

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

In the Matter of)	
)	
Access 220, LLC)	WT Docket No. 02-224
)	
Request for Waivers with Associated)	
Proposed Conditions to Establish)	RM-9664
Band Manager Status in 220-222 MHz)	

**Petition for Reconsideration
and Clarification**

Warren C. Havens (“Havens”) and Telesaurus Holdings GB, LLC (“Telesaurus”), together DBA LMS Wireless (“LMSW”), submitted Reply Comments and Supplementary Reply Comments in the above-captioned matter (together, the “LMSW Comments”).¹ The FCC Wireless Bureau granted the above-captioned waiver request by Access 220, LLC (“Access”) (the “Access Request”) in a Memorandum Opinion and Order released October 16, 2002, DA 02-2717 (the “Order”).

Herein, LMSW requests that the Bureau reconsider its decision for the following purposes: LMSW asks that the Bureau clarify the basis of the grant of the Access Request so that other similarly situated licensees can understand and potentially seek the same or similar relief. Only if, upon consideration of such clarification, the Bureau finds that it extended relief not warranted, does LMSW ask that the Order be appropriately modified. The following discussion is for these purposes.

Neither the Access Request nor the Order presented argument or evidence as to why Access was entitled to special waiver relief that is subject of §1.925. The Access Request

¹ It served copies on Access. It is serving a copy of this Petition on Access.

demonstrated no qualifications for such relief that other 220 MHz licensees were not entitled to. The Order is ambiguous as to whether the relief was granted under the waiver rule §1.925, or rule §1.3 under which the Commission may waive rules on its own motion for good cause. If the waiver was granted under §1.925, it should be clarified as to how the relief is warranted under at least one of the criteria in §1.925; and if granted under §1.3, it should be clarified as to the good cause that was shown by Access or otherwise found by the Commission. Without this, the Order stands as a grant to Access that is, in relation to these rules, arbitrary and unjustified, and not a useful precedent as and such order should be for similarly situated licensees.

The Order found:

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.

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.

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 serve as another tool in helping to promote efficient use and expand usage opportunities. We have noted in similar contexts that "band manager licensing is a market-based mechanism that can create incentives for efficient spectrum use." By granting this waiver, the Commission is providing more opportunities to the public to obtain radio transmission capacity under desired terms.

15. At the same time, denial of the waiver would be inconsistent with the purposes of the Commission's 220 MHz rules. Enforcement of the provisions of section 90.733 to bar Access 220 from providing band manager services would thwart achievement of this important set of objectives and undermine the Commission's general efforts to promote customer choice in wireless services and flexibility in service offerings. We accordingly determine that the underlying purpose of section 90.733 would not be served if the requested waiver were denied. Grant of the Access 220 waiver request thus meets our section 1.925 waiver requirements and furthers our 220 MHz regulatory objectives.

[Footnotes deleted in above excerpt.]

As argued in the LMSW Comments, the Access Request did not meet the waiver standards required in the applicable rule, §1.925, and the above Order finding does not demonstrate this either. Section 1.925 provides, in relevant part:

(2) Requests for waiver must contain a complete explanation as to why the waiver is desired. If the information necessary to support a waiver request is already on file, the applicant may cross-reference the specific filing where the information may be found.

(3) The Commission may grant a request for waiver if it is shown that:

(i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or

(ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

[Underlining added.]

The LMSW Comments pointed out that the Access waiver request fails under both §1.925(3)(i) and §1.925(3)(ii) criteria. LMSW pointed out that any 220 MHz licensee could make the same arguments Access has provided that have any relevance to the request, which are that it holds (or for Access, planned to hold, see below) 220 MHz licenses and it would like to try out guard-band licensing. LMSW pointed out that the other assertions by Access are irrelevant to the standards to be met: including the fact that it is a band manager in 700 MHz, the size of its contemplated (see below) 220 MHz license holdings, its alleged special relation with Motorola, its plan to buy other 220 MHz licenses (aided by the grant of the special advantage of the requested waiver)², its alleged financial capability, its alleged success as a band manager to date, etc.³

To the degree that the Bureau found that the above allegations warranted grant of the waiver, LMWS asks reconsideration and reversal of such finding, or at minimum clarification of how these warrant grant of the waiver.

If the Commission, in granting the Order, takes the position that Access did have special qualifications which warranted grant of the waiver, these should be made clear, if there are any, so that the meaning of the Order and its usefulness as a precedent are clear, and if not, it should be made clear that any other 220 MHz licensee will be granted the same relief upon request. In the latter case, it seems that a rule change would be more appropriate. But as a licensee, LMSW

² The Order did not grant this request, but suggested that it would be merely a matter of applying in order extend the relief granted in the Order to 220 MHz licenses that Access may acquire in the future. See footnote 35.

³ Nor did Access substantiate these and other assertions in any of its three filings in this proceeding, as would be required in a showing under §1.925 if they were of relevance, and as be needed for credibility in general. It asserts on page two: “great” strides, “wholly new,” “exhaustive,” “extensive,” “significant,” “broad,” “exceedingly.” These adjectives only beg for

does not oppose a liberal precedent—a expedient waiver grant that is in effect a rule change—as long as this is made clear.

The Order noted in footnote 35:

35 This waiver is granted only for the authorizations included in the underlying Waiver Request. Because a waiver is associated with a specific call sign, and given the nature of our fees and application forms, Access 220 will need to request equivalent waiver relief for any authorizations not specifically included within the terms of this order.

This appears to mean that Access merely needs to ask, with proper fees and forms, if it wants to extend the relief it was granted in the Order for its existing 220 MHz licenses to other 220 MHz license it may obtain in the future. LMSW uses the above to point out that the relief granted appears to have nothing to do with any special qualification of Access. Per this footnote, if Access bought any particular 220 MHz license after grant of the Order, that license would get the subject relief if Access merely asked in proper manner. Why, then, would that relief not be extended to that license if the licensee, instead of selling to Access, asked for the relief itself? Does that licensee have to be a 700 MHz Band Manager, or big a larger holder of 220 MHz spectrum, or alleger a special relation with Motorola, or what? Is it enough to be a 220 MHz licensee and be willing to attest that it wants to try out Band Manager rules?

The matters described above should be clarified for reasons given. If, upon consideration of these matters the Bureau finds it extended relief without due cause, then it should make the appropriate adjustment.

substance, but none is given. The Order repeats some of these, which is inappropriate as it

Respectfully submitted,

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suggest they are substantiated and of relevance.