

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

In the Matter Of: )  
 )  
ACCESS 220, LLC ) WT Docket No. 02-224  
 )  
Request for Waivers To Provide Band )  
Management Services Utilizing Licenses )  
In the 220-222 MHz Band )

**REPLY COMMENTS OF ACCESS 220, LLC**

Access 220, LLC (“Access 220”) and its parent, Access Spectrum, LLC (collectively, “ASL”), respectfully submit this reply to comments filed on ASL’s request for limited waivers in the above-captioned proceeding.<sup>1</sup> The majority of commenters filing in this docket concur that ASL has met the standard for grant of the requested relief and fully support Access 220’s position that its provision of band management services at 220-222 MHz (“220 MHz band”) will promote the public interest by providing more flexible and efficient use of that spectrum. One commenter misconstrued the factual basis for the relief sought by ASL and did not provide any substantive rationale to deny ASL’s request.<sup>2</sup> Accordingly, ASL urges the Commission to expeditiously grant the subject waivers.

**I. BACKGROUND**

On July 3, 2002, ASL filed its *Waiver Request* seeking authority to allow ASL to utilize certain licenses in the 220 MHz band to provide band management services. As explained in the *Waiver Request*, ASL has acquired the 220 MHz band spectrum assets of aerwav, Inc. and now desires to use those licenses to permit unrelated third party private radio users to meet their radio

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<sup>1</sup> *Request for Waivers of Access 220, LLC, To Provide Band Management Services Utilizing Licenses in the 220-222 MHz Band*, WT Docket No. 02-224 (filed July 3, 2002) (“*Waiver Request*”).

<sup>2</sup> *Comments of Data ComLink, Inc. WT Docket No. 02-224, August 26, 2002* (“*DCL Comments*”).

spectrum needs through contractual arrangements. ASL already provides similar offerings in the 700 MHz guard band, which was explicitly designated for Band Manager licensees. Because the rules for the 220 MHz band pre-date the Commission’s implementation of the band manager concept, ASL requires waiver of the permissible use limitations of Section 90.733 and limited relief from the construction requirements of Sections 90.725 and 90.769, but only to the extent of permitting ASL to utilize a “substantial service” threshold—thereby permitting ASL to consider construction by third party users—in order to satisfy its construction obligations.

ASL’s *Waiver Request* received strong support from Motorola, Inc. (“Motorola”),<sup>3</sup> the United Telecom Council (“UTC”),<sup>4</sup> and the Industrial Telecommunications Association, Inc. (“ITA”).<sup>5</sup> The Texas License Consultants (“TLC”) did not oppose the *Waiver Request*, but filed comments to express “concern” regarding the possibility of interference in the 220 MHz band.<sup>6</sup> Finally, rather than address the merits of the *Waiver Request*, DCL instead used this opportunity to advocate its own proposals for a wholesale refarming of the 220 MHz band along with the reallocation of the 217-220 MHz and the 222-225 MHz bands for commercial use.<sup>7</sup>

As discussed herein, ASL believes the record strongly supports grant of the requested waivers. The parties filing in support of ASL, including two FCC-certified frequency advisory committees and private wireless advocacy associations as well as the largest private radio equipment manufacturer, clearly and cogently support allowing ASL to act as a band manager in the 220 MHz band as a means of serving private radio users’ needs as a whole, as well as serving

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<sup>3</sup> Comments of Motorola Inc., WT Docket No. 02-224, August 26, 2002 (“Motorola Comments”).

<sup>4</sup> Comments of the United Telecom Council, WT Docket No. 02-224, August 26, 2002 (“UTC Comments”).

<sup>5</sup> Comments of the Industrial Telecommunications Association, Inc., WT Docket No. 02-224, August 26, 2002 (“ITA Comments”).

<sup>6</sup> Comments of Texas License Consultants, WT Docket No. 02-224, August 26, 2002 (“TLC Comments”).

<sup>7</sup> See DCL Comments at 8-12.

the overall public interest by promoting efficient spectrum usage. Moreover, the other two commenters have misread a critical aspect of the proposal—*no* equipment will be deployed under the proposed band management scheme that does not comply with the existing technical and operational rules for the 220 MHz band. As such, there is simply no technical basis for opposing ASL’s request.

## **II. THE RECORD SUPPORTS PERMITTING ASL TO OPERATE AS A BAND MANAGER IN THE 220-222 MHZ BAND AND GRANT OF THE REQUESTED RELIEF.**

The *Waiver Request* argued that grant of the requested relief was warranted because the strict application of Sections 90.733, 90.725 and 90.769 would fail to serve the underlying purpose of those rules and because grant of the requested waivers would promote the public interest.<sup>8</sup> A majority of commenters agree that waivers of those sections will serve the public interest and that the requested waivers are warranted.<sup>9</sup>

As an initial matter, the *Waiver Request* argued that the strict application of the permissible use limitations of Section 90.733 would frustrate the underlying Commission purpose of ensuring the availability of spectrum for, and efficient use of spectrum by users whose critical communications requirements cannot be accommodated on commercial consumer networks.<sup>10</sup> As UTC notes, Section 90.733 pre-dates the introduction of the band manager concept, and thus does not take into account the benefits that band management can offer in the 220 MHz band.<sup>11</sup> In fact, as ASL argued in the *Waiver Request*, band management licensing is an optimal means of ensuring that usable 220 MHz band spectrum remains available for users

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<sup>8</sup> See Waiver Request at 15.

<sup>9</sup> See Motorola Comments at 1-2; UTC Comments at 5-6; ITA Comments at 4-6.

<sup>10</sup> See Waiver Request at 15-16.

<sup>11</sup> See UTC Comments at 5; see also Waiver Request at 15-16.

whose needs cannot be met through traditional commercial networks.<sup>12</sup> As ITA recognizes in its comments, “[o]n the basis of its business model alone, band managers have an incentive to be spectrally efficient, to achieve maximum usage of its acquired spectrum, and to lease to a variety of users.”<sup>13</sup> The majority of commenters agree that a waiver of Section 90.733 is warranted and will serve the public interest.<sup>14</sup>

The *Waiver Request* also demonstrated that the strict application of the construction requirements of Sections 90.725 and 90.769 to ASL would frustrate the underlying purpose of promoting efficient utilization of the spectrum.<sup>15</sup> As ITA recognized, the market forces behind the band management process will provide ASL with an incentive to promote the utilization of its 220 MHz band licenses because it is in the best interest of ASL to have the users of its spectrum operational as soon as possible.<sup>16</sup> Moreover, as recognized by both ITA and Motorola,<sup>17</sup> ASL is not seeking a wholesale exemption from the coverage benchmarks, but rather “seeking regulations that are applicable to the circumstance and leading to the best utilization of the spectrum.”<sup>18</sup> ASL is seeking to have the construction requirements measured using a “substantial service” test, thereby permitting the FCC to consider the construction undertaken by third parties utilizing ASL licensed spectrum pursuant to Spectrum Use Agreements (“SUAs”).

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<sup>12</sup> See *Waiver Request* at 16; *see also* UTC Comments at 7 (“the band manager framework ... offers a much better tailored service to PLMR users such as some utilities than traditional commercial networks.”)

<sup>13</sup> ITA Comments at 5. ( ITA also noted that because “market forces alone provide the band manager with an incentive to lease the spectrum quickly to maximize revenues for its investors,” band manager licensing is “inherently an efficient utilization of the spectrum ...” ITA Comments at 6.).

<sup>14</sup> See ITA Comments at 5; UTC Comments at 5; Motorola Comments at 1-2.

<sup>15</sup> See *Waiver Request* at 16-17.

<sup>16</sup> See ITA Comments at 6.

<sup>17</sup> See ITA Comments at 6; Motorola Comments at 3.

<sup>18</sup> ITA Comments at 6; *see also* *Waiver Request* at 17-18.

A majority of commenters support the grant of the requested limited waivers and the employment of “substantial service” tests for construction benchmarks.<sup>19</sup>

Grant of the ASL *Waiver Request* also meets the second prong of the waiver standard by furthering the public interest. First, the Commission itself has recognized that band manager licensing 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 incentive for the band managers themselves to maximize spectral efficiency and use.<sup>20</sup> Most commenters strongly agree with ASL that grant of the requested waivers will serve the public interest by providing spectrum users with the flexibility necessary to allow more efficient and effective use of the 220 MHz band. ITA argues that the *Waiver Request* should be granted, as ‘the band manager framework has shown to be an efficient way to license spectrum while maximizing its usage and value of the spectrum through a variety of users.’<sup>21</sup> Similarly, UTC recommends the Commission grant all relief requested by ASL and argues that “Access’s waiver request would put 220-222 MHz spectrum to better and more efficient use than this band has enjoyed in the past, while furthering the Commission’s goals of regulatory flexibility and market-based spectrum solutions.”<sup>22</sup> Motorola argues that “grant of the requested waivers will serve the public

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<sup>19</sup> See ITA Comments at 6 (“the ‘substantial service’ test including construction of band manager’s leases ... would be the most equitable solution while providing much needed flexibility”); Motorola Comments at 3 (“If granted, this waiver would not undermine the underlying goal of the regulation, which is to promote efficient use of the spectrum.”); UTC Comments at 5-6 (indicating that waiver of the construction requirements would be in the public interest if ASL is required to provide the guarantee of substantial service it proposes).

<sup>20</sup> See *Waiver Request* at 9 (citing *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, 47 (2000).).

<sup>21</sup> ITA Comments at 6; see also *id.* at 4 (“Allowing a band manager licensing scheme in the 220-222 MHz band, would achieve the same benefits of the 700 MHz band, help achieve the goal of flexibility much like the government transfer bands, promote the public interest and maximize the usage and value of the spectrum.”).

<sup>22</sup> UTC Comments at 3.

interest by permitting Access 220 to provide radio users additional flexibility, which will allow more efficient use of the 220 MHz band and thereby fulfill one of the Commission’s primary allocation policies.”<sup>23</sup>

Second, the record also demonstrates overwhelmingly that extending band manager status for ASL in the 220-222 MHz band will promote the public interest by affording spectrum users additional options for spectrum to meet particularized communications needs, thereby maximizing the use of the underutilized 220 MHz band.<sup>24</sup> According to UTC, ASL’s proposal for band management licensing in the 220-222 MHz band “seems an appropriate marriage of excellent PLMR [private land mobile radio] spectrum with a regulatory framework suitable for many end users. The flexibility of these rules allows both parties to meet their own needs while making more efficient use of under-utilized spectrum.”<sup>25</sup> Similarly, Motorola argues that “[b]y affording spectrum users with a variety of options to access spectrum to meet their particular communications service needs, Access 220 will be promoting the public interest by maximizing use of the 220-222 MHz spectrum.”<sup>26</sup>

Finally, ASL’s *Waiver Request* also argued, and most commenters agree, that grant of ASL’s requested waivers will serve the public interest by alleviating the regulatory burdens on spectrum users, thereby increasing the number and diversity of users in the band and expediting service to areas that might not otherwise receive it.<sup>27</sup> As UTC notes, ASL’s proposed service “will help to alleviate the critical shortfall of PLMR [private land mobile radio] spectrum by

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<sup>23</sup> Motorola Comments at 2.

<sup>24</sup> See Waiver Request at 9-10; ITA Comments at 4; UTC Comments at 7-8; Motorola Comments at 2.

<sup>25</sup> UTC Comments at 7.

<sup>26</sup> Motorola Comments at 2.

<sup>27</sup> See Waiver Request at 8-10; Motorola Comments at 3; UTC Comments at 7-8; ITA Comments at 4-5.

opening availability to previously auctioned spectrum to those who would otherwise have no viable means of using it.”<sup>28</sup>

The *Waiver Request* demonstrated that grant of the requested limited waivers of Section 90.733, 90.725 and 90.769 is warranted and will serve the public interest. The record compiled in this docket clearly supports grant of the requested waivers, having demonstrated that the waivers will serve the public interest in a myriad of ways. ASL therefore urges the Commission to expeditiously grant the *Waiver Request*.

## **II. UTILIZATION OF 220 MHZ BAND FREQUENCIES UNDER ASL’S PROPOSED BAND MANAGEMENT SCHEME WILL FULLY CONFORM TO ALL APPLICABLE TECHNICAL STANDARDS.**

In its comments, DCL shows an apparent misunderstanding of key aspects of the *Waiver Request* and therefore fails to address meaningfully the merits of the request. First, DCL expresses a concern that ASL’s operations as a band manager may cause adjacent channel interference with DCL’s member’s use of their 220 MHz licenses.<sup>29</sup> DCL argues, for example, that grant of the waivers allows 220 MHz licensees to deploy and operate service “regardless of the potential for co-channel, adjacent channel, and other potential interference types.”<sup>30</sup> DCL’s comments, however, overlook the fact that ASL is not seeking a waiver of any technical standards, the channelization requirements, or the assignment policies currently in effect for the 220 MHz band. In fact, as indicated in the *Waiver Request*, ASL believes it is appropriate to

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<sup>28</sup> UTC Comments at 7-8; *see also* Motorola Comments at 3 (“By decreasing the regulatory burdens traditionally associated with providing communications services in the 220-222 MHz band, Access 220 will be serving the public interest by increasing the diversity of users in the band and expediting service to areas that might not otherwise receive it.”).

<sup>29</sup> DCL Comments at 2-4. TLC also expresses vague concerns regarding the potential for interference due to the use of aggregated channels. TLC, for its part, did not object to the grant of the requested waivers, because TLC at least recognized “that the FCC’s co-channel separation requirements are designed to prevent licensees operation in aggregated spectrum from interfering with operations conducted on 5 kHz channels.” TLC Comments at 3.

<sup>30</sup> *Id.* at 3.

condition the requested waiver relief on compliance with an additional set of requirements specific to band manager licensing, including requirements designed to ensure that spectrum users remain in compliance with all existing licensee obligations.<sup>31</sup> As UTC observes, compliance with the Commission’s technical and operational requirements will help ensure that harmful interference to the other licenses users in the 220 MHz band will not occur.<sup>32</sup> Given that spectrum users will remain subject to all of the 220 MHz technical and operational requirements, concerns regarding interference do not warrant a denial of the requested relief.

Second, DCL argues that ASL’s proposal to provide meaningful bandwidth for private users through the utilization of 12.5 kHz aggregated channels will “create a vacuum” that will not promote efficient use of the 220-222 MHz band.<sup>33</sup> As noted above, however, ASL is not seeking a waiver of the rules governing channel aggregation. The Commission’s rules already expressly permit channel aggregation to form channels in excess of 5 kHz.<sup>34</sup> Because no equipment would be deployed under the requested waivers that ASL could not already lawfully deploy under the licenses as they now exist, the use of aggregated channels cannot be said to negatively impact spectrum efficiency. Indeed, by facilitating channel aggregation to meaningful bandwidths that will enable users to employ the technologies that best meet their communications service requirements, ASL’s proposal will help further spectrum efficiency—

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<sup>31</sup> See Waiver Request at 4.

<sup>32</sup> UTC Comments at 5. (noting that “to extend technical requirements specific to this band to any end users ... is appropriate to ensure that the operations of non-licensees do not cause harmful interference to other licensees”).

<sup>33</sup> See DLC Comments at 6-7.

<sup>34</sup> See 47 C.F.R. § 90.733(d).

one of the primary goals articulated by the Commission when first authorizing adjacent channel aggregation in the 220-222 MHz band.<sup>35</sup>

Third, DCL mistakenly argues that the grant of the waivers would be “effectively turning over ownership of frequencies to entities ... not bound by governmental responsibilities to the public.”<sup>36</sup> DCL also expresses the related concern that grant of the requested waivers will “permit any entity to effectively operate as a manager”<sup>37</sup> in the 220-222 MHz band.<sup>38</sup>

Grant of ASL’s requested waivers will not turn over “ownership of frequencies” to entities not subject to the Commission’s rules. As noted above, spectrum users will remain subject to all existing 220 MHz licensee obligations, consistent with the general framework of the band manager concept. Moreover, ASL intends to exercise its right, when appropriate, to suspend or terminate the operations of any spectrum user determined to be in violation of the Commission’s rules and will use all legal means necessary to enforce that right. Contrary to DCL’s understanding, spectrum users will remain bound by all of the “governmental responsibilities” currently applied to existing 220 MHz licensees.

Finally, grant of the requested waivers will not permit “any entity” to operate as a band manager. Indeed, the *Waiver Request* noted that the benefits of band management could only be realized if licensees act in a *bona fide* capacity as neutral spectrum brokers.<sup>39</sup> ASL’s proposal, therefore, assumes that any requested relief will be conditioned on compliance with all of the

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<sup>35</sup> 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, 10991-94 (1997).

<sup>36</sup> DCL Comments at 5.

<sup>37</sup> *Id.* at 2.

<sup>38</sup> *Id.* at 3.

<sup>39</sup> Waiver Request at 3.

band manager operating requirements relevant in the 220-222 MHz band.<sup>40</sup> Given these clearly articulated restrictions and requirements, grant of the requested relief will in no way permit “any entity” to operate as a band manager.

### III. CONCLUSION.

The majority of comments submitted in this docket wholeheartedly concur with ASL that the standard for grant of the requested relief has been met. The majority of comments also agree that Access 220’s provision of band management services in the 220-222 MHz band will promote the public interest by providing a more flexible and efficient use of the 220-222 MHz band by enabling parties to more readily acquire spectrum for a variety of uses, and by easing the regulatory burdens of spectrum users. Therefore, ASL respectfully requests that the Commission expeditiously 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 MHz band. Expeditious action by the Commission will allow ASL the opportunity to quickly begin providing radio users the flexibility necessary to allow more efficient and effective use of the 220 MHz band.

Respectfully submitted,

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<sup>40</sup> *Id.* at 4-5.