



Federal Communications Commission
Washington, D.C. 20554

May 31, 2012

ATTN: Jeff Sohn
JSM Holding LLC
P.O. Box 118
Sheboygan Falls, WI 53985

DA 12-849

RE: JSM Holding LLC Petition for Reconsideration of Termination Pending status; and Supplemental Substantial Service Showings for Call Signs WPVF722, WPVF725, WPVF737, WPVF739, WPVF741, WPVF742, WPVF752, and WPVF754.

Dear Mr. Sohn:

This letter addresses the Petitions for Reconsideration (collectively, "Petitions") filed by JSM Holding LLC ("JSM") of the Wireless Telecommunication's Bureau's ("Bureau") dismissal of its five year construction notifications for the above-referenced call signs ("JSM Licenses").¹ For the reasons discussed below, we deny the Petitions because JSM has not complied with the population coverage or substantial service requirements set forth in Section 22.503(k)(2)-(3)² of the Commission's Rules for any of the JSM Licenses. Accordingly, the JSM Licenses automatically terminated on June 21, 2007.

JSM was a winning bidder in Auction 40, and the Commission granted the JSM Licenses on June 21, 2002,³ establishing June 21, 2007 as the five-year construction deadline.⁴ By this deadline, the licensee must demonstrate that it is operating sufficient facilities to cover two thirds of the licensed area population; or the licensee may demonstrate that it is providing substantial service.⁵ Substantial service is defined as "service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal."⁶ Pursuant to the Commission's substantial service requirements, "any party relying on 'substantial service' in lieu of the three-year and five-year coverage requirements must demonstrate that level of service or will automatically lose the geographic area license."⁷ Because the substantial service requirement can be met in a variety of ways, the Bureau reviews substantial service claims on a case-by-case basis.⁸ If the construction requirement for a license is not met, the license terminates automatically as of the construction deadline unless a waiver or extension of time is granted.⁹

On June 19, 2007, JSM filed the required notifications of construction for the subject licenses, asserting that "JSM Holding, LLC has provided substantial services per 22.503 (k)(3) of the rules as an

¹ FCC Call Signs WPVF722, WPVF725, WPVF737, WPVF739, WPVF741, WPVF742, WPVF752, and WPVF754.

² 47 C.F.R. §22.503(k)(2)-(3).

³ See Lower and Upper Paging Bands Auction Closes, Winning Bidders Announced, *Public Notice*, 16 FCC RCD 21821 (WTB 2001).

⁴ See 47 C.F.R. §22.503(k)(2)-(3).

⁵ *Id.*

⁶ 47 C.F.R. §22.503(k)(3). The Commission has used this basic definition of "substantial service" for a number of commercial wireless services. See *e.g.* 47 C.F.R. §24.103(d).

⁷ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030 ¶ 66 (1999).

⁸ *Id.* at ¶70.

⁹ See 47 C.F.R. §1.946(c) and 47 C.F.R. §1.955(a)(2).

option on [all] call signs.”¹⁰ However, as JSM did not explain how this requirement was met or provide any supporting information,¹¹ on August 16, 2007, the Wireless Telecommunications Bureau (“Bureau”) returned JSM’s notifications and directed JSM to supplement its construction notification by either: (1) stating that it had met the population benchmarks in rule section 22.503(k) and showing the percentage of coverage; or (2) specifying how the substantial service requirement was met.¹² JSM failed to timely file the requested supplements and, as a result, on November 3, 2007, the Bureau dismissed each notification.¹³ On November 7, 2007, the licenses entered automatic termination.¹⁴

On November 14, 2007, JSM filed petitions for reconsideration, stating that its failure to timely file the requested supplemental information was inadvertent and due to an administrative oversight.¹⁵ JSM again contended that it was providing substantial service within its license areas and provided coverage information for each subject call sign.¹⁶ JSM claimed that, since it was providing service to predominantly rural areas and its claimed coverage for each call sign exceeded the 20 percent “safe harbor” that the Commission established for substantial service showings in the 218-219 MHz band,¹⁷ it was providing “substantial service” within each of its license areas. However, the petitions for reconsideration also included the following language: “certain... coverage reflects components of the overall system that were licensed at different times, only one of which involves the subject authorization. Nonetheless, the subject authorization is part of the substantial service provided by the system as a whole.”¹⁸ The paging construction rules require coverage in each particular “paging geographic area”¹⁹ and it is well established that each license must be evaluated on an individual basis in determining compliance with applicable construction requirements.²⁰ Based on JSM’s response, it was unclear what coverage was attributable to each individual license at issue and what JSM was attributing to other license holdings in the same market areas.

In an effort to clarify this ambiguous language and determine whether the JSM licenses were in compliance with the Commission’s Rules, between November 2007 and January 2008, Mobility Division staff had three separate conversations with JSM’s counsel.²¹ During those conversations, staff explained exactly what information was needed to properly evaluate the construction notifications and made it clear that construction requirements for each license would be evaluated individually and without reliance on coverage provided under separate authorizations.²² On February 19, 2008, JSM replied to the staff’s inquiries but again stated that “certain of the coverage reflects components of the overall system that were

¹⁰ JSM Holding LLC, Attachment to Construction Notification Filing at 1 (June 19, 2007), ULS File Nos. 0003076048, 0003076044, 0003076050, 0003076055, 0003076058, 0003076062, 0003076073, and 0003076076.

¹¹ *See id.*

¹² *See* Notices of Return, Ref. Nos. 4639378, 4639377, 4639379, 4639380, 4639381, 4639382, 4639383 and 4639384 (August 16, 2007).

¹³ *See* Notices of Dismissal, Ref. Nos. 4676667, 46766676, 4676668, 4676669, 4676670, 4676671, 4676672, and 4676673 (November 6, 2007).

¹⁴ *See* Notices of License Termination Pending Status, Ref. Nos. 4677235, 4677236, 4677237, 4677238, 4677239, 4677240, 4677241, and 4677242 (November 7, 2007).

¹⁵ JSM Holding LLC, Petition for Reconsideration at 1 (November 14, 2007).

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 2-3 (citing Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Report and Order*, 15 FCC Rcd 1497 ¶70 (1999) (“218-219 MHz Order”).

¹⁸ *Id.* at 3.

¹⁹ 47 C.F.R. §22.503(k)(2)-(3).

²⁰ *See, e.g.*, Cingular Interactive, L.P., Showing of Substantial Service Pursuant to Section 90.665(c), File No. 0000226552, *Order*, 16 FCC Rcd 19200, 19203 (WTB 2001).

²¹ *See* Letter of Inquiry Re: Construction Notifications for Call Signs WPVF722; WPVF725; WPVF737; WPVF739; WPVF741; WPVF742; WPVF752; and WPVF754 at 2 (April 9, 2008).

²² *Id.*

licensed at different times, only one of which involves the subject authorization. Nonetheless, the subject authorization is part of the substantial service provided by the system as a whole.”²³ Due to JSM’s continuing failure to provide clear coverage information for each market area, the Bureau sent a letter pursuant to 47 U.S.C. §308(b) directing JSM to provide specific tower and service information for each of the JSM Licenses (“Letter of Inquiry”).²⁴

On May 12, 2008, JSM responded to the Letter of Inquiry (“Response”) stating that “the build-outs being utilized are in a very real way licensing-saving builds, designed to comply with government mandates (rather than to seek extensions as so many others have done), and do not reflect JSM’s long run plans for the spectrum.”²⁵ In its Response, JSM also stated that three of the eight licenses at issue were being “withdrawn,”²⁶ because they were “simply not worth fighting for any longer.”²⁷ With respect to the remaining licenses, JSM stated that it is providing a “manual dispatch service”²⁸ that “complies with all applicable rules.”²⁹ JSM also estimated the population coverage for each license as follows: WPVF722 - 47.8%; WPVF725 - 94%; WPVF742 - 76%; WPVF752 - 71%; and WPVF754 - 71%.³⁰

After thoroughly reviewing JSM’s Petitions and Response, we find that JSM has failed to demonstrate that it has met its construction requirements for the subject licenses, either through population coverage or the provision of substantial service. First, JSM does not claim that it meets the two-thirds population coverage requirement set forth in Section 22.503(k)(2)³¹ for the markets covered by the JSM licenses.³² Second, by its own admission, JSM is operating a single manual dispatch transmitter under each call sign functioning as a “licens[e]-saving build... designed to comply with government mandates.”³³ This assertion conflicts with JSM’s prior assertion that the licenses were “for use as link frequencies” and “are used as an integral part of the over all paging system.”³⁴ As we have noted, Section 22.503(k)(3) defines “substantial service” as service that is “sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.”³⁵ Moreover, 47 U.S.C §309(J) makes it clear that the purpose of performance requirements, including construction timetables, for licenses acquired via competitive bidding is to “ensure prompt delivery of service to rural areas, to prevent

²³ See JSM Holding LLC, Petition for Reconsideration (February 19, 2008).

²⁴ See Letter of Inquiry at 2.

²⁵ Response to Letter of Inquiry Re: Construction Notifications for Call Signs WPVF722; WPVF725; WPVF737; WPVF739; WPVF741; WPVF742; WPVF752; and WPVF754 at 2 (May 12, 2008) (“Response”).

²⁶ The licenses that JSM claims to have “withdrawn” were for call sign stations WPVF737, WPVF739, and WPVF741. However, these licenses were never formally cancelled prior to this order.

²⁷ Response at 2.

²⁸ JSM defines “manual dispatch” as follows: “a transmitter exists on-site on the specific frequency specified in the construction permit. It is an analog transmitter connected to the antenna with a microphone and speaker. Any person seeking to use the system need only drive to the location of the transmitter and pick up the microphone and talk to the mobile that is in the coverage area. This area is plotted by reasonable assumptions, generally consistent with industry norms for compliance with build-out requirements, of how far a mobile with a gain antenna can operate from the base location and communicate.” Response at 2.

²⁹ Response at 2.

³⁰ Response at 4-7.

³¹ 47 C.F.R. §22.503(k)(2).

³² Although JSM provided population coverage estimates for each license area, some of which exceed the two-thirds coverage threshold set forth in 47 C.F.R. § 22.503(k)(2), JSM only claims to have provided substantial service within its license areas. Moreover, based on the information provided by JSM, our staff’s analysis found the actual population covered by each transmitter to be significantly less than JSM claims.

³³ Response at 1.

³⁴ See JSM Holding LLC, Attachment to Construction Notification Filing at 1 (June 19, 2007). While JSM continues to assert that the 459.400 MHz frequency is “a major control link for our main paging system,” it does not provide evidence that any of the subject licenses are actually used to provide control link services and relies solely on “manual dispatch” to establish substantial service for each license. See Response at 4-7.

³⁵ 47 C.F.R. §22.503(k)(3).

stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.”³⁶ JSM has not demonstrated that it is providing a service that meets the established definition of substantial service or the underlying purpose of the construction requirements. Notably, JSM has not provided us with any evidence to support its claim that “it [manual dispatch service] appears to be at least as vibrant a service that the Commission has in other instances involving auctions recognized as being acceptable.”³⁷ Indeed, JSM makes no claims that its “manual dispatch service” is actually being utilized or that it provides a useful service to any segment of the marketplace.

In addition, even for those licenses that meet or exceed 20 percent population coverage, we do not find JSM’s reliance on the “safe harbor” set forth in the *218-219 MHz Order* compelling.³⁸ A safe harbor established for an entirely different class of services cannot remedy JSM’s failure to meet the Commission’s construction requirements for the Licenses in question. Accordingly, we find that the manual dispatch service provided by JSM falls well short of the substantial service requirements set forth in Section 22.503(k)(3).

Based upon the foregoing, we deny JSM’s Petitions for the subject licenses. We also note that JSM is no longer seeking reconsideration of Commission action regarding call signs WPVF737, WPVF739, and WPVF741. Accordingly, we shall modify the information in ULS to reflect that the JSM Licenses automatically terminated on June 21, 2007. JSM must immediately cease any and all operations under these licenses. This action is taken pursuant to delegated authority under sections 0.131, 0.331, 1.925, 1.955, and 22.503 of the Commission's Rules.³⁹

Sincerely,

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³⁶ 47 U.S.C. §309(j)(4)(B).

³⁷ Response at 2.

³⁸ See *218-219 MHz Order* at ¶70.

³⁹ 47 C.F.R. §§0.131, 0.331, 1.925, 1.955, and 22.503.