

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

In the Matter of
Access 220, LLC., Assignor,
and
Spectrum Equity, Inc., Assignee,
Application for Assignment of 220 MHz Licenses
and Request for Waiver
File No. 0003956170

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 2012

Released: August 10, 2012

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On September 4, 2009, Access 220, LLC ("Access 220"), a wholly-owned subsidiary of Access Spectrum, LLC ("Access Spectrum"), and Spectrum Equity, Inc. ("SEI"), a wholly-owned subsidiary of Enterprise Wireless Alliance, Inc ("EWA") (collectively, the "Applicants"), filed an application ("Application") seeking Commission consent to assign certain 220 MHz licenses to SEI and Commission grant of a waiver to SEI of the limitations on permissible operations under the licenses that are the subject of the Application. On September 23, 2009, Warren Havens, Verde Systems LLC, Environmental LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation (collectively, "Petitioners") filed a petition to deny the Application ("Petition"). For the reasons discussed below, we dismiss the Petition. As an alternative and independent basis for rejecting the Petition, we find that the Petitioners' claims fail on the merits. Finally, we grant the Application and the requested waiver of rules to permit SEI to operate as a band manager on these licenses.

II. BACKGROUND

2. On July 3, 2002, Access 220 filed a request seeking limited waiver of section 90.733 of the Commission's rules to provide band manager services under its 220-222 MHz licenses, which the

1 File No. 0003956170 (filed Sept. 4, 2009). The call signs of the licenses included in the Application are: WPOI695, WPOI696, WPOI707, WPOI709, WPOI710, WPOI861, WPOI862, and WPVL861 (the "Licenses").

2 Warren C. Havens, Verde Systems LLC, Environmental LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation, Petition to Dismiss or Deny, and in the Alternative, Section 1.41 Request (filed Sept. 23, 2009).

3 47 C.F.R. § 90.733.

Wireless Telecommunications Bureau (“Bureau”) granted with certain restrictions.<sup>4</sup> Petitioners filed a timely petition seeking clarification or reconsideration of the waiver grant, arguing that the Bureau failed to explain how Access 220’s waiver request met the waiver standard set forth in the Commission’s rules. On November 12, 2003, the Bureau denied that petition, finding that the Bureau had sufficiently justified grant of the waiver.<sup>5</sup>

3. On September 4, 2009, Access 220 and SEI filed the Application seeking permission to assign the Licenses to SEI and requesting a waiver of section 90.733 to allow SEI to act as a band manager.<sup>6</sup> Access 220 and SEI stated in the waiver request that allowing SEI to act as a band manager would allow it to build on Access 220’s operations and further the Commission’s goals of encouraging the efficient use of the 220 MHz spectrum.<sup>7</sup> The Application was placed on public notice on September 9, 2009.<sup>8</sup>

4. On September 23, 2009, Petitioners filed the Petition against the Application and waiver request on the grounds that Access 220, SEI, Access Spectrum, and EWA had failed to disclose their respective real parties in interest on their Forms 602, pursuant to section 1.2112.<sup>9</sup> In addition, Petitioners also opposed grant of the requested waiver for the same reasons they had opposed grant of the similar waiver to Access 220.<sup>10</sup> Access 220 and SEI filed an opposition to the Petition on October 7, 2009, arguing, *inter alia*, that Petitioners lacked standing as a party in interest.<sup>11</sup> Petitioners filed a reply on October 20, 2009.<sup>12</sup>

### III. DISCUSSION

5. Petitioners contend that they have standing to file the Petition because they hold licenses “in the area of the Licenses with which they may provide competitive services to those of the Licenses.”<sup>13</sup> Petitioners alternatively allege that they have standing because they have pending before the Commission an appeal of the grant of Access 220’s waiver request in 2002.<sup>14</sup>

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<sup>4</sup> Access 220, LLC, *Memorandum Opinion and Order*, 17 FCC Rcd 20464 (WTB 2002) (“*MO&O*”). The Bureau also granted the requested waiver of certain construction requirements under sections 90.725 and 90.769 of the Commission’s rules.

<sup>5</sup> Access 220, LLC, *Order on Reconsideration*, 18 FCC Rcd 23841 (WTB 2003) (“*Reconsideration Order*”).

<sup>6</sup> The Application was amended on October 14, 2009.

<sup>7</sup> See Application, Exhibit 2.

<sup>8</sup> *Public Notice*, Report No. 5256 (rel. Sept. 9, 2009).

<sup>9</sup> Petition at 2.

<sup>10</sup> Petition at 5.

<sup>11</sup> Access 220, LLC, and Spectrum Equity, Inc. Opposition (filed Oct. 7, 2009) (“*Opposition*”).

<sup>12</sup> Warren C. Havens, Verde Systems LLC, Environmental LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation, Reply to Opposition to Petition to Dismiss or Deny, and in the Alternative Section 1.41 Request (Oct. 20, 2009) (“*Reply*”).

<sup>13</sup> Petition at 1.

<sup>14</sup> *Id.* at 2.

6. Applicants respond that Petitioners lack standing to petition for the denial of the instant assignment application because they do not demonstrate a direct injury by virtue of competitive status.<sup>15</sup> Applicants note that the Petitioners do not allege actual and current competition with Access 220 and assert that the mere possibility that Petitioners might compete with services provided pursuant to the Licenses is insufficient to establish standing.<sup>16</sup> Applicants further point out that Petitioners do not have a waiver to provide band management services in the 220 MHz band, and that the requested assignment of the Licenses from one entity to another would not create additional competition but simply replace one for another.<sup>17</sup> Finally, Applicants refute Petitioners' claim that they have an appeal pending before the Commission, citing to the previous order that denied the Petitioners' appeal.<sup>18</sup>

7. In their Reply, Petitioners reassert that they have an appeal pending before the Commission.<sup>19</sup> They also argue that they have standing because certain entities in the past have used Petitioners' services pursuant to their licenses in preference to the services of Access 220, and that *Lujan v. Defenders of Wildlife* does not suggest as narrow a standard for standing as Access 220 would contend.<sup>20</sup> Further, Petitioners allege that they have standing under Article III of the Constitution, reasoning that standing may be established through assertions of unfair competition or antitrust law violation.<sup>21</sup>

8. Section 1.939(d) of the Commission's rules requires that a petition to deny contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity.<sup>22</sup> To establish standing as a party in interest, a petitioner must allege facts sufficient to demonstrate that grant of the subject applications would cause it to suffer a direct injury.<sup>23</sup> In addition, a petitioner must demonstrate a causal link between the claimed injury and the challenged action,<sup>24</sup> and that any injury would be redressable by the relief requested.<sup>25</sup> Based on our review of the record in this proceeding, we find that the Petition fails to meet this standard.

9. We reject the Petitioners' contention that the mere holding of their licenses and the possibility they one day may use them to provide services competitive with those offered pursuant to the

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<sup>15</sup> See Opposition at 1-4.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 2-3.

<sup>18</sup> *Id.* at 4, citing *Reconsideration Order* and explaining that Petitioners did not seek further appeal.

<sup>19</sup> Reply at 2.

<sup>20</sup> *Id.* at 5, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("*Lujan*").

<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> 47 C.F.R. § 1.939(d).

<sup>23</sup> See AT&T Wireless PCS, Inc., *Order*, 15 FCC Rcd 4587, 4588 ¶ 3 (WTB CWD 2000) ("*AT&T Wireless*"), citing *Sierra Club v. Morton*, 405 U.S. 727, 73 (1972); Petition for Reconsideration of Various Auction 87 Public Notices, 27 FCC Rcd 4374, 4382 ¶ 21 (WTB MD & ASAD 2012) ("*Auction 87 Order*"); Lawrence N. Brandt, *Memorandum Opinion and Order*, 3 FCC Rcd 4082 ¶ 5 (CCB DFD 1988).

<sup>24</sup> *AT&T Wireless*, 15 FCC Rcd at 4588 ¶ 3, citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.* 438 U.S. 59, 72, 78 (1978)). See also *Auction 87 Order*, 27 FCC Rcd at 4382 ¶ 21.

<sup>25</sup> *Weblink Wireless, Inc.*, *Memorandum Opinion and Order*, 17 FCC Rcd 24642 ¶ 11 (2002).

Licenses gives them standing to file the Petition.<sup>26</sup> Petitioners cite no precedent for such a broad declaration of standing, and, as previously explained in Commission precedent involving most of the Petitioners, broad allegations of potential competition in the marketplace are insufficient to establish standing.<sup>27</sup> Petitioners' assertion on reply that some customers claim to have considered the use of services from Access 220 essentially is hearsay and provides no explanation of the form of such supposed consideration, or how or where the services might compete.<sup>28</sup> Petitioners have misplaced reliance on *Lujan*, which sets forth a standard for standing that is not broader but practically the same as the Commission's.<sup>29</sup> Further, the Opposition is correct in maintaining that the Petitioners' appeal is not pending but was denied about nine years ago in the *Reconsideration Order*.<sup>30</sup> Lastly, Petitioners have not formally asserted any unfair competition or antitrust claims for the purpose of obtaining Article III standing, and the Commission is not the proper forum to do so, nor would it establish standing in these proceedings. Accordingly, we dismiss the Petition.

10. While we dismiss the Petition, we have discretion to consider informally<sup>31</sup> its allegations that Access 220, SEI, Access Spectrum, and EWA have not disclosed their respective real parties in interest, pursuant to section 1.2112.<sup>32</sup> We have determined that Petitioners' arguments provide no basis for denying the Application. Petitioners argue that the Forms 602 for Access 220 and SEI list their respective owners, Access Spectrum and EWA, only at the company level, and that the real parties in interest must be disclosed down to the individual level.<sup>33</sup>

11. Applicants seeking to assign licenses are required on the Form 602 to specify only those individuals that hold a disclosable interest.<sup>34</sup> Further, the Commission's rules only require Form 602

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<sup>26</sup> See Petition at 1-2.

<sup>27</sup> See *Paging Systems, Inc. and American Telecasting of Oklahoma, Inc., Memorandum Opinion and Order*, 22 FCC Rcd 1294 (WTB 2007), *recon. dismissed, Order on Reconsideration*, 23 FCC Rcd 7458 (2008), *app. for review dismissed w/o prejudice*, Letter from John J. Schauble, Deputy Chief, Broadband Division, Wireless Telecommunications Bureau, to Warren C. Havens, *Letter*, 24 FCC Rcd 13776 (2009).

<sup>28</sup> See *New World Radio, Inc. v. FCC*, 294 F.3d 164, 169-172 (D.C. Cir. 2002) (standing is premised on the petitioner's status as a *direct* and *current* competitor whose bottom line may be adversely affected by the challenged government action," so no standing to challenge license grant that "is, at most, the first step in the direction of future competition" and thus economic injury dependent on a "chain of events").

<sup>29</sup> See *Lujan*, 504 U.S. at 560-61 ("...the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."").

<sup>30</sup> See *Reconsideration Order*, 18 FCC Rcd at 23843 ¶ 6.

<sup>31</sup> See 47 C.F.R. § 1.41.

<sup>32</sup> Petition at 2.

<sup>33</sup> *Id.* at 2-5.

<sup>34</sup> This is clearly contemplated in the instructions for Form 602, *available at*: <<http://www.fcc.gov/Forms/Form602/602.pdf>>. See Application for Transfer of Control of Progeny LMS LLC to Progeny LMS Holdings LLC, 27 FCC Rcd 5871 ¶ 34 (WTB MD 2012).

disclosure for “applicants or licensees in Wireless Radio Services.”<sup>35</sup> Access 220 and SEI fulfilled their disclosure requirements by listing all of the entities with a disclosable interest in each.<sup>36</sup> Therefore, we see no basis to deny the Application or the associated waiver request. Indeed, we conclude that grant of the requested waiver to SEI, where it is seeking to assume the business operations of Access 220, is in the public interest in the same way that the Bureau found that grant of the waiver to Access 220 was in the public interest.

#### IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons discussed above, we find that the Petition fails to contain specific allegations of fact sufficient to make a *prima facie* showing that the Petitioners, individually or collectively, have the requisite standing to file the instant Petition.<sup>37</sup> We therefore dismiss the Petition. Nonetheless, even considering the merits of the Petition, we conclude that the Petitioners do not have any basis to argue that Access 220, SEI, Access Spectrum, and EWA have failed to meet their disclosure requirements, and therefore how denial of the instant assignment application would serve the public interest.

13. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 309, and section 1.939 of the Commission’s rules, 47 C.F.R. § 1.939, that the Petition To Deny filed by Warren C. Havens, Verde Systems LLC, Environmental LLC, Intelligent Transportation and Monitoring Wireless LLC, Telesaurus Holdings GB LLC, and Skybridge Spectrum Foundation on September 23, 2009 IS DISMISSED. On alternative and independent bases as set forth herein, the Petition To Deny IS DENIED.

14. IT IS FURTHER ORDERED that the above-captioned application for assignment of certain 220 MHz licenses from Access 220, LLC to Spectrum Equity, Inc. and the request for waiver to allow Spectrum Equity, Inc. to perform band management services ARE HEREBY GRANTED.

15. This action is taken under delegated authority pursuant to sections 0.131 and 0.331 of the Commission’s rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Katherine M. Harris  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>35</sup> 47 C.F.R. § 1.919(a).

<sup>36</sup> See Ownership Disclosure Report of Spectrum Equity, Inc., FCC Form 602, ULS File No. 0003953054 (filed Sept. 1, 2009); Ownership Disclosure Report of Access 220, LLC FCC Form 602, ULS File No. 0003105451 (filed July 10, 2007).

<sup>37</sup> 47 C.F.R. § 1.939(d); 47 U.S.C. § 309(d)(1).