



Federal Communications Commission
Washington, D.C. 20554

May 5, 2011

DA 11-841

Longhorn Communications Inc.
PO Box 2169
819 South Jefferson
Mt. Pleasant, TX 75455

ATTN Dean S. Kozel

RE: Longhorn Communications Inc.'s Request for Waiver or Extension of Time to Construct Call Signs WPOJ213, WPOJ215, WPOJ216, WPOJ217, WPOJ218, WPOJ219, WPOJ220, WPOJ221, WPOJ222, WPOJ223, WPOJ224, WPOJ225, WPOJ226, WPOJ227, WPOJ228, WPOJ230 and WPOJ233.

Dear Mr. Kozel:

This letter addresses Longhorn Communications Inc.'s (Longhorn) March 20, 2009 Requests for Waiver or Extension of Time to Construct with respect to 220 MHz licenses under the above-referenced call signs (Extension Requests).¹ Longhorn concurrently filed renewal applications for the subject licenses² and also requested waiver of section 90.743(a) of the Commission's rules³ requiring that substantial service be demonstrated at the time of license renewal. For reasons discussed below, we deny the Extension Requests pursuant to section 1.946(e) of the Commission's rules.⁴ As a result, the licenses referenced above automatically terminated pursuant to sections 90.767 and 1.955 of the Commission's rules, on March 22, 2009, their expiration date.⁵ Therefore, we also dismiss the renewal applications for the above-referenced call signs.

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 the EA or REAG within five years of the issuance of its initial license and at least two-thirds of the population of its EA or REAG within ten years of the issuance of its initial license.⁶ In the alternative, licensees may provide substantial service to their licensed area at the

¹ FCC File Nos. 0003775873, 0003775874, 0003775875, 0003775876, 0003775877, 0003775878, 0003775879, 0003775880, 0003775881, 0003775882, 0003775883, 0003775884, 0003775885, 0003775886, 0003775887, 0003775888, and 0003775889 (filed Mar. 20, 2009) (Extension Requests).

² FCC File Nos. 0003775907, 0003775908, 0003775909, 0003775910, 0003775911, 0003775912, 0003775913, 0003775914, 0003775915, 0003775916, 0003775917, 0003775918, 0003775919, 0003775920, 0003775921, 0003775922, and 0003775923 (filed Mar. 17, 2009).

³ 47 C.F.R. § 90.743(a).

⁴ 47 C.F.R. § 1.946(c).

⁵ 47 C.F.R. §§ 90.767 and 1.955(a)(2).

⁶ 47 C.F.R. § 90.767.

appropriate five- or ten-year benchmarks.⁷ Further, section 90.767(c) provides that failure by an EA or REAG licensee to meet the applicable construction requirements will result in automatic cancellation of its entire EA or REAG license.⁸

On July 13, 2004, the Wireless Telecommunications Bureau (Bureau) released a *Memorandum Opinion and Order* extending the five-year construction deadline by three years until November 5, 2007, for Phase II EA and REAG 220 MHz licensees that had timely sought an extension of the five-year deadline, if the construction deadline had expired as of the date of the order; or whose five-year construction deadline fell after the release date of the order.⁹ 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.¹⁰ Moreover, based on its finding that a limited three-year extension of the five-year construction deadline was sufficient to permit licensees to construct their systems, the Bureau denied a request for extension of the ten-year construction requirement.¹¹

Longhorn's licenses were issued on March 22, 1999, with five-year construction deadlines of March 22, 2004, and ten-year construction deadlines of March 22, 2009. We note that Longhorn submitted construction notifications in a timely manner on April 5, 2004, for the licenses' five-year construction deadlines, before the Bureau released its extension order.¹² Longhorn now seeks an extension of the ten-year construction deadline for the subject licenses until March 31, 2012.¹³ Longhorn states that the lack of available 220 MHz, 5 kHz bandwidth land mobile radio technology has been, and continues to be the reason for the build-out delays, that are beyond its control.¹⁴ Longhorn also states that although it did acquire some 220 MHz equipment it is now no longer supported and there is no viable market for this service. Longhorn argues that constructing a system using outdated equipment as a stop-gap measure would not serve the underlying purpose of the construction rules and they would not be able to provide a satisfactory or economically feasible service to its customers.¹⁵ Longhorn contends that their

⁷ *Id.*

⁸ 47 C.F.R. § 90.767(c); *see id.* §§ 1.955(a)(2) (providing that “[a]uthorizations automatically terminate (in whole or in part as set forth in the service rules), without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements); 1.946(c) (providing that “[i]f 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 (in whole or in part as set forth in the service rules), without specific Commission action, on the date the construction or coverage period expires”).

⁹ 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, 13002, ¶ 19 (WTB 2004) (*Extension MO&O*).

¹⁰ *Id.* at 13001, ¶ 17.

¹¹ *Id.* at 13002, ¶ 20.

¹² *See, e.g.*, FCC File Nos. 0001685861 (WPOJ213); 0001685877 (WPOJ215).

¹³ Extension Requests at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2.

request is supported by the precedence set in the case of extensions granted Local Multipoint Distribution Service (LMDS) licensees. Further, Longhorn states that it is just now seeing interest in the band by critical infrastructure entities and believes new, 220 MHz radio technology may be under development by manufacturers.¹⁶ Longhorn also states that it is working on a software defined radio (SDR) solution to support and facilitate narrow bandwidth transmission of encrypted data. Longhorn contends that it is not a case where the licenses could be better put to use by another licensee; and that it has made a large investment in its licenses and should be allowed time to construct in an economically feasible manner. Longhorn argues that the lack of equipment issue that prompted the 2004 three-year extension for 220 MHz licensees caused a late start for licensees and the same consideration should apply to the ten-year requirement.¹⁷ Consequently, Longhorn seeks to extend the build-out deadline to March 31, 2012.

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) unique or unusual factual circumstances exist, such that application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁸ Further, section 1.946(e) 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."¹⁹ Section 1.946(e) 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."²⁰ 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.²¹

We find that grant of an extension of time to construct the subject call signs is not warranted in this instance. We note that the Bureau, in previously providing regulatory relief for certain 220 MHz licensees, stated that there were several factors that would result in use of the subject licenses in the near term.²² While many licensees have taken advantage of this relief to meet applicable construction

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 1.925. The Commission has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving construction requirements on a case-by-case basis. *See* Amendment of the Commission's Rules To Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994), *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹⁹ 47 C.F.R. § 1.946(e)(1).

²⁰ *Id.* § 1.946(e)(2).

²¹ *See* 47 U.S.C § 309(j)(4)(B).

²² *See Extension MO&O* at 13001-02, ¶¶ 16-18 (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). *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

requirements and are providing service in the public interest, Longhorn, after holding the licenses since March 1999, has failed to achieve a viable service offering 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 to 220 MHz licensees due to equipment limitations.²³

We find that Longhorn 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.²⁴ 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.²⁵ 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."²⁶

Further, we do not find that an extension is warranted by Longhorn's claim that it is exploring software defined radio (SDR) solutions for encrypted data; that critical infrastructure entities are expressing interest in the band; or based on its hopes that Part 90 manufacturer's efforts to develop 6.25 kHz radios will result in narrowband voice equipment for the 220 MHz band. Longhorn has only offered speculative options and has failed to demonstrate or provide material evidence that further regulatory

Docket No. 93-253, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943 (1997) (220 MHz *Third Report and Order*).

²³ A search of the equipment authorization database indicates 30 new equipment authorizations for the 220-222 MHz band since January 2004. Search performed April 25, 2011 at www.fcc.gov/oet/ea/fccid.

²⁴ 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).

²⁵ See, e.g., Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau, to Buddy C. Stanley, ITV, Inc., 20 FCC Rcd 9548 (May 31, 2005), *recon den.*, Application of ITV, Inc. to Renew the License for Station KIVD0011, San Francisco-Oakland, California, in the 218-219 MHz Service, *Memorandum Opinion and Order*, 22 FCC Rcd 1908 (WTB MD 2007); Letter 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 Jan. 31, 2007).

²⁶ 220 MHz *Third Report and Order*, 12 FCC Rcd at 10953, ¶ 19.

relief will result in its licenses being put to use in the near term. Allowing an extension well beyond the license term to explore options or in hopes that a particular business model comes to fruition is not in the public interest; especially when other entities have been able to construct facilities and provide service. In this instance, we find there are sufficient equipment options for 220 MHz licensees and Longhorn's decision to not construct its system and hold out for possible future equipment developments is a business decision and not a factor beyond its control. While we agree with Longhorn that stop-gap construction of a nonviable system merely to meet construction obligations is not in the public interest, we also find that extensions of time for licensees to pursue a different business model can also undercut the public interest if it is not supported by evidence that it can be accomplished in the near term.

Finally, we disagree with Longhorn, that the extensions granted for LMDS licensees²⁷ justify an extension for Longhorn. The Bureau granted a three year extension of time to LMDS licensees after their ten-year construction requirement under Section 101.1011(a) of the Commission's Rules²⁸ due to equipment availability issues.²⁹ Longhorn argues that they are similarly situated and seeks a three year extension after their ten-year construction deadline due to lack of available 220 MHz, 5 kHz bandwidth land mobile radio equipment. However, as noted above we find there are sufficient equipment options for 220 MHz licensees and therefore, we find the LMDS extension is not a precedent for Longhorn's extension request. We therefore deny Longhorn's Extension Requests.

Because we deny Longhorn's Extension Requests, the licenses for Stations WPOJ213, WPOJ215, WPOJ216, WPOJ217, WPOJ218, WPOJ219, WPOJ220, WPOJ221, WPOJ222, WPOJ223, WPOJ224, WPOJ225, WPOJ226, WPOJ227, WPOJ228, WPOJ230 and WPOJ233 automatically terminated, pursuant to sections 90.767, 1.946, and 1.955 of the Commission's rules,³⁰ as of their construction deadline, March 22, 2009. In addition, because the licenses have expired, we dismiss the renewal applications that Longhorn filed for these stations.

Accordingly, IT IS ORDERED that, pursuant to Section 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r); and Section 1.946(e) of the Commission's Rules, 47 C.F.R. § 1.946(e), the Requests for Waiver or Extension of Time to Construct filed by Longhorn Communications, Inc. on March 20, 2009 ARE DENIED and File Nos. 0003775873, 0003775874, 0003775875, 0003775876, 0003775877, 0003775878, 0003775879 0003775880, 0003775881, 0003775882, 0003775883, 0003775884, 0003775885, 0003775886, 0003775887, 0003775888, and 0003775889 ARE DISMISSED.

IT IS FURTHER ORDER that; pursuant to Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r); and Sections 1.949 and 90.743 of the Commission's Rules, 47 C.F.R. §§ 1.949, 90.743, the renewal applications filed by Longhorn Communications, Inc. on March 17, 2009, under File Nos. 0003775907, 0003775908, 0003775909, 0003775910, 0003775911, 0003775912, 0003775913, 0003775914, 0003775915, 0003775916, 0003775917, 0003775918, 0003775919, 0003775920, 0003775921, 0003775922, and 0003775923 ARE DISMISSED.

²⁷ See Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd 5894 (WTB 2008) (*LMDS MO&O*).

²⁸ 47 C.F.R. § 101.1011.

²⁹ *LMDS MO&O* at 5906, ¶ 26.

³⁰ 47 C.F.R. §§ 90.767, 1.946, 1.955.

The Mobility Division is directed to modify the Commission's licensing records to reflect the dismissal of the extension and renewal applications, as well as the automatic termination of the licenses. This action is taken pursuant to delegated authority under sections 0.131 and 0.331 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331.

Sincerely,

Thomas Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau