

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

|   |   |                         |
|---|---|-------------------------|
| In the Matter of Applications of                | ) |                         |
|   | ) |                         |
| W & E Interactive TV L.C.                       | ) | FCC File Nos.           |
|   | ) |                         |
| For Renewal of License and Extension of Time to | ) | 0002013615, 0002013616, |
| Construct 218-219 MHz Service Stations          | ) | 0002054683, 0002054684  |
| KIVD0462, Sioux Falls, South Dakota; and        | ) |                         |
| KIVD0435, Sioux City, Iowa-Nebraska             | ) |                         |
|   | ) |                         |
| Request for Waiver of Section 95.831 of the     | ) |                         |
| Commission's Rules                              | ) |                         |

**ORDER**

**ADOPTED: January 31, 2007**

**RELEASED: January 31, 2007**

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this Order, we address the applications and waiver requests filed by W & E Interactive TV, L.C. (W&E), for renewal of license and extension of the construction deadline for the above-captioned 218-219 MHz Service stations. For the reasons discussed below, we grant the requests for a limited 90-day waiver and hold W&E's renewal applications in pending status until such time as W&E amends its renewal applications to reflect compliance with our rules, specifically Section 95.833(b).

**II. BACKGROUND**

2. On February 28, 1995, the Commission granted 218-219 MHz Service licenses, KIVD0462, Block B, Market IVM267 – Sioux Falls, South Dakota and KIVD0435, Block B, Market IVM253 – Sioux City, IA-NE to Stephen B. Elliot. Mr. Elliot later assigned these licenses to W&E.<sup>1</sup> In 1999, the Commission extended the license term for the 218-219 MHz Service to ten years from the date of license grant, establishing February 28, 2005 as the expiration date for these licenses.<sup>2</sup> The Commission also eliminated interim construction benchmarks and adopted a “substantial service” requirement to be assessed at the end of the license term as a condition for renewal.<sup>3</sup> Substantial service is “service that is sound, favorable and substantially above a level of service which might minimally

<sup>1</sup> FCC File No. 001044171 (filed Oct. 4, 2002).

<sup>2</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) (1999 Flexibility Order).

<sup>3</sup> *Id.*, 15 FCC Rcd at 1540 ¶ 75. The Commission specifically stated that “[f]ailure to demonstrate that ‘substantial service’ is being provided will result in a license not being renewed.” *Id.*; see also 47 C.F.R. § 95.833 (substantial service showing required at license renewal).

warrant renewal.”<sup>4</sup> Unless a waiver or extension is granted, the failure to meet the Commission’s construction requirements results in the automatic termination of the license.<sup>5</sup>

3. On January 20, 2005, W&E timely filed applications to renew its licenses.<sup>6</sup> Subsequently, W&E amended its renewal applications to include a request to waive any rules necessary to ensure renewal of its licenses.<sup>7</sup> In addition, on February 23, 2005, W&E filed waiver requests seeking a 90-day waiver and extension of the ten-year construction requirement for both of its 218-219 MHz Service licenses.<sup>8</sup> In its Waiver Request, W&E contends that a “waiver and extension of time would serve the public interest without presenting any counterbalancing negative consequences.”<sup>9</sup> As discussed below, we find the circumstances set forth in W&E’s Waiver Request warrant grant of a limited waiver to enable the licensee to meet the ten-year construction requirement.

### III. DISCUSSION

4. The Commission may grant a waiver if the licensee 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.<sup>10</sup> The Commission has also 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.<sup>11</sup>

5. W&E states that it has been unable to obtain reliable equipment to construct its 218-219 MHz Service systems. W&E contends that as of 2003, there was only one manufacturer of equipment that was suitable for its intended systems, but that the equipment was “inefficient, ineffective and . . . unable to consistently provide service.”<sup>12</sup> W&E further states that it is now pursuing equipment in collaboration with Sioux Valley Rural TV, Inc. (“SVRTV”), another license-holder in the 218-219 MHz band. Together with SVRTV, W&E has identified a new manufacturer which is capable of providing equipment that can be used to build-out W&E’s systems. W&E contends that its service plans include “a new application for a simple, slow-speed monitoring and control system, which will work very well with the slow-speed data transfer rates available with 218 MHz systems.”<sup>13</sup> W&E states that such service “will be a viable product for many new IP based remote control devices that can be used for a multitude of

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<sup>4</sup> 47 C.F.R. § 95.831.

<sup>5</sup> See 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

<sup>6</sup> FCC File Nos. 0002013615 and 0002013616 (filed Jan 20, 2005, amended Feb. 22, 2005).

<sup>7</sup> *Id.*

<sup>8</sup> Request for Waiver and Extension of Time to Construct, FCC File Nos. 0002054683 and 0002054684, (filed Feb. 23, 2005)(“Waiver Request”).

<sup>9</sup> Waiver Request at 1.

<sup>10</sup> 47 C.F.R. § 1.925.

<sup>11</sup> See, e.g., Amendment of the Commission’s Rules To Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>12</sup> Statement of Dee Ann Wunschel (attached to Waiver Request) at 1.

<sup>13</sup> Waiver Request at 2.

applications.”<sup>14</sup> W&E contends that the equipment required to build out such systems will be available shortly once manufacturer testing is complete and product shipment begins.<sup>15</sup> W&E states that it has obtained all necessary tower sites to construct its systems for the licenses at issue. W&E further states that it intends to use its systems to provide monitoring and control services that can be used by various customers, including utility companies.

6. Based on our review of the record, as explained below, we find that grant of a waiver to allow W&E a limited 90 day period to complete construction of its systems is warranted. We conclude that strict application of the rule would not support the statutory and Commission goals in adopting the 218-219 MHz Service construction requirements and such application would be contrary to the public interest. W&E’s planned deployment is consistent with the statutory goals of performance requirements; specifically, “to promote investment in and rapid deployment of new technologies and services.”<sup>16</sup> Moreover, a waiver in this instance also fosters the Commission’s goals of providing services to rural areas, improving efficiency of spectrum use, encouraging competition and providing “services to the largest feasible number of users within the 218-219 MHz band.”<sup>17</sup> We find it relevant that W&E has a ready plan to launch service within 90 days using newly available equipment, has acquired all necessary tower sites for its systems,<sup>18</sup> and can provided service to critical infrastructure customers, for example, utility companies. Moreover, W&E’s proposed system will benefit the public by introducing new IP-based monitoring and control services to rural areas and will thereby serve the public interest.<sup>19</sup>

7. For the reasons stated above, we believe the public interest is served by granting a limited 90-day waiver of W&E’s ten-year construction requirement. Accordingly, we grant W&E’s requests and waive the requirements in sections 1.946(c), 1.955(2), 95.831, 95.833 such that W&E has a period of 90 days from the release date of this Order to meet its ten-year construction deadlines for the subject 218-219 MHz Service licenses.<sup>20</sup> We will also hold W&E’s renewal applications, FCC File Nos. 0002013615 and 0002013616, in pending status for 90 days from the release date of this Order or until such time as W&E amends its renewal applications to reflect compliance with our rules, specifically Section 95.833(b).

#### IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act, as

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3.

<sup>16</sup> 47 U.S.C. § 309(j)(4)(B). In addition, when adopting construction requirements, Section 309(j) of the Communications Act of 1934, as amended, requires the Commission to “ensure prompt delivery of service to rural areas [and] prevent stockpiling or warehousing of spectrum by licensees or permittees.” *Id.*

<sup>17</sup> 1999 Flexibility Report and Order, 15 FCC Rcd at 1497.

<sup>18</sup> *See, e.g.*, Leap Wireless MO&O, 16 FCC Rcd at 19578 (licensee’s demonstrated diligence in constructing licenses – site planning, market research and deployment in other markets – was one factor supporting waiver of construction deadline).

<sup>19</sup> *See, e.g.*, In the Matter of Leap Wireless International, Inc. Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (2001)(“Leap Wireless MO&O”)(granting limited waiver and extension of time to comply with broadband PCS construction requirements where licensee was awaiting near-term delivery of equipment necessary to construct high speed data system).

<sup>20</sup> We note that W&E will also be required to comply with Section 1.946 of the Commission’s rules which requires a licensee who commences service within its construction period to notify the Commission by filing an FCC Form 601 within 15 days of the expiration of the applicable construction deadline. 47 C.F.R. § 1.946(d).

amended, 47 U.S.C. § 154(i), and Sections 0.331 and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, that W&E Interactive TV L.C.'s requests for waiver of the ten-year construction deadline for its 218-219 MHz Service licenses, FCC File Nos. 0002054683 and 0002054684, filed on February 23, 2005, are GRANTED, and that the construction deadline is hereby extended for 90 days from the release date of this grant.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Derenge  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau