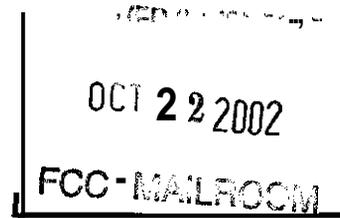


Before the
Federal Communications Commission
Washington, D.C. 20554



MEMORANDUM OPINION AND ORDER .

Adopted: October 16, 2002

Released: October 16, 2002

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 3, 2002, Access 220, LLC (“Access 220”) and its parent, Access Spectrum, LLC (“Access Spectrum”), filed a request seeking limited waiver of sections 90.733, 90.725, and 90.769 of the Commission’s rules in order to extend their existing 700 MHz band management activities to Access 220’s newly acquired 220-222 MHz licenses.¹ By this Order, we grant Access 220’s Waiver Request, as described below.

II. BACKGROUND

A. 220-222 MHz Service Rules

2. The 220-222 MHz band is allocated for private and federal government land mobile use, and is dedicated to “the development of narrowband spectrum efficient technologies to meet the communications requirements of the land mobile service.” Section 90.733 of the Commission’s rules limits permissible operations for a licensee in the 220-222 MHz frequency band to private land mobile operations and certain one-way or two-way paging operations and fixed operations.) Section 90.725 of the Commission’s rules sets forth the construction requirements for “Phase I” nationwide licenses in the 220-222 MHz band whereas section 90.769 sets forth the construction and implementation requirements

¹ See Request for Waivers of Access 220, LLC, To Provide Band Management Services Utilizing Licenses in the 220-222 MHz Band, WT Dkt. No. 02-224 (filed July 3, 2002) (“WaiverRequest”).

² 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, 2356 (1991) (subsequent history omitted).

¹ 47 C.F.R. § 90.733.

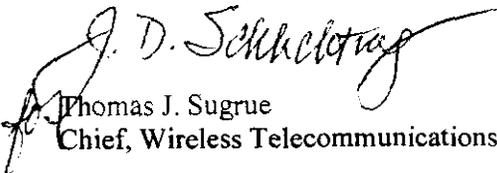
220 now seeks a waiver of the construction requirements. Consistent with the Commercial Wireless Division's reasoning in the *Intek Waiver Order*, we find that it would be unduly burdensome to apply staggered construction timetables to the call signs at issue here, particularly when we are approving the use of these licenses as an integral part of Access 220's band manager operations at 220 MHz. Thus, we find no need to retain the condition imposed by the Commercial Wireless Division requiring that the 28 channels governed by the *Intek Waiver Order* be operated on an integrated basis.⁶³

25. Accordingly, for the reasons stated above, we grant Access 220 waiver of the construction requirements, subject to the conditions outlined in the preceding paragraphs.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131, 0.331, 1.3, and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, 1.3, 1.925, the request filed by Access 220 for waiver of the permissible use restrictions of section 90.733 and the Phase I and Phase II construction requirements of sections 90.725 and 90.769 IS **HEREBY** GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION


Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau

⁶³ Because we decide to lift the integration requirement, it is not necessary to address Bizcom's statement that "the management and allocation of discrete spectrum leases in no way equates to the operation of a consolidated nationwide network." Bizcom Reply Comments at 5.

serve their underlying purposes, and the requested waivers, if granted, will promote the public interest by ensuring the most flexible and efficient use of the **220-222 MHz** spectrum.”

5. Access **220** seeks a waiver of section **90.733** because the rule does not list band management as a permissible use for the **band**.¹² Access **220** asserts that the rule did not include band management because section **90.733** pre-dates the Commission’s implementation of band managers. Therefore, Access **220** contends, a grant of waiver would be consistent with the underlying purpose of the rule: to ensure the availability and efficient use of spectrum for users whose needs cannot be met through consumer **technology**.¹³ Access **220**’s request for waiver of section **90.733** concerns all 115 **220 MHz** licenses that Access **220** acquired from **Aerwav**.¹⁴

6. Access **220** also seeks limited waivers of the construction requirements of sections **90.725** and **90.769** in order to permit alternative construction showings by band managers, which do not necessarily operate facilities. Access **220** asserts that grant of the waiver requests would be consistent with the underlying purposes of the rules to promote utilization of the **220-222 MHz** band and to assure that only “bona fide applicants” apply for licenses in the **band**.¹⁵ Access **220** urges the Commission to allow construction to be measured by a “substantial service” test so as to include as relevant third party construction under subscriber agreements, with a safe harbor coverage percentage consistent with the decision in *Intek License Acquisition Corp. Request for Waiver and Consolidation of 220 MHz Construction Requirements*.¹⁶ Access **220** asserts that a waiver is needed because, unlike other 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 the two build-out rules.¹⁷ Access **220**’s request for waiver of sections **90.725** and **90.769** concerns only three of the **220 MHz** licenses acquired from **Aenvav**: two Phase I nationwide licenses and one Phase II nationwide license.

7. With regard to extending its **700 MHz** band manager role to the **220-222 MHz** band, Access **220** proposes to apply the Commission’s **700 MHz** band manager rules and obligations detailed in Part **27** of the Commission’s rules to the **220-222 MHz** licenses, except for certain specific provisions not meaningful in the **220 MHz** context.¹⁸ Access **220** also states that it is committed to complying with all the applicable technical standards of Subpart I of Part **90** of the Commission’s rules and all relevant technical and operational requirements applicable to operations in the **220-222 MHz** band. According to Access **220**, the use of band managers in the **220-222 MHz** band will fulfill the Commission’s original

¹¹ Waiver Request at **15**.

¹² Waiver Request at **14**.

¹³ Waiver Request at **15-16**.

¹⁴ Waiver Request at **14 n.30** (citing Appendix A to the Waiver Request).

¹⁵ Waiver Request at **16-17**.

¹⁶ *Intek License Acquisition Corp. Request for Waiver and Consolidation of 220 MHz Construction Requirements, Memorandum Opinion and Order*, 16FCC Rcd 16431 (2001) (*Intek Waiver Order*).

¹⁷ Waiver Request at **18**.

¹⁸ Waiver Request at **4-5**.

220's specific request but on the rules as they currently exist. For instance, certain concerns⁵⁰ in reality relate to section 90.733(d), which, as amended in 1997,⁵¹ already permits all licensees in the 220 MHz band to combine channels to form channels wider than 5 kHz, as Access 220 proposes to do.⁵² A second concern,⁵³ regarding the 1 MHz offset between transmit and receive frequencies, is governed by rules, sections 90.715⁵⁴ and 90.723,⁵⁵ that have been in place since the 220 MHz service was created. Again, nothing in Access 220's request for waiver raises unique harmful interference issues, and Access 220 seeks no waiver of any technical requirements. Accordingly, such concerns provide no impediment to grant of the requested waiver.

19. In addition, contrary to the concern raised by one commenter,⁵⁶ the Commission in no way is forcing land mobile radio users to give up their own licenses and instead become customers of a band manager or other licensee.

B. Waiver of Build-out Rules

20. **Background.** Access 220 requests a waiver of construction requirements set forth in sections 90.725 and 90.769 of the Commission's rules for three of its licenses to permit it to implement

⁵⁰ E.g., Data Comlink Comments at 4-5; Texas License Consultants Comments at 2-3; Bizcom Reply Comments at 5-6.

⁵¹ 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, *Third Report and Order; Fifth Notice & Proposed Rulemaking*, 12 FCC Rcd 10943, 10970 (1997).

⁵² 47 C.F.R. § 90.733(d).

⁵³ Data Comlink Comments at 8.

⁵⁴ 47 C.F.R. § 90.715.

⁵⁵ 47 C.F.R. § 90.723.

⁵⁶ Data Comlink Comments at 5 ("Like the Internet Service Provider (ISP) business, we see the movement for band management as a precursor to Land Mobile Radio users having to become subscribers, just like Internet users.").

⁵⁷ 47 C.F.R. §§ 90.725, 90.769. Under section 90.725 of the Commission's rules, Phase I nationwide licensees must construct base stations having a minimum of five assigned nationwide channels, and must place those base stations into operation: (1) in at least ten percent of the geographic areas designated in the application within two years of the initial license grant, including base stations in at least seven urban areas listed in section 90.741; (2) in at least forty percent of the geographic areas designated in the application within four years of the initial license grant, including base stations in at least twenty-eight urban areas listed in section 90.741; (3) in at least seventy percent of the geographic areas designated in the application within six years of the initial license grant, including base stations in at least twenty-eight urban areas listed in section 90.741; and (4) in all geographic areas designated in the application within ten years of the initial license grant, including base stations in at least twenty-eight urban areas listed in section 90.741. 47 C.F.R. § 90.725. The sites to be selected under section 90.741 of the Commission's rules are the "Top 100 Urban Areas for Phase I Nationwide Systems." 47 C.F.R. § 90.741. Section 90.769 of the Commission's rules requires Phase II nationwide licensees to construct a sufficient number of base stations to provide coverage to: (1) either a composite area of at least 750,000 square kilometers or 37.5 percent of the U.S. population within five years of the initial license grant; and (2) either a composite area of at least 1,500,000 square kilometers or 75 percent of the U.S. population within ten years of the initial license grant. 47 C.F.R. § 90.769. Phase II nationwide licensees offering fixed services as part of their system may meet the construction requirements by demonstrating an appropriate level of "substantial service" at their five- and ten-year deadlines. 47 C.F.R. § 90.769(2)(b). There is no requirement that the sites used to satisfy the Phase II requirements be selected from a pre-determined list.

unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the petitioner has no reasonable **alternative**.²⁸ Alternatively, the Commission may, on its own motion or on petition if “good cause” is shown, waive any provision of the Commission’s rules at any time, subject to the provisions of the Administrative Procedure Act and the Commission’s **rules**.²⁹

12. **Discussion.** We find that grant of a limited waiver to permit Access 220 to engage in band manager operations pursuant to the 220 MHz authorizations it currently holds would further the public interest by facilitating the Commission’s stated objectives for the 220 MHz spectrum and is warranted under the waiver standards established by sections 1.925 and 1.3 of the Commission’s rules. We condition grant of this waiver on Access 220’s compliance with the requirements imposed on 700 MHz Guard Band Manager licensees, with the specific exceptions set out below. These conditions mirror the terms of operation established by the Commission for 700 MHz Guard Band Manager licensees when it established the **service**.³⁰

13. The Commission has made clear that it wishes to facilitate efficient use of the 220 MHz spectrum and expedite service to areas that might not otherwise receive it.” In addition, in revamping the 220 MHz rules, the Commission set forth additional goals for operation in this 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. In addition, we seek to ensure that licenses are granted to those who value the spectrum most highly and will maximize its use to provide the best quality and variety of service to **consumers**.³²

14. Permitting Access 220 to operate as a band manager in the 220 MHz spectrum, subject to all the relevant conditions from the Commission’s 700 MHz Guard Band Manager licensing rules, will help to further the Commission’s objectives for this spectrum. Among other things, Access 220’s operation as a band manager will provide potential users of 220 MHz spectrum with an additional option for deploying 220 MHz facilities. Specifically, in addition to obtaining a Commission-defined geographic area license or procuring service **as** a customer of a licensee, entities will be able to obtain access to 220 MHz spectrum based on a tailored coverage area and an individually negotiated agreement with Access 220. Access 220’s deployment of band manager operations in the 220 MHz frequencies will

²⁸ 47 C.F.R. § 1.925,

²⁹ 47 C.F.R. § 1.3

³⁰ 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 (2000).

³¹ 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 Services, *Report and Order*, 6 FCC Rcd 2356,2358 (1991).

³² 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, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188,193 (1995).

- Access 220 shall enter into written agreements regarding the use of Access 220's licensed spectrum that contain the requirements and conditions listed in section 27.602 of the Commission's **rules**,³⁹ including provisions that apply all existing licensee obligations to the spectrum user, require the spectrum user to comply with applicable Commission rules and direct Commission oversight and enforcement, and stipulate that if Access 220 determines that there is an ongoing violation of the Commission's rules or that the spectrum user's system is causing harmful interference, then Access 220 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.
- Access 220 shall not engage in unjust or unreasonable discrimination among spectrum users, nor unreasonably deny prospective spectrum users access to Access 220's licensed **spectrum**.⁴⁰
- Access 220 shall 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 Access 220.⁴¹
- Access 220 shall utilize the predominant amount of its spectrum for **non-affiliates**.⁴²
- Access 220 shall resolve disputes with its customers or disputes between its customers in the same manner that the parties would resolve other commercial disputes arising out of the spectrum user agreement."⁴³
- Access 220 shall file an annual report providing the Commission with information about the manner in which its spectrum is being utilized, including: (1) the total number of spectrum users and the number of those users that are affiliates of Access 220; (2) the amount of Access 220's spectrum being used by its affiliates in any part of the licensed service area; (3) the amount of Access 220's spectrum being used pursuant to agreements with unaffiliated third parties; (4) the nature of the spectrum use of Access 220's customers; and (5) the length of the term of each spectrum use **agreement**.⁴⁴
- Access 220 shall file separate station applications, as necessary, with respect to all Environmental Assessments, international coordination, and quiet zones (*i.e.*, end users will not make such FCC **filings**).⁴⁵
- Access 220 shall make filings, as necessary, with respect to the notification and authorization requirements set forth in section 27.66⁴⁶ when a deletion, move, or change

³⁹ 47 C.F.R. § 27.602.

⁴⁰ 47 C.F.R. § 27.603(a)

⁴¹ 47 C.F.R. §§ 27.602(g), 27.603(b)

⁴² 47 C.F.R. § 27.603(c).

⁴³ 47 C.F.R. § 27.606.

⁴⁴ 47 **C.F.R.** § 27.607(b), (c)

⁴⁵ 47 C.F.R. § 27.601(c)(1).

⁴⁶ 47 C.F.R. § 27.66.