



Federal Communications Commission  
Washington, D.C. 20554

June 26, 2009

DA 09-1447

S.K. Warren Communications, Inc.  
PO Box 470372  
The William Medical Bldg, #900  
Tulsa, OK 74147-0372

ATTN: Stephen K. Warren

Re: S.K. Warren Communications's Request for Waiver of Construction Deadline or Extension of Time of Five-Year Construction Requirement – Call Signs WPOJ265, WPOJ266, WPOJ267, WPOJ268, WPOJ269 and WPOJ270

Dear Mr. Warren:

This letter addresses S.K. Warren Communications's ("SKWC") November 5, 2007 request to waive the construction deadline or extend the five-year construction requirement with respect to 220 MHz licenses under call signs WPOJ265, WPOJ266, WPOJ267, WPOJ268, WPOJ269 and WPOJ270 ("Request").<sup>1</sup> For the reasons discussed below, we deny the Request, and find that the licenses WPOJ265, WPOJ266, WPOJ267, WPOJ268, WPOJ269 and WPOJ270 automatically terminated on November 5, 2007 pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission rules.<sup>2</sup>

*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.<sup>3</sup> In the alternative, licensees may provide substantial service to their licensed area at the appropriate five-year benchmark.<sup>4</sup> 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.<sup>5</sup>

On July 13, 2004, the Wireless Telecommunications Bureau ("Bureau") released a *Memorandum Opinion and Order* extending the five-year construction requirement deadlines by three years until

<sup>1</sup> See Universal Licensing System (ULS) File Nos. 0003222759, 0003222760, 0003222761, 0003222762, 0003222763, and 0003222764.

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

<sup>3</sup> 47 C.F.R. § 90.767.

<sup>4</sup> *Id.*

<sup>5</sup> 47 C.F.R. § 1.946(c).

November 5, 2007, for a large number of Phase II EA and REAG licensees.<sup>6</sup> 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 has enabled entities to provide a variety of services, including fixed data applications.<sup>7</sup>

SKWC requests a waiver of the five-year construction deadline or, alternatively, at least a five year extension of the construction deadline for the subject licenses.<sup>8</sup> SKWC states that the equipment problems in the band have only worsened since the Bureau provided the three year extension and in that time “no new 5 kHz equipment for the 220 MHz band has materialized.”<sup>9</sup> SKWC argues that the absence of a reliable, sustainable, and innovative equipment supplier over the last decade has left it without a reasonable path to compliance and the failure of 220 MHz equipment to materialize is beyond its control. SKWC further states that forcing it to meet the construction deadline will result in a loss of investment made by it to date and will cause undue hardship and unrecoverable financial burden on the company.<sup>10</sup> SKWC also asserts that the 220 MHz equipment situation represents a unique or unusual factual circumstance where application of the rule would be inequitable, unduly burdensome and contrary to the public interest in accordance with Commission rule section 1.925(3)(ii), but also is outside of the Company’s control and therefore falls squarely within extensions contemplated in Commission rule section 1.946(e).<sup>11</sup>

*Discussion.* A waiver may be granted, pursuant to section 1.925 of the Commission’s rules, if the petitioner establishes 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>12</sup> Further, section 1.946 of the Commission’s rules allows for an extension of time to meet construction requirements where a licensee demonstrates that failure to meet the construction deadline is due to circumstances beyond their control, but it also outlines reasons that would not justify an extension, such as a failure to obtain financing, or to obtain antenna sites or equipment.<sup>13</sup> However, the waiver standard and extension standards 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.<sup>14</sup>

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<sup>6</sup> 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 Red 12994 (WTB 2004) (*MO&O*).

<sup>7</sup> *MO&O* at ¶ 17.

<sup>8</sup> Extension Request at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 6.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> 47 C.F.R. § 1.925.

<sup>13</sup> 47 C.F.R. § 1.946(e).

<sup>14</sup> See 47 U.S.C §309(j)(4)(B).

We find that grant of a waiver of 5-year construction deadline, or an additional extension of time to construct call signs WPOJ265, WPOJ266, WPOJ267, WPOJ268, WPOJ269 and WPOJ270 is not warranted in this instance. 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.<sup>15</sup> While many licensees have taken advantage of this relief to meet applicable construction requirements and are providing service in the public interest, SKWC, after holding its licenses for eight years, has failed to provide any service to the public. 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 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.<sup>16</sup>

We find that SKWC has made certain business decisions relating to the use of the license and that the failure to timely construct the referenced stations is not the result of circumstances beyond its control. 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.<sup>17</sup> 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.<sup>18</sup> Finally, we note that prior to the 220 MHz auctions, the Commission stated that "[t]he Commission makes no warranties about the use of

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<sup>15</sup> 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*).

<sup>16</sup> Requests of Progeny LMS, LLC and PCS Partners, L.P., Waiver of Multilateration Location Monitoring Service Construction Rules, *Order*, DA 08-2614 (WTB 2008).

<sup>17</sup> 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).

<sup>18</sup> 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 CWD 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).

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.”<sup>19</sup>

For the reasons discussed above, we deny S.K. Warren Communications’ Request. Accordingly, call signs WPOJ265, WPOJ266, WPOJ267, WPOJ268, WPOJ269 and WPOJ270 automatically terminated on November 5, 2007, for failure to meet the construction requirements set forth in section 90.767 of the Commission's rules.<sup>20</sup> This action is taken pursuant to delegated authority under sections 0.131, 0.331, 1.955, and 90.767 of the Commission's rules.<sup>21</sup>

Sincerely,

Roger S. Noel  
Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>19</sup> *Third Report and Order*, 12 FCC Rcd at 10953 ¶ 19.

<sup>20</sup> 47 C.F.R. § 90.767.

<sup>21</sup> 47 C.F.R. §§ 0.131, 0.331, 1.955, 90.767.