



Federal Communications Commission
Washington, D.C. 20554

January 31, 2007

Stephen E. Coran, Esquire
Rini Coran, PC
1615 L Street, NW
Suite 1325
Washington, DC 20036

DA 07-477

Re: Applications for Renewal of Licenses and Requests for Waiver or Extension of Time to Construct for U.S. Telemetry-Abilene, LLC (KIVD0390); U.S. Telemetry Gulf of Mexico, LLC (KIVD0509); U.S. Telemetry-Midland, LLC (KIVD0498); U.S. Telemetry-Odessa, LLC (KIVDO439); and U.S. Telemetry San Angelo, LLC (KIVD0496)

Dear Mr. Coran:

This letter addresses the license renewal applications and waiver requests (Waiver Request)¹ filed by the above-captioned U.S. Telemetry entities (US Telemetry), seeking additional time to construct five 218-219 MHz Service stations (Stations).² For the reasons discussed below, we deny the Waiver Request, dismiss the renewal applications, and note that the licenses for the Stations terminated automatically on February 28, 2005.

The Commission granted licenses to operate the Stations to U.S. Telemetry on February 28, 1995 through the Commission's auction 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 February 28, 2005 as the expiration date for the Stations.³ The Commission also eliminated the interim construction benchmarks and adopted a "substantial service" construction requirement to be assessed at the end of the license term for all 218-219 MHz Service licensees as a condition for renewal.⁴ Unless an extension or waiver is granted, the failure to meet the Commission's construction requirements results in the automatic termination of the license.⁵

U.S. Telemetry states that it operates, along with affiliates, a regional system centered on providing communications services in the state of Texas and the Gulf of Mexico and has plans to develop new lines of business.⁶ According to U.S. Telemetry, its controlling member has entered into an agreement with affiliates of Nedder Enterprises, Inc. (Nedder), in which Nedder would provide financing,

¹ Because the arguments supporting the requests for waiver and extension of time to construct for of the stations are identical, we refer to the requests singularly and interchangeably for convenience.

² See FCC File Nos.0002062173 and 0002062142; 0002062321 and 0002062207; 0002062350 and 0002062223; 0002062335 and 0002062293; and 0002062313 and 0002062303.

³ See 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*).

⁴ *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.*

⁵ See 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 95.833(c).

⁶ See Waiver Request at 1-2. Its business focuses, among other things, on homeland security-related applications.

management, construction, and other services for the Stations.⁷ U.S. Telemetry states that it has relied on Nedder to continue to finance construction of the system, which includes the subject licenses, but that a bank error has precluded access to funds that were to be used to meet its construction obligations.⁸ On February 28, 2005, US Telemetry filed the instant applications for renewal and requests a waiver of the substantial service construction requirement, or in the alternative, a six-month extension of time to demonstrate that it is providing substantial service.

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.⁹ In addition, pursuant to section 1.946(e) of the Commission's rules, an extension of time to complete construction may be granted if the licensee shows that the failure to complete construction is due to causes beyond its control.¹⁰ Section 1.946 also lists specific circumstances where extension requests will not be granted, including, for example, delays caused by a failure to obtain financing, because the licensee undergoes a transfer of control, or because the licensee intends to assign the authorization.¹¹

In support of its request, U.S. Telemetry contends that unusual circumstances stemming from the Commission's "history of leniency" in enforcing construction requirements for the 218-219 MHz Service as well as recent case law, warrant grant of its request.¹² It also contends that a "waiver would not prejudice the Commission or other licensees," because identifying other use of the spectrum would take at least twelve months and "either the station facilities would be constructed or the license would be cancelled in sufficient time to 'clear' the spectrum for auction."¹³ In addition, U.S. Telemetry states that the underlying purpose of the construction rules, and the public interest, would be served by allowing it to provide service to the public within a short period of time.¹⁴ Finally, U.S. Telemetry argues that "[t]he bank errors that have delayed final funding were not reasonably anticipated or foreseeable and thus were outside U.S. Telemetry's control."¹⁵

⁷ See *id.* at 2. According to U.S. Telemetry, Nedder has "expended or committed approximately \$468,000 for the 218-219 MHz Service system" and over \$1 million for other associated costs. *Id.* at 2-3.

⁸ *Id.* at 4. U.S. Telemetry adds that it has explored alternative means that would allow timely construction but has "simply run out of time." *Id.*

⁹ 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 *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

¹⁰ See 47 C.F.R. § 1.946(e).

¹¹ See 47 C.F.R. § 1.946(e)(2)-(3).

¹² Waiver Request at 5. The Commission has afforded 218-219 MHz service licensees substantial relief from its regulatory requirements, including, among other things, elimination of interim construction benchmarks and an extension of the initial license term for five additional years. See, e.g., *218-219 MHz Reg. Flex. Order*, 15 FCC Rcd 1497.

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.* at 7. According to U.S. Telemetry, although the funds would be available in seven business days, purchase and installation of equipment would require approximately six months.

Based on the record before us, we conclude that an extension of time to construct or waiver of the construction requirements for these licenses is unwarranted. Section 1.946(e) of the Commission's rules specifically precludes extensions of construction deadlines "due to delays caused by a failure to obtain financing...or to order equipment in a timely manner"¹⁶ Thus, U.S. Telemetry's reliance on Nedder for financing its construction is not a valid basis for relief. Instead, we find that the failure to construct was the result of the licensee's business decisions, rather than due to circumstances beyond its control. It is well established that failed business decisions do not qualify as grounds for relief of our regulatory requirements,¹⁷ which in this case are intended to ensure the efficient and effective use of the radio spectrum.¹⁸

We also find that the circumstances in this instance are insufficiently "unique or unusual" to warrant relief of the applicable construction requirements. The Commission has held that a third party's failure to perform in accordance with a business agreement is not an unusual circumstance that justifies a waiver of the rules.¹⁹ We reject U.S. Telemetry's contention that grant of its Waiver Request would serve the public interest,²⁰ and we conclude that application of the construction rules in this case would not frustrate their underlying purpose.²¹ U.S. Telemetry's asserts that this case is analogous to *PinPoint Wireless*, however, we find the cases distinguishable.²² U.S. Telemetry states that its "delays in building out a regional system stemmed from unforeseeable events that were beyond the licensee's control."²³ In *PinPoint Wireless*, the licensee missed its construction deadline because it took longer than usual for the LATA access tandem provider to provision a T1 connection, not because of a failure to obtain financing.²⁴ Moreover, it was significant in *PinPoint Wireless* that relief was provided to a small, locally-based PCS carrier that was thought to be "in a unique position" to be responsive to the particularized

¹⁶ 47 C.F.R. § 1.946(e)(2).

¹⁷ See *Globalstar, L.P., Memorandum Opinion and Order*, 18 FCC Rcd. 1249, 1252 (Int'l Bur. 2003) (business decisions based on economic considerations are not circumstances outside the control of the licensee and do not warrant an extension); see also, *Panamsat License Corp, Memorandum Opinion and Order*, 15 FCC Rcd 18720, 18723 (Int'l Bur. 2000) (business transactions are within the control of the licensee, and so cannot justify a milestone extension); *Columbia Communication Corporation, Memorandum Opinion and Order*, 15 FCC Rcd 15566, 15571 n.35 (Int'l Bur. 2000) (construction contract negotiations cannot justify a milestone extension request); *Advanced Communications Corporation, Memorandum Opinion and Order*, 11 FCC Rcd 3399, 3417 (1995) (same).

¹⁸ The Commission adopts construction requirements for services in part to fulfill its obligations under section 309(j) of the Communications Act of 1934, as amended, which requires the Commission to include "safeguards to protect the public interest in the use of the spectrum" and performance requirements "to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services." 47 U.S.C. §§ 309(j)(3), 309(j)(4)(B).

¹⁹ See e.g., *Daniel R. Goodman, Receiver, Memorandum Opinion and Order*, 10 FCC Rcd 8537 (1995) (investor reliance on fraudulent company does not excuse compliance with Commission rules); see also *Aircom Consultants, Inc., Order on Reconsideration*, 18 FCC Rcd 1806 (PSPWD 2003) (failure of business arrangements do not justify waiver of Commission rules).

²⁰ See Waiver Request at 6.

²¹ 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." 47 U.S.C. §§ 309(j)(3), 309(j)(4)(B).

²² *PinPoint Wireless, Order on Reconsideration*, 19 FCC Rcd 2686 (WTB, MD 2004) (*PinPoint Wireless*).

²³ Waiver Request at 6.

²⁴ *PinPoint Wireless*, 19 FCC Rcd at ¶ 7.

needs of consumers in some of the least-populated rural areas in the country.²⁵ Finally, the licensee in *PinPoint Wireless* was found to have “made a concerted effort” to meet its construction deadline, even though it obtained its licenses with only twenty months remaining in the five-year construction period,²⁶ whereas, U.S. Telemetry has had ten years to meet its substantial service requirement.

Accordingly, because we are denying U.S. Telemetry’s waiver and extension requests, the licenses for the above-captioned stations automatically terminated on their expiration dates. As a result, there are no valid licenses to renew, and the renewal applications are hereby dismissed as moot. 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, 0.331.²⁷

Sincerely,

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

²⁵ *Id* at ¶ 7.

²⁶ We note that while the Commission’s rules preclude grant of an extension “*solely* to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct,” 47 C.F.R. § 1.946 (e)(3), the Commission in *PinPoint Wireless* considered a licensee’s efforts in the time remaining in the construction period after an assignment is granted as a factor in the waiver analysis.

²⁷ 47 C.F.R. §§ 0.131, 0.331.