

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

In the Matter of
Extension of the Five-Year Build-Out Period
For BTA Authorization Holders in the Multipoint
Distribution Service
MM Docket No. 01-109

MEMORANDUM OPINION AND ORDER

Adopted: June 14, 2001

Released: June 15, 2001

By the Chief, Mass Media Bureau:

I. INTRODUCTION

1. The Mass Media Bureau ("Bureau"), acting pursuant to delegated authority, has proposed on its own motion to extend the current five-year build-out requirement imposed upon Basic Trading Area ("BTA") authorization holders in the Multipoint Distribution Service ("MDS") by two years. Currently, BTA authorization holders have five years from the grant date of the initial BTA authorization to construct, develop and expand MDS station operations in their respective protected service areas. For the reasons stated below, we find that the public interest would be served by issuing a waiver of the current five-year build-out requirement for certain BTA authorization holders. Pursuant to the action we take today, BTA authorization holders new build-out date will now be either (a) August 16, 2003 or (b) the authorization holders' existing build-out date, whichever is later. Accordingly, for BTA authorization whose five-year build-out date is August 16, 2001, their new build-out date will be August 16, 2003. For those BTA authorization holders whose build-out date is after August 16, 2003, no extension of time is granted under this Order.

1 BTAs are the geographic areas governing the system-wide authorization of MDS station licenses and are based on material copyrighted by Rand McNally & Company ("Rand McNally"). See Rand McNally, 1992 Commercial Atlas and Marketing 36-39 (123rd ed. 1992). BTAs are drawn based on the counties in which residents of a given BTA make the bulk of their shopping goods purchases. Rand McNally defined 487 BTAs in the 1992 Commercial Atlas and Marketing Guide. Because Rand McNally did not include some geographic areas that were the subject of the MDS auction, those areas were added to Rand McNally's list as BTA-like geographic areas, bringing the total to 493 authorizations auctioned.

2 See Public Notice, In the Matter of Extension of the Five-Year Build-Out Period for BTA Authorization Holders in the Multipoint Distribution Service, MM Docket No. 01-109, DA 01-1072 (MMB rel. April 25, 2001) ("Public Notice").

3 47 C.F.R. § 21.930.

II. BACKGROUND

2. Traditionally, MDS spectrum had been used to deliver multichannel video programming services similar to cable television. In March 1996, the Commission completed its auction of the remaining unlicensed MDS spectrum with the expectation that such spectrum would be used for the provision of wireless cable services. The United States was divided into 493 BTAs and these markets were auctioned to the highest bidders.⁴ Since the 1996 auction, the MDS industry has been rapidly evolving. In July 1996, the Commission's *Digital Declaratory Ruling* permitted licensees to utilize digital modulation techniques on their MDS spectrum.⁵ In October 1996, the Commission allowed MDS operators to use their spectrum for high-speed digital data applications, including Internet access.⁶

3. In March 1997, the Wireless Cable Association International, Inc. ("WCA"),⁷ along with over 100 participants, petitioned the Commission to grant the industry the right to use MDS and Instructional Television Fixed Service ("ITFS") spectrum for two-way services. Two-way authorization enables licensees to provide high-speed, ultra-high-capacity broadband service, including two-way Internet service *via* cellularized communication systems. In 1998, the Commission approved the use of two-way transmissions on MDS and ITFS frequencies.⁸

4. In the initial filing window for two-way service, which was held August 14 - 18, 2000, MDS and ITFS licensees filed approximately 2,267 applications. On April 6, 2001, the Bureau released its first Public Notice announcing the grant of 1,024 of these applications.⁹ The Bureau continues to grant additional applications filed during the initial filing window. Furthermore, on April 16, 2001, the Bureau commenced a rolling one-day filing window, which permits licensees to seek two-way authorization on a first-come first-served basis.¹⁰

5. Section 21.930(c)(1) of the Commission's rules provides that within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals pursuant to Section 21.907 of the Commission's rules that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent stations.¹¹ On August 16, 1996, the

⁴ Although a BTA holder has rights to transmit throughout its authorized area, incumbent licensees whose authorizations predate the 1996 auction continue to operate within any BTA as before the auction. *See* 47 C.F.R. § 21.902.

⁵ *See In the Matter of Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 11 FCC Rcd 18839 (1996).

⁶ *See Public Notice, The Mass Media Bureau Implements Policy for Provision of Internet Service on MDS and Leased ITFS Frequencies*, 11 FCC Rcd 22419 (1996).

⁷ The organization subsequently changed its name to the Wireless Communications Association International, Inc.

⁸ *See In the Matter of Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions ("Two-Way Order")*, 13 FCC Rcd 19112 (1998), *recon.*, 14 FCC Rcd 12764 (1999), *further recon.*, 15 FCC Rcd 14566 (2000).

⁹ *Public Notice*, Report No. 337 (MMB April 6, 2001).

¹⁰ *Public Notice*, DA 01-751 (MMB March 26, 2001).

¹¹ *See* 47 C.F.R. §§ 21.907, 21.930(c)(1).

Commission granted 334 of the 493 BTA authorizations to 54 different entities. These BTA authorization holders will be the first entities to reach the five-year build-out date of August 16, 2001.¹² Additionally, these authorization holders are required to certify compliance with the build-out requirements by June 18, 2001.¹³

6. In the April 25, 2001 *Public Notice*, the Bureau proposed to extend the five-year build-out requirement for all current BTA authorization holders, reasoning that such action could serve the public interest because it will allow the introduction of innovative data, voice and broadband services, thus benefiting consumers and promoting competition. The Bureau noted that the build-out benchmarks were originally established in order to ensure that BTA authorization holders would promptly deliver their anticipated video programming service to the public. The Bureau indicated that it would be inequitable to require authorization holders to follow build-out criteria applicable to rules governing wireless cable operations since many of them are now providing high-speed broadband services.

7. Eight entities filed comments in response to the *Public Notice*.¹⁴ All of the comments support waiver of the five-year build-out requirement, with the overwhelming majority supporting a two-year extension.¹⁵ Some commenters indicated that although they would prefer to receive an extension for a longer period of time, they would be satisfied with a two-year extension.¹⁶

¹² The remaining 153 BTA authorizations were granted on varied dates subsequent to August 16, 1996, with the most recent BTA authorization granted on October 12, 1999. There are six pending applications for BTA authorizations.

¹³ See 47 C.F.R. § 21.930(c)(2) (“Sixty days prior to the end of the five-year build-out period, the BTA authorization holder must file with the Commission proof that demonstrates the holder has met the requirements of § 21.930(c)(1)”).

¹⁴ Sprint Corporation (“Sprint”) comments, Wireless One of North Carolina, L.L.C. (“WONC”) comments and reply comments, Virginia Communications, Inc. (“VCI”) comments, WorldCom, Inc. (“WorldCom”) comments, Hubbard Trust (“The Trust”) comments, Nucentrix Broadband Networks, Inc. (“Nucentrix”) comments, Wireless Communications Associations International, Inc. (“WCA”) comments, TV Communications Network, Inc. (“TVCN”) reply comments.

¹⁵ See, e.g., Sprint comments at 1 (“Sprint wholeheartedly supports the Commission’s proposal to extend the build-out requirement and thereby allow BTA authorization holders a more reasonable time in which to construct facilities.”); WONC comments at 1 (“WONC supports this proposal [to extend the build-out requirement by two years] and believes that such an extension will promote the development of two-way services in the BTAs and ensure the successful launch of two-way digital wireless broadband systems throughout the country.”); VCI comments at 1 (“VCI strongly supports the Bureau’s proposal to extend the build-out requirement by two years.”); WorldCom comments at 1 (“At a minimum, the Commission should immediately grant, as an interim measure, the proposed two-year extension”), Hubbard Trust comments at 1 (“The Trust strongly supports the Commission’s proposal to extend the build-out date for MMDS systems”); Nucentrix comments at 1 (“Nucentrix supports a minimum two-year extension of the BTA build-out requirement and construction deadlines for new BTA stations.”); and, WCA comments at 1 (“WCA strongly supports the Commission’s proposal to extend each build-out deadline by a minimum of two years.”).

¹⁶ See TVCN reply comments at 1 (requesting a five to eight year extension); Trust comments at 4 (requesting a three-year extension); WorldCom comments at 1 (requesting a five-year extension); and, WONC reply comments at 1 (requesting a five year extension).

III. DISCUSSION

8. We find that the record uniformly supports waiver of the five-year build-out requirement, as set forth in Section 21.930(a)(1) of the Commission's rules, 47 C.F.R. § 21.930(a)(1). Pursuant to the action we take today, BTA authorization holders new build-out date will now be either (a) August 16, 2003 or (b) the authorization holders' existing build-out date, whichever is later. We find that in light of the service rule changes promulgated in the *Two-Way Order*, the timing of the initial filing window, the recent two-way application grants allowing BTA authorization holders to provide broadband service, the forthcoming grants of other pending two-way applications, and the upcoming August 16, 2001 build-out deadline for many BTAs, waiver of the build-out requirement and extension of it by a maximum of two years for certain authorization holders is in the public interest and promotes the maximization of efficient and effective use of this service.¹⁷ We believe that a maximum two-year extension will be a sufficient amount of time to allow the MDS industry to build-out its facilities and provide new and innovative two-way services to the public.¹⁸ Further, we disagree with commenters who request an extension of greater than two years. The deployment of broadband service to all areas of the country, including rural areas, is a vital policy objective. We believe an extension of greater than two years would unreasonably delay MDS entry in both rural and urban markets. Therefore, we fully expect MDS licensees to adhere to the revised build-out schedule established in this *Order*. Accordingly, for MDS BTA authorization holders with a build-out requirement of August 16, 2001, the new build-out deadline will be August 16, 2003. For those authorization holders whose current build-out date is August 16, 2002, they will receive a one-year extension and their new build-out date will be August 16, 2003. For those BTA authorization holders whose build-out date is after August 16, 2003, no extension of time is granted under this *Order*. In addition, we extend the construction deadline for all outstanding conditional licenses issued pursuant to a BTA authorization which have specified the BTA build-out deadline under Section 21.930(a)(1) as the construction deadline. The new construction deadline for those conditional licenses will be the BTA authorizations holders' new respective build-out dates. To the extent

¹⁷ Pursuant to Section 21.19 of the Commission's rules, 47 C.F.R. § 21.19, a waiver of our rules may be granted if such a grant is in the public interest. *See also* 47 C.F.R. § 1.3.

¹⁸ We note that in a similar context, the Wireless Telecommunications Bureau granted an extension of the five-year construction requirement for all Major Trading Area ("MTA") licensees in the 900 MHz band for a period of less than two years. *See In the Matter of FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements and Neoworld License Holdings, Inc. Request for Waiver of the 900 MHz Band Construction Requirements and Petition for Declaratory Ruling*, DA 01-1297 (WTB rel. May 25, 2001). In that proceeding, Neoworld License Holdings, Inc. ("Neoworld") and Nextel Communications, Inc. ("Nextel") requested waivers of Section 90.665(c) of the Commission's rules, which requires a 900 MHz MTA licensee to construct and place into operation a sufficient number of base stations to provide coverage to at least one-third of the population of its MTA within three years of original license grant, and at least two-thirds of the MTA population within five years of original license grant. Neoworld argued that it intended to use its licenses to deploy a nationwide 900 MHz digital dispatch system, but that it was not possible to secure digital voice equipment in time to meet a August 12, 2001 construction deadline. Nextel argued that it could build analog facilities in time to meet the five-year construction deadline, but that such construction would be contrary to the public interest. Nextel also argued that an extension was needed because of lack of 900 MHz digital voice network equipment. The Wireless Telecommunications Bureau ("WTB") granted the waiver requests, which provides for a 16-month extension of the construction deadline for all 900 MHz MTA licensees. WTB stated that it was in public interest to grant extension because such action will speed the delivery of innovative services to the public and obviate the need for licensees to construct obsolete analog systems solely to satisfy the present five-year construction deadline.

that the construction deadlines listed in recently granted two-way authorizations fall after the extended BTA build-out date, they remain unchanged.

9. Although each of the commenters indicate that some immediate extension of the build-out requirement is warranted, several commenters view such action as an interim measure and recommend that the Commission issue a rulemaking to revisit the terms of the MDS BTA-build out requirement. Several commenters propose that in lieu of a build-out requirement, the Commission should impose a “substantial service” analysis at the time of license renewal on MDS BTA authorization holders, consistent with other fixed wireless services.¹⁹ In addition, several commenters request that the Commission clarify various aspects of Section 21.930 of the Commission’s rules. Specifically, several parties request that the Commission clarify the portion of the rule that excludes protected service areas of incumbent stations from the total population to be considered for purposes of calculating the population reach of a BTA authorization holder in an applicable service area.²⁰ Several commenters argue that it is unfair to exclude service populations within incumbent protected service areas where the BTA licensee and the protected service area licensee are the same or affiliated entities.²¹ In response to commenters’ suggestions that the Commission review, clarify, modify and/or abolish the MDS BTA build-out requirement, the Commission expects to address these issues in an upcoming rulemaking.

IV. ORDERING CLAUSE

10. Accordingly, **IT IS ORDERED**, That pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), Section 5(e) of the Administrative Procedure Act, 5 U.S.C. § 5(e), and Sections 1.3, and 21.19 of the Commission’s rules, 47 C.F.R. §§ 1.3, 21.19, the five-year build-out requirement set forth in 47 C.F.R. § 21.930 IS WAIVED and EXTENDED, to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

¹⁹ See WorldCom comments at 5 (“The current build-out requirements are also wholly inconsistent with the build-out requirements applied to other point-to-multipoint fixed wireless services. The Commission applies to WCS, LMDS, 24 GHz and 39 GHz licensees a requirement that ‘substantial service’ be provided at the end of its initial license term. There is no logical reason why MDS BTA licensees should be subjected to far more stringent build-out requirements than other fixed wireless licensees.”); see also Nucentrix comments at 2 (“Nucentrix submits that a “substantial service” standard -- such as the standard applicable to WCS, LMDS, 24 GHz and 39 GHz licensees -- would be more appropriate than the existing standard.”).

²⁰ See 47 C.F.R. § 21.930(c)(1) (stating that within five years of the grant of a BTA authorization, the authorization holder must construct MDS stations to provide signals pursuant to Section 21.907, 47 C.F.R. § 21.907, that are capable of reaching at least two-thirds of the population of the applicable service area, excluding the populations within protected service areas of incumbent stations).

²¹ Sprint comments at 1; WorldCom comments at 5; Nucentrix comments at 7-8.