19 F.C.C.R. 12994, 19 FCC Rcd. 12994, 2004 WL 1555411

Federal Communications Commission (F.C.C.)
Memorandum Opinion and Order

IN THE MATTER OF REQUEST OF WARREN C. HAVENS FOR WAIVER OR EXTENSION OF THE FIVE-YEAR CONSTRUCTION REQUIREMENT FOR 220 MHZ SERVICE PHASE II ECONOMIC AREA AND REGIONAL LICENSEES
AND
REQUEST OF BIZCOM USA, INC. FOR WAIVER AND EXTENSION OF THE CONSTRUCTION REQUIREMENTS FOR 220 MHZ SERVICE PHASE II REGIONAL AND NATIONWIDE LICENSEES
AND
REQUEST OF CORNERSTONE SMR, INC. FOR WAIVER OF SECTION 90.157 OF THE COMMISSION'S RULES

DA 04-2100
ADOPTED: July 12, 2004
RELEASED: July 13, 2004

**1 *12994 By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address two requests for waiver or extension of the construction requirements for Phase II 220 MHz service licensees. These are the January 12, 2004 request of Warren C. Havens (Havens) for a waiver or extension of the five-year construction requirements for Economic Area (EA) and Regional Economic Area Grouping (REAG or regional) licensees, [1] and the February 10, 2004 request of BizCom USA, Inc. (BizCom) for a three-year extension of both the five- and ten-year construction requirements for regional and nationwide licensees. [2] For the reasons stated below, we find ***12995** that the public interest would be served by extending the five-year construction requirement until November 5, 2007 for all 220 MHz Phase II EA, regional, and nationwide licensees subject to this order. [3] We also grant BizCom's request that it be permitted to use geographic coverage as an alternative to population coverage for its regional licenses because it is constructing a nationwide system. Finally, we deny the following: (i) Havens' alternative request for a complete waiver of the five year construction requirement; (ii) BizCom's request for a three year extension of the ten year construction requirement; and (iii) Cornerstone SMR, Inc.'s ("Cornerstone") request for a waiver of Section 90.157 [4] to permit constructed 220 MHz service licensees to deconstruct their facilities and remain non-operational until they either choose to reconstruct or until the extended construction deadline, whichever comes first.

II. BACKGROUND

A. The 220-222 MHz Service

2. In 1988, the Commission reallocated the 220-222 MHz band from the Amateur Radio service to private and Federal Government land mobile use. [5] In 1991, the Commission established the 220 MHz service and adopted rules for the assignment of 200 five kilohertz channel pairs [6] in various channel block sizes for use by both

Government and non-Government licensees. [7] Through the adoption of these service rules, the Commission essentially dedicated this spectrum for the development of spectrally efficient narrowband technology to afford this technology an opportunity to gain acceptance in the marketplace.

3. In 1997, the Commission completed a review of the 220 MHz service rules and established a more flexible regulatory framework intended to: (i) allow efficient assignment of 220 MHz licenses; (ii) eliminate unnecessary regulatory burdens on both Phase I and Phase II licensees; and (iii) enhance the competitive potential of the 220 MHz service in the marketplace. [8] While the Commission issued Phase I licenses on a site-based and nationwide basis with various eligibility requirements, it subsequently instituted a geographic area licensing scheme. Specifically, in the *Third Report and Order*, the Commission established that 220 MHz licenses would be issued for EA, regional, and nationwide service areas for certain channel blocks that would be assigned through competitive bidding (Phase II). Phase II licenses consist of various channel block sizes (*e.g.*, 10 and 15- paired five kilohertz channels ***12996** resulting in 100 kilohertz, and 150 kilohertz channel blocks). Several channel blocks consist of non-contiguous interleaved channel pairs separated to enable trunked operations. [9] The Commission also allowed Phase I and Phase II licensees to aggregate contiguous five kilohertz channels to achieve wider channel widths and allowed flexibility in the type of operations allowed (*e.g.*, fixed data operations in addition to mobile applications).

****2** 4. To ensure efficient spectrum use, the Commission adopted the construction requirements in Section 90.767(a) of its rules, which requires 220 MHz EA and regional licensees to construct a sufficient number of base stations to provide coverage to at least one-third of the population of their market areas within five years of license issuance and to at least two-thirds of the population within ten years. [10] Additionally, Section 90.769(a) requires that 220 MHz nationwide licensees construct a sufficient number of base stations to provide coverage to a composite area of at least 750,000 square kilometers or 37.5 percent of the United States population within five years of license issuance and to at least 1,500,000 square kilometers or 75 percent of the United States population within ten years of license issuance. [11]

5. In FCC Auction Nos. 18 and 24, the Commission auctioned 693 and 222 Phase II 220 MHz service licenses, respectively. These licenses were granted on various dates throughout 1999. [12] Thus, in accordance with Sections 90.767(a)(1) and 90.769(a)(1), the five-year construction deadlines for these licenses are in 2004. [13]

B. Requests to Waive or Extend the 220 MHz Service Construction Requirements

6. On January 12, 2004, Havens requested that the five-year construction deadline for 220 MHz Phase II EA and regional licensees in certain channel blocks be either waived or extended for three years. [14] In support of his request, Havens argues that he plans to provide trunked two-way voice communications via narrowband five kilohertz channels, but no such equipment is currently available that is economically feasible or being technically supported. Havens argues that this relief would allow 220 MHz licensees to seek and install new, viable equipment to provide the trunked two-way voice services for which the band was configured. Havens states that the relief is justified by the regulatory limitations placed on 220 MHz licensees (*e.g.*, non-contiguous five kilohertz channels) and that more time will allow appropriate solutions to be developed.

7. Havens notes that two companies manufactured equipment for 220 MHz narrowband, voice communications, but that both companies stopped manufacturing such equipment several years ago ***12997** because the equipment "failed in the marketplace." [15] Havens further states that he is aware of a company that is currently manufacturing 220 MHz narrowband equipment, but this equipment is not capable of voice communications. [16] Rather, this equipment provides for data communications, such as telemetry and supervisory control and data applications (SCADA). [17] Havens contends that because such equipment is primarily employed for internal communications

systems, such as those used by utility companies, "there are few viable business cases" for commercial voice systems based on this equipment and it would thus be inequitable to require licensees to construct their systems with this equipment. [18] Havens also reports that he is aware of at least three companies that manufacture equipment for 220 MHz voice and data communications, but this equipment operates on 12.5 kilohertz channels. [19] Havens argues, although licensees in the 220 MHz service are permitted to aggregate adjacent channels to form wider channels, they should not be required to do so merely to meet the construction requirement. [20] Havens contends that many 220 MHz licensees do not hold licenses for the adjacent channels, and that the service was not designed with such aggregation in mind. [21] Havens further argues that the channel configuration [22] in the 220 MHz band, as well as Commission pronouncements, indicate that the Commission intended trunked, two-way voice communications to be the primary purpose of the 220 MHz service. [23]

**3 8. Havens contends that the standards for granting a waiver are met because licensees have no reasonable alternative for providing service because of the lack of voice equipment, and it would be unduly burdensome and contrary to the public interest to require licensees to use discontinued or inappropriate equipment to meet construction requirements. [24] Havens also argues that without relief, the licenses would be terminated and additional Commission resources would be expended to re-license the band, which, on balance, would delay any solutions and not serve the public interest, thus frustrating the purpose of Section 90.767. Havens also states that the 220 MHz service has similar characteristics to the Wireless Communications Service (WCS), for which the Commission adopted a ten-year construction requirement. [25] Finally, Havens cites as precedent for granting relief the Wireless Telecommunications Bureau's (Bureau) 2001 *Nextel/Neoworld Order*, where certain 900 MHz SMR licensees were granted a 16-month extension of the five-year construction deadline because digital voice equipment was not *12998 available in sufficient quantities to enable all of the licensees to meet the deadline. [26]

9. On January 21, 2004, the Bureau's Mobility Division released a *Public Notice* seeking comment on Havens Request. [27] In response to the *Public Notice*, we received six comments and three reply comments. [28] Commenting parties generally agree that there is a scarcity of equipment for trunked, narrowband voice communications in the 220-222 MHz band. [29] BizCom, which owns manufacturing rights for 220 MHz narrowband equipment, states that such equipment is available, but that it is not available in sufficient quantities to enable all 220 MHz licensees to meet their five-year construction deadlines. [30] Pujari and Two-Twenty assert that the available 220 MHz 5 kilohertz voice equipment represents "first generation technology" and is "outdated and inadequate to meet customer demands." [31] Repeater states that no company is currently manufacturing 5 kilohertz portable voice radio units for the band, which, "in an era of increasingly small two-way radios," has "severely crippled the ability of licensees to compete in the marketplace." [32]

10. GEMC opposes a waiver or extension of the deadline. [33] GEMC, which utilizes its 220 MHz spectrum to provide SCADA services, asserts that the 220 MHz service is being used by some licensees and urges the Commission to consider requests for waiver or extension of the deadline on an individual basis. [34] GEMC states that this would be the most equitable method because it would enable the Commission to distinguish between those licensees that have made a good faith effort to construct their systems from those that have not, and to grant relief accordingly. [35] GEMC also contends that this approach would enable the Commission to recover the spectrum of those licensees that do not meet the waiver or extension standards, and would provide an opportunity for GEMC and others, which are currently operating in the service, to acquire additional spectrum to supplement their systems at the reauction *12999 of the recovered spectrum. [36]

**4 11. We also note that numerous licensees electronically filed requests for extension through the Commission's Universal Licensing System (ULS). [37] These licensees generally echo the sentiments of the

commenters. For instance, Tuchman & Brown Investment, Inc. (T & B) states that, despite its diligent efforts, the only 220 MHz voice equipment that it has located that is compatible with five kilohertz bandwidth channels is obsolete. [38] T & B further states that enforcement of the construction deadline would force licensees to invest substantial sums in obsolete equipment and, because the systems had been constructed with obsolete technology, would result in systems with questionable long-term commercial viability. [39] Georgia 220 MHz Alliance, LLC, (Georgia 220) also states that it has been hampered by the lack of current equipment, especially portable radio units, resulting in the deterioration of the customer base of its site-specific 220 MHz system. [40]

12. On February 10, 2004, BizCom filed a request for a three-year extension of both the five-year and ten-year construction requirements for its regional and nationwide licenses to allow it to construct a coordinated nationwide system comprised of a combination of licenses issued during Phase I and Phase II on both a site-specific and a geographic basis (*i.e.*, EA, REAG, and nationwide licensees). [41] Thus, BizCom proposes to meet the five-year construction requirement for its Phase II licenses within eight years of license issuance and the ten-year construction requirement within thirteen years of license issuance.

13. Considering the nationwide scope of its planned system, BizCom also requests that its regional licenses be subject to the geographic area coverage standards of Section 90.769 for nationwide licenses, and not the population coverage standards applied to regional licenses pursuant to Section 90.767. BizCom makes this request with the understanding that it would complete the required construction in each of its six REAGs. [42] BizCom argues that the Commission granted similar relief in response to waiver requests from NRTC [43] and Intek [44] to allow them to efficiently construct a nationwide ***13000** system. BizCom argues this relief is needed because its channels fall into different licensing categories that are subject to inconsistent and, to some degree, conflicting construction requirements and timetables. BizCom states that complying with the various construction requirements of its licenses would be unduly burdensome and counter to the underlying purpose of the construction requirements. [45]

III. DISCUSSION

A. Extension of the Construction Requirements

14. A waiver may be granted, pursuant to Section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) 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; or (2) where the petitioner establishes unique or unusual factual circumstances, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative. [46] Additionally, an extension of time to complete construction may be granted, pursuant to Section 1.946(e) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control. [47] Furthermore, in recognizing that compliance with construction requirements may be difficult at times, the Commission has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving construction requirements on a case-by-case basis. [48]

****5** 15. As explained below, we find that it would be in the public interest to grant a three year extension of the five-year construction requirements for all Phase II 220 MHz EA, regional and nationwide licensees subject to this order. Specifically, consistent with the Bureau's *Public Notice* in this proceeding, [49] we grant relief only to the Phase II 220 MHz EA, regional and nationwide licensees that sought relief by timely filing an extension request of the applicable construction deadline. The record indicates that many licensees intend to provide commercial services using five kilohertz voice equipment and an extension will allow additional time for this equipment to be developed. The two companies that originally manufactured five kilohertz voice equipment no longer do

so.[50] We find that the loss of that ***13001** equipment was a unique circumstance that have frustrated licensees' efforts to meet the construction requirements. While promoting spectrum efficiency through advanced narrowband techniques is a laudable goal that we continue to pursue in many bands,[51] we do not believe it is reasonable to fault licensees who obtained licenses and then faced an unexpected loss of equipment.

16. The record indicates that the small amount of narrowband spectrum in non-contiguous blocks has presented unique challenges to certain 220 MHz licensees. While some licensees contend there is a market for 220 MHz trunked, voice communications equipment, we are persuaded by the record that this equipment is scarce presently or faces technical and economic challenges. We note an encouraging development, in that BizCom has acquired the manufacturing rights for 220 MHz trunked, voice communications equipment.[52] BizCom, however, states that it is not currently capable of producing such equipment in sufficient quantities to enable all 220 MHz licensees to meet their construction deadlines.[53] We are also encouraged by the late-filed comments of Cornerstone,[54] which state that CX2 Technologies is developing a portable radio capable of operating on 5 kilohertz channels in the 220 MHz band which should be available in the near future.[55] It also appears that some licensees are aggregating their five kilohertz channels into 12.5 kilohertz channels and that there is equipment available to operate trunked, voice systems on these wider channels.[56] We, therefore, find that this is a unique situation where there are widespread equipment availability difficulties facing licensees and confining technical characteristics. We, however, find there is an evolving potential for voice applications in the 220 MHz service either through the development of new five kilohertz equipment or through the further consolidation and deployment of 12.5 kilohertz equipment. A three-year extension of the construction deadline is warranted because it will provide the equipment market time to develop the next-generation digital technology that may allow for viable commercial operation of voice or data networks in this band.

****6** 17. Further, we find that the flexibility granted by the 1997 restructuring of the 220 MHz service rules has enabled entities to provide a variety of services, including fixed data applications without efficiency standards.[57] The record demonstrates success within the 220 MHz service for narrowband data communications.[58] BizCom has demonstrated that a three-year extension would be in the public interest to allow it, and other licensees that may be consolidating licenses, to deploy new digital technologies in the orderly construction of wide-area or nationwide data systems. By contrast, the public interest would be ill-served by compelling 220 MHz Phase II licensees to devote their resources to the construction of stopgap, legacy analog systems to meet the construction deadline. Our finding is similar to the Bureau's finding in the *Nextel/Neoworld Order*, in that BizCom clearly has a plan to construct a ***13002** system using newly developed technology and additional time is needed for widespread deployment.[59]

18. We also note that the Commission recently authorized leasing for the 220 MHz band, which could enable a variety of service offerings in the near term in a flexible fashion that was previously not available.[60] Given this unique case where a large number of licenses face equipment availability problems due to technical constraints (*e.g.*, narrow, non-contiguous channels) and solutions appear to be available in the near term; we believe that the new secondary markets principles offer flexible options for 220 MHz licensees to construct viable systems. We see evidence of this happening in this band presently where several parties have consolidated licenses in the 220 MHz band to provide wide-area or nationwide data operations and others have consolidated licenses to enable the use of 12.5 kilohertz voice equipment. The three year extension and new equipment developments, combined with the flexibility of secondary markets will only enhance a licensee's ability to overcome the equipment and consolidation challenges discussed here and should more rapidly lead to use of this spectrum. We envision that licensees could form partnerships with or lease their spectrum to other entities that would lead to immediate deployment or use without losing the option of using the spectrum for different service applications should they develop in the future. In addition, spectrum leasing would also address GEMC's concern that licensees currently operating in the band need an opportunity to acquire additional spectrum to supplement their systems. While these developments do not

constitute an independent justification for granting an extension of time to construct, they allow us to conclude that the extension will give licensees a fair opportunity to construct systems and place them in service.

19. We therefore believe that a three-year extension of the five-year construction requirement will benefit the public interest by expediting the provision of services to consumers and lowering administrative burdens on licensees. We also see merit in consolidating the extended construction deadline, which will ease the administrative burden on licensees that are constructing integrated regional or nationwide systems comprised of licenses with varying deadlines. We find that this relief should be granted to all Phase II 220 MHz EA, regional, and nationwide licensees that timely sought a construction deadline extension, rather than just licensees in particular channel blocks as requested by Havens. Such relief will ensure that all licensees are treated equally, and will ease the administrative burden on licensees that are consolidating EA, regional, and nationwide licenses into integrated systems. Additionally, the fact that twenty-three licensees have sought relief leads us to believe that the technical and equipment challenges in this band are widespread. Accordingly, the five-year construction deadline is hereby extended for a three-year period until November 5, 2007 for the following: 1) all 220 MHz Phase II EA, regional, and nationwide licenses that timely sought an extension of the applicable construction deadline, if the construction deadline has expired as of the date of the release of this order; and 2) all 220 MHz Phase II EA, regional, and nationwide licenses with five-year construction deadlines falling after the release date of this order.

**7 20. We find that the record supports grant of a limited extension, and that a three-year extension is sufficient to permit licensees to construct their systems. Accordingly, we deny Havens' request for a complete waiver of the five-year construction requirement and Bizcom's request for an extension of the ten-year construction requirement. [61]

*13003 21. Additionally, Cornerstone urges us to waive rule 90.157, [62] and thereby permit Phase II 220 MHz licensees to discontinue operations until the earlier of either (1) the three-year extended construction deadline or (2) "end-user radio product is available in sufficient quantity to open various geographic markets . . . ." [63] Cornerstone contends that many 220 MHz licensees are small businesses with limited capital and this capital would be better spent on development of new radio products than site rent, insurance and other expenses associated with maintaining existing operations. The standards for waiver of the Commission's rules are set forth in paragraph 14, above. We find that Cornerstone has not demonstrated that grant of the waiver would be in the public interest and that it has failed to support adequately its request for industry-wide relief from section 90.157. We also find that Cornerstone has failed to demonstrate that its particularized circumstances warrant individual relief from section 90.157. We therefore deny Cornerstone's waiver request.

22. Finally, we note that, on April 6, 2004, Access 220, LLC (Access 220) submitted information for the purpose of demonstrating that it has met the five-year construction requirements for 112 Phase II 220 MHz licenses by providing an appropriate level of substantial service. Access 220 acquired its licenses in August 2002 and was granted band manager status in October 2002 through a waiver request granted by the Wireless Telecommunications Bureau. [64] In its submission, Access 220 states that it has diligently pursued the provision of band management services in the 220 MHz band, specifically by developing partnerships with equipment manufacturers to pursue previously non-existent voice and data solutions for the band, and by investing substantial sums in sales and marketing efforts. We find it is in the public interest to afford Access 220 the same relief afforded other 220 MHz licensees as described herein. We therefore grant, *sua sponte*, Access 220 a three-year extension of the five-year construction requirement of the licenses for which it filed substantial service showings. This relief is warranted because Access 220 has diligently implemented its band manager operations and it will assist Access 220 in overcoming the slow development of 220 MHz equipment. [65] We note that Access 220 is the only band manager in the 220 MHz service, and we believe that this extension is consistent with the Commission's objectives of establishing flexibility, eliminating unnecessary regulatory burdens, and enhancing the competitive potential of the 220 MHz service.

B. BizCom Request to Meet Geographic Benchmarks

8 23. We grant BizCom's request that it be permitted, in the alternative, to meet the construction requirements for its regional 220 MHz licenses by satisfying the geographic coverage requirement of Section 90.769 for nationwide licenses. BizCom is using all of its licensed facilities to construct a single integrated nationwide system, and it is reasonable to apply a uniform construction **13004 requirement to the system as a whole, rather than individual population coverage requirements for each license area as specified in Section 90.767. Consistent with prior Bureau actions, we will require BizCom to meet either geographic coverage or population coverage benchmarks in each of its six regional areas. We note that similar flexibility was granted to other 220 MHz licensees, which were consolidating smaller geographic licenses to achieve nationwide systems. [66] Accordingly, in each of its six regional areas on channels that have been authorized, BizCom must construct a sufficient number of base stations to provide coverage to: (i) either a composite area of at least 100,000 square kilometers or one-third of the population of the REAG by November 5, 2007, and (ii) either a composite area of at least 200,000 square kilometers or two-thirds of the population of the REAG on or before BizCom's current license expiration dates.

IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the requests filed by Warren C. Havens and BizCom USA, Inc. for waiver or extension of the 220 MHz service five-year construction requirements are HEREBY GRANTED to the extent discussed herein, and otherwise ARE DENIED.

25. IT IS FURTHER ORDERED that the five-year construction deadline is hereby extended for a three-year period until November 5, 2007 for the following: 1) all 220 MHz Phase II EA, regional, and nationwide licenses that timely sought an extension of the applicable construction deadline, if the construction deadline has expired as of the date of the release of this order; 2) all 220 MHz Phase II EA, regional, and nationwide licenses with five-year construction deadlines falling after the release date of this order; and 3) the Phase II 220 MHz licenses covered by the Access 220, LLC notification of substantial service filing.

26. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act, as amended 47 U.S.C. § 154(i), and Sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the request of Cornerstone SMR, Inc. for waiver of Commission rule 90.157 IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

**9 John Muleta
Chief
Wireless Telecommunications Bureau

Footnotes

1 *See* Petition to Waive or Extend the Five-Year Construction Requirement: Partial Waiver of Section 90.767, with requests to apply to other Regional and EA Licenses, filed by Warren C. Havens (Jan. 12, 2004) (Havens Request) and "Wireless Telecommunications Bureau, Mobility Division Seeks Comment on Warren C. Havens' Petition to Waive or Extend 220 MHz Phase II Economic Area and Regional Licenses Five-Year Construction Requirement," *Public Notice*, DA 04-122 (2004 WESTLAW 89711) (WTB, MD rel. Jan. 21, 2004).

2 *See* Request for Waiver or Extension of 220 MHz Construction Requirements, filed by BizCom USA, Inc. (Feb. 10, 2004) (BizCom Request).

3 Generally, Phase I licenses were applied for prior to May 24, 1991 and were issued by lottery for specific sites or for nationwide operations. All subsequent licenses are considered Phase II licenses, which generally consist of various channel blocks (*e.g.*, 5- and 10-paired five kHz channels resulting in 50 kilohertz and 100 kilohertz channel blocks) auctioned for varying size geographic areas (*e.g.*, EAs, regional, and nationwide licenses).

4 47 C.F.R. § 90.157.

5 *See* Amendment of Part 2 of the Commission's Rules Regarding the Allocation of the 216-225 MHz Band, *Report and Order*, GEN Docket No. 87-14, 3 FCC Rcd 5287 (1988) (*220 MHz Allocation Order*).

6 The five kilohertz bandwidth was chosen because the narrowbanding of voice communications and promoting efficient spectrum use was a Commission priority and it was demonstrated that voice communications are possible with the use of five kilohertz channels.

7 *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, PR Docket No. 89-552, *Report and Order*, 6 FCC Rcd 2356 (1991) (*220 MHz Report and Order*).

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 Service, PR Docket No. 89-552, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943 (1997) (*Third Report and Order*).

9 *See* 47 C.F.R. § 90.721.

10 47 C.F.R. § 90.767(a).

11 47 C.F.R. § 90.769.

12 *See* "Wireless Telecommunications Bureau Grants 654 Phase II 220 MHz Licenses," *Public Notice*, 14 FCC Rcd 4444 (Mar. 24, 1999); "Wireless Telecommunications Bureau Grants 221 Phase II 220 MHz Licenses," *Public Notice*, 15 FCC Rcd 6941 (Oct. 7, 1999). The dates of grant include: March 22, March 23, April 16, May 21, May 24, October 7, November 2 and November 3 of 1999.

13 We also note the Commission concluded Auction # 43 in January, 2002, wherein 4 220 MHz geographic area licenses were re-auctioned (2 EA licenses and 2 REAG licenses). We do not extend relief to the 4 licenses granted pursuant to Auction # 43, as their respective five year construction deadlines are in 2007.

14 Havens Request at 3. Havens argues that his request should only apply to EA and regional 220 MHz licenses that have trunked channel groups and, therefore, relief would not be necessary for 220 MHz J-block and E-block licenses.

15 *Id.* at 10.

16 *Id.* at 11.

17 *Id.*

18 *Id.* at 11-12.

19 *Id.* at 12.

20 *Id.*

21 *Id.*

22 Most of the 220 MHz service is made up of narrowband, non-contiguous channels. That is, many five kilohertz channels are spaced 150 kilohertz away from their paired channels.

23 Havens Request at 7-8.

24 Id. at 18.

25 Id. at 21. Havens contends that the WCS and the 220 MHz service are similarly situated and cites the WCS decision where the Commission only established a ten-year buildout requirement because it was an auctioned service with special technical requirements, with an "undeveloped nature of equipment," and would be providing "new and innovative services."

26 *See* In the Matter of FCI 900, Inc. Expedited Request for Three-Year Extension of 900 MHz Band Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of 900 MHz Band Construction Requirements and Petition for Declaratory Ruling, *Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11077 ¶ 7 (WTB 2001) (*Nextel/Neoworld Order*).

27 *See* note 1, *supra*. The *Public Notice* announced that the Bureau would not toll the construction requirements for 220 MHz licensees pending review of the request and advised that licenses that were not timely constructed or for which timely extension requests were not filed would terminate automatically.

28 Seven of the nine parties (including Havens and BizCom) commenting in this proceeding support a waiver or an extension. *See* Comments of Nirmal and Helene Pujari (Pujari) at 1; Comments of Two-Twenty Auction Co., Inc. (Two-Twenty) at 1; Comments of Cornerstone SMR, Inc. (Cornerstone) at 3; Comments of Deltacom, Repeater Network Spectrum Aq. Inc., and Mobile Communications Service of Miami, Inc. (collectively, Repeater) at 4; Comments of Venture Communications, Inc. (Venture) at 6. Two parties oppose a waiver or extension. *See* Comments of GEMC 220, LLC (GEMC) at 1; Reply Comments of Texas License Consultants (TLC). We note that TLC withdrew its Reply Comments. We also accepted late-filed Comments of Cornerstone SMR, Inc. (April 9, 2004) and late-filed Reply Comments of Two-Twenty (March 9, 2004) and Havens (April 12, 2004).

29 Havens Request at 4; Venture Comments at 3; Pujari Comments at 1-2; Two-Twenty Comments at 1-3.

30 BizCom Reply Comments at 3.

31 Pujari Comments at 2, Two-Twenty Comments at 3.

32 Repeater Comments at 3-4.

33 *See* GEMC Comments.

34 GEMC Comments at 3-4.

35 *Id.*

36 *Id.*

37 Requests for waiver or extension have been filed electronically by twenty-three licensees, which collectively hold 318 220 MHz Phase II licenses.

38 *See* Universal Licensing System file number 0001610428, Attachment at 1.

39 *Id.*

40 *See* Universal Licensing System file number 0001662794, Attachment at 4-5.

41 BizCom Request at 6. We note that, in his Reply Comments of Warren C. Havens to Late-Filed Comments of Texas License Consultants ("TLC") and Late-Filed Comments of BizCom (filed April 12, 2004), Havens opposes BizCom's request, seemingly because BizCom's request is based on circumstances which are different from the circumstances upon which Havens' request is based. In this filing, Havens also objects to claims made by TLC in its reply comments. However, TLC has withdrawn its reply comments, therefore the issue is moot.

42 *Id* BizCom is proposing that, in each of its six REAGs, it will construct a sufficient number of base stations to provide coverage to (1) either a composite area of at least 100,000 square kilometers or one-third of the population of the REAG within eight years of license issuance; and (2) either a composite area of at least 200,000 square kilometers or two-thirds of the population of the REAG within 13 years of license issuance.

43 *See* In the Matter of National Rural Telecommunications Cooperative, LLC, Request for Waiver and Consolidation of 220 MHz Construction Requirements, *Memorandum Opinion and Order*, 15 FCC Rcd 13402 (WTB CWD Aug. 4, 2000) (*NRTC MO & O*). In the *NRTC MO&O*, the Bureau's former Commercial Wireless Division (Division) found that it is reasonable to apply a uniform set of construction requirements to a licensee that is building an integrated nationwide system.

44 *See* In the Matter of Intek License Acquisition Corp., Request for Waiver and Consolidation of 220 MHz Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 16431 (WTB CWD 2000) (*Intek MO& O*). In the *Intek MO&O*, the Division concluded that it would be unduly burdensome to apply the various construction rules to a 220 MHz licensee that held three different types of licenses and planned to build a single nationwide system.

45 *Id.*

46 47 C.F.R. § 1.925. Alternatively, pursuant to Section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. *See also Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

47 47 C.F.R. § 1.946. Section 1.946(e) also enumerates specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

48 *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (*PCS MO&O*), *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

49 *See* note 27, *supra.*

50 *See* Havens Comments at 10, Two-Twenty Comments at 1-3.

51 *See 220 MHz Report and Order*, 6 FCC Rcd at 2364-65 ¶¶ 59, 62. As mentioned above, in 1991, the Commission chose to pursue its goal of encouraging the development of spectrally efficient technologies by adopting service rules for the

assignment of 200 five kilohertz channel pairs in the 220-222 MHz band. The result is that the channelization of the 220 MHz service (*i.e.*, non-contiguous channel pairs which are separated to enable trunked operations) is unique.

52 *See* BizCom Reply Comments at 2.

53 *See id.* at 3.

54 Cornerstone filed its comments on April 9, 2004. We found it was in the public interest to accept Cornerstone's late-filed comments because they contained pertinent information of which we were not previously aware.

55 *See* Cornerstone Comments at 2.

56 *See* Havens Request at 12.

57 *See Third Report and Order.*

58 *See* GEMC Comments at 1-3, TLC Comments at 4.

59 *See Nextel/Neoworld Order* at 6.

60 In the Matter of Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Secondary Markets R & O*).

61 Therefore, the applicable ten-year construction requirement for all 220 MHz Phase II licensees remains the respective license expiration date of each authorization. We decline to set a consolidated ten year construction deadline because license renewal deadlines fall on different dates in 2009.

62 47 C.F.R. § 90.157. Section 90.157 provides that "[a] station license shall cancel automatically upon permanent discontinuance of operations," and that "any station which has not operated for one year or more is considered to have been permanently discontinued." *Id.*

63 Cornerstone Comments at 3.

64 In 2002, the WTB granted Access 220's request for waiver of sections 90.733, 90.725, and 90.769 of the Commission's rules in order to allow it to act as a band manager in the 220 MHz service. *See* Request for Waivers to Provide Band Management Services Utilizing Licenses in the 220-222 MHz Band, WT Docket No. 02-224, *Memorandum Opinion and Order*, 17 FCC Rcd 20464 (2002) ("*Access 220 Order*"). In doing so, the WTB stated that because most of Access 220's spectrum will be leased to third parties, it must necessarily allow Access 220 to rely on the construction activities of third parties in order to meet its build-out requirements. The WTB also allowed Access 220 to meet its construction requirements by making a substantial service showing for its one Phase I nationwide license and its two Phase II nationwide licenses.

65 *See* 47 C.F.R. §§ 1.925(a) (Commission may waive specific requirements of the rules on its own motion), 0.331 (authority delegated).

66 *See NRTC MO&O*, 15 FCC Rcd 13402 (2000) and *Intek MO &O*, 16 FCC Rcd 16431 (2000).

19 F.C.C.R. 12994, 19 FCC Rcd. 12994, 2004 WL 1555411

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