



Federal Communications Commission
Washington, D.C. 20554

June 26, 2009

David G Boyle
3402 Sunset Drive
San Angelo, TX 76904-6047

DA 09-1444

Re: David G. Boyle's Request for Extension of Time of Five-Year Construction Requirement – Call Signs WPOI487 and WPOI488

Dear Mr. Boyle:

This letter addresses David G. Boyle's ("Boyle") November 2, 2007 request to extend the five-year construction requirement with respect to 220 MHz licenses under call signs WPOI487 and WPOI488 ("Extension Request").¹ For the reasons discussed below, we deny the Extension Request, and find that the licenses WPOI487 and WPOI488 automatically terminated on November 5, 2007 pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission rules.²

Background. Pursuant to section 90.767 of the Commission's rules, an Economic Area (EA) or Regional Economic Area Groupings ("REAG") 220 MHz licensee must construct a sufficient number of base stations (*i.e.*, base stations for land mobile and/or paging operations) to provide coverage to at least one-third of the population of its EA or REAG within five years of the issuance of its initial license.³ In the alternative, licensees may provide substantial service to their licensed area at the appropriate five-year benchmark.⁴ Further, pursuant to section 1.946(c), if a licensee fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires.⁵

On July 13, 2004, the Wireless Telecommunications Bureau ("Bureau") released a *Memorandum Opinion and Order* extending the five-year construction requirement deadline by three years until November 5, 2007, for a large number of Phase II EA and REAG licensees.⁶ The Bureau indicated that a three-year extension would be sufficient time for the 220 MHz licensees to construct their systems using available or soon to be developed equipment. The Bureau found that the public interest would be served by allowing additional time for licensees to consolidate licenses, develop new technologies, or take advantage of the technical flexibility provided in the 1997 restructuring of the 220 MHz service rules that

¹ See Universal Licensing System (ULS) File Nos. 0003220830, 0003220831.

² 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

³ 47 C.F.R. § 90.767.

⁴ *Id.*

⁵ 47 C.F.R. § 1.946(c).

⁶ 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, 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; *Memorandum Opinion and Order*, 19 FCC Rcd 12994 (WTB 2004) (*MO&O*).

has enabled entities to provide a variety of services, including fixed data applications.⁷

Boyle requests a further extension to at least March 22, 2009 to construct his licenses, based on his claim of a lack of suitable and viable 220 MHz equipment.⁸ According to Boyle, “the Commission is equally aware of the difficulties and problems of the band’s equipment manufacturers,” and also states that “while he diligently tried to build-out his two systems, the delays encountered have been beyond his control.”⁹ Accordingly, Boyle argues that enforcement of the construction deadline would not be in the public interest, would result in complete loss of his investment to date, and cause undue economic hardship.¹⁰

Discussion. Section 1.946 of the Commission’s rules provides that an extension of time to meet construction requirements “may be granted if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control.”¹¹ Section 1.946 also specifies circumstances where an extension will not be granted, such as “a failure to obtain financing, or to obtain an antenna site or to order equipment in a timely manner.”¹² The extension standard must be applied in consideration of section 309(j) of the Communications Act, as amended, which states that the Commission shall include performance requirements to ensure prompt delivery of services, to prevent stockpiling and warehousing of spectrum by licensees, and to promote investment and deployment of new technologies and services.¹³

We find that Boyle has not made a sufficient showing to justify a further extension of time to construct call signs WPOI487 and WPOI488. We note that the Bureau, in previously providing regulatory relief for a substantial number of 220 MHz licensees, stated that there were several factors that would result in use of the subject licenses in the near term.¹⁴ Many 220 MHz licensees have taken advantage of the substantial relief afforded to meet applicable construction requirements and are providing service in the public interest. Although Boyle had held his licenses for nearly eight years by the time he filed the further extension request, he has failed to provide service to the public. Rather, Boyle has made a business decision to seek further regulatory relief in lieu of deploying available equipment. We find that there have been significant deployments in 220 MHz service, particularly data systems, and a search of the Commission’s equipment database indicates that a variety of equipment has been approved for the 220 MHz service, including several new authorizations since the 2004 regulatory

⁷ *MO&O* at ¶ 17.

⁸ Extension Request at 1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 47 C.F.R. § 1.946(e)(1).

¹² 47 C.F.R. § 1.946(e)(2).

¹³ *See* 47 U.S.C § 309(j)(4)(B).

¹⁴ *See MO&O* at ¶¶ 16-18. Specifically, in extending the prior build-out deadline by three years, the Bureau cited comments in the record indicating that new digital equipment could be developed in the near term; the fact that some licensees were aggregating multiple 5 kHz channels to utilize 12.5 kHz equipment available in the band; and the flexibility provided in the 1997 restructuring of the 220 MHz service rules that enabled entities to provide a variety of services, including fixed data applications. *Id.* *See also* 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*).

relief was granted. In contrast, there has been no initiation of service in the 900 MHz Multilateration Location Monitoring Service (M-LMS), where the Bureau recently extended licensee construction deadlines based on a complete lack of available equipment.¹⁵

The Commission has consistently found that licensee business decisions are not circumstances beyond the licensee's control and are not the basis for regulatory relief.¹⁶ Prior to the 220 MHz auctions, the Commission stated that "[t]he Commission makes no warranties about the use of this spectrum for particular services. Applicants should be aware that a Commission auction represents an opportunity to become a Commission licensee in this service, subject to certain conditions and regulations. A Commission auction does not constitute an endorsement by the Commission of any particular services, technologies, or products, nor does a Commission license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture."¹⁷

We find that Boyle has made certain business decisions relating to the use of the licenses and that the failure to timely construct call signs WPOI487 and WPOI488 is not the result of circumstances beyond his control. We also find our action today to be consistent with our treatment of licensees in the 218-219 MHz service, where regulatory relief was initially granted based on equipment difficulties. In those cases, the licensees' further requests for extended relief were denied based in part on the determination that the licensees made business decisions to not initiate service notwithstanding the availability of equipment.¹⁸

For the reasons discussed above, we deny Boyle's Extension Request. Accordingly, call signs WPOI487 and WPOI488 automatically terminated on November 5, 2007, for failure to meet the construction requirements set forth in Commission rule section 90.767.¹⁹ This action is taken pursuant to

¹⁵ Requests of Progeny LMS, LLC and PCS Partners, L.P., Waiver of Multilateration Location Monitoring Service Construction Rules, *Order*, DA 08-2614 (WTB 2008).

¹⁶ *See, e.g.*, Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner's control); Eldorado Communications LLC, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee's determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); Bristol MAS Partners, *Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); AAT Electronics Corporation, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee's control); Business Radio Communications Systems, Inc., 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee's control); Texas Two-Way, Inc., 98 FCC 2d 1300 (1984), *aff'd sub nom.*, Texas Two-Way, Inc. v. FCC, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

¹⁷ *Third Report and Order*, 12 FCC Rcd at 10953 ¶ 19.

¹⁸ *See, e.g.*, Letter dated May 31, 2005 from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Buddy C. Stanley, ITV, Inc., 20 FCC Rcd 9548, *recon den.*, Application of ITV, Inc., *Memorandum Opinion and Order*, 22 FCC Rcd 1908 (WTB MD 2007); Letter dated January 31, 2007, from Thomas P. Derenge, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Stephen E. Coran, Esquire, counsel for U.S. Telemetry, 22 FCC Rcd 1921 (WTB MD 2007).

¹⁹ 47 C.F.R. § 90.767.

delegated authority under sections 0.131, 0.331, 1.955, and 90.767 of the Commission's rules.²⁰

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

²⁰ 47 C.F.R. §§ 0.131, 0.331, 1.955, 90.767.