

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

In re Matter of)	
)	
BTA ASSOCIATES, LLC)	File No. 0005237168
)	
Request for Extension of Time, or in the)	
alternative, Limited Waiver of Substantial Service)	
Requirements for Local Multipoint Distribution)	
Service License WPOH652)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2012

Released: November 8, 2012

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny a request from BTA Associates, LLC (“BTA”) for extension of time to demonstrate compliance with the substantial service requirements for Local Multipoint Distribution Service (“LMDS”) license WPOH652, Walla Walla, WA-Pendelton, OR) (“License”), as well as its associated request for waiver of the June 1, 2012 substantial service deadline. Given our denial of these requests, this license automatically terminated, by operation of Commission rule, as of June 1, 2012.

II. BACKGROUND

2. In 1997, the Commission allocated 1,300 megahertz of LMDS spectrum in each basic trading area (“BTA”) across the United States.¹ Specifically, the Commission allocated two LMDS licenses per BTA – an “A Block” and a “B Block” in each.² The A Block license is comprised of 1,150

¹ See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12605 ¶ 136 (1997) (“*Second LMDS Report and Order*”); see also Rand McNally Commercial Atlas & Marketing Guide 36-39 (123rd ed. 1992). Rand McNally is the copyright owner of the Major Trading Area (MTA) and BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally’s Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally’s Commercial Atlas & Marketing Guide. The conditional use of Rand McNally copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994 and covers use by LMDS applicants. This agreement requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally ownership. The Commission has allocated the LMDS for operations in a total of 493 BTAs throughout the nation.

² See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 12.

megahertz of total bandwidth, and the B Block license is comprised of 150 megahertz of total bandwidth.³ The A Block consists of the sub bands 27.50-28.35 GHz (the A1 Band); 29.10-29.25 GHz (the A2 Band); and 31.075-31.225 GHz (the A3 Band).⁴ The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).⁵ The same entity may hold the licenses for both the A and B Blocks of spectrum in an individual BTA, but each license is auctioned and licensed separately.

3. LMDS licensees are regulated under Part 101 of the Commission's rules, which generally governs terrestrial microwave operations, and may provide any service consistent with the Commission's rules and the licensee's regulatory status,⁶ subject to a ten-year term from the initial license grant date.⁷ At the end of the ten-year period, licensees are required to submit an acceptable showing to the Commission demonstrating that they are providing "substantial service" in each licensed area.⁸ Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.⁹

4. The final LMDS band allocation was adopted by the Commission on March 20, 1997.¹⁰ Since allocating the LMDS spectrum, the Commission has thus far held two LMDS auctions: Auction 17 and Auction 23.¹¹ Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998.¹² The license in question here was originally issued to HighSpeed.com, LLC, ("HighSpeed.com") on August 10, 1998 as a result of Auction No. 17.¹³ After a series of assignments of the license, on October 27, 2006, the Bureau consented to an assignment of the license from HighSpeed Communications, LLC, ("HighSpeed Communications") to BTA.¹⁴

³ See *id.*

⁴ See 47 C.F.R. § 101.1005.

⁵ See *id.*

⁶ See 47 C.F.R. § 101.1013(b).

⁷ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259. Pursuant to 47 C.F.R. § 101.67, LMDS licenses are issued for a period not to exceed ten years, subject to renewal upon demonstration of substantial service.

⁸ See 47 C.F.R. § 101.1011(a); see also *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262.

⁹ See 47 C.F.R. § 101.1011(a).

¹⁰ See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 13; see also Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005, 19025 ¶ 45 (1996) (allocating the initial 1 gigahertz of spectrum for LMDS and seeking comment on the allocation of an additional 300 megahertz of spectrum at 31.0-31.3 GHz).

¹¹ See, e.g., LMDS Auction Closes, *Public Notice*, 13 FCC Rcd 18217 (1998) (*Auction 17 Closing PN*); Local Multipoint Distribution Service Auction Closes, *Public Notice*, 14 FCC Rcd 8543 (1999) (*Auction 23 Closing PN*).

¹² See FCC Announces Spectrum Auction Schedule for 1998, *Public Notice*, 12 FCC Rcd 19726 (1997); *Auction 17 Closing PN*, 13 FCC Rcd at 18217.

¹³ See File No. 0000000029 (granted Aug. 10, 1998); see also FCC Announces the Conditional Grant of 51 Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 15419 (WTB 1998).

¹⁴ See File No. 0002786244 (consented to Oct. 27, 2006, consented to Jan. 9, 2007, consummated Jan. 12, 2007). See also File No. 0000011688 (filed Apr. 26, 1999, consented to Sep. 20, 1999, consummated Oct. 1, 1999) (*pro forma* transfer of control of HighSpeed.Com, LLC to HighSpeed Management, LLC); File No. 0000313358 (filed Jan. 4, 2001) (changing licensee name to HighSpeed Communications, LLC); File No. 0000190547 (filed July 18, (continued...))

5. BTA was originally required to demonstrate substantial service by August 10, 2008, or ten years after the initial license grant date.¹⁵ On February 12, 2008, BTA filed an application for an extension of time to demonstrate substantial service for WPOH652.¹⁶ On April 11, 2008, the Wireless Telecommunications Bureau (the “Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees – including BTA – to extend their deadlines to meet the substantial service requirements to June 1, 2012, resulting in a nearly four-year construction extension for each of these licensees.¹⁷

6. The Bureau found that these LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.¹⁸ In making this finding, the Bureau noted that the licensees seeking relief from the construction deadlines represented a majority of LMDS licensees for whom buildout requirements were approaching, and that they all faced these same basic obstacles to timely construction.¹⁹ Thus, these obstacles were not a product of an individual licensee’s short-sightedness or its unfortunate business decisions; rather, the difficulties in procuring the basic equipment necessary for LMDS operations were widespread, stemming from the state of the market. Based on the record evidence, the Bureau anticipated that various developments in the market – arising in large part from the rollout of new services that could provide opportunities for LMDS operations – would help rectify these difficulties. Thus, the Bureau found that LMDS licenses could provide wireless backhaul services to licensees in the 700 MHz band, the Advanced Wireless Services-1 (“AWS-1”) band, and other bands suitable for mobile broadband service, all of which at that time had recently been auctioned, licensed, or put into use.²⁰ The Bureau anticipated that these bands would develop robustly, along with other mobile and fixed wireless services, and that resulting opportunities for associated LMDS service (such as wireless backhaul) would help spur production of equipment designed for LMDS use and thus facilitate timely construction by LMDS licensees, under the extended buildout deadline set by the Bureau.²¹

7. On May 29, 2012, BTA filed an application pursuant to Section 1.946(e) of the Commission’s Rules seeking a further twelve month extension of time until June 1, 2013, to construct its LMDS license.²² Invoking the Commission’s general waiver authority under Section 1.925 of the Commission’s Rules, BTA seeks a time-delimited waiver of Section 101.1011(a) of the Commission’s

(...continued from previous page)

2000, consented to Nov. 17, 2000, consummated Apr. 4, 2001) (transfer of control of HighSpeed.Com, LLC to HighSpeed Partners Holding, LLC); File No. 0002786244 (filed Oct. 17, 2006, consented to Oct. 26, 2006) (involuntary transfer of control of licensee to a receiver).

¹⁵ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259.

¹⁶ File No. 0003322944 (filed Feb. 12, 2008).

¹⁷ 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 Order*).

¹⁸ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 24.

¹⁹ *Id.*

²⁰ *Id.* at 5905 ¶ 25.

²¹ *Id.*

²² See File No. 0005237168 (filed May 29, 2012) (Extension Application). With its Extension Application, BTA filed an exhibit entitled “Request for Waiver and ‘Substantial Service’ Deadline Extension” (Extension and Waiver Request).

Rules.²³ BTA contends that an extension of the current construction deadline will serve the public interest because it will allow the Licensee to pursue Commission authorization to assign the License to Columbia Rural Electric Association (“Columbia”), and, upon receipt of such consent, for Columbia to construct facilities to improve control and security monitoring of Columbia’s electric distribution substations in Basic Trading Area 460, the geographic license area for WPOH652.²⁴ BTA states that Columbia is a rural electric cooperative based in Dayton, Washington, which delivers reliable, competitively priced electric service to farms, homes and businesses in Columbia and Walla Walla Counties in Washington and Umatilla County in Oregon.²⁵ BTA adds that Columbia has committed to acquire the License from BTA if there is sufficient time available for Columbia to obtain Commission consent for the License assignment and to construct the links required for its planned operations.²⁶ According to BTA, the Federal Energy Regulatory Commission (FERC), the North American Electric Reliability Corporation (NERC) and the Western Electricity Coordinating Council have advised Columbia and other electric utility companies to improve security for their assets by, among other means, using licensed frequencies for the control and monitoring of electric distribution substations.²⁷ Although Columbia already operates a substantial licensed microwave system as the backbone of a network to control and monitor its eight substations, it also makes use of unlicensed spectrum for control purposes.²⁸ BTA says that Columbia desires to replace use of unlicensed spectrum with LMDS spectrum to lessen interference potential and improve security, and to support additional substations that it plans to add on a continuing basis.²⁹

III. DISCUSSION

8. We find that BTA has not justified a grant of an extension of time, or a waiver of the construction deadline, for its LMDS license. Without such extension or waiver, BTA’s LMDS license automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules, as of June 1, 2012.³⁰ We discuss these findings in detail below.

A. Extension Requests

9. BTA requests a further twelve month extension of time, until June 1, 2013, to demonstrate substantial service.³¹ As noted above, this is the second extension that BTA has requested for constructing these licenses. To be eligible for an extension of time to construct, BTA must show that

²³ Extension and Waiver Request at 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ 47 C.F.R. §§ 1.946(c) (providing that if a licensee in the Wireless Radio Services 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, without specific Commission action, on the date the construction or coverage period expires) and 1.955(a)(2) (cross-referencing Section 1.946(c) and reiterating that authorizations in the Wireless Radio Services automatically terminate without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements).

³¹ Extension and Waiver Request at 1.

its “failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”³² We conclude that BTA has not met this threshold.

10. BTA admits that it seeks an extension for the purpose of assigning the license to Columbia, a third party. The Commission’s rules, however, explicitly state:

Extension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.³³

We therefore find that BTA’s purported rationale for an extension is inconsistent with our rules.

11. BTA also cites the Commission’s acknowledgement, in the *LMDS Order*, that the LMDS equipment market was initially slow to develop.³⁴ BTA acknowledges, however, that suitable equipment has since become available.³⁵ BTA made a voluntary business decision to assign its licenses to Columbia, as opposed to attempting to develop the License itself. The Commission has consistently found that a licensee’s own business decisions are not circumstances beyond the licensee’s control and are therefore not an appropriate basis for regulatory relief.³⁶ In view of these precedents, we find that none of the factors cited by BTA demonstrate that its failure to construct was caused by circumstances beyond its control. We therefore conclude that the argument presented by BTA does not support its request for yet more time to construct.

B. Waiver Request

12. To be granted a waiver of the June 1, 2012 construction deadline, BTA 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.³⁷ As

³² 47 C.F.R. § 1.946(e)(1).

³³ 47 C.F.R. § 1.946(e)(3).

³⁴ Extension and Waiver Request at 3, *citing LMDS Order*, 23 FCC Rcd at 5904 ¶ 26.

³⁵ Extension and Waiver Request at 3.

³⁶ *See, e.g.*, Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercises 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 was 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).

³⁷ *See* 47 C.F.R. § 1.925(b)(3); *see also* 47 C.F.R. § 1.3; *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).

is discussed more fully below, we conclude that BTA has failed to make the requisite showing, and we therefore deny its waiver request.

13. First, we conclude that an extension would be inconsistent with the underlying purpose of the substantial service standard, which, as the Commission has said, is to provide “a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.”³⁸ Despite the past unavailability of LMDS equipment to which BTA alludes, many other licensees have since found such equipment to be readily available and have built out their license areas. Granting BTA a further extension despite its lack of effort in attempting to develop its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

14. We also conclude that BTA has not shown that requiring compliance with the substantial service rules is inequitable, unduly burdensome, and contrary to the public interest. As we have previously discussed, BTA’s decision not to construct its LMDS licenses was a business decision. Other licensees made other business decisions that led them to build out their licenses.³⁹

15. BTA argues that granting its request would serve the public interest because it would facilitate construction of licensed microwave stations by Columbia, to which BTA proposes to transfer its license.⁴⁰ As noted above, pursuant to Section 1.946(e)(3) of the Commission’s Rules, extension requests will not be granted because the licensee intends to assign the authorization to another entity that plans to complete facilities that the assignor failed to construct.⁴¹

16. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁴² In light of our decision to deny BTA’s request for an extension or waiver of the construction requirements on the ground that grant of such request is not in the public interest, BTA’s license automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,⁴³ as of June 1, 2012.

³⁸ See Amendment of Part 101 of the Commission’s Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees, WT Docket No. 10-153, *Second Report and Order, Second Further Notice of Proposed Rulemaking, Second Notice of Inquiry, Order on Reconsideration, and Memorandum Opinion and Order*, 27 FCC Rcd 9735, 9773-9774 ¶ 104 (2012) (“*Wireless Backhaul 2nd R&O*”), citing *39 GHz R&O*, 12 FCC Rcd at 18623 ¶ 42; see also *39 GHz R&O*, 12 FCC Rcd at 18625 ¶ 46 (“This approach will permit flexibility in system design and market development, while ensuring that service is being provided to the public.”); *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 46 (“This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings.”); *39 GHz R&O*, 12 FCC Rcd at 18625 ¶ 47 (“[A]pplying a similar performance requirement to all licensees at the license renewal point will help establish a level playing field without compromising the goals of ensuring efficient spectrum use and expeditious provision of service to the public.”); *39 GHz Renewal Order*, 17 FCC Rcd at 4407 ¶ 11 (“The Commission’s overarching purpose behind adopting the substantial service standard for renewal was to ensure that the spectrum was being used to provide service to the public.”).

³⁹ As of October 3, 2012, the Broadband Division had accepted 67 LMDS buildout notifications from at least 18 different licensees. Another 221 showings were pending and undergoing review.

⁴⁰ Extension and Waiver Request at 3-4.

⁴¹ 47 C.F.R. § 1.946(e)(3).

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

⁴³ *Id.*

IV. CONCLUSION AND ORDERING CLAUSES

17. BTA has failed to justify an extension of time to meet the substantial service deadline for its LMDS stations or to justify a waiver of the June 1, 2012 deadline for establishing substantial service. We therefore deny the Extension and Waiver Request. Accordingly, BTA's license to operate LMDS station WPOH652 automatically terminated, by operation of Commission rule, as of June 1, 2012.

18. 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 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. 0005237168) filed by BTA Associates, LLC on May 29, 2012 IS DENIED.

19. 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 Universal Licensing System SHALL BE UPDATED to reflect that the license issued to BTA Associates, LLC for Local Multipoint Distribution Service Station WPOH652 TERMINATED as of June 1, 2012.

20. These actions are 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

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