

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

In the Matter of)	
)	
XANADOO, LLC)	File Nos. 0004710163, 0004710165
)	
Applications for Extension of Time to Meet)	
Substantial Service Requirement and for Renewal)	
of for Broadband Radio Service Station WMY298)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2012

Released: April 4, 2012

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny Xanadoo, LLC’s (“Xanadoo”) request for extension of time until March 31, 2012 to demonstrate substantial service to operate incumbent Broadband Radio Service (“BRS”) Station WMY298 and its associated request for a waiver of the May 1, 2011 substantial service deadline. We also dismiss Xanadoo’s renewal application and cancel Xanadoo’s license to operate Station WMY298.

II. BACKGROUND

2. BRS is a radio communications service that consists of 73.5 megahertz of spectrum in the 2496-2690 MHz band and is licensed under Part 27 of the Commission’s rules; the remaining 112.5 megahertz of spectrum in the band is allocated to the Educational Broadband Service (“EBS”) and to two four-megahertz guard bands.¹ In 2004, the Commission undertook the radical transformation of the 2496-2690 MHz band to facilitate the development and deployment of advanced wireless services, including wireless broadband.² The Commission radically changed the band plan and technical and licensing rules applicable to BRS licenses and required BRS licensees to transition from their old channel locations to their new channel locations.³

3. On April 27, 2006, the Commission required all BRS and EBS licensees to demonstrate substantial service on or before May 1, 2011, which coincides with the expiration date for incumbent BRS licenses, including the expiration date for Station WMY298.⁴ Under Section 27.14(o) of the

¹ 47 C.F.R. § 27.5(i)(2).

² See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165 (2004) (*BRS/EBS R&O and FNPRM*, as appropriate).

³ *Id.*

⁴ 47 C.F.R. § 27.14(o). See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5718-5736 ¶¶ 274-310 (2006) (*BRS/EBS Second R&O*). The Commission later gave BRS licenses granted after November 6, 2009

Commissions Rules, a BRS licensee may demonstrate substantial service by showing that it meets one or more of five safe harbors: that it constructed six permanent links per one million people for licensees providing fixed point-to-point services; that it provided coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services; that it provided service to “rural areas” or areas with limited access to telecommunications services; that it provided specialized or technologically sophisticated service; or that it provided service to niche markets.⁵ Or, a BRS licensee may show that it has established a level of service, which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.⁶

4. Xanadoo operates fourth generation (“4G”) wireless broadband systems using BRS and EBS spectrum in the 2.5 GHz band.⁷ Xanadoo was one of the first companies to offer 4G Worldwide Interoperability for Microwave Access (“WiMAX”) in historically unserved or underserved smaller communities and rural areas.⁸ Xanadoo provides 4G WiMAX service in Abilene, Lubbock, and Wichita Falls, Texas; Lawton, Oklahoma; and Springfield and Decatur, Illinois.⁹

5. On November 2, 2006, Fixed Wireless Holdings, LLC, a wholly-owned subsidiary of Clearwire Corporation (“Clearwire”) filed a Transition Initiation Plan to transition the EI Dorado-Magnolia-Camden, Arkansas Basic Trading Area (BTA 125).¹⁰ The majority of the Geographic Service Area (“GSA”) of Station WMY298 is located within BTA 125.¹¹ On July 17, 2008, Fixed Wireless Holdings, LLC filed a Transition Completion Notification in which it notified the Commission that it had completed the transition of BRS and EBS licensees in BTA 125.¹² NSAC, LLC, another subsidiary of Clearwire, currently holds the BTA license for the EI Dorado-Magnolia-Camden, Arkansas BTA, as well as the BTA licenses in the other BTAs that include a portion of the GSA of Station WMY298.¹³

6. On April 29, 2011, Xanadoo filed a request for an extension of time to demonstrate substantial service to March 31, 2012.¹⁴ Xanadoo also submitted an application for renewal of license of Station WMY298, along with a request for waiver of the May 1, 2011 substantial service deadline applicable to BRS licensees.¹⁵ Xanadoo argues that it cannot provide substantial service in El Dorado,

(...continued from previous page)

four years from the date of initial license grant to demonstrate substantial service. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Third Report and Order*, WT Docket No. 03-66, 25 FCC Rcd 7743 (2010) (*BRS/EBS Third R&O*).

⁵ 47 C.F.R. § 27.14(o)(1).

⁶ 47 C.F.R. § 27.14(o).

⁷ See File No. 0004710165 (Extension Application), Request for Extension of Substantial Service Deadline (Extension Request). See also File No. 0004710163 (Renewal Application), Request for Waiver (Waiver Request).

⁸ Waiver Request, Extension Request.

⁹ Waiver Request, Extension Request.

¹⁰ Letter from Terri B. Natoli, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Nov. 2, 2006).

¹¹ See license for Station WMY298.

¹² Letter from Terri B. Natoli, Clearwire Corporation to Office of the Secretary, Federal Communications Commission, WT Docket No. 06-136 (filed Jul. 17, 2008).

¹³ See licenses for call sign B125, B257 (Little Rock, AR), B304 (Monroe, LA), B349 (Pine Bluff, AR), and B419 (Shreveport, LA).

¹⁴ Extension Application.

¹⁵ Waiver Request.

Arkansas where Station WMY298 is located because of “marketplace events” beyond its control.¹⁶ Xanadoo maintains that since it provided services to the markets noted above, the industry has shifted away from using equipment based on the WiMAX standard to equipment based on the Long-Term Evolution (“LTE”) standard.¹⁷ Xanadoo says it cannot buildout Station WMY298 using WiMAX equipment because its equipment supplier, Cisco, has exited the WiMAX business altogether.¹⁸ It cannot obtain financing to purchase WiMAX equipment from another vendor because investors have expressed an unwillingness to provide financing for any launch of additional WiMAX markets.¹⁹ Xanadoo admits that “it is no longer financially viable for Xanadoo to continue launching WiMAX-based systems . . .”²⁰ Moreover, Xanadoo cannot build out Station WMY298 using LTE equipment because it cannot obtain LTE equipment.²¹ According to Xanadoo, the LTE equipment suitable for the 2.5 GHz band, Time-Division-Duplex LTE (“TDD-LTE”) is not commercially available and will not become commercially available until the fourth quarter of 2011, at the earliest.²²

7. Xanadoo further argues that a grant of its requests is in the public interest because cancellation of its license to operate Station WMY298 will forestall launch of any wireless broadband service over the station for the foreseeable future, with no countervailing benefit to the public.²³ The Extension Application, Renewal Application, and Waiver Request are unopposed.

III. DISCUSSION

8. BRS licensees may engage in terrestrial point-to-point and point-to-multipoint fixed and mobile operations.²⁴ Under Section 27.14(o) of the Commission’s Rules, BRS licensees that were originally issued a BRS license prior to November 6, 2009 must demonstrate substantial service on or before May 1, 2011.²⁵ In adopting the May 1, 2011 deadline for demonstrating substantial service the Commission said that it struck the appropriate balance between ensuring that the band is placed in use and giving licensees a fair opportunity to transition their facilities.²⁶ Because WMY298 was initially granted before November 6, 2009, Xanadoo was required to demonstrate substantial service on or before May 1, 2011.

A. Extension Request

9. Xanadoo requests an extension of time to demonstrate substantial service until March 31, 2012.²⁷ To be granted an extension of time to construct, under the Commission’s Rules, Xanadoo must show that its “failure to meet the construction deadline is due to involuntary loss of site or other causes

¹⁶ Waiver Request, Extension Request.

¹⁷ Waiver Request, Extension Request.

¹⁸ Waiver Request, Extension Request.

¹⁹ Waiver Request, Extension Request.

²⁰ Waiver Request, Extension Request.

²¹ Waiver Request, Extension Request.

²² Waiver Request, Extension Request.

²³ Waiver Request, Extension Request.

²⁴ 47 C.F.R. § 27.4.

²⁵ 47 C.F.R. § 27.14(o).

²⁶ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5733 ¶ 304.

²⁷ Extension Request.

beyond its control.”²⁸ Under the Commission’s Rules, a request for extension cannot be granted for failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of a transfer of control of the licensee.²⁹

10. We conclude that Xanadoo has not shown that its failure to construct is due to circumstances beyond its control. We find that Xanadoo’s inability to obtain financing is the cause of its inability to meet the May 1, 2011 deadline. As explained above, the Commission’s Rules expressly prohibit an extension of a construction deadline because of a licensee’s failure to obtain financing.³⁰ Therefore, we deny Xanadoo’s request for an extension of time to construct.

11. Although Xanadoo argues that “marketplace events” beyond its control have caused it to miss the substantial service deadline, it has not shown that these “market place events” affected the ability of any other BRS licensees to comply with the May 1, 2011 deadline. On the contrary, the vast majority of BRS licenses were constructed by the May 1, 2011 deadline. Only 77 of the over 800 licenses that were subject to the May 1, 2011 deadline were not constructed by the deadline. Of these 77 licenses that did not meet the May 1, 2011 deadline, only one, Station WMY298, was affected by “marketplace events.”³¹ Thus, those “marketplace events” have affected only one license and not the actual marketplace. Therefore, we find that Xanadoo has not shown that its inability to meet the deadline was caused by “marketplace events,” or that these “marketplace events” were circumstances beyond its control.

12. While we recognize that BRS licensees operating systems using WiMAX equipment in the 2.5 GHz band may, at some point, transition to systems based on TDD-LTE, most BRS licensees met the May 1, 2011 deadline for demonstrating substantial service. The three largest operators in the 2.5 GHz Band, Clearwire, DigitalBridge, and Xanadoo, itself, provide service using WiMAX equipment. Xanadoo reports that it is operating WiMAX service in six markets covering over 900,000 people throughout the Midwest and Southwest.³² Clearwire also reports that it offers pre-4G service in 17 markets in the United States covering 2 million people while it offers 4G mobile WiMAX in 71 markets covering 119 million people.³³ DigitalBridge Communications reports that it offers mobile WiMAX in six states covering 390,000 people.³⁴ Thus, despite Cisco’s exit from the WiMAX market, there are WiMAX systems operating in the 2.5 GHz band. Clearly, there are other WiMAX equipment suppliers. Xanadoo also cannot attribute its failure to the industry’s transition to systems based on TDD-LTE. Such a shift affects all licensees in the band, and yet, most licensees are providing service based on WiMAX equipment. Xanadoo’s inability to meet the May 1, 2011 is because it cannot obtain financing, which our

²⁸ 47 C.F.R. § 1.946(e)(1).

²⁹ 47 C.F.R. § 1.946(e)(2), (3).

³⁰ *See, e.g.*, Douglas SMR Works, *Letter*, 24 FCC Rcd 8596, 8597 (WTB MD 2009) (“Section 1.946 also specifies circumstances where an extension will not be granted, such as “a failure to obtain financing . . .”); Stephen E. Coran, Esq., *Letter*, 22 FCC Rcd 1921, 1923 (WTB MD 2007) (“Section 1.946(e) of the Commission’s rules specifically precludes extensions of construction deadlines “due to delays caused by a failure to obtain financing. . .”); Michael V. Roberts, *Letter*, 16 FCC Rcd 21968 (WTB CWD 2001) (“Section 1.946(e)(2) states that “[e]xtension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing. . .”).

³¹ The remaining requests for extensions which have been granted cited difficulties in obtaining backhaul (*see, e.g.*, File No. 0004701713), difficulties caused by severe weather (*see, e.g.*, File No. 0004711567), or had shown concrete steps towards developing and constructing facilities.

³² Waiver Request, Extension Request.

³³ *See* File No. 0004872955.

³⁴ *See* File No. 0004725410.

rules specifically prohibit using as justification for an extension under Section 1.946(e)(2) of the Commission's Rules.³⁵ Thus, we conclude that Xanadoo may not be granted an extension of time to construct.

B. Waiver Request

13. In the alternative, Xanadoo requests a waiver of Section 27.14(o) of the Commission's Rules, which establishes May 1, 2011 as the deadline for BRS licenses that were initially granted before November 6, 2009 to demonstrate substantial service. To be granted a waiver of the May 1, 2011 construction deadline, Xanadoo must show that either (1) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of the unique or unusual 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.³⁶

14. We conclude that Xanadoo has not shown that a waiver of the substantial service deadline is warranted in this case. With respect to the first prong of the waiver standard, the underlying purpose of the BRS substantial service requirement is to fulfill our statutory duty to "ensure prompt delivery of service to rural areas, . . . prevent stockpiling or warehousing of spectrum by licensees or permittees, and . . . promote investment in and rapid deployment of new technologies and services."³⁷ Xanadoo has not shown how an extension would be consistent with those underlying purposes. Xanadoo fails to provide a specific plan for how it will obtain financing to purchase and construct TDD-LTE equipment. We further reject Xanadoo's argument that it is in the public interest to grant its waiver request because cancellation of its license will forestall launch of any wireless broadband service over Station WMY298 for the foreseeable future with no countervailing benefit to the public.³⁸ Cancellation of Xanadoo's license to operate Station WMY298 does not mean that the spectrum that it holds reverts to BRS white space, which cannot be licensed or used for the foreseeable future. On the contrary, under Section 27.1206(b) of the Commission's rules,³⁹ Xanadoo's Geographic Service Area ("GSA") for Station WMY298 dissolves and the right to operate in that area automatically reverts to the BTA holder, which in this case is Clearwire.⁴⁰ As mentioned above, Clearwire offers 4G mobile WiMAX service in 71 markets covering 119 million people.

15. Xanadoo also fails to justify a waiver under the second prong of the waiver standard. As explained above, the only "unique circumstance" Xanadoo demonstrates is its inability to obtain financing, which cannot serve as an excuse for failure to construct. Thus, we find that Xanadoo has not shown that a waiver is justified in this case.

16. An authorization for a BRS license automatically terminates if the licensee fails to meet construction or coverage requirements.⁴¹ In light of our conclusion that grant of an extension to Xanadoo is not in the public interest, we find that Xanadoo's license to operate Station WMY298 automatically

³⁵ See 47 C.F.R. § 1.946(e)(2).

³⁶ See 47 C.F.R. § 1.925(b)(3); see also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (1972), *cert. denied*, 409 U.S. 1027 (1972); 47 C.F.R. § 1.3.

³⁷ *BRS/EBS Second Report and Order*, 21 FCC Rcd at 5720 ¶ 278, *citing* 47 U.S.C. § 309(j)(4)(B).

³⁸ Waiver Request, Extension Request.

³⁹ 47 C.F.R. § 27.1206(b).

⁴⁰ See license for Station B125.

⁴¹ See 47 C.F.R. § 1.955(a)(2). See also 47 C.F.R. § 27.14(o).

terminated on May 1, 2011, the date that BRS licensees that were issued before November 6, 2009 were required to demonstrate substantial service. We will therefore deny the Extension Application and dismiss the Renewal Application. Under Section 27.1206(b) of the Commission's Rules, the GSA associated with Station WMY298 is dissolved into Clearwire's license for BTA 125.

IV. CONCLUSION AND ORDERING CLAUSES

17. Xanadoo has failed to justify an extension of time to meet the substantial service deadline for Station WMY298 or to justify a waiver of the May 1, 2011 deadline for establishing substantial service. We therefore deny the Extension Application and the Waiver Request, dismiss its Renewal Application, and declare that Xanadoo's license to operate Station WMY298 automatically terminated as of May 1, 2011.

18. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 1.925 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the request for waiver and the application for extension of time to demonstrate substantial service (File No. 0004710165) filed by Xanadoo, LLC on April 29, 2011 ARE DENIED.

19. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.949 of the Commission's Rules, 47 C.F.R. § 1.949, that the application for renewal of Broadband Radio Service license WMY298 filed by Xanadoo, LLC on April 29, 2011 (File No. 0004710163) IS DISMISSED WITH PREJUDICE.

20. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the license issued to Xanadoo, LLC for Station WMY298 IS DECLARED TERMINATED as of May 1, 2011.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau