



Federal Communications Commission
Washington, D.C. 20554

June 26, 2009

DA 09-1449

Knox LaRue Separate Property Trust
2171 Ralph Avenue
Stockton, CA 95206

ATTN: Mr. Robert LaRue

Re: Knox LaRue Separate Property Trust's Request for Extension of Time of Five-Year Construction Requirement and Waiver – Call Signs WPOJ243, WPOJ244, and WPOJ245

Dear Mr. LaRue:

This letter addresses Knox LaRue Separate Property Trust's ("Trust") November 5, 2007 request for a three year extension of the five-year construction requirement with respect to 220 MHz licenses under call signs WPOJ243, WPOJ244, and WPOJ245 (Extension Request).¹ For the reasons discussed below, we deny the Request, and find that the licenses WPOJ243, WPOJ244, and WPOJ245 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

¹ See Universal Licensing System (ULS) File Nos. 0003222236, 0003222237, 0003222238.

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*).

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.⁷

The Trust requests a further 3-year extension for the subject licenses⁸ or, in the alternative, if the Commission finds that equipment is sufficiently available to allow a viable service, the Trust requests an extension of 180 days for it to explore equipment suggested by the Commission that could offer a viable service.⁹ The Trust states that it cannot invest in inferior, unsupported equipment that has not been designed to offer a viable radio service.¹⁰ The Trust argues that manufacturers' failure to make viable equipment could not have been foreseen or prevented by the Trust and is a circumstance beyond its control, leaving it "at the mercy" of equipment manufacturers.¹¹ The Trust also states that challenges related to availability of equipment have not changed since the Bureau provided relief and additional time is needed for equipment manufacturers to catch up with demand from licensees seeking to offer commercially viable service.¹² The Trust adds that it is unrealistic and nearly punitive to require licensees to construct facilities merely to meet administrative requirements when such action would not result in viable service.¹³ The Trust further adds that the public interest is served by constructing facilities to provide service to the public, not merely to save a license.¹⁴

Discussion. 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.¹⁵ The applicable extension standard must be considered in conjunction with 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.¹⁶ In addition, 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.¹⁷

We find that grant of a further extension of the five-year construction deadline for call signs

⁷ *MO&O* at ¶ 17.

⁸ Extension Request at 1.

⁹ *Id.* at 3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 2.

¹² *Id.* at 4.

¹³ *Id.* at 3.

¹⁴ *Id.* at 3.

¹⁵ 47 C.F.R. § 1.946(e).

¹⁶ See 47 U.S.C §309(j)(4)(B).

¹⁷ 47 C.F.R. § 1.925.

WPOJ243, WPOJ244, and WPOJ245 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.¹⁸ Many 220 MHz licensees have taken advantage of this relief to meet applicable construction requirements and are providing service in the public interest. Despite holding licenses originally issued in 1999 since 2005, the Trust has failed to provide any service to the public, and 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 the 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 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.¹⁹

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.²⁰ 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."²¹ We find that the Trust's decision not to pursue another service application for which equipment is currently available is a business decision and not a circumstance beyond its control. We provide licensees with substantial flexibility in their system design to meet our build-out requirements

¹⁸ 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*).

¹⁹ Requests of Progeny LMS, LLC and PCS Partners, L.P., Waiver of Multilateration Location Monitoring Service Construction Rules, *Order*, DA 08-2614 (WTB 2008).

²⁰ 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).

²¹ *Third Report and Order*, 12 FCC Rcd at 10953 ¶ 19.

and decline, as the Trust requests, to “cite to” equipment which the Trust might find will result in viable service. As stated above, we do not find that an extension in this instance is warranted, particularly where, unlike the M-LMS service, equipment options do exist in the 220 MHz band and other licensees are in fact providing service. We also find our action today to be consistent with our treatment of licensees in 218-219 MHz service where regulatory relief was initially granted based on equipment difficulties. In those cases, we denied the licensees’ further requests for extended relief based in part on the determination that the licensees made business decisions to not initiate service notwithstanding the availability of equipment.²²

We also note that the Trust captions its pleading as a request for extension of time and a request for waiver of Commission rules, specifically rule section 1.946. However, the Trust does not reference the waiver standard set forth in section 1.925²³ applicable to requests for waiver, nor does it present any arguments pursuant to the prongs of that standard. Nonetheless, to the extent a waiver is requested, we do not believe that in this instance an additional extension would serve the underlying purpose of the construction rules. Further, we do not find that enforcement of the construction benchmark is inequitable, unduly burdensome or contrary to the public interest because equipment options do exist in the 220 MHz band and other licensees are providing service.

For the reasons discussed above, we deny Knox LaRue Separate Property Trust’s Request. Accordingly, call signs WPOJ243, WPOJ244, and WPOJ245 automatically terminated on November 5, 2007, for failure to meet the construction requirements set forth in section 90.767 of the Commission’s rules.²⁴ This action is taken pursuant to delegated authority under sections 0.131, 0.331, 1.925, 1.955, 90.146 and 90.767 of the Commission’s rules.²⁵

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

cc: Robert H. Schwaninger, Jr.
Schwaninger & Associates, P.C.
1331 H Street, NW, Suite 500
Washington DC, 20005

²² 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).

²³ 47 C.F.R. § 1.925.

²⁴ 47 C.F.R. § 90.767.

²⁵ 47 C.F.R. §§ 0.131, 0.331, 1.925, 1.955, 90.146, 90.767.