47 C.F.R. § 1.3.

³⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

³⁶ *Id.*

³⁷ While ASL believes it has identified all of the regulations contained in Subpart T of Part 90 that would restrict the ability of ASL to operate as a band manager in the 220-222 MHz band, to the extent the Commission believes band manager licensing would be inconsistent with other 220-222 MHz regulations, ASL would request any other relief the Commission deems appropriate.

³⁸ 47 C.F.R. § 90.733 (2001).

consider the manifest benefits, documented in Section II, that band management could offer in the 220-222 MHz band. Indeed, as ASL has argued in Section II, ASL believes that extension of ASL's band manager status to these 220 MHz licenses may, in fact, be the *only* means of fulfilling the Commission's purposes under Section 90.733.

In short, given the balkanization of the 220-222 MHz band, consolidation through a band manager approach is the optimal means to ensure usable spectrum remains available for users whose needs cannot be met through consumer technology. ASL, which fully intends to provide for third party use of the entire band, harbors no aspirations to become a radio service provider, aspirations ASL believes are fundamentally at odds with the band management concept.³⁹ Indeed, band management is not an ancillary component of our overall corporate strategy; it is our *raison d'etre* and a logical outgrowth of our company's experience and expertise in land wireless frequency coordination. Thus, extending ASL's band management status to these 220-222 MHz authorizations is in the public interest and offers a unique opportunity to realize fully the original intent of the 220-222 MHz allocation policies. Strict application of Section 90.733, accordingly, would in fact frustrate the underlying purpose of the rule.

B. A Limited Waiver of the Construction Requirements Is Warranted To Accommodate the Mode of Operation of Band Managers

The strict application of the construction requirements of Sections 90.725 and 90.769 to ASL is also contrary to the public interest and would frustrate the underlying purpose of those requirements. The construction requirements and applicable benchmarks in Sections 90.725 and 90.769 were adopted to "promote utilization" of the 220 MHz band and "to assure only *bona fide*

³⁹ The Commission recognized that commercial use of spectrum by band managers may be incompatible with the goals behind band management licensing when establishing a "predominate use" requirement in the *700 MHz Second Report and Order*. See *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 59.

applicants” apply for licenses in the band.⁴⁰ As the Commission has recognized, “as a ‘spectrum broker.’ the Guard Band Manager licensee will have an incentive to maximize efficient use of the spectrum.”⁴¹ In this instance, the market forces behind the band management process itself ensures that band managers will utilize the band in the most efficient manner possible, thereby satisfying the primary goal behind the construction requirements and applicable benchmarks. On a pragmatic level, ASL has raised significant private funding to implement its band manager business plan. ASL is under substantial pressure to make its spectrum available to third parties as rapidly as possible in order to meet its investors’ expectations, quite apart from any construction rule of the FCC. Applying the construction requirements to Access 220 would therefore be unnecessary and duplicative in this instance.

ASL recognizes, however, that while *bona fide* band managers have the requisite motivation to fully utilize spectrum, the absence of construction requirements entirely may result in some parties assuming the mantle of band management as a means of escaping their regulatory obligations. Accordingly, ASL is *not* seeking a wholesale exemption from the coverage benchmarks. Rather, ASL is seeking to have its construction measured using a “substantial service” test, which would permit the FCC to consider the construction undertaken by third parties under SUAs, with a safe harbor coverage percentage derived from the Commission’s decision in the *ILAC Order*.⁴²

⁴⁰ See *200 MHz First Report and Order*, 6 FCC Rcd 2356 at ¶ 76.

⁴¹ *700 MHz Second Report and Order*, 15 FCC Rcd 5299 at ¶ 29.

⁴² See *Intek License Acquisition Corp. Request for Waiver and Consolidation of 220 MHz Construction Requirements*, Memorandum Opinion and Order, 16 FCC Rcd 16431 (2001) (“*ILAC Order*”). We further note that the *ILAC Order* conditioned its relief on ILAC or its successor in interest operating the licenses as an integrated 28-channel system. ASL believes its coordinated efforts to manage the aerwav channels should be deemed to meet this requirement. Indeed, the *ILAC Order* expressly noted that relief was being provided to Intek to permit it to pursue a band manager plan. ASL’s plans are thus fully consistent with the underlying basis of the *ILAC* waiver, and ASL should remain the beneficiary of the *ILAC* determination.

Strict application of the construction requirements in this case would be harmful to the users of the 220-222 MHz band because it would effectively prohibit the provision of band management services in the 220-222 MHz band, leaving the many recognized benefits that band management can bring to users of the band unrealized. Unlike typical licensees, band managers provide for the coordinated use of spectrum by third parties, and consequently have no construction of their own on which to base a geographic or population coverage filing required by Sections 90.725 and 90.769. Moreover, band managers provide highly efficient use of the radio spectrum for others, but are not engaged in the type of PCS or cellular wide area schemes that naturally build out from high density areas, making the construction requirement of Section 90.741 unduly burdensome.⁴³ Under these circumstances, substitution of a “substantial service” standard appears to provide needed flexibility while ensuring that spectrum will not lie fallow.

As in other cases where the Commission has employed “substantial service” tests for construction benchmarks, ASL believes it is appropriate to provide a safe harbor that clarifies the application of the standard. In this case, with respect to the Phase I licenses, ASL suggests a safe harbor, “counting” third party operator construction, that corresponds with the remaining six- and ten-year construction requirements set forth in Section 90.725, or the construction requirements set forth in Section 90.769 (i.e., the Phase II nationwide deadlines and benchmarks). This is consistent with the relief provided to Intek in the ILAC Order.⁴⁴ Similarly, with respect to the Phase II nationwide license, ASL suggests a safe harbor, “counting” third party operator construction, to satisfy the construction requirements set forth in Section 90.769.

⁴³ For example, one potential spectrum use proposal Access 220 has submitted to an unaffiliated third party is for the use of 220 MHz spectrum at 85 separate sites located throughout the country, but all of the sites are located in exceedingly low-population density industrial locations.

⁴⁴ See *ILAC Order*, 16 FCC Rcd 16431 at ¶ 11.

In this manner, the Commission can ensure the integrity of the Phase I and II construction rules, while providing the flexibility needed for ASL's proposed band management services. ASL believes this minor adaptation is fully consistent with the waiver standards and should be granted as in the public interest.

V. CONCLUSION

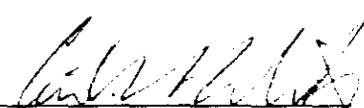
ASL submits that it has met the standard for grant of the requested relief. The strict application of the requirements listed above would fail to serve the underlying purpose of those requirements, and the requested waivers would promote the public interest by ensuring the most flexible and efficient use of the 220-222 MHz spectrum. At a minimum, ASL believes that it has shown good cause for the grant of a waiver.

ASL believes that a grant of the requested limited waiver will allow it to provide radio users the flexibility necessary to allow more efficient and effective use of the 220-222 MHz band. Such relief will allow ASL to implement its plan to vitalize the 220-222 MHz band and bring a myriad of benefits to spectrum operators and the general public. For the foregoing

reasons, ASL respectfully requests to Commission waive sections 90.733, 90.725, and 90.769 of its rules to the extent necessary to permit ASL to provide band manager services in the 220-222 MHz band.

Respectfully submitted,

ACCESS 220, LLC

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Its Attorneys

July 3, 2002

Appendix A
Call Signs Requiring Waiver of Section 90.733

WPFR284	WPOI761	WPOL367
WFPF444	WPOI758	WPOI696
WPOI701	WPOI762	WPOI715
WPOI704	WPOI792	WPOI849
WPOI705	WPOI796	WPOI759
WPOI706	WPOI725	WPOI765
WPOI708	WPOI764	WPOI767
WPOI702	WPOI766	WPOI777
WPOI703	WPOI857	WPOI785
WPOI732	WPOI755	WPOI756
WPOI774	WPOI713	WPOI720
WPOI800	WPOI709	WPOI738
WPOI750	WPOI722	WPOK943
WPOK767	WPOI719	WPOI858
WPOI718	WPOI810	WPOI728
WPOI848	WPOI811	WPOI729
WPOI739	WPOI859	WPOI803
WPOI760	WPOI802	WPOI805
WPOI763	WPOI804	WPOI751
WPOI723	WPOK736	WPOI776
WPOI710	WPOI733	WPOK731
WPOI735	WPOI862	WPOI717
WPOI743	WPOI695	WPOI847
WPOI757	WPOI716	WPOI741
WPOI721	WPOI724	WPOI809
WPOK779	WPOI754	WPOI797
WPOI707	WPOI711	WPOI778
WPOI501	WPOI740	WPOI779
WPOI502	WPOI742	WPOI753
WPOI730	WPOI714	WPOI712
WPOI731	WPOI745	WPOI734
WPOK730	WPOI726	WPOI737
WPOI861	WPOI768	WPOI812
WPOI863	WPOI769	WPOI860
WPOI880	WPOI772	WPOI727
WPOL368	WPOI775	WPOI770
WPOI752	WPOI799	WPOI807
WPOI808	WPOI801	
WPOI806	WPOI877	

Appendix B
Call Signs Requiring Waiver of the Construction Requirements of Section 90.725 or
Section 90.769

WPFR284
WFPF444
WPOI701



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July 3, 2002

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Federal Communications Commission
Wireless Bureau Applications
P.O. Box 358130
Pittsburgh, PA 15251-5130

Re: Rule Waiver Request Package

By this filing, Access 220, LLC and Access Spectrum, LLC ("ASL") seek limited waivers of Sections 90.733, 90.725, and 90.769 of the Commission's rules to extend ASL's existing 700 MHz band management activities to ASL's soon to be acquired 220-222 MHz licenses.¹ Because ASL does not yet hold the subject licenses, however, ASL is unable to utilize the ULS database to file the required FCC Forms electronically. As such, ASL is requesting a waiver of Section 1.913 of the Commission's rules to permit ASL to file FCC Form 601 manually.

Please find included in this waiver request package: 1) a completed Form 159-Fee Remittance Advice; 2) A single remittance for \$17,110.00; 3) a completed Form 601; and 4) an exhibit detailing ASL waiver request, including the rule numbers requested to be waived and a complete explanation of the circumstances that warrant a waiver of the Commission's rules. Please contact me at (202) 719-3182 if you have any questions.

Sincerely,

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¹ See Application of Aerway Spectrum Holdings, Inc. for Assignments of Authorization and Transfers of Control to Access 220, LLC, FCC File. No. 000846169.