

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

In re Matter of
TWG LMDS, LLC
Request for Extension of Time, or in the
alternative, Limited Waiver of Substantial Service
Requirements for Local Multipoint Distribution
Service Stations WPLM542, WPLM543, and
WPLM544
File Nos. 0005375679-0005375681

MEMORANDUM OPINION AND ORDER

Adopted: December 3, 2012

Released: December 4, 2012

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny TWG LMDS, LLC's ("TWG") request for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service ("LMDS") licenses for Stations WPLM542, WPLM543, and WPLM544, as well as its associated request for waiver of the September 1, 2012 substantial service deadline. Because we deny TWG's request, the licenses for Stations WPLM542, WPLM543, and WPLM544 automatically terminated, by operation of Commission rule, as of September 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

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.

licenses per BTA – an “A Block” and a “B Block” in each.² The A Block license is comprised of 1,150 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 GHz (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 licenses for Stations WPLM542, WPLM543 and WPLM544 were originally issued to TWG on June 17, 1998, as a result of Auction No. 17.¹³

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

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. 0000000135 (granted June 17, 1998); see also FCC Announces the Conditional Grant of 199 Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 16730 (WTB 1998). The licenses in question are WPLM524 (Santa Barbara-Santa Maria, CA), WPLM543 (San Luis Obispo, CA), and WPLM544 (Salinas-Monterey, CA). Each of those licenses authorizes operations on the B block.

5. TWG was originally required to demonstrate substantial service on June 17, 2008, or 10 years after the initial license grant date.¹⁴ On June 4, 2008, TWG filed applications for an extension of time to demonstrate substantial service for its LMDS licenses.¹⁵ On June 13, 2008, the Bureau granted TWG an extension until June 1, 2012 to construct its LMDS licenses, resulting in a nearly four-year construction extension.¹⁶ The application was granted with a comment referring to a 2008 Bureau order where the Bureau granted extensions to other LMDS licensees.¹⁷ In the *LMDS Order*, the Bureau found that 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 licensees could potentially use their LMDS licenses to 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

6. On May 25, 2012, TWG filed applications seeking a further three-month extension of time, until September 1, 2012, to construct Stations WPLM542, WPLM543 and WPLM544.²² TWG reported that it had “engaged contractors to oversee site acquisition, system development, and initiation of service,” and “secured transmission sites and engaged in discussions with respect to the purchase and use of equipment.”²³ TWG represented that with the three-month extension it was seeking, “TWG anticipates that it will be able to perfect the development of its network to meet its performance obligations and

¹⁴ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259.

¹⁵ File Nos. 0003462791, 0003462795, 0003462799 (filed June 4, 2008).

¹⁶ File Nos. 0003462791, 0003462795, 0003462799 (granted June 13, 2008).

¹⁷ *Id.*, citing 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 Nos. 0005230151-0005230153 (filed May 25, 2012).

²³ See, e.g., File No. 0005230151, Waiver Request at 5.

thereby put its LMDS spectrum to productive use.”²⁴ Based on those representations, on July 23, 2012, the Bureau granted TWG’s request and extended the substantial service deadline to September 1, 2012.²⁵

7. On August 31, 2012, TWG filed a third request seeking an extension of time or waiver of the construction deadline, until March 1, 2013.²⁶ Invoking the Commission’s general waiver authority under Section 1.925 of the Commission’s Rules, TWG argues, once again, that it has been unable to construct due to a lack of available equipment for the B Block.²⁷ It is not clear what type of operations TWG intends to deploy in the band, but it does acknowledge that “LMDS is showing promise as a high-capacity, backhaul solution for the burgeoning wireless broadband industry”, and that “vendors have only just begun producing viable, affordable, commercially available equipment capable of operating in the LMDS B-Block band.”²⁸ TWG further argues that while vendors have made some equipment available, they are uninterested in producing additional equipment until there is substantial demand, and that due to its small size, it has been unable to “engender the requisite demand to compel additional equipment production.”²⁹ Additionally, TWG argues that in an effort to obtain equipment, it has “made commitments to companies to have equipment tested and installed for each of the sites, when such equipment becomes available,”³⁰ has “tasked its contractor with looking for used equipment that TWG could purchase,”³¹ and “is cautiously optimistic that, with the requested additional time, it can either secure equipment through its own efforts or consolidate its request with other small businesses that have not yet constructed their systems to increase the demand for equipment and thereby encourage vendors to increase production.”³²

III. DISCUSSION

8. We find that TWG has not justified a grant of an extension of time, or a waiver of the construction deadline, for its LMDS licenses. And without such extension or waiver, TWG’s LMDS licenses for Stations WPLM542, WPLM543 and WPLM544 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules, as of September 1, 2012.³³ We discuss these findings in detail below.

²⁴ *Id.*

²⁵ See File Nos. 0005230151-0005230153 (granted July 23, 2012).

²⁶ File Nos. 0005375679-0005375681 (filed Aug. 31, 2012) (Extension Applications). With each Extension Application, TWG filed an exhibit entitled “Request for Additional Time to Demonstrate Substantial Service” (Extension & Waiver Request).

²⁷ Extension and Waiver Request at 2.

²⁸ *Id.* at 4.

²⁹ *Id.*

³⁰ *Id.* at 5.

³¹ *Id.* at 5-6.

³² *Id.* at 6.

³³ 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).

A. Extension Requests

9. TWG requests a further six-month extension of time, until March 1, 2013, to demonstrate substantial service.³⁴ As noted above, this is the third extension that TWG has requested for constructing these licenses. To be eligible for an extension of time to construct, TWG must show that its “failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”³⁵ We conclude that TWG has not met this threshold.

10. TWG explains that it has not constructed any LMDS service due to the lack of development of LMDS equipment in general, but also for the B Block specifically.³⁶ Although it is not clear from TWG’s pleadings what type of service it intends to deploy with its licenses, we note that other B Block licensees have been able to secure equipment that led to the construction of their stations.³⁷ TWG has not provided a satisfactory explanation as to why it was unable to obtain B Block equipment when other licensees did build in a timely fashion. Indeed, TWG believes that there is, at a minimum, used equipment on the market, and has thereby engaged its contractor to seek out such equipment.³⁸ Furthermore, TWG’s future plans include uniting with other licensees that have not yet constructed to increase the demand for equipment, a strategy which it believes will be successful.³⁹ TWG does not identify any other licensees it has contacted in an attempt to implement that strategy, and it is uncertain, at best, whether such a strategy would be successful. Under these circumstances, we conclude that TWG has not demonstrated that its failure to construct was caused by circumstances beyond its control.

11. TWG cites the *LMDS Order* as support for its current request.⁴⁰ As noted above, when the Bureau granted an extension to LMDS licensees in 2008, it anticipated that licensees could potentially provide wireless backhaul services to licensees in bands that had recently been auctioned, licensed, or put into use.⁴¹ In the years since the Bureau originally extended the construction deadline for these licenses, there has been considerable deployment of wireless broadband service in the 700 MHz, AWS-1, and BRS/EBS bands. Thus, the validity of one of the factors supporting the Bureau’s earlier extension of the construction deadline – that with some additional time, productive opportunities for using LMDS licenses would develop as these emerging wireless broadband services create a need for supporting backhaul service – has been substantially confirmed. Notwithstanding that progress, including progress by other B Block licensees, TWG made no attempt to construct LMDS facilities. We therefore conclude that the decision to grant an extension to LMDS licensees in 2008 does not support TWG’s request for yet more time.

³⁴ Extension and Waiver Request at 1.

³⁵ 47 C.F.R. § 1.946(e)(1).

³⁶ Extension and Waiver Request at 1.

³⁷ See e.g. GCI Communication Corp, File No. 0005245298 (filed June 1, 2012, accepted Aug. 20, 2012); IDT Spectrum, LLC, File No. 0004864473 (filed Sep. 6, 2011, accepted Feb. 8, 2012); Nsight Spectrum, LLC, File No. 0005243854 (filed June 1, 2012, accepted Aug. 20, 2012).

³⁸ Extension and Waiver Request at 5-6.

³⁹ *Id.* at 6.

⁴⁰ Extension and Waiver Request at 3-4.

⁴¹ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 25.

12. TWG cites a series of cases in which the Bureau granted extensions of the buildout requirement in other services.⁴² Those cases are distinguishable from TWG's situation. In many of those cases, there was a systemic problem with equipment availability that affected all licensees in the band.⁴³ Here, by contrast, many LMDS licensees have been able to obtain and deploy equipment. In the case of WCS, there were also broader issues with the service rules that delayed or prevented deployment.⁴⁴ No party has argued that the LMDS service rules are responsible for delays in deploying service.

B. Waiver Request

13. To be granted a waiver of the September 1, 2012 construction deadline, TWG 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.⁴⁵ As is discussed more fully below, we conclude that TWG has failed to make the requisite showing, and we therefore deny its waiver request.

14. 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."⁴⁶ TWG

⁴² Extension and Waiver Request at 2 n.11.

⁴³ See, e.g., Request of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service, *Order*, 25 FCC Rcd 10097, 10102 ¶ 10 (WTB 2010) (waiver of interim substantial service deadline granted to MVDDS licensees because "there is a lack of viable, affordable equipment for MVDDS that can be deployed in the 12.2-12.7 GHz band."); Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, WT Docket No. 06-102, *Order*, 21 FCC Rcd 14134, 14139-14140 ¶ 10 (WTB 2006) (*WCS Order*) (construction deadline extended until July 21, 2010 for WCS licensees; "participation by almost all of the licensees in the WCS industry in this proceeding leads us to believe that the technical and equipment challenges in this band are widespread"); Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Part II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13000-13001 ¶ 15 (WTB 2004) (Five-year construction requirement until November 5, 2007 for all 220 MHz Phase II EA, regional, and nationwide licensees. "The two companies that originally manufactured five kilohertz voice equipment no longer do so. We find that the loss of that equipment was a unique circumstance that have frustrated licensees' efforts to meet the construction requirements."); FCI 900, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11077 ¶ 7 (WTB 2001) (16 month extension of construction deadline granted for 900 MHz Major Trading Area licensees - no digital voice equipment available for the 900 MHz SMR band).

⁴⁴ See *WCS Order*, 21 FCC Rcd at 14139 ¶ 10 (noting that restrictive out-of-band emission limits may have impeded development of WCS equipment).

⁴⁵ 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).

⁴⁶ 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*, FCC 12-87, 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

(continued...)

asserts that it has been unable to secure any equipment to construct its licenses. In contrast, many other licensees, including B Block licensees, have built their facilities.⁴⁷ Granting TWG a further extension despite its lack of success in developing its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

15. We also conclude that TWG has not shown requiring compliance with the substantial service rules is inequitable, unduly burdensome, and contrary to the public interest. TWG expresses optimism that it will be able to secure either used equipment, or unite with other licensees to create a larger demand, yet it did not attempt to implement these strategies prior to its license expiration. As we have previously discussed, other licensees have been able to secure equipment that led them to build out their licenses.⁴⁸

16. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁴⁹ In light of our decision to deny TWG'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, TWG's license automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,⁵⁰ as of September 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

17. TWG has failed to justify an extension of time to meet the substantial service deadline for its LMDS station or to justify a waiver of the September 1, 2012 deadline for establishing substantial service. We therefore deny the Extension and Waiver Requests. Accordingly, TWG's licenses to operate LMDS Stations WPLM542, WPLM543, and WPLM544 automatically terminated, by operation of Commission rule, as of September 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 requests for a waiver and applications for extension of time to demonstrate substantial service (File Nos. 0005375679, 0005375680, and 0005375681) filed by TWG LMDS, LLC, on August 31, 2012 ARE 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

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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.").

⁴⁷ 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.

⁴⁸ See note 47, *supra*.

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

⁵⁰ *Id.*

UPDATED to reflect that the licenses issued to TWG Communications, Inc. for Local Multipoint Distribution Service Stations WPLM542, WPLM543, and WPLM544 TERMINATED as of September 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
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