

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

In the Matter of
ELDORADO COMMUNICATIONS, L.L.C.
Request for a Waiver and Extension of the
Broadband PCS Construction Requirements
File No. 0000866735

ORDER

Adopted: December 4, 2002

Released: December 5, 2002

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

I. INTRODUCTION

1. In this Order, we address the request by Eldorado Communications, L.L.C. ("Eldorado") for waiver and extension of time to meet the construction requirements for one of its broadband Personal Communications Services ("PCS") licenses.

II. BACKGROUND

2. Eldorado is the licensee of the 10 MHz F-block broadband PCS license in the Houghton BTA. Pursuant to section 24.203(b) of the Commission's rules, 10 MHz broadband PCS licensees are required to provide service to at least one-quarter of the population of its BTAs or make a showing of substantial service within five years of initial license grant.

1 See File No. 0000866735, filed on April 29, 2002 ("Houghton Request") and amended on September 16, 2002 ("Houghton Amendment") by Eldorado (collectively, "Extension Request").

2 47 C.F.R. § 24.203(b).

3 We note that Eldorado's Extension Request was timely filed, although date-stamped by the Commission's electronic Universal Licensing System one day after the expiration of its construction period. While section 1.946(e) requires that requests for extension of time to construct must be filed prior to the expiration of the construction period, section 1.4(j) provides that, if the filing date falls on a holiday, as is the case in this proceeding, the document shall be filed on the next business day. See 47 C.F.R. §§ 1.946(e), 1.4(j).

4 See Houghton Amendment.

### III. DISCUSSION

3. Eldorado acknowledges that it did not satisfy the construction requirement set forth in section 24.203(b) of the Commission's rules for 10 MHz PCS license. Pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules, a broadband PCS license will terminate automatically as of the construction deadline if the licensee fails to meet the requirements of section 24.203, unless the Commission grants an extension request or waives the PCS construction requirements.<sup>5</sup> Accordingly, without grant of extension of time or a waiver of the PCS construction rule, the subject license for the Houghton BTA automatically terminated as of the April 28, 2002 construction deadline. An extension of time to complete construction may be granted, pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.<sup>6</sup> Furthermore, in recognizing that compliance with the broadband PCS construction requirements may be difficult at times, the Commission has stated that, in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.<sup>7</sup> Waiver may be granted, pursuant to section 1.925 of the Commission's rules, if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>8</sup> As discussed below, we find that Eldorado fails to satisfy the criteria for grant of an extension of time to satisfy its construction requirement and/or grant of a waiver of the construction requirement.

4. Eldorado contends that its delay in constructing the Houghton BTA results from its decision to forego deployment of a network using time division multiple access ("TDMA") technology in favor of global system for mobile communications ("GSM") technology. Eldorado explains that its network consists of only one market and that many of its potential subscribers would roam on adjacent market systems; similarly, Eldorado anticipates that it would derive revenues from roamers traveling through the Houghton BTA and using Eldorado's system.<sup>9</sup> Because certain major carriers decided to migrate from TDMA to GSM, Eldorado argues that it "was forced to either continue its plans for a TDMA network that would ultimately limit its subscriber's ability to effectively roam; or to utilize and [*sic*] alternative technology, such as GSM."<sup>10</sup> Eldorado states that it continued with its plans to deploy TDMA after hearing of AT&T Wireless' migration to GSM in December 2000, but "decided to scrap TDMA" upon learning that Cingular Wireless was also transitioning to GSM in November 2001.<sup>11</sup> Eldorado claims that "but not for [the] eleventh hour decision to change technology away from TDMA

<sup>5</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203.

<sup>6</sup> 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) also states specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

<sup>7</sup> See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 5019 (1994) (*PCS MO&O*), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>8</sup> 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>9</sup> Houghton Request at 1-2.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> Houghton Amendment at 1.

. . . Eldorado most likely would have satisfied the Commission's build-out requirements . . . ."<sup>12</sup> Eldorado also indicates that "it is virtually impossible as a single market carrier to obtain roaming agreements on competitive terms with major regional and national carriers."<sup>13</sup>

5. Eldorado further argues that grant of its request for an extension of time to construct the Houghton BTA serves the public interest because it will promote service to underserved rural areas.<sup>14</sup> Eldorado explains that the population density of the Houghton BTA is 18.3 persons per square mile.<sup>15</sup> Eldorado further explains that, unlike other markets where deployment in major cities will satisfy the buildout requirements, Eldorado cannot focus on construction in the highly populated areas alone. First, Eldorado states that the largest city in the Houghton BTA is only 7,498, which is just 16.6 percent of the market population.<sup>16</sup> Second, Eldorado claims that it would be "futile . . . to focus only on construction in certain areas of the market" in order to satisfy the construction deadline, because such service "would not be commercially viable since the service offering would contain too much unserved area, especially since a majority of [the] potential customers" do not live or work within the BTA's primary city.<sup>17</sup> Eldorado also claims that strict enforcement of the construction requirement would delay service to rural areas due to the time necessary to re-auction the spectrum and initiate a new construction deadline.<sup>18</sup> Eldorado argues that it is "similarly situated" to certain licensees who have received an extension of time to construct their rural markets.<sup>19</sup> Eldorado specifically references *American Wireless*, *GTE*, and *TeleCorp*, in which the Commission granted extensions of time to satisfy the construction requirements.<sup>20</sup> Eldorado explains that it is similar to these licensees in that it "has demonstrated its commitment to providing PCS service in rural underserved areas."<sup>21</sup>

6. Finally, Eldorado argues that requiring compliance with "archaic build-out requirements" does not serve the public interest.<sup>22</sup> Eldorado states that "licensees such as Eldorado are inappropriately subject to both the five-year and ten year construction requirements that are not being applied to licensees

---

<sup>12</sup> Houghton Request at 2.

<sup>13</sup> *Id.*

<sup>14</sup> Houghton Request at 4-5.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 5; *see also* Houghton Amendment at 1.

<sup>17</sup> Houghton Request at 5.

<sup>18</sup> *Id.* at 3, 6.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 5-6, citing American Wireless, LLC Request for Extension/Waiver of Personal Communications Services (PCS) Build-out Requirement, *Memorandum Opinion and Order*, 15 FCC Rcd 11025 (WTB Comm. Wir. Div. 2000) ("*American Wireless*"); GTE Wireless of the Pacific, Inc., Request for Waiver of Construction Requirements for PCS Station WPOI208 in the Yakima, Washington BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 11779 (WTB Comm. Wir. Div. 2000) ("*GTE*"); Telecorp PCS, LLC Request for Waiver of Section 24.203(a) of the Commission's Rules for Broadband PCS Licenses WPOI215 in the Louisville- Lexington-Evansville MTA and WPOI217 in the St. Louis MTA, *Order*, 16 FCC Rcd 18917 (WTB Comm. Wir. Div. 2001) ("*TeleCorp*"). Eldorado also references *Leap*, but does not claim that it is similarly situated to this case. *See* Houghton Request at 5-6, citing Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (WTB Comm. Wir. Div. 2001) ("*Leap*").

<sup>21</sup> Houghton Request at 6.

<sup>22</sup> *Id.*

in other services,” thereby raising parity concerns.<sup>23</sup> In support of its argument, Eldorado references other wireless services licensed by geographic area, such as 218-219 MHz and 39 GHz, in which the licensees are subject to only a ten-year construction requirement.<sup>24</sup> Eldorado also argues that although LMDS, 39 GHz, 218-219 MHz, and paging licensees are not substantively different from BTA licensees, these licensees are subject to more relaxed construction requirements.<sup>25</sup>

7. Based upon the record before us, we find that Eldorado has not demonstrated that its failure to construct in a timely manner resulted from circumstances beyond its control and, for this reason, Eldorado does not warrant an extension of time pursuant to sections 1.946(e) and 24.843(b). Eldorado implies that it was unable to construct in a timely manner as a result of other carriers’ business decisions to deploy GSM rather than TDMA. Eldorado states that it was not “privy to either AT&T or Cingular’s transition plan prior to such plan becoming public” and that “but not for [the] eleventh hour decision to change technology away from TDMA . . . Eldorado most likely would have satisfied the Commission’s build-out requirements . . . .”<sup>26</sup> Although Eldorado naturally could not control the decisions of carriers such as AT&T or Cingular to adopt a GSM platform, Eldorado was in control of the construction of its own network. Eldorado made an initial business decision to move forward using TDMA. Subsequently, Eldorado made a business decision to adopt GSM with only months remaining before its construction deadline. These decisions were within Eldorado’s control and constituted nothing more than the exercise of Eldorado’s own business judgment. Furthermore, the record indicates that Eldorado may have experienced construction delays regardless of any switch in technology. Eldorado states that, but for the decision to change technology, it “most likely” would have satisfied the construction deadline, therefore suggesting that it may *not* have satisfied the construction requirement, even if it had proceeded with its original plan to deploy TDMA technology. In sum, the Extension Request describes construction delays that resulted from Eldorado’s exercise of business judgment and therefore were within Eldorado’s control. We therefore find that Eldorado does not warrant an extension of time pursuant to sections 1.946(e) and 24.843(b) of the Commission’s rules.

8. We also find that Eldorado does not satisfy the criteria for grant of a waiver pursuant to section 1.925. Specifically, Eldorado has not demonstrated that application of the construction requirement in this case will frustrate the rule’s underlying purpose, nor has Eldorado demonstrated unique or unusual circumstances sufficient to justify a waiver. The Commission’s construction requirements are intended to ensure that the PCS spectrum is used effectively and made available to as many communities as possible.<sup>27</sup> It is apparent, based on the record before us, that in the five years Eldorado has held this license, Eldorado has made little more than preliminary progress towards constructing its PCS system. According to Eldorado, as of September 16, 2002, it had “establish[ed] a working design” for its network and had “select[ed] potential compatible GSM equipment.”<sup>28</sup> Indeed, as of September, Eldorado contends that “[w]ith a cloak of uncertainty surrounding the pending extension request and the industry generally, Eldorado could not be expected to, and did not, physically build the system.”<sup>29</sup> In cases where an extension of time has been granted in the past, the licensee has often taken “significant steps” toward constructing its network, including, at a minimum, ordering equipment well in

---

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 6-7.

<sup>26</sup> Houghton Request at 2.

<sup>27</sup> *See PCS MO&O* at 5018.

<sup>28</sup> Houghton Amendment at 1.

<sup>29</sup> *Id.*

advance of the deadline.<sup>30</sup> In contrast, despite holding the license for over five years, Eldorado is just now at the stage of selecting *potential* equipment. The fact that, four months after the *expiration* of its construction period, Eldorado was formulating *initial* build-out plans only supports our determination that, as of the construction deadline, Eldorado had not made sufficient progress toward utilizing this spectrum in an effective or efficient manner.<sup>31</sup> Eldorado's actions prior to its construction deadline do not demonstrate the level of diligence expected of a licensee in meeting the construction requirements, particularly in this case, where Eldorado has held the license for the entire license period.

9. In addition, we do not believe that the potential public interest benefits raised by Eldorado are sufficient to present good cause for grant of a waiver. Eldorado argues that grant of an extension of time would serve the public interest because it is a small business that is committed to providing PCS service in underserved rural markets.<sup>32</sup> As mentioned above, however, it appears that Eldorado has done very little in the five years of holding the license toward constructing a PCS network in this market. While we agree that the provision of PCS to rural customers serves the public interest, Eldorado has not raised capital, executed site leases, or placed equipment orders.<sup>33</sup> Furthermore, while the rural nature (*i.e.*, amount and distribution of population) of the Houghton BTA may prevent a licensee from satisfying the population coverage benchmark by providing service to one or two selected cities, we note that the Commission's construction requirements offer F-block licensees sufficient flexibility in terms of coverage options and do not require that a licensee serve a specific percentage of the population. Instead of serving 25 percent of the population of its licensed area, a licensee instead may elect to satisfy its five-year construction requirement by providing "substantial service."<sup>34</sup> At any rate, as of its construction deadline, Eldorado did not serve *any* percentage of the population of its licensed area. We are not inclined to grant a waiver based on a general statement of intent to serve rural areas when Eldorado has done little towards constructing in the Houghton BTA.

10. We also are not persuaded that an extension is warranted because, absent grant of such relief, service to these rural areas may be delayed due to the time necessary to re-auction the spectrum and re-initiate a five-year construction deadline for a new licensee.<sup>35</sup> First, our records indicates that, of the three counties that comprise the Houghton BTA, two counties receive cellular coverage and a significant portion of the third county receives cellular coverage;<sup>36</sup> moreover, portions of Houghton county (the area that Eldorado claims it would focus on initially in terms of construction) receive PCS coverage.<sup>37</sup> While the Commission, to the extent possible, encourages multiple wireless carriers in an area in order to promote vigorous competition, the record in this case does not support the grant of a waiver of the PCS construction requirement for a licensee who has not acted with a sufficient level of diligence. Second, *any* PCS licensee that requests an extension for a period of less than five years could make the same

---

<sup>30</sup> See, e.g., *American Wireless* (licensee ordered equipment 2 1/2 months prior to the deadline).

<sup>31</sup> Eldorado states that its "initial build-out" will focus on coverage within Houghton county. See Houghton Amendment at 1.

<sup>32</sup> See Houghton Request at 4-5; see also Houghton Amendment at 1.

<sup>33</sup> See Houghton Amendment at 1.

<sup>34</sup> See 47 C.F.R. § 24.203(b).

<sup>35</sup> See Houghton Request at 3, 6.

<sup>36</sup> ACC Michigan License, LLC is providing cellular service to portions of Keweenaw, Houghton and Baraga counties in the Houghton BTA. CenturyTel Wireless of Michigan RSA #1 and 2, Inc. is providing service to Baraga, Houghton, and portions of Keweenaw counties in the Houghton BTA.

<sup>37</sup> AT&T Wireless PCS, LLC is providing service using the D-block spectrum in Houghton county within the Houghton BTA.

argument, and grant of a waiver on this basis alone would effectively undermine the construction rules adopted by the Commission.

11. We find that Eldorado is not similarly situated to *American Wireless*, *GTE*, *TeleCorp*, or *Leap*. Each of these cases involved unconstructed licenses acquired on the post-auction secondary market.<sup>38</sup> Furthermore, three of the four cases involved licensees who demonstrated diligence in constructing their licenses or who had taken significant steps toward providing PCS service within their licensed areas.<sup>39</sup> In addition, for three of the four cases, the licensed areas at issue had been partitioned and another party already had constructed within the market.<sup>40</sup> In contrast, Eldorado has held its license for the Houghton BTA for the entire five-year construction period and, as explained above, has done very little to deploy PCS networks in the Houghton BTA. Based on these circumstances, grant of a waiver would undermine the Commission's goals of ensuring the effective use of PCS spectrum and wide availability of services using that spectrum.

12. We also find that Eldorado has failed to establish the presence of unique or unusual circumstances in this case. Carriers' decisions to adopt or discard specific technical standards such as TDMA or GSM are reasonably foreseeable occurrences in the communications industry, as wireless carriers must modify their business plans in order to keep up with evolving technology. Eldorado's business decision to switch from TDMA to GSM is not a unique circumstance that distinguishes it from other, similarly situated small licensees who seek to enter into roaming partnerships with larger carriers such as Cingular or AT&T for business reasons. Moreover, we note that many carriers, both large and small, hold licenses for rural areas and are subject to the same buildout requirements as Eldorado. Accordingly, in light of the foregoing, we do not find any unique or unusual circumstances in this case that justify grant of a waiver.

13. Finally, we reject Eldorado's claim that application of the construction requirement is inequitable and unduly burdensome.<sup>41</sup> We dismiss Eldorado's argument that it is inappropriately subject to both a five-year and a ten-year construction requirement, unlike licensees in other wireless services that only have a ten-year requirement or have a less stringent benchmark to meet.<sup>42</sup> We note as an initial matter that broadband PCS F-block licensees do not have both a five-year and a ten-year construction requirement, only a five-year requirement.<sup>43</sup> Second, Eldorado is essentially arguing that the construction

---

<sup>38</sup> Although GTE Wireless of the Pacific, Inc. ("GTE Wireless") originally acquired the subject market (the Yakima BTA) at auction, as part of its Seattle A-Block MTA license, it subsequently partitioned and assigned the Yakima BTA to ELLTELL Wireless, Inc. ("ELLTELL"), which assumed responsibility for constructing the partitioned area. ELLTELL did not construct the Yakima BTA, however; instead, ELLTELL assigned the unconstructed license back to GTE Wireless with only three days remaining in the construction period. See *GTE* at 11779-80.

<sup>39</sup> See *TeleCorp*, *American Wireless* and *Leap*. We note that, in *GTE*, the only case where the licensee had not demonstrated diligence or otherwise taken significant steps to construct the market, the licensee acquired the license just three days before the construction deadline and had already built out the remainder of the MTA encompassing the subject BTA (and, indeed, had nearly satisfied the ten-year construction requirement for the MTA). See *GTE* at 11780.

<sup>40</sup> See *GTE*, *TeleCorp* and *American Wireless*.

<sup>41</sup> See Houghton Request at 7. We note that a showing that application of the construction requirement is inequitable or unduly burdensome is a necessary, but insufficient, aspect of seeking a waiver pursuant to section 1.925(b)(3)(ii). Eldorado must *also* demonstrate that the rule is inequitable or unduly burdensome "[i]n view of unique or unusual factual circumstances," which they have not, as discussed above. See 47 C.F.R. § 1.925(b)(3)(ii).

<sup>42</sup> See Houghton Request at 6-7.

<sup>43</sup> F-block PCS licensees are only required to meet a five-year construction benchmark of 25 percent population coverage or substantial service. See 47 C.F.R. § 24.203(b).

requirements for broadband PCS licensees should be modified to mirror those requirements imposed on other wireless licensees. This argument, however, is more appropriately raised in a petition for rulemaking. Moreover, Eldorado fails to provide any reason why the PCS construction requirements are inequitable or unduly burdensome as applied to all PCS licensees. In fact, we note that, to date, the vast majority of PCS licensees whose deadlines have passed have notified the Commission that they have met its construction requirements. To the extent that broadband PCS licensees do have different construction requirements from licensees in other wireless services, the Commission has, when adopting specific construction requirements, taken into account various factors relevant to the spectrum in question, including the predicted likely uses of the spectrum, *e.g.*, fixed versus mobile wireless use,<sup>44</sup> and whether the spectrum is heavily encumbered.<sup>45</sup>

14. Based on the foregoing, we find that Eldorado does not warrant an extension of time and does not satisfy the criteria for a waiver of the PCS construction rule. We therefore deny Eldorado's Extension Request and find that Eldorado's license for the Houghton BTA automatically terminated on April 28, 2002, pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission's rules.<sup>46</sup>

#### IV. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the request for waiver and extension of the broadband PCS construction requirements filed by Eldorado Communications, L.L.C. on April 29, 2002, and amended on September 16, 2002, IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel  
Deputy Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

---

<sup>44</sup> In some circumstances where there was no clear indication what the spectrum would be used for, the Commission established a more flexible construction requirement -- for example, requiring the licensee to demonstrate that it has provided substantial service by the end of its license term. *See, e.g.*, In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 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 Service, *Second Report and Order*, 12 FCC Rcd 12545, 12659 (1997) ("Without knowing the type of service or services to be provided, it would be difficult to devise specific construction benchmarks.").

<sup>45</sup> Incumbency can affect the actual benchmark (*e.g.*, 800 MHz EA Upper 200 channels have a channel capacity requirement) or the amount of time to meet the benchmark (*e.g.*, 700 MHz Band). *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, 11 FCC Rcd 1463, 1529 (1995); Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 15 FCC Rcd 476, 505 (2000).

<sup>46</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2).