

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

In the Matter of
Joint Request by Stratophone, LLC and SkyTel Spectrum, LLC for Waiver of Certain Air-to-Ground Radiotelephone Service Licensing Rules for General Aviation
WT Docket No. 09-44

ORDER

Adopted: July 2, 2010

Released: July 2, 2010

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. This Order grants a request for waiver of sections 22.815 and 22.817 of the Commission’s rules governing the general aviation air-ground radiotelephone service (“Waiver Request”) jointly filed by Stratophone, LLC (“Stratophone”) and SkyTel Spectrum, LLC (“SkyTel,” and collectively with Stratophone, “Petitioners”).

1 47 C.F.R. §§ 22.815, 22.817.

2 Waiver Request of Stratophone, LLC and SkyTel Spectrum, LLC, filed Feb. 24, 2009 (“Waiver Request”). See also Letter from Doane F. Kiechel, Esq., Counsel for Stratophone, LLC, to Marlene H. Dortch, Secretary, FCC, dated Aug. 21, 2009 (“August Supplement”) (which includes, inter alia, a Declaration of Albert Gencarella, Vice President of Stratophone (“Gencarella Decl.”), service coverage maps, and certain FAA data); and Letter from Doane Kiechel, Esq., Council for Stratophone, LLC, and Elizabeth R. Sachs, Esq., Counsel to SkyTel Spectrum, LLC, to Nina Shafran, Wireless Telecommunications Bureau, FCC, dated Oct. 16, 2009 (“October Supplement”).

3 The Wireless Telecommunications Bureau (“Bureau”) released a Public Notice inviting comment on Petitioners’ Waiver Request. See Comment Cycle Established for Joint Request by Stratophone, LLC and Skytel Spectrum, LLC for Waiver of Certain Air-To-Ground Radiotelephone Automated Service Licensing Rules for General (Private/Non-Commercial) Aviation, Public Notice, WT Docket No. 09-44, 24 FCC Rcd 3651 (WTB 2009) (“Public Notice”). See also 47 C.F.R. § 1.925(c)(i). Two parties separately submitted one-page letters in support on the petition. See Letter from Dana B. Fisher to Nina Shafran, dated May 12, 2009; and Letter from David L. Davidson, Vice President, Corporate Jet Partners, to Marlene Dortch, Secretary, FCC, dated May 20, 2009. Although both letters were posted after the reply comment period, we will consider them as ex parte submissions.

4 The Commission’s rules governing radiotelephone service to airborne mobile subscribers in general aviation aircraft are primarily found in Part 22, Subpart G. See 47 C.F.R. §§ 22.801-22.817. Air-ground service for commercial aviation systems operates in different frequency bands and is governed by separate rules. See 47 C.F.R. §§ 22.801 and 22.853 et seq.

5 Waiver Request at ii.

6 47 C.F.R. § 22.817 (introductory paragraph, (a)-(c), and (e)).

channels in the same service area.⁷ Petitioners also ask the Commission to waive the 12-month construction period requirement of section 22.815 to allow an extended build-out period of 24 months for their planned nationwide network. For the reasons stated below, we grant Petitioners' Waiver Request to the extent described herein, with certain specified conditions. In addition, as explained further below, we waive on our own motion⁸ subsection 22.813(a),⁹ to the extent described herein, and subsection 22.813(b)¹⁰ with a condition.

I. BACKGROUND

2. The Commission has allocated 12 communication channel pairs in the 454.700-454.975 MHz and 459.700-459.975 MHz bands for general aviation air-ground use.¹¹ The Commission's Universal Licensing System ("ULS") database shows that, as of July 1, 2010, there are 60 active general aviation air-ground licenses/call signs. Of these, 45 are held by SkyTel, with locations throughout the country,¹² and 11 are held by Stratophone, primarily in the Northeast and Mid-Atlantic regions.¹³ Petitioners note that the coverage for their combined operations extends throughout most of the United States with overlapping service contours.¹⁴ Three other entities hold the remaining 4 licenses/call signs.¹⁵

3. Petitioners claim that, while the general aviation industry has been in strong growth mode,¹⁶ the industry is underserved in telecommunications products. Petitioners state that, whereas

⁷ 47 C.F.R. § 22.817 (introductory paragraph, (a) and (f)).

⁸ See 47 C.F.R. § 1.925(a) (stating the "Commission may waive specific provisions of the rules on its own motion . . .").

⁹ 47 C.F.R. § 22.813(a).

¹⁰ 47 C.F.R. § 22.813(b).

¹¹ See 47 C.F.R. § 22.805. A thirteenth "signaling channel pair" -- 454.675 MHz (ground) and 459.675 MHz (airborne mobile) -- is assigned to every licensee's ground station. See *id.* § 22.805(a) (noting that the signaling channel is "to be used only for automatically alerting airborne mobile stations of incoming calls.").

¹² SkyTel reports holding this same number of licenses/call signs. See Waiver Request at 1 (also reporting it was acquired by Velocita Wireless, Inc., a subsidiary of United Wireless Holdings, Inc.). Pursuant to Commission consent granted December 10, 2008, SkyTel acquired licenses (which it formerly leased) from Bell Industries, Inc. in a transaction consummated May 16, 2009. See FCC File No. 0003385370.

¹³ See Waiver Request at 1 (reporting, as of the date the Waiver Request was filed, that Stratophone held 9 licenses/call signs).

¹⁴ See August Supplement, *supra* note 2.

¹⁵ ULS data show that Able Communications LTD and Verizon Florida Inc. each hold one license/call sign, and that Mobile Radio Communications, Inc. holds two.

¹⁶ Gencarella Decl. ¶¶ 3, 5 (clarifying data provided in Waiver Request at 2-3 and citing General Aviation and Part 135 Activity Surveys – CY 2007, Tables 1.1 through 1.8, *available at* http://www.faa.gov/data_research/aviation_data_statistics/general_aviation/CY2007/) ("FAA 2007 Survey Data"). Relying on FAA forecasts through the year 2025, Petitioners assert that larger classes of jets, turbo props and rotor aircraft are expected to continue to grow, as is the number of total hours flown in these aircraft. Gencarella Decl. ¶ 4 (clarifying data provided in Waiver Request at 2-3 and citing FAA Aerospace Forecasts FY 2009-2025, Table 27, "Active General Aviation and Air Taxi Aircraft," and Table 28, "Active General Aviation and Air Taxi Hours Flown," *available at* http://www.faa.gov/data_research/aviation/aerospace_forecasts/2009-2025/) ("FAA Forecast Data 2009-2025"). Petitioners attribute expected growth to popularization of "Very Light Jets ("VLJs") . . . [which] have fostered a new class of jet service [known] as 'Air Taxis'" that transport individuals to smaller airports "without time-consuming connections." Waiver Request at 2-3 (explaining that new concepts such as fractional ownership make private flights more affordable).

Federal Aviation Administration data show more than 230,000 active aircraft (general aviation and air taxi of all types),¹⁷ “only about 11,000 have telecommunications services, other than required aeronautical frequencies.”¹⁸ Of those, they report, only a small fraction -- “approximately 1,200 active subscribers” -- use the general aviation air-ground service.¹⁹ Petitioners acknowledge that the licensees of two other services -- (1) AirCell, using Iridium Satellite service,²⁰ and (2) LiveTV²¹ -- have made efforts to provide advanced services to general aviation aircraft. Noting, however, that both the AirCell and LiveTV licensees operate in the commercial aviation band,²² Petitioners predict that both will continue their historically heavy focus on commercial aviation business, as “upwards of two million passengers” fly daily on commercial airlines, compared to only several million *monthly* on general aviation flights.²³

4. Petitioners argue that current general aviation air-ground service offerings are out-dated and cannot meet the needs of the general aviation industry. General aviation air-ground providers currently use Air-Ground Radiotelephone Automated Service technology, or AGRAS, a standardized duplex analog technology employed to provide telephone service to general aviation subscribers.²⁴ Ground stations connect callers with the Public Switched Telephone Network (“PSTN”) using equipment installed on aircraft. The airborne caller gets service when there is an available ground station to receive the wireless transmission and connect the call to the PSTN. Notably, current general aviation air-ground systems are not designed for call hand-off, as each ground station is independently connected to the PSTN, not to other ground stations. Once an airborne person on a call travels out of the ground station’s range (typically 100 to 200 miles), that call is terminated automatically and the caller must redial to reconnect to the PSTN, via the next available ground station.²⁵ Petitioners describe a vicious cycle: the “need for interconnection to the PSTN at each site also increases equipment requirements and maintenance costs for each site, and this in turn causes subscriber billing to be more costly and inefficient” as licensees strive to recoup costs, but the resulting higher price discourages new subscribers

¹⁷ See FAA 2007 Survey Data, *supra* note 16, Table 1.2.

¹⁸ Gencarella Decl. ¶ 5.

¹⁹ Waiver Request at 3 (noting these subscribers “include corporate aircraft, charter airline services, fractional ownership aircraft and government agency aircraft”). See also Gencarella Decl. ¶ 8. As Petitioners point out, Part 22 cellular telephones are banned from in-flight use on all aircraft. See 47 C.F.R. § 22.925.

²⁰ See Waiver Request at 3. See also www.aircell.com (stating, *inter alia*, that Aircell acquired commercial air-to-ground broadband frequencies by FCC auction in 2006 and offers services to commercial airlines, business aviation, and other aviation classes).

²¹ See Waiver Request at 3. See also www.teledyne-controls.com/productsolution/MagnaStar.asp (including a letter dated Oct. 6, 2008 announcing LiveTV’s purchase of the Verizon Airfone Network, stating a commitment to offering services to the general aviation market as well as commercial airline passengers, noting also that “LiveTV is the world’s leading provider” of communications services for commercial airlines.).

²² See *supra* note 4.

²³ Gencarella Decl. ¶ 7; Waiver Request at 3.

²⁴ See, e.g., Nathan J. Muller, *Desktop Encyclopedia of Telecommunications* 15-17 (3d ed. 2002). See also Waiver Request at 2. According to Petitioners, current technology supports voice-only communications, although the spectrum in theory permits data signals as well. As Petitioners also note, there is a separate communications system for aviation flight communications. See *id.* at 3. The general aviation air-ground service is not used for that purpose.

²⁵ See Waiver Request at 4. Also, because most sites have only one or two channels in operation, callers may experience delays before they can re-dial to resume a dropped call.

and even existing subscriber retention.²⁶ Further, another key factor contributing to the general aviation air-ground service's downturn, Petitioners observe, is that AGRAS-compatible equipment has not been produced for at least ten years.²⁷ As Petitioners explain, subscribers must attempt to replace equipment or parts through non-traditional and resale sources.²⁸

5. Petitioners wish to consolidate their existing operations and focus their combined resources on revitalizing their general aviation air-ground systems by deploying a new, upgraded digital telecommunications network.²⁹ They propose to create a new entity jointly owned and controlled by Stratophone and Skytel, with each contributing its currently-held licenses and operations to the new entity.³⁰ However, Petitioners argue that the main stumbling block in upgrading their operations is the current regulatory framework, especially the procedural requirements of section 22.817, which states in pertinent part:

The general policy . . . is to assign one ground station communications channel in an area to a carrier per application cycle, up to a maximum of six . . . channels per area. That is, a carrier must apply for one . . . channel, receive the authorization, construct the station, and notify the FCC of commencement of service before applying for an additional . . . channel in that area.³¹

6. Petitioners assert they must be capable of providing adequate capacity to justify the anticipated cost of building a new network.³² The general aviation air-ground service is allotted approximately 0.64 MHz of bandwidth -- 0.32 MHz for the ground station, and 0.32 MHz for the airborne mobile unit.³³ Petitioners maintain that this small amount makes it critical to be able to use efficiently all spectrum available, so as to better construct a system offering competitive services at competitive rates.³⁴ They argue that section 22.817's six-channel cap, however, prevents full use of the available spectrum.³⁵ Petitioners state that upon grant of the Waiver Request, they would submit modification applications to request available general aviation air-ground channels (*i.e.*, up to 12) at their already authorized locations, noting also that certain existing sites may need to be relocated to facilitate automatic hand-off.³⁶

²⁶ *Id.* at 4-5.

²⁷ *See id.* at 5.

²⁸ *Id.* at 5.

²⁹ *Id.* at 1.

³⁰ Gencarella Decl. ¶ 9; Waiver Request at 6 (recognizing that such transactions would entail seeking/securing any FCC approvals that might be required).

³¹ 47 C.F.R. § 22.817 (introductory paragraph). Subsections 22.817(a) through (f) set out the various procedural steps in detail. *See id.* §§ 22.817(a) through (f).

³² *See* Waiver Request at 11.

³³ *See* 47 C.F.R. § 22.805.

³⁴ Waiver Request at 5. Petitioners state that air-to-ground licensees in other aviation services have up to 3 MHz of contiguous spectrum which can be fully used within their service area to build networks. *See* Waiver Request at 5. Petitioners complain that Aircell and Live TV "are not subject to the same licensing restrictions . . . but rather are governed by the commercial aviation rules, even though they can (and do) provide service to general aviation and government aircraft. In short, they compete with [general aviation air-ground] providers, but because of the licensing advantages they enjoy, there is not a level playing field." Gencarella Decl. ¶ 5.

³⁵ Waiver Request at 4.

³⁶ *Id.* at 6, n.7.

Petitioners state they will then continue to request available multi-channel, site-based licenses for future facilities.³⁷ Because of the limited spectrum allocated to a channel (20 kHz), Petitioners seek the ability to control “all available channels at approximately forty sites” to assure sufficient capacity at each location to justify their investment in a new, integrated network.³⁸ Petitioners state that they also will endeavor to acquire licenses currently held by others.³⁹

7. Petitioners argue it is “absolutely necessary” to their venture to secure waiver of both sections 22.817 and 22.815; otherwise, they will forego creating a new entity and will abandon their plans to upgrade the network.⁴⁰ “The piecemeal licensing approach required by the current rules,” they contend, “would result in prohibitive costs and delays in building out a nationwide network and preclude [Petitioners’] ability to obtain adequate financing for the project.”⁴¹

8. Petitioners state they will not apply for channels that would not provide the requisite distance-separation protection to third parties under section 22.813(a).⁴² Petitioners also claim that grant of the Waiver Request would not preclude others from applying for available general aviation air-ground channels, but they maintain that “in virtually all cases,” third parties would have their applications denied because of the distance separation requirements *vis-a-vis* Petitioners’ existing facilities.⁴³

9. Petitioners assert that, given that they as well as all others are stymied from acquiring all desired channels in the existing regulatory framework, the general aviation air-ground service will only continue to stagnate further if the Waiver Request is denied. In contrast, they argue, with grant of the Waiver Request, they will develop a “modern[] nationwide Air-Ground network to service passengers in the growing general (private) aviation industry” at competitive prices and ensure “ubiquitous coverage throughout the United States.”⁴⁴ Thus, they claim, their proposal serves the public interest.

II. DISCUSSION

10. Section 1.925 of the Commission’s rules states in pertinent part that the Commission may grant a waiver when either (i) “[t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and . . . grant of the requested waiver would be in the public interest,” or (ii) “[i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”⁴⁵

11. The general aviation air-ground rules at issue were introduced in a 1992 Notice of Proposed Rule Making, which entailed a rewrite of much of Part 22.⁴⁶ In seeking to streamline the

³⁷ *Id.* at 6.

³⁸ *Id.* at 7; Gencarella Decl. ¶¶ 9-10.

³⁹ *Id.* at 6.

⁴⁰ *Id.* at 9; Gencarella Decl. ¶ 9.

⁴¹ Gencarella Decl. ¶ 9.

⁴² *See, e.g.*, Waiver Request at 9; Gencarella Decl. ¶ 9.

⁴³ Waiver Request at 7.

⁴⁴ *Id.* at ii.

⁴⁵ 47 C.F.R. §§ 1.925 (b)(3)(i)-(ii).

⁴⁶ Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services, *Notice of Proposed Rule Making*, CC Docket No. 92-115, 7 FCC Rcd 3658 (1992) (“*Part 22 Rewrite NPRM*”). Prior to the *Part 22 Rewrite* (continued....)

process by which Part 22 licensees could request additional channels for existing systems, the Commission explained its goal to “allow licensees that need additional channels the opportunity to obtain them, while continuing to provide an adequate safeguard against warehousing.”⁴⁷ Specifically regarding section 22.817’s six-channel cap, the Commission aimed to “promote competition and to prevent warehousing.”⁴⁸ The Commission also proposed a new section 22.813 establishing technical channel assignment criteria for general aviation air-ground service, including limits on distance separation and on the number of channels allowed within a certain radius of proposed antenna locations. “We believe,” the Commission stated, “that the proposed [section 22.813] would ensure that nationwide coverage is maintained, while allowing more flexibility for licensees to respond to local air-ground markets.”⁴⁹ While the Commission did not seek to change the construction period requirement for general aviation air-ground facilities, it proposed a “new” section 22.815 in the *Part 22 Rewrite NPRM* that retained the same 12-month build-out period then in effect pursuant to former section 22.43(a)(2).⁵⁰

12. The Commission issued its Report and Order in the Part 22 proceeding in 1994, adopting the general aviation air-ground provisions as proposed, without revision.⁵¹ The *Part 22 Rewrite R&O* devoted little discussion to adoption of new general aviation air-ground service rules, stating the following purposes of the additional channel policy and the technical channel assignment criteria:

- (1) to maintain a nationwide in-route coverage, by prohibiting the future assignment of more than half of the channels in any general geographic area;
- (2) to limit co-channel interference for aircraft flying at low and moderate altitudes, by maintain spacing between co-channel ground stations;
- (3) to establish and preserve competition among air-ground carriers, by allowing the possibility of multiple providers at any location and by preventing any one carrier from obtaining exclusive use of more than half of the channels in any general geographic area; and
- (4) within the constraints of the first three goals, to allow flexibility in ground station locations to meet demand for general aviation air-ground radiotelephone service, by eliminating the allotment table and requirement for rule making proceedings to amend it.⁵²

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proceeding, the general aviation air-ground rules included an allotment table that fixed the location of base stations and regulated the channels allowed to operate at each location. The purposes of the table were to insure that nationwide in-route service would be possible, that channels would be initially allotted according to the level of air traffic activity, that co-channel interference would not occur for aircraft at low and moderate altitudes, and that each ground station would have a substantial service volume. *Id.* However, changes to the allotment table could only be accomplished by a rule making proceeding. Further, only one licensee could operate at a given location, even if additional channels were available.

⁴⁷ *Id.* at 3660.

⁴⁸ *Id.* at 3672.

⁴⁹ *Id.*

⁵⁰ *Id.* at 3658; 47 C.F.R. § 22.43(a)(2) (1992).

⁵¹ See Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services, *Report and Order*, CC Docket Nos. 92-115, 94-46, and 94-201, 9 FCC Rcd 6513 (1994) (“*Part 22 Rewrite R&O*”). See also *id.*, Appendix A at 6570 (also adopting other rules for general aviation air-ground stations, but without discussion or reference to specific commenters). The Commission stated that, “[i]n general,” the parties’ comments supported the proposed new [general aviation air-ground] rules. *Id.*, 9 FCC Rcd at 6570. Subsequently, the Commission received 37 petitions for reconsideration of the *Part 22 Rewrite R&O*, but did not report any that opposed or otherwise addressed the general aviation air-ground rules. See Revision of Part 22 of the Commission’s Rules Governing the Public Mobile Services, *Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd 7463, 7464 (2000).

⁵² *Part 22 Rewrite R&O*, Appendix A, 9 FCC Rcd at 6569.

13. Considering the totality of the circumstances on the record before us, including the outdated and declining state of current AGRAS-based service offerings, the unavailability of equipment, the policies underlying the rules at issue, and the unique position of Petitioners, which collectively hold most of the active licenses (with operations throughout most of the United States), we find that the public interest, convenience and necessity would be served by granting limited waiver relief, as described below. We are persuaded that, absent such relief, the general aviation industry will be deprived of “a long-overdue modern and affordable voice communication network,”⁵³ and the general aviation air-ground spectrum will continue to be under-utilized.

14. Waiver relief in this case is consistent with court decisions,⁵⁴ and with Commission precedent.⁵⁵ We also recognize the Commission’s statutory mandate to “generally encourage the larger and more effective use of radio in the public interest,”⁵⁶ and specifically to “encourage the provision of new technologies and services to the public.”⁵⁷ Petitioners propose to use the available spectrum more efficiently for a new integrated network. This promises to result in lowered construction and maintenance costs, which in turn promises an increase in the scope and quality of services offered, and lower prices for subscribers. A modernized competitive system may also stimulate the growth of additional products and services. Encouraging Petitioners’ endeavor thus falls also within the spirit of our statutory mandate. Our specific reasoning concerning each provision is provided under the respective rule headings below.

15. *Waiver of Section 22.817.* As noted above, a key goal of section 22.817 was “to establish and preserve competition . . . by allowing the possibility of multiple providers at any location. . . .”⁵⁸ We agree with Petitioners that, in this case, interested parties have had substantial opportunity to apply for

⁵³ Waiver Request at 1.

⁵⁴ See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969) (holding that the FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest), appeal after remand, 459 F.2d 1203 (D.C. Cir. 1972), cert. denied, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990) (holding that a waiver of the Commission’s rules may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question).

⁵⁵ See, e.g., Request of PTC-220, LLC for Waivers of Certain 220 MHz Rules, *Memorandum Opinion and Order*, WT Docket No. 08-256, 24 FCC Rcd 8537 (WTB 2009) (granting waiver, noting the licensee’s plan for a “comprehensive deployment of a nationwide, fully integrated” system); Hawaiian Wireless Partners, *Order*, 11 FCC Rcd 21192, 21197 (WTB 1996) (“*HWP Order*”) (finding waiver warranted as it would enable HWP to implement digital SMR service, including construction of 33 new sites, and because “the HWP plan does not prejudice any other existing or potential SMR licensees”); *SkyTel Waiver Order*, 8 FCC Rcd at 2797-98 (noting that SkyTel, which proposed “to fully integrate its nationwide paging network,” was in a unique position as the only carrier that had obtained authorizations to use 931.4375 MHz frequencies throughout the nation, and finding that waiver of the rule would “increase the scope of services available to nationwide network . . . subscribers and possibly increase the number of subscribers,” and also “benefit the public by reducing construction costs . . . , thereby lowering the costs at which the service can be made available”). See also Letter from Ralph A. Haller, Chief, Private Radio Bureau, to Mr. David E. Weisman, Meyer, Faller, Weisman and Rosenberg, P.C., 8 FCC Rcd 143 (Private Radio Bureau 1992) (“*Weisman Letter*”) (clarifying it would grant waivers where relevant frequencies “could not be used by any other applicant to develop a viable system” and noting prior waivers for proposals “to increase spectrum efficiency substantially”).

⁵⁶ 47 U.S.C. § 303(g).

⁵⁷ 47 U.S.C. § 157(a).

⁵⁸ *Part 22 Rewrite R&O*, 9 FCC Rcd at 6569.

channels throughout the United States. Aside from SkyTel and Stratophone, three other companies operate only a few general aviation air-ground facilities, using the same out-dated technology at relatively high cost to subscribers. Moreover, no one filed in opposition to Petitioners' request, suggesting little or no third-party interest in additional channels. To the contrary, authorizations have been returned or have been allowed to expire by licensees.

16. We also find that waiver of section 22.817 is not likely to result in harm to others in so far as future licensing by a third party is unlikely due to co-channel separation requirements. We agree with Petitioners' assessment that the co-channel separation distance requirement in section 22.813 would limit the ability of third parties to apply for new channels and put into operation a viable network given Petitioners' existing deployment.⁵⁹ Petitioners argue that the Commission has granted waiver relief in analogous instances.⁶⁰ They cite the *HWP Order*, among other cases, as support for the relaxation of licensing requirements aimed at promoting competition and deterring spectrum warehousing, such as an "additional channel policy," in circumstances where channels are unavailable to future third party licensing due to rules requiring minimum distances between co-channel licensees.⁶¹ We agree that the *HWP Order* provides appropriate guidance in this matter. We are persuaded that strict application of section 22.817—*i.e.*, limiting Petitioners to six channels, and requiring them to complete construction on one channel in an area before seeking an additional channel—is not in the public interest, given the improbability of future third-party licensing.

17. We believe that, rather than undermining the goal of competition, waiver of section 22.817 in this instance will promote competition and innovation, promising general aviation aircraft owners and passengers up-to-date and reasonably-priced alternatives to other air-ground services. Existing general aviation air-ground facilities were constructed using the modern technology of the day and met user expectations at the time. Since then, subscribers' needs and expectations have evolved dramatically. The technologies and services offered to consumers on the ground have evolved to a staggering degree. In stark contrast to the scenario in wireless communications 16 years ago, consumers today are accustomed to virtually ubiquitous, reliable, terrestrial mobile services at very low cost, with automatic call hand-off and an increasingly broad scope of features and services. Mobile communications for general aviation aircraft, however, have lagged woefully behind. Also, with the low number of aircraft currently subscribing to the general aviation air-ground service – a tiny fraction of the

⁵⁹ See 47 C.F.R. § 22.813(a). Subsection 22.813(a) specifies that applications will not be granted to assign a channel unless the proposed antenna location is at least 800 kilometers (497 miles) from the nearest co-channel ground transmitter.

⁶⁰ See October Supplement at 2.

⁶¹ In the *HWP Order*, Petitioners explain, the Bureau waived a similar "additional channel policy" that required 800 MHz Specialized Mobile Radio ("SMR") licensees to complete construction and commence service to subscribers on one channel in an area before seeking an additional channel. See October Supplement at 2, citing *HWP Order*, 11 FCC Rcd at 21197. The Bureau granted the waiver to "enable HWP to construct thirty-three new lower power sites throughout Oahu so that it [could] implement digital SMR service throughout the island," noting also that "the HWP plan does not prejudice any other existing or potential SMR licensees . . ." *HWP Order*, 11 FCC Rcd at 21197. Petitioners claim that the additional channel policy in the *HWP Order* "was intended to prevent spectrum warehousing" and that the channels at issue were, as here, unavailable to third parties because of the "applicable co-channel protection standards." See October Supplement at 2-3, citing *HWP Order*, 11 FCC Rcd at 21197. We note that the *HWP Order* also granted a limited waiver of a freeze on 800 MHz SMR applications. The Bureau concluded that, in light of co-channel separation requirements, a waiver of the application freeze would not infringe on any new spectrum or previously uncovered geographical area that could be licensed to any other entity. *HWP Order*, 11 FCC Rcd at 21195-96.

total number of general aviation aircraft in use today,⁶² there is no incentive to manufacture equipment for the existing AGRAS technology. Grant of the Waiver Request would permit Petitioners to leverage recent technological advances and make more effective use of the spectrum.

18. Accordingly, we conclude that a waiver of section 22.817 is appropriate.⁶³ This will provide the flexibility Petitioners need to proceed expeditiously.⁶⁴ Although we anticipate that Petitioners will, as they have stated, apply for all available channels simultaneously within months of our grant of the Waiver Request, we condition our waiver of section 22.817 on Petitioners' submission of all applications within six months of the release of this decision.

19. *Waiver of Section 22.815.* As noted, Petitioners seek to convert what are effectively independent, analog ground stations into a more technologically advanced and integrated nationwide system. Not only will Petitioners be deploying a more advanced digital network on existing as well as new sites, they will also be transitioning current customers to the new system.⁶⁵ We find that Petitioners' proposal to integrate their operations into an upgraded, more spectrally efficient telecommunications system presents unique and special circumstances justifying waiver of section 22.815's 12-month construction requirement.

20. We find that a limited two-year extension of the construction period as requested by Petitioners will not undermine the policy against spectrum warehousing. In light of the ambitious scope and technical complexity of Petitioners' project, we agree that Petitioners require more than the usual 12-month construction period to complete deployment, the end result of which will be an integrated nationwide network that fully utilizes all available channels. Moreover, we are persuaded that Petitioners are committed to placing their new system into operation as quickly as possible. They intend to apply for all available channels concurrently at approximately 40 sites.⁶⁶ In addition, they plan to commence negotiations with other general aviation air-ground licensees as soon as their Waiver Request is granted, with the hope of integrating third-party channels into their new network.⁶⁷

⁶² See *supra* ¶ 3.

⁶³ Petitioners seek explicit confirmation that the Commission would not dismiss applications under subsection 22.817(e) if filed for more than one additional channel at a time, nor dismiss applications under subsection 22.817(f) if filed for a seventh through twelfth channel. In waiving section 22.817, we affirm that applications for more than one channel at a time would not be dismissed as premature under section 22.817(e), provided, however, that in seeking a seventh-through-twelfth channel in the same geographic area, Petitioners must comply with our conditions in waiving section 22.813, as discussed *infra*.

⁶⁴ Petitioners wish to include multiple channels for a given site on a single application and pay a single application fee for each such bundled application. Gencarella Decl. ¶ 10. We will require Petitioners to include all channels for a particular site on a single application. However, Petitioners must file a formal request for waiver of fees with the Commission's Office of Managing Director ("OMD"). In the absence of an OMD fee waiver, Petitioners will be required to pay the normal per-channel filing fee, notwithstanding the requisite inclusion of multiple channels on a single application. General aviation air-ground licenses are authorized on a per-site and per-frequency basis. Regardless of the methods used in the system's design and implementation, each frequency and site must ultimately be licensed individually.

⁶⁵ Petitioners plan to keep their existing channels active and then allow some additional time period to enable subscribers to transition to the new system. See Gencarella Decl. ¶ 12.

⁶⁶ See Waiver Request at 9; Gencarella Decl. ¶ 10.

⁶⁷ See Gencarella Decl. ¶ 12.

21. There is ample precedent for waiver of construction deadlines in special circumstances, such as where severe operating conditions prevent construction within the requisite timeframe,⁶⁸ or where, as here, licensees have sought additional time to transition from traditional site-specific operations to complex wide-area systems.⁶⁹ In light of the magnitude and complexity of the proposal⁷⁰ and the prospect of more efficient use of the spectrum with benefits for consumers, a waiver of section 22.815 serves the public interest. Accordingly, we provide Petitioners with a two-year period to construct any site within its proposed integrated system. The two-year period will run from the end of the six-month application period set forth above.

22. *Waiver of Section 22.813.* The Part 22 rulemaking proceeding, as discussed above, added technical criteria to replace the allotment table that previously fixed the location of base stations and regulated the channels available to operate at each location.⁷¹ Section 22.813 sets forth those criteria “intended to provide substantial service volumes over areas that have significant local and regional general aviation activity, while maintaining the continuous nationwide in-route coverage of the original geographical layout.”⁷² Subsection 22.813(a), designed to protect co-channel licensees from harmful interference, specifies that applications will not be granted to assign a channel unless the proposed antenna location is at least 800 kilometers (497 miles) “from the antenna location of the nearest co-channel ground transmitter in the United States, its territories and possessions”⁷³ Subsection 22.813(b), entitled “Dispersion” and intended to ensure that channels are available to bridge any regional gaps in service, specifically provides that the Commission will grant an application “only if there are no more than five different communication channel pairs already assigned to ground transmitters with antenna locations within a 320 kilometer (199 mile) radius of the proposed antenna location.”⁷⁴ Petitioners have not requested a waiver of either of these two subsections.

23. Petitioners state their “assum[ption] that the distance separation requirements (subsection 22.813(a)) and the dispersion requirements (subsection 22.813(b)) would not apply in the case of a single carrier,”⁷⁵ and assert that Stratophone and SkyTel are “able to concur with their own managed ‘short-spaced’ use of these channels.”⁷⁶ Contrary to their assumption, however, there is no exception to the

⁶⁸ See, e.g., Letter from Roger S. Noel, Chief, Mobility Division, WTB, to Stefan M. Lopatkiewicz, Esq., *Order*, 24 FCC Rcd 7380 (WTB 2009) (waiving a 12-month build-out requirement under 47 C.F.R. § 22.946); Letter from Michael Ferrante, Associate Chief, Mobility Division, WTB, to Stefan M. Lopatkiewicz, Esq., *Order*, 22 FCC Rcd 16273 (WTB 2007).

⁶⁹ See, e.g., Request of Fleet Call, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 1533, 1536 (1991) (noting that, through the use of vastly improved technology, applicant would be able to offer more of all permitted services in the spectrum available to it, and finding that the “expense and technical complexity of developing and building [the proposed wide-area digital SMR system] make it “virtually impossible . . . to meet the one-year construction deadline”). See also *Weisman Letter*, 8 FCC Rcd at 143.

⁷⁰ See, e.g., *Weisman Letter*, 8 FCC Rcd at 143 (clarifying that the Private Radio Bureau would waive construction build-out requirement in cases presenting unique circumstances and also based on the “magnitude and complexity of the proposals”).

⁷¹ See *supra* note 46.

⁷² 47 C.F.R. § 22.813.

⁷³ 47 C.F.R. § 22.813(a) (establishing a separate distance separation minimum of 1000 km (621 miles) with respect to a co-channel ground transmitter in Canada).

⁷⁴ 47 C.F.R. § 22.813(b).

⁷⁵ Waiver Request at 9 n.11.

⁷⁶ Waiver Request at 7 (citation omitted).

applicability of these provisions. There is no provision in our rules that permits a single general aviation air-ground carrier to short-space its own facilities,⁷⁷ nor may seven or more channels be authorized within a given 320-kilometer area, regardless of whether the channels are licensed to a single licensee or different licensees. In light of the unique circumstances of this case, however, we find that it serves the public interest to grant, on our own motion, a limited waiver of subsections 22.813(a) and (b).⁷⁸ In the absence of such waiver relief, the benefits to be derived from waiver of sections 22.817 and 22.815 could not be realized.⁷⁹

24. We acknowledge that existing co-channel licensees must be protected under subsection 22.813(a) from unacceptable interference, and waive the rule's distance separation requirement solely with respect to Petitioners' own facilities (including those that will be held by any future joint venture entity). We emphasize the importance of continued compliance with subsection 22.813(a) in all other cases.⁸⁰ No other licensee will be required to accept harmful interference, nor to alter its operations to accommodate the operations of Stratophone, SkyTel, or their prospective new entity. This limited waiver ensures that the underlying purpose of the distance separation provision will continue to be served, protecting third-party licensees as well as operations in border areas, while providing Petitioners with flexibility in locating channels in the new network.

25. Further, we find that a waiver of section 22.813(b) will provide Petitioners with the flexibility to effectively manage and operate the new network. We recognize, as do Petitioners, that their proposed new network will require careful planning and additional channel management.⁸¹ By having access to all available channels at each site, Petitioners will have greater flexibility to allocate channels based on the amount of traffic in the various regions.⁸² Such licensing flexibility, Petitioners claim, is generally enjoyed by operators of competing commercial systems and is "important in responding to dynamic subscriber demands."⁸³ We conclude that, under the particular facts of this case, strict application of subsection 22.813(b) will not serve the public interest.

26. Notwithstanding Petitioners' stated intent to shift use of channels as demand shifts, we conclude that a condition requiring such dynamic management is warranted. Petitioners' new network must include measures that ensure continuous monitoring of the network's facilities, and be managed in such a way that the system can meet demand nationwide on general aviation aircraft. This requirement will ensure that service is not concentrated in certain highly populated regions to the detriment of less-

⁷⁷ Notably, contrary to the rules applicable to the parties in the *HWP Order*, there is nothing in the Commission's general aviation air-ground rules allowing licensees to short-space co-channel facilities even by mutual contractual consent. *Cf. HWP Order*, 11 FCC Rcd at 21196 (citing 47 C.F.R. § 90.621(b)(5)).

⁷⁸ *See* 47 C.F.R. § 1.925(a) (stating that the "Commission may waive specific provisions of the rules on its own motion . . .").

⁷⁹ Moreover, there would be no prejudice to third parties as they would be limited in their ability to apply for new channels.

⁸⁰ This also includes all co-channel ground transmitters located outside the United States, its territories and possessions.

⁸¹ *See* Gencarella Decl. ¶ 12.

⁸² Gencarella Decl. ¶ 10. *See also* Waiver Request at 7.

⁸³ Waiver Request at 7. Petitioners argue that "the ability to utilize all or most channels in New York" at times of unusually high demand, for example, "while restricting those channels from use at adjacent sites" during such times, would allow them to "meet peak demand and maintain a higher level of service to our subscribers." Gencarella Decl. ¶ 10.

populated regions where demand for service exists. Thus, the purpose of the dispersion provision of the rule will not be undermined.

III. CONCLUSION

27. Taking into account all the special circumstances presented in this case, including the public interest benefits that will accrue, we find that deviation from the general rule better serves the public interest. We conclude that waivers, to the extent discussed above, of sections 22.817, 22.815, and 22.813 of the Commission's rules will enable Stratophone, LLC and SkyTel Spectrum, LLC to deploy a modernized general aviation air-ground network, thereby making more effective use of the spectrum, and providing enhanced product offerings to general aviation consumers.

IV. ORDERING CLAUSES

28. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, that the request jointly filed by Stratophone, LLC and SkyTel Spectrum, LLC for waiver of section 22.817 of the Commission's rules, 47 C.F.R. § 22.817, is GRANTED to the extent described, and with the condition specified, herein.

29. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and section 1.925 of the Commission's rules, 47 C.F.R. § 1.925, that the request jointly filed by Stratophone, LLC and SkyTel Spectrum, LLC for waiver of section 22.815, 47 C.F.R. § 22.815, is GRANTED to the extent described herein.

30. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.925(a) of the Commission's rules, 47 C.F.R. § 1.925, that the Wireless Telecommunications Bureau GRANTS ON ITS OWN MOTION a waiver of section 22.813(a) of the Commission's rules, 47 C.F.R. § 22.813(a), to the extent described herein, and a waiver of section 22.813(b), 47 C.F.R. § 22.813(b), to the extent described, and with the condition specified, herein.

31. These actions are taken under delegated authority pursuant to sections 0.11, 0.231, 0.131, and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.11, 0.231, 0.131, and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger Noel
Chief, Mobility Division
Wireless Telecommunications Bureau