

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

In the Matter of)	
)	
ACCESS 220, LLC)	
)	WT Docket No. 02-224
Request for Waivers To Provide Band)	
Management Services Utilizing Licenses)	
In the 220-222 MHz Band)	

MEMORANDUM OPINION AND ORDER

Adopted: October 16, 2002

Released: October 16, 2002

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 3, 2002, Access 220, LLC (“Access 220”) and its parent, Access Spectrum, LLC (“Access Spectrum”), filed a request seeking limited waiver of sections 90.733, 90.725, and 90.769 of the Commission’s rules in order to extend their existing 700 MHz band management activities to Access 220’s newly acquired 220-222 MHz licenses.¹ By this Order, we grant Access 220’s Waiver Request, as described below.

II. BACKGROUND

A. 220-222 MHz Service Rules

2. The 220-222 MHz band is allocated for private and federal government land mobile use, and is dedicated to “the development of narrowband spectrum efficient technologies to meet the communications requirements of the land mobile service.”² Section 90.733 of the Commission’s rules limits permissible operations for a licensee in the 220-222 MHz frequency band to private land mobile operations and certain one-way or two-way paging operations and fixed operations.³ Section 90.725 of the Commission’s rules sets forth the construction requirements for “Phase I” nationwide licenses in the 220-222 MHz band whereas section 90.769 sets forth the construction and implementation requirements

¹ See Request for Waivers of Access 220, LLC, To Provide Band Management Services Utilizing Licenses in the 220-222 MHz Band, WT Dkt. No. 02-224 (filed July 3, 2002) (“Waiver Request”).

² 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 Services, *Report and Order*, 6 FCC Rcd 2356, 2356 (1991) (subsequent history omitted).

³ 47 C.F.R. § 90.733.

for “Phase II” nationwide licenses in the 220-222 MHz band.⁴ The build-out benchmarks for the Phase I nationwide licenses are based on coverage of specified geographic areas, while the benchmarks for Phase II nationwide licenses are based on a certain level of coverage of geographic areas or the U.S. population.

B. The Waiver Request

3. Access Spectrum is a private venture formed by the Industrial Telecommunications Association, Inc. (“ITA”) to increase the spectrum options available to mobile radio users.⁵ Access Spectrum holds 21 major economic area (“MEA”) licenses as a band manager licensee in the 700 MHz Guard Band.⁶ Access 220, a wholly-owned subsidiary of Access Spectrum, was formed to acquire 220-222 MHz licenses from Aerwav Spectrum Holdings, Inc. (“Aerwav”), the largest spectrum holder in the 220-222 MHz band.⁷ The Commission consented on July 9, 2002, to Access 220 acquiring 115 authorizations from Aerwav, and the assignment was consummated on August 27, 2002.⁸ These licenses include one Phase II nationwide license, two Phase I nationwide licenses, eight economic area grouping (“EAG”) licenses, and 104 economic area (“EA”) licenses.⁹ Because Access 220 intends to acquire additional authorizations in this band, it requests that any waiver relief granted be extended to include any 220-222 MHz licenses it may subsequently acquire.¹⁰

4. Access Spectrum, by and through its subsidiary, Access 220, seeks to extend its existing 700 MHz band management activities to the recently acquired 220-222 MHz licenses. Because the 220-222 MHz service rules do not expressly contemplate the use of band managers, however, Access 220 seeks limited waivers of the section 90.733 permissible use restrictions and the construction requirements of sections 90.725 and 90.769. Access 220 asserts that the strict application of these rules would fail to

⁴ 47 C.F.R. §§ 90.725, 90.769. Phase I licensees in the 220-222 MHz band are defined as licensees granted initial authorizations to operate based on applications filed on or before May 24, 1991, applicants that filed initial applications to operate on or before May 24, 1991, and all assignments, operations, stations, and systems of licensees granted authorizations based on applications filed on or before May 24, 1991. *See* 47 C.F.R. § 90.701(b). Phase II licensees in the 220-222 MHz band are defined as licensees granted initial authorizations for operations from applications filed after May 24, 1991, applicants that filed initial applications to operate after May 24, 1991, and all assignments, operations, stations, and systems of licensees granted authorizations from among applications filed after May 24, 1991. *See* 47 C.F.R. § 90.701(c).

⁵ Waiver Request at 1.

⁶ Waiver Request at 2.

⁷ Waiver Request at 3. Aerwav’s 220 MHz holdings represent the consolidated licenses of RoamerOne, Securicor, and Intek License Acquisition Corp. One hundred fifteen licenses were assigned to Access 220; Aerwav surrendered approximately 55 licenses for cancellation. Waiver Request at 3.

⁸ *See* Application of Aerwav Spectrum Holdings, Inc., for Assignments of Authorization and Transfers of Control to Access 220, LLC, FCC File No. 0000846169; Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1230 (rel. July 10, 2002). The assignment of licenses was consummated on August 27, 2002. *See* Required Notification of Access 220, LLC, FCC File No. 0001010959.

⁹ Waiver Request at 3. The EAG (or regional) and EA licenses were auctioned under the 220-222 MHz Phase II rules and policies.

¹⁰ Waiver Request at 8.

serve their underlying purposes, and the requested waivers, if granted, will promote the public interest by ensuring the most flexible and efficient use of the 220-222 MHz spectrum.¹¹

5. Access 220 seeks a waiver of section 90.733 because the rule does not list band management as a permissible use for the band.¹² Access 220 asserts that the rule did not include band management because section 90.733 pre-dates the Commission's implementation of band managers. Therefore, Access 220 contends, a grant of waiver would be consistent with the underlying purpose of the rule: to ensure the availability and efficient use of spectrum for users whose needs cannot be met through consumer technology.¹³ Access 220's request for waiver of section 90.733 concerns all 115 220 MHz licenses that Access 220 acquired from Aerwav.¹⁴

6. Access 220 also seeks limited waivers of the construction requirements of sections 90.725 and 90.769 in order to permit alternative construction showings by band managers, which do not necessarily operate facilities. Access 220 asserts that grant of the waiver requests would be consistent with the underlying purposes of the rules to promote utilization of the 220-222 MHz band and to assure that only "bona fide applicants" apply for licenses in the band.¹⁵ Access 220 urges the Commission to allow construction to be measured by a "substantial service" test so as to include as relevant third party construction under subscriber agreements, with a safe harbor coverage percentage consistent with the decision in *Intek License Acquisition Corp. Request for Waiver and Consolidation of 220 MHz Construction Requirements*.¹⁶ Access 220 asserts that a waiver is needed because, unlike other licensees, band managers provide for the coordinated use of spectrum by third parties and consequently have no construction of their own on which to base a geographic or population coverage filing required by the two build-out rules.¹⁷ Access 220's request for waiver of sections 90.725 and 90.769 concerns only three of the 220 MHz licenses acquired from Aerwav: two Phase I nationwide licenses and one Phase II nationwide license.

7. With regard to extending its 700 MHz band manager role to the 220-222 MHz band, Access 220 proposes to apply the Commission's 700 MHz band manager rules and obligations detailed in Part 27 of the Commission's rules to the 220-222 MHz licenses, except for certain specific provisions not meaningful in the 220 MHz context.¹⁸ Access 220 also states that it is committed to complying with all the applicable technical standards of Subpart I of Part 90 of the Commission's rules and all relevant technical and operational requirements applicable to operations in the 220-222 MHz band. According to Access 220, the use of band managers in the 220-222 MHz band will fulfill the Commission's original

¹¹ Waiver Request at 15.

¹² Waiver Request at 14.

¹³ Waiver Request at 15-16.

¹⁴ Waiver Request at 14 n.30 (*citing* Appendix A to the Waiver Request).

¹⁵ Waiver Request at 16-17.

¹⁶ *Intek License Acquisition Corp. Request for Waiver and Consolidation of 220 MHz Construction Requirements, Memorandum Opinion and Order*, 16 FCC Rcd 16431 (2001) (*Intek Waiver Order*).

¹⁷ Waiver Request at 18.

¹⁸ Waiver Request at 4-5.

policy goals of encouraging efficient use of the 220-222 MHz band and expediting service to areas that otherwise would not receive it.¹⁹

8. To seek comment on Access 220's request for waivers, we released a *Public Notice* on August 6, 2002.²⁰ In response to the *Notice*, we received five comments, six reply comments, and three further or supplemental comments.²¹

III. DISCUSSION

A. Waiver of the Permissible Use Restrictions

9. **Background.** As stated above, Access 220's parent, Access Spectrum, holds 21 MEA licenses in the 700 MHz Guard Band Manager service.²² Access 220 points out that, in the 700 MHz Guard Band, Access Spectrum has "developed exhaustive spectrum channelization plans and technical parameters to maximize efficient band usage, secured extensive third party financing, and is negotiating a significant number of spectrum use agreements ('SUAs') with unaffiliated spectrum customers."²³ According to Access 220, Access Spectrum "has turned the band management concept into reality, and is now poised to efficiently offer new service options – in a new spectrum band – to radio users in need of voice and data solutions."²⁴ Indeed, Access Spectrum is the only 700 MHz Guard Band Manager licensee that has reported entering into a current, long-term spectrum use agreement with an unaffiliated entity.²⁵

10. In order to complement Access Spectrum's 700 MHz Guard Band Manager service areas to create some nationwide opportunities, Access 220 acquired the 220 MHz licenses previously held by Aerwav and its affiliates.²⁶ At present, section 90.733 does not expressly authorize band manager operations in the 220-222 MHz band.²⁷ Accordingly, in order to extend its band manager operations into the 220 MHz band, Access 220 has requested a waiver of the rule.

11. To obtain a waiver of the Commission's rules, Access 220 must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the

¹⁹ Waiver Request at 6-8.

²⁰ See Wireless Telecommunications Bureau Seeks Comment on Access 220, LLC Request for Waivers to Provide Band Management Services Utilizing Licenses in the 220-222 MHz Band, *Public Notice*, DA 02-1939 (rel. Aug. 6, 2002) ("*Notice*").

²¹ The commenters are listed in Appendix A hereto.

²² Waiver Request at 2.

²³ Waiver Request at 2.

²⁴ Waiver Request at 2.

²⁵ Letter to Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Mark E. Crosby, President, Access Spectrum, LLC, re Access Spectrum, LLC Annual Report on Spectrum Utilization (dated Oct. 1, 2002). Nextel 700 Guard Band Corporation authorized operation under one of its licenses for the period January 28, 2002 through March 1, 2002, by the 2002 Olympic Committee in the Salt Lake City, Utah area. Nextel 700 Guard Band Corporation Annual Guard Band Manager Report (dated Oct. 1, 2002).

²⁶ Waiver Request at 2.

²⁷ See Waiver Request at 14-16.

unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that the petitioner has no reasonable alternative.²⁸ Alternatively, the Commission may, on its own motion or on petition if “good cause” is shown, waive any provision of the Commission’s rules at any time, subject to the provisions of the Administrative Procedure Act and the Commission’s rules.²⁹

12. **Discussion.** We find that grant of a limited waiver to permit Access 220 to engage in band manager operations pursuant to the 220 MHz authorizations it currently holds would further the public interest by facilitating the Commission’s stated objectives for the 220 MHz spectrum and is warranted under the waiver standards established by sections 1.925 and 1.3 of the Commission’s rules. We condition grant of this waiver on Access 220’s compliance with the requirements imposed on 700 MHz Guard Band Manager licensees, with the specific exceptions set out below. These conditions mirror the terms of operation established by the Commission for 700 MHz Guard Band Manager licensees when it established the service.³⁰

13. The Commission has made clear that it wishes to facilitate efficient use of the 220 MHz spectrum and expedite service to areas that might not otherwise receive it.³¹ In addition, in revamping the 220 MHz rules, the Commission set forth additional goals for operation in this band:

Our primary goal in this proceeding is to establish a flexible regulatory framework that will allow for more efficient licensing of the 220-222 MHz band, eliminate unnecessary regulatory burdens on both existing and future licensees, and enhance the competitive potential of the 220 MHz service in the mobile services marketplace. In addition, we seek to ensure that licenses are granted to those who value the spectrum most highly and will maximize its use to provide the best quality and variety of service to consumers.³²

14. Permitting Access 220 to operate as a band manager in the 220 MHz spectrum, subject to all the relevant conditions from the Commission’s 700 MHz Guard Band Manager licensing rules, will help to further the Commission’s objectives for this spectrum. Among other things, Access 220’s operation as a band manager will provide potential users of 220 MHz spectrum with an additional option for deploying 220 MHz facilities. Specifically, in addition to obtaining a Commission-defined geographic area license or procuring service as a customer of a licensee, entities will be able to obtain access to 220 MHz spectrum based on a tailored coverage area and an individually negotiated agreement with Access 220. Access 220’s deployment of band manager operations in the 220 MHz frequencies will

²⁸ 47 C.F.R. § 1.925.

²⁹ 47 C.F.R. § 1.3.

³⁰ Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

³¹ See, e.g., 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 Services, *Report and Order*, 6 FCC Rcd 2356, 2358 (1991).

³² 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, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188, 193 (1995).

serve as another tool in helping to promote efficient use and expand usage opportunities.³³ We have noted in similar contexts that “band manager licensing is a market-based mechanism that can create incentives for efficient spectrum use.”³⁴ By granting this waiver, the Commission is providing more opportunities to the public to obtain radio transmission capacity under desired terms.

15. At the same time, denial of the waiver would be inconsistent with the purposes of the Commission’s 220 MHz rules. Enforcement of the provisions of section 90.733 to bar Access 220 from providing band manager services would thwart achievement of this important set of objectives and undermine the Commission’s general efforts to promote customer choice in wireless services and flexibility in service offerings. We accordingly determine that the underlying purpose of section 90.733 would not be served if the requested waiver were denied. Grant of the Access 220 waiver request³⁵ thus meets our section 1.925 waiver requirements and furthers our 220 MHz regulatory objectives.³⁶

16. A couple of commenters have suggested that, in lieu of granting the waiver requested by Access 220, the Commission should launch a more expansive rulemaking.³⁷ Nothing in the grant of this waiver precludes future consideration of alternative policies for the 220 MHz band.

17. We impose as conditions on the grant of this waiver the requirements applied by the Commission to the 700 MHz Guard Band Manager service, with the exception of those provisions that are not technically or operationally relevant to the 220 MHz band.³⁸ These conditions will help to ensure that Access 220’s band manager operations are in full compliance with the requirements of the Communications Act of 1934, as amended, and the Commission’s rules and policies. Specifically, Access 220’s band management operations will be governed by the following conditions:

³³ Waiver Request at 8. *See also* ITA Comments at 4 (“Allowing a band manager licensing scheme in the 220-222 MHz band, would achieve the same benefits of the 700 MHz band, help achieve the goal of flexibility much like the government transfer bands, promote the public interest and maximize the usage and value of the spectrum.”); Motorola Comments at 2 (“In Motorola’s view, grant of the requested waivers will serve the public interest by permitting Access 220 to provide radio users additional flexibility, which will allow more efficient use of the 220 MHz band and thereby fulfill one of the Commission’s primary allocation policies.”); UTC Comments at 7 (“UTC emphasizes that the band manager framework, allowing users to build and operate their own systems through contractual agreement with the licensee, offers a much better tailored service to PLMR users such as some utilities than traditional commercial networks.”).

³⁴ Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22729 (2000).

³⁵ This waiver is granted only for the authorizations included in the underlying Waiver Request. Because a waiver is associated with a specific call sign, and given the nature of our fees and application forms, Access 220 will need to request equivalent waiver relief for any authorizations not specifically included within the terms of this order.

³⁶ The Commission will consider any future requests for waiver of the 220 MHz rules on their merits. Contrary to the fears of one commenter, *see* Data Comlink Comments at 5, nothing in this action serves as “precedent to allow other licensees holding location-specific Phase I, nationwide Phase I, regional Phase II, and national Phase II to use whatever modes of operation or system deployment techniques as they please, regardless of the potential for co-channel, adjacent channel, and other potential interference types.”

³⁷ *See* Data Comlink Comments at 9-12; LMS Wireless Reply Comments at 6-8. We note that the North Carolina Electric Membership Corporation generally endorses the comments of Data Comlink.

³⁸ *See* Waiver Request at 4-5.

- Access 220 shall enter into written agreements regarding the use of Access 220's licensed spectrum that contain the requirements and conditions listed in section 27.602 of the Commission's rules,³⁹ including provisions that apply all existing licensee obligations to the spectrum user, require the spectrum user to comply with applicable Commission rules and direct Commission oversight and enforcement, and stipulate that if Access 220 determines that there is an ongoing violation of the Commission's rules or that the spectrum user's system is causing harmful interference, then Access 220 shall have the right to suspend or terminate operation of the spectrum user's system and will use all legal means necessary to enforce that suspension or termination.
- Access 220 shall not engage in unjust or unreasonable discrimination among spectrum users, nor unreasonably deny prospective spectrum users access to Access 220's licensed spectrum.⁴⁰
- Access 220 shall not impose unduly restrictive requirements on use of its licensed frequencies, including any requirement that is not reasonably related to the efficient management of the spectrum licensed to Access 220.⁴¹
- Access 220 shall utilize the predominant amount of its spectrum for non-affiliates.⁴²
- Access 220 shall resolve disputes with its customers or disputes between its customers in the same manner that the parties would resolve other commercial disputes arising out of the spectrum user agreement.⁴³
- Access 220 shall file an annual report providing the Commission with information about the manner in which its spectrum is being utilized, including: (1) the total number of spectrum users and the number of those users that are affiliates of Access 220; (2) the amount of Access 220's spectrum being used by its affiliates in any part of the licensed service area; (3) the amount of Access 220's spectrum being used pursuant to agreements with unaffiliated third parties; (4) the nature of the spectrum use of Access 220's customers; and (5) the length of the term of each spectrum use agreement.⁴⁴
- Access 220 shall file separate station applications, as necessary, with respect to all Environmental Assessments, international coordination, and quiet zones (*i.e.*, end users will not make such FCC filings).⁴⁵
- Access 220 shall make filings, as necessary, with respect to the notification and authorization requirements set forth in section 27.66⁴⁶ when a deletion, move, or change

³⁹ 47 C.F.R. § 27.602.

⁴⁰ 47 C.F.R. § 27.603(a).

⁴¹ 47 C.F.R. §§ 27.602(g), 27.603(b).

⁴² 47 C.F.R. § 27.603(c).

⁴³ 47 C.F.R. § 27.606.

⁴⁴ 47 C.F.R. § 27.607(b), (c).

⁴⁵ 47 C.F.R. § 27.601(c)(1).

⁴⁶ 47 C.F.R. § 27.66.

of a station's operations constitutes a discontinuance, reduction, or impairment of service under that section, or results from an involuntary act subject to section 27.66(a).⁴⁷

While we have decided to include as conditions the requirements imposed on Access 220's parent, Access Spectrum, as a provider of 700 MHz Guard Band Manager services, we also conclude that certain restrictions applied in that service are not technically or operationally relevant to operations in the 220 MHz band. Specifically, we do not impose the following requirements on Access 220 in connection with its band manager operations at 220 MHz:

- Section 27.2(b)'s prohibition against employing a cellular system architecture (intended to help prevent harmful interference to adjacent public safety operations);
- Section 27.601(d)'s requirement to notify public safety frequency coordinators (also part of the effort to prevent harmful interference to nearby public safety operations);
- Section 27.604's limitations on number of block A and B 700 MHz Guard Band licenses won at auction;⁴⁸
- Section 27.605's restrictions that 700 MHz Guard Band licenses may only be partitioned and/or disaggregated to another 700 MHz Guard Band Manager licensee;
- The performance requirements jointly imposed by sections 27.607 and 27.14(a) (which incorporate for the 700 MHz Guard Band Manager licenses a definition of "substantial service" applied to Wireless Communications Service, also a Part 27 service, rather than the 220 MHz spectrum); and
- Section 27.601(d)'s special requirements governing coordination among Guard Band Managers in the 700 MHz Guard Band, which is licensed exclusively to band managers (as the sole band manager at 220 MHz, Access 220's operations – like those of other licensees in the 220 MHz service – will be governed by the coordination procedures and operational requirements specifically applicable to that service).

Given the differences in technical characteristics and public safety coordination needs between the 700 MHz Guard Band and the 220 MHz band, we find that these 700 MHz Guard Band Manager requirements are not technically or operationally relevant in the 220 MHz context.

18. We also require Access 220 to abide by all of the technical requirements applicable to 220 MHz licensees. Contrary to the suggestions of some of the commenters, the Access 220 waiver request does not increase the risk of interference or other technical problems. Access 220 has agreed to abide by all of the technical rules,⁴⁹ and we require such compliance as a condition of the relief granted to Access 220. Moreover, the concerns raised about potential harmful interference are based not on Access

⁴⁷ 47 C.F.R. § 27.601(e); *see* 47 C.F.R. § 27.66(a).

⁴⁸ There are no comparable limits on the number of 220 MHz licenses a single entity may hold.

⁴⁹ Access 220 states that it is committed to complying with the applicable technical standards of Subpart I of Part 90 of the Commission's rules and all relevant technical and operational requirements applicable to operations in the 220-222 MHz band. *See* Waiver Request at 5-6; Access 220 Reply Comments at 7-10.

220's specific request but on the rules as they currently exist. For instance, certain concerns⁵⁰ in reality relate to section 90.733(d), which, as amended in 1997,⁵¹ already permits all licensees in the 220 MHz band to combine channels to form channels wider than 5 kHz, as Access 220 proposes to do.⁵² A second concern,⁵³ regarding the 1 MHz offset between transmit and receive frequencies, is governed by rules, sections 90.715⁵⁴ and 90.723,⁵⁵ that have been in place since the 220 MHz service was created. Again, nothing in Access 220's request for waiver raises unique harmful interference issues, and Access 220 seeks no waiver of any technical requirements. Accordingly, such concerns provide no impediment to grant of the requested waiver.

19. In addition, contrary to the concern raised by one commenter,⁵⁶ the Commission in no way is forcing land mobile radio users to give up their own licenses and instead become customers of a band manager or other licensee.

B. Waiver of Build-out Rules

20. **Background.** Access 220 requests a waiver of construction requirements set forth in sections 90.725 and 90.769 of the Commission's rules⁵⁷ for three of its licenses to permit it to implement

⁵⁰ E.g., Data Comlink Comments at 4-5; Texas License Consultants Comments at 2-3; Bizcom Reply Comments at 5-6.

⁵¹ 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, *Third Report and Order; Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 10970 (1997).

⁵² 47 C.F.R. § 90.733(d).

⁵³ Data Comlink Comments at 8.

⁵⁴ 47 C.F.R. § 90.715.

⁵⁵ 47 C.F.R. § 90.723.

⁵⁶ Data Comlink Comments at 5 ("Like the Internet Service Provider (ISP) business, we see the movement for band management as a precursor to Land Mobile Radio users having to become subscribers, just like Internet users.").

⁵⁷ 47 C.F.R. §§ 90.725, 90.769. Under section 90.725 of the Commission's rules, Phase I nationwide licensees must construct base stations having a minimum of five assigned nationwide channels, and must place those base stations into operation: (1) in at least ten percent of the geographic areas designated in the application within two years of the initial license grant, including base stations in at least seven urban areas listed in section 90.741; (2) in at least forty percent of the geographic areas designated in the application within four years of the initial license grant, including base stations in at least twenty-eight urban areas listed in section 90.741; (3) in at least seventy percent of the geographic areas designated in the application within six years of the initial license grant, including base stations in at least twenty-eight urban areas listed in section 90.741; and (4) in all geographic areas designated in the application within ten years of the initial license grant, including base stations in at least twenty-eight urban areas listed in section 90.741. 47 C.F.R. § 90.725. The sites to be selected under section 90.741 of the Commission's rules are the "Top 100 Urban Areas for Phase I Nationwide Systems." 47 C.F.R. § 90.741. Section 90.769 of the Commission's rules requires Phase II nationwide licensees to construct a sufficient number of base stations to provide coverage to: (1) either a composite area of at least 750,000 square kilometers or 37.5 percent of the U.S. population within five years of the initial license grant; and (2) either a composite area of at least 1,500,000 square kilometers or 75 percent of the U.S. population within ten years of the initial license grant. 47 C.F.R. § 90.769. Phase II nationwide licensees offering fixed services as part of their system may meet the construction requirements by demonstrating an appropriate level of "substantial service" at their five- and ten-year deadlines. 47 C.F.R. § 90.769(2)(b). There is no requirement that the sites used to satisfy the Phase II requirements be selected from a pre-determined list.

its band manager plan for the 220 MHz band licenses. In particular, Access 220 seeks to have its construction measured using a “substantial service” test so as to permit it to rely on the construction undertaken by third parties (*i.e.*, its band manager customers), with a safe harbor coverage percentage derived from the 220 MHz waiver granted by the Bureau’s Commercial Wireless Division in the *Intek Waiver Order*.

21. The *Intek Waiver Order* granted a waiver of construction requirements in connection with 11 call signs that have subsequently been assigned to Access 220, including the three specific call signs for which Access 220 has requested waiver of the construction requirements in this proceeding. For the two Phase I nationwide licenses, the *Intek Waiver Order* permitted Intek to satisfy *either* the remaining six- and ten-year construction requirements set forth in section 90.725 *or* the construction requirements for Phase II nationwide licenses set forth in section 90.769.⁵⁸ In addition, Intek was required to meet an additional interim coverage benchmark of 250,000 square kilometers or 12.5 percent of the United States population by September 16, 2002, and this coverage requirement could be satisfied with respect to all 11 licenses covered by the order in the aggregate.⁵⁹ Finally, the Commercial Wireless Division ruled that the waiver would be applicable to the 11 licenses only as long as Intek or any successor in interest – at this time, Access 220 – were to operate the licenses as an integrated 28-channel system.⁶⁰

22. **Discussion.** We find that grant of a limited waiver of the construction requirements of sections 90.725 and 90.769 is warranted to permit Access 220 to rely on a substantial service showing for the three call signs. Consistent with the conditions imposed above on Access 220’s operation as a band manager in the 220 MHz spectrum, the predominant portion of the 220 MHz spectrum licensed to Access 220 will be leased to third parties, who will construct the necessary facilities to operate. If we are to permit Access 220 to operate as a band manager subject to this condition, we necessarily must allow it to rely on the construction activities of third parties in order to meet the applicable build-out requirements. Endorsing a substantial service test for the three call signs will permit Access 220 to rely on third party activities. In addition, this approach is consistent with our build-out requirements for Economic Areas and regional licenses for this service.⁶¹

23. The construction requirements adopted for these three call signs in the *Intek Waiver Order* will continue to apply. Thus, for the Phase I nationwide licenses (call signs WFPF444 and WPF284), because no six-year construction showing was submitted to the Commission,⁶² Access 220 must satisfy the construction requirements set forth in section 90.769 for Phase II nationwide authorizations. Similarly, the construction requirement for the Phase II nationwide license (call sign WPOI701) will continue to be the construction requirements set forth in section 90.769. In both cases, as indicated above, Access 220 will be permitted to count third party construction.

24. Grant of this waiver to Access 220 is fully consistent with the action taken by the Commercial Wireless Division in the *Intek Waiver Order*. Our action in this order incorporates and takes into account the build-out waiver already granted in connection with the three call signs for which Access

⁵⁸ *Intek Waiver Order*, 16 FCC Rcd at 16434. Because the six-year deadline for the two licenses had already passed, the order extended the deadline to 30 days after the order’s release, or October 13, 2001.

⁵⁹ *Intek Waiver Order*, 16 FCC Rcd at 16435. This interim benchmark requirement has been satisfied.

⁶⁰ *Id.*

⁶¹ See 47 C.F.R. § 90.767(b).

⁶² Such a showing would have been required if Access 220’s predecessor had planned to make a construction showing under section 90.725, as permitted by the *Intek Waiver Order*.

220 now seeks a waiver of the construction requirements. Consistent with the Commercial Wireless Division's reasoning in the *Intek Waiver Order*, we find that it would be unduly burdensome to apply staggered construction timetables to the call signs at issue here, particularly when we are approving the use of these licenses as an integral part of Access 220's band manager operations at 220 MHz. Thus, we find no need to retain the condition imposed by the Commercial Wireless Division requiring that the 28 channels governed by the *Intek Waiver Order* be operated on an integrated basis.⁶³

25. Accordingly, for the reasons stated above, we grant Access 220 waiver of the construction requirements, subject to the conditions outlined in the preceding paragraphs.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 0.131, 0.331, 1.3, and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331, 1.3, 1.925, the request filed by Access 220 for waiver of the permissible use restrictions of section 90.733 and the Phase I and Phase II construction requirements of sections 90.725 and 90.769 IS HEREBY GRANTED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Thomas J. Sugrue
Chief, Wireless Telecommunications Bureau

⁶³ Because we decide to lift the integration requirement, it is not necessary to address Bizcom's statement that "the management and allocation of discrete spectrum leases in no way equates to the operation of a consolidated nationwide network." Bizcom Reply Comments at 5.

**Appendix A
List of Commenters**

Comments (filed Aug. 26, 2002)

Data Comlink, Inc. (Data Comlink)
Industrial Telecommunications Association, Inc. (ITA)
Motorola, Inc. (Motorola)
Texas License Consultants
United Telecom Council (UTC)

Reply Comments (filed Sept. 5, 2002)

Access 220, LLC (Access 220)
ARRL, the National Association for Amateur Radio
Bizcom U.S.A. Inc. (Bizcom)
North Carolina Electric Membership Corporation
Venture Communications, Inc.
Warren C. Havens and Telesaurus Holdings GB, LLC, dba LMS Wireless (LMS Wireless)

Supplemental Reply Comments (filed Sept. 11, 2002)

Access 220

Reply Comments (filed Sept. 16, 2002)

Richard B. Mills, Amateur Radio Station WX7Y, and the Sinbad Desert Amateur Radio Club

Reply Comments Supplement (filed Sept. 16, 2002)

LMS Wireless