

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

In the Matter of Applications of )
THOMAS A. SEAMAN, RECEIVER FOR )
VITECH CORPORATION )
For Renewal of License and Extension of Time to ) FCC File Nos.
Construct 218-219 MHz Service Stations )
KIVD0133, Anderson, Indiana; KIVD0151, ) 0002010618, 0002010595, 0002010619,
Kokomo, Indiana; KIVD0154, Kankakee, Illinois; ) 0002010596, 0002010620, 0002010597,
KIVD0157, Sheboygan, Wisconsin; KIVD0167, ) 0002010621, 0002010598, 0002010622,
Aurora-Elgin, Illinois; KIVD0169, Joliet, Illinois; ) 0002010599, 0002010623, 0002010600,
KIVD0396, Elkhart-Goshen, Indiana; KIVD0405, ) 0002062424, 0002062364, 0002062425,
Decatur, Illinois; KIVD0409, Wichita Falls, ) 0002062365, 0002062426, 0002062366,
Texas; KIVD0423, Dothan, Alabama; KIVD0427, ) 0002062427, 0002062367, 0002062428,
Anniston, Alabama; KIVD0454, Wausau, ) 0002062368, 0002062429, 0002062369,
Wisconsin; KIVD0459, Glen Falls, New York; ) 0002062430, 0002062370, 0002062431,
KIVD0467, St. Joseph, Missouri; KIVD0480, ) 0002062371, 0002062432, 0002062372,
Elmira, New York; KIVD0493, Pine Bluff, ) 0002062433, 0002062373, 0002062434,
Arkansas; KIVD0497, San Angelo, Texas; and ) 0002062374, 0002062435, and 0002062375
KIVD0504, Bismarck, North Dakota )
Request for Waiver of Section 95.833 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 (Waiver Request)1 filed by Thomas A. Seaman, Receiver for Vitech Corporation (Receiver), for renewal of license and extension of the construction deadline for the above-captioned 218-219 MHz Service stations (Stations). For the reasons discussed below, we deny the requests for waiver and extension of time, dismiss the renewal applications, and note that the licenses for the Stations terminated automatically on January 18, 2005 and February 28, 2005.

1 Because the arguments supporting the requests for waiver and extension of time to construct for all eighteen stations are identical, we refer to the requests singularly and interchangeably for convenience.

## II. BACKGROUND

2. The Commission granted the licenses for the Stations to Vitech Corporation (Vitech) on January 18, 1995 and February 28, 1995.<sup>2</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 January 18, 2005 as the expiration date for six of the stations, and February 28, 2005 for the remaining twelve stations.<sup>3</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>4</sup> Unless an extension or waiver is granted, the failure to meet the Commission’s construction requirements results in the automatic termination of the license.<sup>5</sup>

3. On November 30, 2004, an application was filed for involuntary assignment of the licenses from Vitech to the Receiver.<sup>6</sup> The US District Court, Central District of California, Southern Division ordered the appointment of the Receiver to take control of Vitech, because it was affiliated with individuals named in a complaint for securities fraud brought by the Securities and Exchange Commission (SEC).<sup>7</sup> On January 18, 2005, the same day as the license renewal and construction deadline for six of the licenses, the Receiver filed the instant request for waiver or extension of time.<sup>8</sup>

## III. DISCUSSION

4. Under section 1.925 of the Commission’s rules, a waiver may be granted 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, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>9</sup> In addition, pursuant to section 1.946(e) of the Commission’s rules, an extension of time to complete construction may be granted if the licensee shows that the failure to complete construction is due to causes beyond its control.<sup>10</sup> Section 1.946 also lists specific circumstances where extension requests will not be granted, including, for example, delays caused by a failure to obtain financing,

---

<sup>2</sup> Six of the subject licenses were granted on January 18, 1995: KIVD0133, KIVD0151, KIVD0154, KIVD0157, KIVD0167, and KIVD0169. The remaining twelve licenses were granted on February 28, 1995: KIVD0396, KIVD0405, KIVD0409, KIVD0423, KIVD0427, KIVD0454, KIVD0459, KIVD0467, KIVD0480, KIVD0493, KIVD0497, and KIVD0504.

<sup>3</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).

<sup>4</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 47 C.F.R. § 95.833 (substantial service showing required at license renewal).

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

<sup>6</sup> FCC File No. 0001952016. The Commission granted the assignment application on February 10, 2005.

<sup>7</sup> See Waiver Request at 2. According to the Receiver, at least 2,400 investors had invested in the alleged scam, which included more than 40 corporations, limited liability companies, partnerships, and individuals.

<sup>8</sup> FCC File No. 0002010595, Exhibit 1, Request for Waiver of Section 95.833 or, in the Alternative, for Extension of Time to Construct (Request).

<sup>9</sup> 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 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>10</sup> See 47 C.F.R. § 1.946(e).

because the licensee undergoes a transfer of control, or because the licensee intends to assign the authorization.<sup>11</sup>

5. In the Waiver Request, the Receiver states that Vitech investors contacted the SEC after becoming concerned with the representations of Millennium Technical Group (Millennium), a company Vitech contracted with to deploy 218-219 MHz technology, install equipment, and “raise additional capital for build-out and operations.”<sup>12</sup> The resulting SEC investigation confirmed that Millennium had defrauded investors as part of an “overall fraudulent scheme.”<sup>13</sup> The Receiver argues that, as a result of the Millennium fraud, the Commission should either waive or extend the construction deadline for the stations so that a buyer for the licenses can be located and so “the investors can have any possibility of recovery.”<sup>14</sup> The Receiver states that relief from the construction requirements would allow “sufficient time to reach a decision about the market demand and public benefit of the 218-219 MHz Service licenses” and to determine an appropriate course of action consistent with Mr. Seaman’s obligations to the Court.<sup>15</sup> The Receiver also contends that a “waiver would not prejudice the Commission or other licensees,” because identifying other use of the spectrum would take at least twelve months and “either the station facilities would be constructed (likely by a purchaser of the license) or the license would be cancelled in sufficient time to ‘clear’ the spectrum for auction.”<sup>16</sup>

6. Based on the record before us, we find that an extension of time to construct or waiver of the construction requirements for these licenses is not warranted. Section 1.946(e) of the Commission’s rules<sup>17</sup> specifically precludes extensions of construction deadlines for licensees “to identify prospective buyers.”<sup>18</sup> We also reject the Receiver’s argument that the court constrains its ability to use investor funds to construct a system,<sup>19</sup> as section 1.946(e)(2) specifically states that extensions will not be granted for a licensee’s failure to obtain financing or to obtain equipment.<sup>20</sup> Additionally, we find that the failure to construct was the result of the licensee’s business decision, and therefore was not due to circumstances beyond the licensee’s control. It is well established that failed business decisions do not qualify as grounds for relief of our regulatory requirements,<sup>21</sup> which in this case are intended to ensure the efficient

---

<sup>11</sup> *See id.* at § (e)(2)-(3).

<sup>12</sup> Waiver Request at 2.

<sup>13</sup> *Id.*

<sup>14</sup> Waiver Request at 2.

<sup>15</sup> Waiver Request at 5.

<sup>16</sup> *Id.*

<sup>17</sup> 47 C.F.R. § 1.946(e)(3). “Extension requests will not be granted...because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization.”

<sup>18</sup> Waiver Request at 4.

<sup>19</sup> *See id.*

<sup>20</sup> *See* 47 C.F.R. § 1.946(e)(2).

<sup>21</sup> *See* Globalstar, L.P., *Memorandum Opinion and Order*, 18 FCC Rcd. 1249, 1252 (Int’l Bur. 2003) (business decisions based on economic considerations are not circumstances outside the control of the licensee and do not warrant an extension). *See also*, Panamsat License Corp, *Memorandum Opinion and Order*, 15 FCC Rcd 18720, 18723 (Int’l Bur. 2000) (business transactions are within the control of the licensee, and so cannot justify a milestone extension); Columbia Communication Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571 n.35 (Int’l Bur. 2000) (“First Columbia Order”)(construction contract negotiations cannot justify a milestone extension request); Advanced Communications Corporation, *Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3417 (1995) (same).

and effective use of the radio spectrum.<sup>22</sup>

7. We find that the circumstances in this instance are not sufficiently “unique and unusual” to warrant relief of the applicable construction requirements,<sup>23</sup> and that redress may be more appropriate in a civil action. We reject the Receiver’s argument that the public interest supports grant of the requested waiver,<sup>24</sup> particularly where the Receiver has not provided a substantive plan for meaningful service to the public. We also find that the Receiver’s reliance on *Chasetel*,<sup>25</sup> which found that the Commission “has granted extensions of time where construction delays stemmed from unforeseeable events that were beyond the licensee’s control,<sup>26</sup> is misplaced. In that case, the former Commercial Wireless Division granted a three-day extension of the PCS construction requirements because the delays were caused by the grounding of air-traffic immediately following September 11, 2001; the licensee made diligent efforts and had achieved partial construction at the deadline; and the extension was *de minimis*.<sup>27</sup> None of these factors are present here.<sup>28</sup>

8. In addition, we reject the Receiver’s contention that this case is analogous to *Pacific Communications*. In support, the Receiver claims that reliance by the Vitech investors on Millennium’s fraudulent promises, along with the Receiver being appointed with insufficient time to construct commercially viable systems, are circumstances “sufficiently unusual to justify grant of a waiver.”<sup>29</sup> In *Pacific Communications*, the Commission granted a nine-month extension of the broadband Personal Communications Service construction deadline to Pacific Communications, finding that: (1) protracted litigation over most of the license term, leaving only six months to complete construction, was beyond the licensee’s control; and (2) the public interest would not be served by strictly enforcing the construction deadline, because the licensee planned to build a technologically advanced system that would more efficiently use the spectrum and benefit consumers.<sup>30</sup> Important to this determination was the licensee’s statement that if the Commission denied the extension, it would meet the deadline by building a “bare bones” system.<sup>31</sup> In the instant case, however, there has been no protracted litigation over most of the license term and, more importantly, there is no plan to construct any system.

---

<sup>22</sup> The Commission adopts construction requirements for services in part to fulfill its obligations under section 309(j) of the Communications Act of 1934, as amended, which requires the Commission to include “safeguards to protect the public interest in the use of the spectrum” and performance requirements “to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.” 47 U.S.C. §§ 309(j)(3), 309(j)(4)(B).

<sup>23</sup> See e.g., Daniel R. Goodman, Receiver, *Memorandum Opinion and Order*, 10 FCC Rcd 8537 (1995) (investor reliance on fraudulent company does not excuse compliance with Commission rules); see also Aircom Consultants, Inc., *Order on Reconsideration*, 18 FCC Rcd 1806 (PSPWD 2003) (failure of business arrangements do not justify waiver of Commission rules).

<sup>24</sup> See Request at 5.

<sup>25</sup> *Chasetel Licensee Corp., Order*, 17 FCC Rcd 9351 (CWD 2002) (*Chasetel*).

<sup>26</sup> Request at 6.

<sup>27</sup> *Chasetel*, 17 FCC Rcd at 9353 ¶6.

<sup>28</sup> The Receiver also cites to *Monet*. See *Monet Mobile Networks, Inc., Order*, 17 FCC Rcd 6452 (CWD 2002). In that case, unlike here, an extension was granted because the licensee was diligent in its construction efforts and promised to offer advanced broadband wireless services to sparsely-populated rural areas. Significantly, the extension was conditioned on the actual deployment of service.

<sup>29</sup> *Id.*

<sup>30</sup> *Pacific Communications, Memorandum Opinion and Order*, 19 FCC Rcd 15574, 15577 ¶9 (WTB 2004).

<sup>31</sup> *Id.*, 19 FCC Rcd at 15575-76 ¶6.

9. Accordingly, because we are denying the Receiver's waiver and extension requests, the licenses for the above-captioned stations automatically terminated as of the license expiration date. As a result, there are no valid licenses to renew, and the renewal applications are dismissed as moot.

#### IV. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.131, 0.331, 1.925, 1.946(e) and 95.833 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.925, 1.946(e), 95.833 that the requests for waiver or extension of the construction requirements for 218-219 MHz Service licenses filed by Thomas A. Seaman, Receiver for Vitech Corporation on January 18, 2005, and on February 25, 2005, IS HEREBY DENIED.

11. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.131, 0.331, and 1.949 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.949 that the above-captioned applications for renewal of license ARE HEREBY DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

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