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

MAILED

OCT 19 2007

FCC

In the Matter of)
)
Petition for Extension of Terms for 220-222 MHz)
Band Phase I Nationwide Licenses held by Access)
220 LLC (WFPF444 and WPF284) and Other)
Relief or, Alternatively, for Renewal of Licenses)

Petition for Extension of Term for 220-222 MHz)
Band Phase II Nationwide License Held by Access)
220 LLC (WPOI701) and Other Relief)
)

Petition for Extension of Terms for 220-222 MHz)
Band Phase II Economic Area and Regional)
Licenses Held by Access 220 LLC and Other)
Relief)

WT Docket No. 02-224
ULS Application Nos. 0001873639 and
0001873671

MEMORANDUM OPINION AND ORDER

ADOPTED: OCTOBER 17, 2007

RELEASED: OCTOBER 17, 2007

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address a petition for reconsideration filed by Access 220, LLC, and its parent company, Access Spectrum, LLC (collectively, "Access").¹ Access seeks reconsideration of the Mobility Division's (Division) Memorandum Opinion and Order released on October 23, 2006 (Waiver Order) in the above-captioned proceeding.² In the Waiver Order, the Division granted, in part, Access' request for waiver of section 90.769, 47 C.F.R. § 90.769, of the Commission's rules by granting Access a conditional five-year renewal of its two Phase I nationwide licenses. The Division denied Access' remaining requests for relief. Regarding the instant Petition, we find that Access has neither demonstrated a material error or omission by the Division nor offered new facts or evidence that was not considered in the Waiver Order.³ For the reasons set forth below, we deny the Petition.

¹ Petition for Reconsideration by Access 220, LLC, and Access Spectrum, LLC, FCC File Nos. 0001873639 and 0001873671, (filed Nov. 22, 2006) (Petition).

² Petition for Extension of Terms for 220-222 MHz Band Phase I Nationwide Licenses held by Access 220 LLC, *Memorandum Opinion and Order*, 21 FCC Rcd 11883 (WTB 2006).

³ See, e.g., American Distance Education Consortium Request for an Expedited Declaratory Ruling and Informal Complaint, *Order on Reconsideration*, 15 FCC Rcd 15448 (2000); Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, *Order on Reconsideration*, 13 FCC Rcd 14583 (1998).

II. BACKGROUND

2. In 2002, Access acquired a number of 220 MHz band⁴ licenses from Aerway Spectrum Holdings, Inc. and on July 3, 2002, it requested a waiver of certain Part 90 rules to permit it to operate as a band manager using these 220 MHz licenses.⁵ Access, already a 700 MHz Guard Band Manager, subsequently was granted a waiver to become a band manager in the 220 MHz band as well.⁶ Access' 220 MHz licenses include two Phase I nationwide licenses (call signs WPPF444 and WPFR284) (collectively "the Phase I licenses"), which were scheduled to expire on September 19, 2004 and September 23, 2004, respectively.⁷ On September 16, 2004, Access filed a "Request for Renewal of Licenses and for Additional Waivers," seeking waiver of certain rules and other relief regarding all of its 220 MHz band licenses.⁸ In its Waiver Request, Access sought a 15-year extension of the original license terms of the Phase I licenses.⁹ Alternatively, Access requested renewal of each of the Phase I licenses for another 10-year term based on the submissions included in the Petition.¹⁰

3. On October 23, 2006, the Division found that Access failed to demonstrate substantial service warranting a ten-year renewal for either of the Phase I licenses.¹¹ The Division concluded that the spectrum marketing, equipment development, and other reported activities of Access to date were insufficient to meet its construction obligations for the Phase I licenses even under the Commission's more flexible substantial service standard.¹² Given the unique and unusual factual circumstances presented by Access, however, the Division found that it would be in the public interest to grant Access a conditional five-year renewal of the Phase I licenses and extended the renewal date for call sign WPPF444 to September 19, 2009, and call sign WPFR284 to September 24, 2009.¹³ The Division placed the following three conditions on the renewal: (1) on or before November 5, 2007, Access must submit a report detailing spectrum use agreements (SUAs) involving the Phase I licenses; (2) Access must comply with the applicable construction requirements for its Phase I licenses by the modified renewal dates; and

⁴ We refer to the 220-222 MHz band in this Order as the "220 MHz band."

⁵ See Request for Waiver of Access 220, LLC, To Provide Band Management Services Utilizing Licenses in the 220-220 MHz Band, WT Docket No. 02-224 (filed July 3, 2002).

⁶ See Access 220, LLC, Request for Waivers to Provide Band Management Services Utilizing Licenses in the 220-222 MHz Band, *Memorandum Opinion and Order*, 17 FCC Rcd 20474 (WTB 2002), *recon. denied*, 18 FCC Rcd 23841 (WTB 2003).

⁷ Licenses in the 220 MHz band resulting from applications filed on or before May 24, 1991 are referred to as Phase I licenses. See 47 C.F.R. § 90.701(b). Licenses in the 220 MHz band resulting from applications filed after May 24, 1991 are referred to as Phase II licenses. See 47 C.F.R. § 90.701(b).

⁸ Access 220, LLC Request for Renewal of Phase I Nationwide 220 MHz licenses, and for Additional Waivers of Part 90, ULS Application No. 0001873639 and 0001873671 (filed Sept. 16, 2004) (Waiver Request).

⁹ *Id.* at 18.

¹⁰ *Id.* at 24-39. In the Waiver Request, Access also sought to (1) consolidate its Phase I and Phase II licenses under a single call sign; (b) establish a uniform expiration date in September 2019 for the consolidated license; (c) remove existing interim construction requirements; (d) continue to submit annual reports in lieu of compliance with such interim construction requirements; and (e) substitute a single substantial service standard for renewal at the 2019 expiration of the consolidated license. *Id.* at 18-19. These requests were denied by the Division and are not at issue in the instant Petition. Waiver Order, 21 FCC Rcd at 11885, ¶ 2.

¹¹ Waiver Order, 21 FCC Rcd at 11893-94, ¶ 22.

¹² *Id.*

¹³ *Id.* at 11894-95, ¶ 23-24.

(3) Access must notify the Commission of its completion of construction under rule .946, 47 C.F.R. § 1.946.¹⁴

III. DISCUSSION

4. We deny the Petition for Reconsideration because it neither demonstrates a material error or omission by the Division in the Waiver Order nor introduces any new facts not previously considered by the Division. Section 1.106 of the Commission's rules permits parties to file petitions for reconsideration of actions by the Commission or by delegated authority.¹⁵ Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.¹⁶ A petition that "simply reiterates arguments previously considered and rejected will be denied."¹⁷ Section 1.106(d) of the Commission's rules provides that a petition for reconsideration must state with particularity the respects in which the petitioner believes the action taken by the Commission should be changed. The petition must also specifically state the form of relief sought.¹⁸

5. Access requests reconsideration of the Waiver Order solely to establish October 23, 2011 as the renewal date for the Phase I licenses.¹⁹ Access contends that because two years had elapsed between filing of the Waiver Request and adoption of the Waiver Order, the five-year conditional renewal (calculated from the original renewal date) granted by the Division was effectively reduced to less than three years.²⁰ Access argues that while the Waiver Request was pending, the Phase I licenses were "under a regulatory cloud" which "hindered [its] ability to attract customers."²¹ Access maintains that five years is the "absolute minimum period of time during which the licenses must be clear of regulatory uncertainty to enable [it] to reach agreements with customers to use the spectrum."²² Citing the Bureau's decision in *County of Beaver*,²³ Access also argues that "[t]ying the five-year construction period to the date of the Waiver Order release is consistent with Commission precedent."²⁴

6. We find Access' arguments unpersuasive. First, Access fails to demonstrate a material error or omission by the Division in the Waiver Order, which concluded that the public interest would be

¹⁴ *Id.* at 11894, ¶ 24.

¹⁵ 47 C.F.R. § 1.106(a)(1).

¹⁶ See *WQAM License Limited Partnership, Memorandum Opinion and Order*, 15 FCC Rcd 13549, 13549 ¶ 2 (2000) (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorrain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c)).

¹⁷ Petition for Reconsideration by Warren C. Havens, AMTS Consortium, LLC, Telesaurus-VPC, LLC and Telesaurus Holdings GB LLC, *Memorandum Opinion and Order*, 22 FCC Rcd 1860, ¶ 7 (WTB 2007) (*Havens Order*).

¹⁸ 47 C.F.R. §§ 1.106(d)(1) and (d)(2).

¹⁹ Petition at 3-4.

²⁰ *Id.* at 3.

²¹ *Id.* at 4.

²² *Id.* at 3.

²³ *County of Beaver; Request for Extension of Time to Construction 800 MHz Public Safety/Special Emergency Trunked Station WPKM927, Beaver Pennsylvania; Application for Renewal of Station WPKM927, Memorandum Opinion and Order*, 18 FCC Rcd 18754 (WTB 2003) (*County of Beaver*).

²⁴ Petition at 5-6.

served by affording Access limited relief to continue its band manager efforts, and that such relief, coupled with Access' equipment development and marketing efforts, could result in near term, efficient use of the spectrum.²⁵ Access' Petition does not question the Division's reasoning in granting a conditional renewal to afford it more time to meet its construction requirements. We also find that the Division did not err in tying the conditional five-year renewal to Access' original renewal dates.²⁶ Consistent with the Commission's general policy, license terms run consecutively and are calculated from the previous license expiration date, without specific tolling during the Commission's review of a renewal application. Pursuant to Commission rules, licensees are permitted to continue operating during the pendency of the licensee's renewal application.²⁷ We note that even in instances where the Commission has granted waivers or extensions of construction requirements for periods extending beyond a licensee's initial license term, the licensee was subject to renewal requirements triggered by its original license expiration date.²⁸ We also note that Access did not request that relief be tolled from the release date of the Division's order.²⁹

7. Second, Access' Petition reiterates arguments made and previously considered by the Division in connection with the Waiver Request. Specifically, Access states that it needs more time to reach agreements with customers to use its 220 MHz spectrum.³⁰ Although Access now frames its arguments in terms of "regulatory uncertainty,"³¹ these arguments are identical to those made in its Waiver Request – that the challenges faced by a band manager justify an extension of its construction deadlines. As discussed above, the Division considered these arguments when it granted Access the conditional five-year renewals. Restated arguments previously considered by the Division cannot support a petition for reconsideration.³²

8. Finally, the precedent cited by Access is inapposite. In *County of Beaver*, the County sought reconsideration of the former Public Safety and Private Wireless Division's (PSPWD) decision to dismiss a request to extend the construction period for its 800 MHz Public Safety/Special Emergency Trunked

²⁵ *Id.*

²⁶ *Id.* at 11895, ¶ 24.

²⁷ See 47 C.F.R. § 1.62.

²⁸ See, e.g., Consolidated Request for the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006) (where grant of three-year extension of construction deadline extended beyond initial license term and request to extend the license term was denied, licensee remained obligated to timely file renewal applications); see also Airwave Wireless, L.L.C. and GW Wireless, Inc. Requests for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 22 FCC Rcd 1451 (WTB 2007) (granting a conditional extension of the five-year construction requirement, but maintaining obligation to timely comply with the ten-year renewal requirements).

²⁹ Cf. Applications of W&E Interactive TV L.C.; For Renewal of License and Extension of Time to Construct 218-219 MHz Service Stations KIVD0462, Sioux Falls, South Dakota; and KIVD0435, Sioux City, Iowa-Nebraska, *Order*, 22 FCC Rcd 1898, 1900, ¶ 7 (WTB 2007) (*W&E Interactive TV Order*) (granting 90-day extension of construction deadline calculated from the release date of order where it was specifically requested by licensee (FCC File No. 001044171 (filed Oct. 4, 2002))); Applications of Sioux Valley Rural Television, Inc.; For Renewal of License and Extension of Time to Construct 218-219 MHz Service Station KIVD0489, Rapid City, South Dakota, *Order*, 22 FCC Rcd 1894, 1896-97, ¶ 9 (WTB 2007) (*Sioux Valley Rural Television Order*) (same (FCC File No. 0002054479 (filed Feb. 22, 2005))).

³⁰ Petition at 3-5.

³¹ Petition at 3, 4.

³² See *Havens Order*, 22 FCC Rcd 1860, ¶¶ 7-8, 10.

license.³³ The petition for reconsideration was filed two days before the license was scheduled to expire on May 5, 2002.³⁴ On September 23, 2003, PSPWD granted the County's petition and provided the County with a one-year extension of its construction deadline commencing from the release date of the order.³⁵ *County of Beaver* is distinguishable from the instant case because: 1) *County of Beaver* did not involve a license renewal; and 2) had PSPWD not calculated the construction extension period from the release date of the order, it would have wholly subsumed the relief granted.³⁶ In contrast, Access' conditional license terms do not expire until September, 2009, when it will be required to meet the applicable construction requirements.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 5(c), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 155(c), and 303(r), and sections 0.331 and 1.106, of the Commission's rules, 47 C.F.R. §§ 0.331 and 1.106, that the Petition for Reconsideration filed by Access Spectrum, LLC, and Access 220, LLC on November 2, 2006, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Fred B. Campbell, Jr.
Chief
Wireless Telecommunications Bureau

³³ See *County of Beaver*, 18 FCC Rcd at 18754, ¶ 1.

³⁴ *Id.*

³⁵ *Id.* at 18757, ¶ 11.

³⁶ See also *W&E Interactive Order*, 22 FCC Rcd 1898 (where licenses had expiration date of February 28, 2005, starting requested 90-day extension of construction deadline from expiration date would have subsumed relief that was granted on January 31, 2007; instead, the Division calculated construction extension from order release date as requested by licensee); *Sioux Valley Rural Television Order*, 22 FCC Rcd 1894 (same).