



Federal Communications Commission
Washington, D.C. 20554

June 26, 2009

DA 09-1448

Tuchman & Brown Investment Inc. No.2
72 Dunbar Rd
Palm Beach Garden, FL 33418

ATTN: Jeffrey B. Brown

Re: Tuchman & Brown Investment Inc. No. 2's Request for Extension of Time of Five-Year Construction Requirement – Call Signs WPOI648 and WPOI649

Dear Mr. Brown:

This letter addresses Tuchman & Brown Investment Inc. No. 2's ("Tuchman/Brown") September 29, 2007 request to extend the five-year construction requirement with respect to 220 MHz licenses under call signs WPOI648 and WPOI649 ("Extension Request").¹ For the reasons discussed below, we deny the Extension Request, and find that the licenses WPOI648 and WPOI649 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 deadlines 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

¹ See Universal Licensing System (ULS) File Nos. 0003185533, 0003185537.

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 Red 12994 (WTB 2004) (*MO&O*).

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.⁷

Tuchman/Brown seeks a further extension for the subject licenses at least until March 22, 2009.⁸ Tuchman/Brown states that the lack of available 220 MHz, 5 kHz bandwidth land mobile radio technology has been, and continues to be the sole reason for the build-out delays, that are beyond its control.⁹ Tuchman/Brown also states that the only available technology that it has been able to identify is obsolete, and in most cases is second hand technology that has been removed from other systems that have been de-constructed because of commercial failure. Tuchman/Brown argues that using obsolete and second hand equipment will cause certain failure of the business venture, which will result in a loss of the licensee's investment and cause undue hardship.¹⁰ Tuchman/Brown further states that it believes that new, 220 MHz, 5 kHz bandwidth land mobile radio technology may be under preliminary development by one or more manufacturers, but the technology may not be available for at least 3 years, and possibly longer. Consequently, Tuchman/Brown seeks to extend the build-out deadline by at least three (3) years.

Discussion. Section 1.946 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 grant of an additional extension of time to construct call signs WPOI648 and WPOI649 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.¹⁴ While many licensees have taken advantage of this relief to meet applicable construction requirements and are providing service in the public interest, Tuchman/Brown, after holding the 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

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*).

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.¹⁵

We find that Tuchman/Brown has made certain business decisions relating to the use of the licenses and that the failure to timely construct the licenses 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.¹⁶ 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.¹⁷ Finally, we note that 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."¹⁸

For the reasons discussed above, we deny the Extension Request. Accordingly, the licenses under call signs WPOI648 and WPOI649 automatically terminated on November 5, 2007, for failure to meet the construction requirements set forth in section 90.767 of the Commission's rules.¹⁹ This action is

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 *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).

¹⁸ *Third Report and Order*, 12 FCC Rcd at 10953 ¶ 19.

¹⁹ 47 C.F.R. § 90.767.

taken pursuant to 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.