



Federal Communications Commission
Washington, D.C. 20554

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DA 07-474

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Re: Boston Spectrum Associates Request for Renewal of License (FCC File No. 0001622323) and Waiver of Construction Deadline for Station KIVD0010, Boston-Lowell-Brockton-Lawrence

Dear Mr. Myers:

This letter addresses the above-captioned application for renewal of license and request for waiver of the construction deadline (request) for 218-219 MHz station KIVD0010, Boston-Lowell-Brockton-Lawrence, licensed to Boston Spectrum Associates (BSA).¹ For the reasons discussed below, we deny the waiver request, dismiss the renewal application, and note that the license for KIVD0010 terminated automatically on February 28, 2004.

The Commission granted a license for station KIVD0010 on March 28, 1994 through the lottery process. In 1999, the Commission extended the license term of 218-219 MHz Service licenses to ten years from the date of license grant, establishing March 28, 2004 as the expiration date for KIVD0010.² The Commission also eliminated the interim construction benchmarks and adopted a "substantial service" requirement to be assessed at the end of the license term for all 218-219 MHz Service licensees as a condition for renewal.³ Moreover, unless an extension or waiver is granted, the failure to meet the Commission's construction requirements results in the automatic termination of the license.⁴

On February 19, 2004, BSA filed an application to renew the license for KIVD0010.⁵ By letter dated March 29, 2004, the Wireless Telecommunications Bureau (Bureau) returned that application because it did not include a substantial service showing as required by the Commission's rules.⁶ In response, BSA submitted an amendment to the renewal application

¹ FCC File No. 0001622323 (Feb. 19, 2004). The 218-219 MHz Service was formerly the Interactive Video and Data Service (IVDS).

² Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) (*218-219 MHz Reg. Flex. Order*).

³ *Id.*, 15 FCC Rcd at 1540 ¶ 75. The Commission specifically stated that "[f]ailure to demonstrate that 'substantial service' is being provided will result in a license not being renewed." *Id.*

⁴ See 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

⁵ See FCC File No. 0001963482.

⁶ Notice of Return Letter sent to Robert Denn, Boston Spectrum Associates LLC, Ref. No. 2662266 (March 29, 2004) (Notice of Return Letter); see 47 C.F.R. § 95.833 ("Each 218-219 MHz Service licensee must file a report to be submitted to inform the Commission of the service status of its system."). *Id.* at § 95.833(b).

noting that BSA constructed “an IVDS facility in Boston which operated for a period of time.”⁷ BSA states that the facility never attracted any subscribers and was “eventually abandoned,” but asserts that “the construction and operation of this facility satisfied the build out requirements,” thus warranting renewal.⁸ BSA also states that it has invested more than 4 million dollars and that this “investment, standing alone, demonstrates compliance with the [construction] rule.”⁹ Finally, BSA “requests a waiver of any rule or requirement which the Commission may deem to be inconsistent with a grant of the renewal.”¹⁰

Sixteen months later, BSA filed its second amendment to the renewal application, expanding on the description of the construction of the system,¹¹ and expands its request for waiver, arguing that the Commission should forgo the strict application of the construction requirements in this case because the underlying purpose of the rule, the provision of service, “would not be served where a fully commercially validated 218-219 MHz technology does not yet exist.”¹² In addition, BSA asserts that there are unique and unusual circumstances surrounding the 218-219 MHz band because at the time of initial licensing, equipment and technology were still being developed and have still not “attained full commercial validation.”¹³ BSA also argues that in light of such unusual circumstances, and its investment of more than \$4 million dollars, strict application of the substantial service requirement would be inequitable, unduly burdensome, and contrary to the public interest.¹⁴

BSA also claims that it is “similarly situated” to San Francisco IVDS, the licensee in a case where the Commission “waived the filing rules to permit [license] renewal.”¹⁵ BSA contends that both licensees: (1) constructed RTT systems during their original license term that met the substantial service safe harbor; (2) operated the systems “for some time before going dark”; and (3) were not “serving customers at the end of their respective license terms.”¹⁶ Because of the factual similarities between BSA, San Francisco IVDS, which was renewed, and the pending ITV matter,¹⁷ BSA argues that the Commission should renew both its and ITV’s license.¹⁸ BSA also “pledges to construct another 218-219 MHz system that meets the Commission’s substantial service requirement within eleven (11) months from the date that the

⁷ Amendment and Contingent Request for Waiver filed by Boston Spectrum Associates LLC at 1 (April 8, 2004) (*Initial Waiver Request*).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2.

¹¹ Amendment to Station KIVD0010 Renewal Application (Aug. 2, 2005).

¹² *Id.* at 2.

¹³ *Id.* at 2-3.

¹⁴ *Id.* at 3. BSA adds that it would be inequitable and unduly burdensome to force it to use outdated RTT technology without any customers.

¹⁵ Letter from Richard S. Myers, Myers Lazrus Technology Law Group to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 16, 2005) (September 16, 2005 Letter).

¹⁶ *Id.* at 2.

¹⁷ ITV’s 218-219 MHz Service license expired automatically on March 28, 2004 for failing to provide substantial service in accordance with the Commission’s requirements. *See* Letter from Katherine M. Harris, Deputy Chief, Mobility Division, Wireless Telecommunications Bureau to Buddy C. Stanley, ITV, Inc., 20 FCC Rcd 9548 (MD 2005), *recon. pending*.

¹⁸ September 16 2005 Letter at 1-2.

Commission renews the license.”¹⁹ Lastly, in the subsequent May 19, 2006 amendment, BSA asserts that the decision in the Commission’s *BRS/EBS Order*,²⁰ allowing the consideration of prior discontinued service as a factor to be considered in making a substantial service determination, provides additional support for renewal of BSA’s license.²¹ BSA also claims that it spent \$4 million to construct a system that covered 76% of the population in the Boston MSA.²²

Substantial Service. As an initial matter, we find that BSA has failed to comply with the Commission’s substantial service construction requirements because it has not demonstrated “that it provides substantial service within the service area.”²³ Under section 95.831 of the Commission’s rules, “[f]ailure to demonstrate that substantial service *is being provided* in the service area will result in forfeiture of the license.”²⁴ In response to the Commission’s Notice of Return Letter, BSA states that it constructed “an IVDS facility in Boston which operated for a period of time” that was “eventually abandoned.”²⁵ Further, after ten years, BSA’s “facility never attracted any subscribers,” and it is unclear whether the transmitter that was installed was providing service or functioned as a test system.²⁶ Given the record before us, we are unable to conclude that the licensee has demonstrated that it met the substantial service requirement to provide a service that is “sound, favorable and substantially above a level of service which might minimally warrant renewal.”²⁷ Also, we disagree with BSA that its “investment, standing alone, demonstrates compliance with the rule,”²⁸ as we have previously held that compliance with substantial service requires more.²⁹

We find BSA’s reliance on the Commission’s *BRS/EBS Order*, which considered prior discontinued service as a factor in a substantial service assessment, to be misplaced. The Commission stated in that case that “[t]he most significant consideration in a substantial service

¹⁹ *Id.* at 2. BSA filed another amendment to its renewal application, modifying it pledge to construct a 218-219 MHz system by reducing the time needed from eleven to eight months. Letter from Richard S. Myers, Myers Lazrus Technology Law Group to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 14, 2005) (December 14, 2005 Letter). BSA includes a month-by-month timetable for completion of a system manufactured by Gateway Communications, Inc. In addition, BSA presents additional reasons why BSA, ITV, and San Francisco IVDS are similarly situated.

²⁰ Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Order on Reconsideration and Fifth memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, FCC 06-46 (2006) (*BRS/EBS Order*).

²¹ Letter from Richard S. Myers, Myers Lazrus Technology Law Group to Marlene H. Dortch, Secretary, Federal Communications Commission (May 19, 2006) (May 19, 2006 Letter).

²² *Id.*

²³ 47 C.F.R. § 95.831.

²⁴ 47 C.F.R. § 95.833(c).

²⁵ April 8 Amendment at 1.

²⁶ Initial Waiver Request at 1.

²⁷ 47 C.F.R. § 95.831.

²⁸ Initial Waiver Request at 1.

²⁹ *See, e.g.* Petition for Extension of Terms for 220-222 MHz Band Phase I Nationwide Licenses Held By Access 220 LLC, *Memorandum Opinion and Order*, (WTB MD rel. Oct. 23, 2006) (licensee’s investment in service, spectrum marketing, equipment development, and other activities insufficient to demonstrate provision of substantial service).

evaluation is the licensee's current service."³⁰ The Commission's decision addressed concerns raised in the record that licensees might be reluctant to discontinue legacy services, and begin the transition to the provision of advanced services, for fear of not meeting the substantial service requirement at renewal.³¹ Significantly, the Commission in that case emphasized that a finding of substantial service requires a licensee to "be providing service to customers or students."³² Based upon the record, BSA has not substantiated that provided service or for how long.³³ We conclude that BSA's construction, expenditures, and overall record are insufficient to demonstrate compliance with its substantial service obligations.

Waiver Request. We also reject BSA's request for waiver of its substantial service requirement. Under section 1.925 of the Commission's rules, a waiver may be granted 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.³⁴

BSA's initial request for waiver of "any rule or requirement which the Commission may deem to be inconsistent with a grant of the renewal" presents no basis for relief.³⁵ BSA failed to specify a rule to be waived, nor did it provide any analysis or attempt to show how it met either prong of the section 1.925 waiver standard. However, in its waiver submission filed sixteen months after the initial renewal filing, BSA argues that the Commission should grant a waiver and license renewal to any 218-219 MHz Service licensee that "managed to construct a system during its original license term that satisfied a [substantial service] safe harbor."³⁶ BSA contends that the purpose of the construction rule is to promote service, which would not be served in this case because "fully commercially validated 218-219 MHz technology does not yet exist."³⁷ Citing *Havens*, BSA also argues that it is Commission policy "to extend construction deadlines where there is a deficiency of available equipment."³⁸

We are not persuaded by BSA's arguments. BSA and other 218-219 MHz service licensees have been afforded substantial relief from the Commission's regulatory requirements, including, among other things, elimination of interim construction benchmarks and an extension

³⁰ *BRS/EBS Order* ¶ 307.

³¹ *Id.* ¶ 6.

³² *Id.* ¶ 308.

³³ See Initial Waiver Request at 1.

³⁴ 47 C.F.R. § 1.925.

³⁵ Amendment and Contingent Request for Waiver filed by Boston Spectrum Associates LLC at 1.

³⁶ Amendment to Station KIVD0010 Renewal Application at 3.

³⁷ Amendment and Contingent Request for Waiver filed by Boston Spectrum Associates LLC at 2.

³⁸ *Id.* In *Havens*, the Division granted a three-year extension of the five-year construction requirement for Location and Monitoring Service licensees because, in contrast to the 218-219 MHz Service, equipment was unavailable. See Request of Warren C. Havens For Waiver of the Five-Year Construction Requirement for his Multilateration Location and Monitoring Service Economic Area Licenses, *Memorandum Opinion and Order*, 19 FCC Rcd 23742 (WTB, MD 2004).

of the initial license term for five additional years.³⁹ We do not believe that under these circumstances the public interest would be served by waiving the construction requirements.⁴⁰ The Commission’s equipment authorization database reflects that equipment is available for the 218-219 MHz band.⁴¹ Moreover, the purposes of the Commission’s construction rules are to promote service to the public and prevent warehousing as well as to provide a mechanism for recovery of the spectrum if a licensee fails to meet its requirements.⁴²

In addition, we reject BSA’s claim that it is “similarly situated” with San Francisco IVDS and find the cases distinguishable. BSA claims that it and San Francisco IVDS “constructed systems during their initial license terms whose systems were dark prior to renewal.”⁴³ While there were several factors leading to the *San Francisco IVDS* decision, the primary factor was the “pendency of the 218-219 MHz Service rulemaking[,which] confused the licensee regarding the need to file a renewal application.”⁴⁴ Contrary to BSA’s assertion, grant of the renewal application for San Francisco IVDS did not require a waiver of the substantial service requirement. The license renewal deadline for all 218-219 MHz licensees that obtained their authorizations through lottery was March 28, 1999. At that time, construction was not a condition of renewal. San Francisco IVDS failed to file its renewal application by this deadline, erroneously believing that the requirement to file had been suspended. San Francisco IVDS subsequently filed its renewal application and requested a waiver of the filing deadline. The Commission extended the renewal deadline for the 218-219 MHz Service licensees for five additional years and added, as a condition of renewal, the current substantial service requirement.⁴⁵ When the Commission granted San Francisco IVDS’s request to waive the license renewal filing deadline and approved the renewal application, it allowed five years for construction, which is what all the other 218-219 MHz Service licensees—including BSA—were afforded. Until the license was reinstated, San Francisco IVDS had no authorization to construct a system.⁴⁶ We note that BSA had no uncertainty regarding the legal status of its authorization and, in fact, filed its purported substantial service showing in 2004 (while San Francisco IVDS continued to seek reinstatement).

Accordingly, for the reasons stated above, pursuant to sections 1.925, 1.955, 95.831, and 95.833 of the Commission’s rules, 47 C.F.R. §§ 1.925, 1.955, 95.831, 95.833, we reject BSA’s

³⁹ See, e.g., *218-219 MHz Reg. Flex. Order*, 15 FCC Rcd 1497.

⁴⁰ See 47 C.F.R. §95.833.

⁴¹ See <https://gullfoss2.fcc.gov/prod/oet/cf/eas/reports/GenericSearch.cfm>. We also note that the Commission does not guarantee the financial success of Commission licenses. See, e.g., *218-219 MHz Reg. Flex. Order*, 15 FCC Rcd 1497 ¶ 1, n.3.

⁴² The Commission is directed by Section 309(j)(4)(B) of the Communications Act to “include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment and rapid deployment of new technologies and services.” *Id*

⁴³ December 14, 2005 Letter at 2.

⁴⁴ *San Francisco IVDS*, 20 FCC Rcd at 1964 ¶12. Specifically, in its waiver analysis, the Commission found that a pending rulemaking proceeding that addressed the duration of license terms, and in which the Commission waived all construction requirements, was an “unusual circumstance” for licensees whose authorizations were scheduled to expire before resolution of that proceeding. *San Francisco IVDS*, ¶¶ 10-12.

⁴⁵ See *218-219 MHz Reg. Flex. Order*, 15 FCC Rcd 1497.

⁴⁶ We also conclude that neither *ICO Global* nor *Melody Music*, which require the Commission to explain apparent inconsistencies in decisions, compel a different result. See *ICO Global*, 428 F.3d 264, 269, citing, *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732-33 and n.4 (D.C. Cir 1965).

substantial service showing, deny its waiver request, and dismiss its renewal application. 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 and 0.331.⁴⁷

Sincerely,

Thomas P. Derenge
Deputy Chief, Mobility Division
Wireless Telecommunications Bureau

⁴⁷ 47 C.F.R. §§ 0.131, 0.331.