

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

In re Matter of)
IDT SPECTRUM, LLC)
Request for Waiver, Extension of Time to Meet)
Coverage Requirements, and Extension of License)
Period)
99 Applications for Renewal of License of)
Common Carrier Point-to-Point Microwave)
Stations)
81 Notifications of Completion of Construction of)
Common Carrier Point-to-Point Microwave)
Stations)
931 Applications for Extension of Time of)
Construct 39 GHz Economic Area Licenses)

ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

Adopted: August 8, 2008

Released: August 8, 2008

By the Acting Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On March 2, 2007, IDT Spectrum, LLC (IDT Spectrum) filed a petition seeking reconsideration of the action taken by the Broadband Division (Division) of the Wireless Telecommunications Bureau (Bureau) on January 31, 2007, on requests for relief regarding 103 Fixed Service (FS) rectangular service area licenses in the 38.6 - 40.0 GHz band (39 GHz band) held by IDT. For the reasons explained below, we grant the Petition in part and extend the deadline for demonstrating substantial service for those 103 licenses until June 1, 2012.

2. In addition, IDT Spectrum has filed substantial service showings for the 103 rectangular service area licenses. For the reasons discussed below, we reject IDT Spectrum's showings that it is providing substantial service in any of the 103 license areas. Our rejection of those substantial service

1 IDT Spectrum, LLC, Petition for Reconsideration (filed Mar. 2, 2007) (Petition).

2 Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, FCC, to Gregory V. Haledjian, Esq., IDT Spectrum, LLC, dated January 31, 2007 (Division Letter).

showings is without prejudice to IDT Spectrum demonstrating substantial service by the extension date of June 1, 2012, and we authorize processing of renewal applications related to those stations.³

3. On April 18, 2008, IDT Spectrum filed applications to extend the deadline for demonstrating substantial service for each of its 931 39 GHz Economic Area (EA) licenses to June 1, 2012.⁴ For the reasons stated below, we conclude that it is in the public interest to extend the deadline for IDT Spectrum to demonstrate substantial service for those licenses to June 1, 2012, and we authorize the Broadband Division to grant the EA Extension Applications.

II. BACKGROUND

4. *39 GHz Licensing Generally.* Licensees in the 39 GHz Service are subject to Part 101 of the Commission's Rules.⁵ Originally, channels in the 39 GHz Service were licensed on a licensee-defined rectangular service area basis.⁶ In 1997, the Commission amended the rules for the 39 GHz Service to provide for licensing on a Basic Trading Area (BTA) basis, as well as for the use of competitive bidding.⁷ Subsequently, the Commission revised the rules to use Economic Area (EA) licensing areas,⁸ and auctioned 39 GHz overlay licenses on an EA basis in 2000.⁹ Pursuant to the Commission's Rules, 39 GHz licenses – both rectangular service areas and EAs – are issued for a period not to exceed ten years.¹⁰ With respect to renewal expectancy and performance requirements, 39 GHz rectangular service area and EA licensees must demonstrate “substantial service” in their license areas in connection with applications for license renewal.¹¹

5. *IDT Spectrum's 39 GHz Rectangular Service Area licenses.* On August 30, 2006, IDT Spectrum filed 103 applications seeking waivers of Sections 1.949(b) and 101.67 of the Commission's Rules¹² to extend the license periods for 103 39 GHz rectangular service area licenses to October 18, 2010.¹³ IDT Spectrum also therein requested waivers of and extensions of time to comply with the

³ Appendix A lists extension applications, construction notifications, and renewal applications for the 81 39 GHz licenses that received partial extensions in the *Division Letter*, as is discussed below in para. 7. Appendix B lists extension applications and renewal applications for the 22 licenses that were denied any extension in the *Division Letter*, as also discussed in para. 7.

⁴ The applications and call signs at issue are listed in Appendix C. The applications will be collectively referred to as the EA Extension Applications.

⁵ 47 C.F.R. Part 101.

⁶ See 47 C.F.R. § 101.147(u). Rectangular service area licenses in the 39 GHz Service are also referred to as incumbent licenses.

⁷ Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, ET Docket No. 95-183, 12 FCC Rcd 18600 (1997) (*39 GHz R&O*).

⁸ Amendment of the Commission's Rules Regarding the 37.0 – 38.6 GHz and 38.6 – 40 GHz Bands, *Memorandum Opinion and Order*, ET Docket No. 95-183, 14 FCC Rcd 12428, 12,452-12,453 ¶ 46 (1999) (*39 GHz MO&O*).

⁹ See 39 GHz Band Auction Closes, *Public Notice*, 15 FCC Rcd 13648 (WTB 2000).

¹⁰ 47 C.F.R. § 101.67.

¹¹ See *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 49. See also 47 C.F.R. § 101.17.

¹² 47 C.F.R. §§ 1.949(b) (detailing the general requirements for filing an application for license renewal), 101.67 (imposing a ten year license period).

¹³ See Applications, Waiver Request.

substantial service requirements set forth in Section 101.17(a) of the Commission's Rules¹⁴ for those 103 licenses.¹⁵ Specifically, IDT Spectrum requested that the Commission extend the license terms for the 103 39 GHz licenses beyond their 10-year license terms and accord IDT Spectrum a uniform expiration date of October 18, 2010 for all of the subject licenses. According to IDT Spectrum, such an action would serve the public interest because October 18, 2010 is the date by which IDT Spectrum must renew the licenses for 931 EA licenses in the 39 GHz band.¹⁶ IDT Spectrum argued that the requested extension would permit IDT Spectrum to develop a more harmonized fixed wireless network and provide an opportunity for the Commission to determine whether IDT Spectrum's efforts satisfy the substantial service requirements for the subject licenses at the same time that the Commission must evaluate IDT Spectrum's showings for its 931 EA licenses in the 39 GHz band.¹⁷

6. IDT Spectrum contended that it had attempted to make productive use of its wireless assets but had faced insurmountable obstacles largely outside of its control.¹⁸ Among other things, IDT Spectrum states that IDT and its subsidiaries spent approximately \$350 million between December 2001 and 2005 to provide service to consumers through its fixed wireless network.¹⁹ However, because these efforts were not successful, IDT Spectrum hired another management team in the spring of 2005.²⁰ IDT Spectrum states that subsequently the new management team spent "significant sums" on expenses related to developing its LMDS and 39 GHz licenses.²¹ IDT Spectrum states that it suspended its efforts in early 2006 due to the uncertainty surrounding the renewal of the subject licenses.²² IDT Spectrum therefore emphasized the importance of the Commission providing IDT Spectrum with a reasonable amount of time to restart its efforts and obtain the third party financing and technological assistance necessary to provide a commercially viable business.²³

7. On January 31, 2007, the Division found that IDT Spectrum's arguments failed to justify an extension of time to demonstrate substantial service for its 39 GHz stations.²⁴ Although the Division

¹⁴ 47 C.F.R. § 101.17(a).

¹⁵ See Applications, Waiver Request. In addition, IDT Spectrum filed applications seeking to extend the substantial service deadline for Local Multipoint Distribution Service (LMDS) Station WPOI485 from February 1, 2006 to October 18, 2010. See File No. 0002468832 (amended Aug. 30, 2006) (extension of time application); File No. 0002468846 (amended Aug. 30, 2006) (renewal application).

¹⁶ See Waiver Request at 2.

¹⁷ See *Id.* at 2-3.

¹⁸ See *Id.* at 2, 4, 7-8.

¹⁹ Petition at 6.

²⁰ See *Id.* at 6.

²¹ *Id.* IDT Spectrum alleges that these efforts cost approximately \$16.5 million. See *Id.*

²² See Waiver Request at 8. IDT Spectrum notes that it has attempted three unsuccessful financings since the spring of 2005. Petition at 7.

²³ See *Id.* at 7.

²⁴ See *Division Letter* at 4. In addition, the Division found that IDT Spectrum failed to demonstrate that LMDS Station WPOI485 is providing substantial service in the NY BTA. See *Division Letter* at 4 (finding "nothing in the record to support a finding that Station WPOI485 has provided substantial service, or any service, to the New York BTA"). The Division specifically rejected IDT Spectrum's "arguments that substantial service should be determined on a basis other than service provided by the licensee within the coverage area" as inconsistent with the Commission's Rules and more appropriately addressed in a rulemaking proceeding. *Id.* The Bureau dismissed the instant Petition with respect to LMDS Station WPOI485 in a separate order, released on July 31, 2007, that

(continued....)

found that IDT Spectrum had failed to demonstrate that the requested waiver was warranted, the Division, on its own motion, granted IDT Spectrum a limited waiver of Section 1.946 of the Commission's Rules to extend, until August 1, 2007, the deadline by which it must demonstrate substantial service for the 81 39 GHz licenses with substantial service deadlines prior to August 1, 2007.²⁵ Specifically, the Division found that such a limited waiver would further the public interest "by preventing the disruption of any service that IDT may currently be providing while giving IDT a last opportunity to put these licenses to use."²⁶ The Division also therein authorized processing of renewal applications for those 81 39 GHz licenses, subject to the condition that such licenses will automatically terminate if IDT Spectrum fails to demonstrate substantial service for each license by August 1, 2007.²⁷ However, the Division did not find that the public interest warranted extending waiver relief to the 22 licenses with substantial service deadlines beyond August 1, 2007.²⁸ Rather, pursuant to the *Division Letter*, IDT Spectrum was required to file a renewal application and demonstrate substantial service for each of those 22 licenses by the deadline currently in effect for each license.²⁹

8. On March 2, 2007, IDT Spectrum filed the instant Petition. IDT Spectrum contends that the limited extension granted by the *Division Letter* promotes the defensive construction of facilities solely to preserve licenses.³⁰ IDT Spectrum further contends that the Division's finding that it has not acted diligently to place the licenses in operation should be reconsidered to account for the actions and investments made by IDT Spectrum and its predecessor during the license terms of the 103 licenses at issue.³¹

9. Pursuant to the *Division Letter*, on July 31, 2007, IDT Spectrum filed 81 notifications of construction completion with substantial service showings for those licenses with renewal dates prior to August 1, 2007.³² In addition, IDT Spectrum has since filed 22 renewal applications for those 39 GHz

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addressed LMDS matters pending with respect to the NY BTA. See SpeedUSNY.com, Request for Finding of Substantial Service for Local Multipoint Distribution Service (LMDS) Station WLT379, New York, New York; IDT Spectrum, LLC, Request for Waiver and Extension of Time of Section 101.1011 of the Commission's Rules or, in the Alternative, a Finding of Substantial Service for Local Multipoint Distribution Service (LMDS) Station WPOI485, New York, New York, *Memorandum Opinion and Order and Order on Reconsideration*, 22 FCC Rcd 13974, 13978 ¶ 24 (WTB 2007) (*NY LMDS Order*).

²⁵ See *Division Letter* at 6.

²⁶ See *Id.*

²⁷ See *Division Letter* at 2, 6. IDT Spectrum filed 78 renewal only applications pursuant to the *Division Letter* between February 2, 2007 and June 1, 2007. IDT Spectrum had already filed renewal applications for three 39 GHz licenses on November 11, 2006. See File Nos. 0002820165, 0002820167, 0002820172. The three applications were granted and new licenses were issued subject to the condition that IDT Spectrum demonstrate substantial service in each license area by August 1, 2007 and that failure to demonstrate substantial service by August 1, 2007 shall result in automatic cancellation of the licenses. In addition, IDT Spectrum also received a conditional grant of the license for Station WPOP580, subject to the same substantial service requirement and automatic cancellation condition. See File No. 0002900293.

²⁸ See *Id.*

²⁹ See *Id.*

³⁰ See Petition at 5, 18-19.

³¹ See *Id.* at 5-7.

³² The 81 notifications at issue are hereinafter collectively referred to as "Notifications."

licenses with expiration dates beyond August 1, 2007.³³ These renewal applications also include substantial service showings for these 22 licenses.³⁴ In all of the substantial service showings,³⁵ IDT Spectrum renews its argument that it meets the Commission's substantial service standard because it has made "substantial and diligent efforts to develop upper millimeter band spectrum."³⁶ IDT Spectrum further states that it "has undertaken efforts to examine potential services such as WiMAX, broadband rural healthcare, and backhaul for advanced wireless services."³⁷ IDT Spectrum claims that it offers fixed wireless private line and spectrum leasing services using its 39 GHz licenses.³⁸ Specifically, IDT Spectrum states that it "has twenty-seven spectrum manager leases, most of which are in the 39 GHz band, and it also operates a private line services business via its fixed wireless spectrum."³⁹

10. IDT Spectrum provides no information regarding what, if any, services are provided using specific licenses except for Stations WPNG951, WPNA368, WPNI218, WPND830, and WPNH842. In the substantial service showings for those stations, IDT Spectrum states that Stations WPNG951, WPNA368, and WPNI218 are providing one link of private line service in their license areas, Station WPND830 is providing two links in its service area, and Station WPNH842 is providing four links of private line service in its service area.⁴⁰ Although IDT Spectrum concedes that its construction in these four license areas fails to satisfy the "safe harbor" standard,⁴¹ it argues that such construction should be considered in combination with "the considerable investment and effort that IDT Spectrum and its

³³ The 22 renewal only applications are collectively referred to as "August Applications." As noted above, IDT Spectrum had filed 78 renewal only applications pursuant to the *Division Letter* prior to August 1, 2007, and only one of those renewal applications was conditionally granted. Therefore, at this time, IDT Spectrum has 99 renewal only applications pending for the subject licenses. See Appendix, Exhibit B.

³⁴ See August Applications, Exhibit A – Request for Renewal and Substantial Service Demonstration.

³⁵ The substantive discussion in each of the 81 exhibits is the same. See, e.g., File No. 0003125883, Exhibit A - Notification of Construction of Call Sign WPN388 (filed July 31, 2007) ("Substantial Service Showing"). However, specific page references to the Substantial Service Showing are with respect to the showing filed for Station WPNA388, File No. 0003125883.

³⁶ Substantial Service Showing at 6. As in prior filings, IDT Spectrum contends that the Commission should consider the investments and efforts of Old Winstar, from which it purchased the subject licenses, as well as its own. See Substantial Service Showing at 6-7.

³⁷ *Id.* at 7.

³⁸ See Substantial Service Showing at 7.

³⁹ *Id.*

⁴⁰ See Substantial Service Demonstration for Station WPNA368 at 8-9 (stating that it is providing one link of private line service to a customer who is serving a federal agency in Fresno, California); Substantial Service Demonstration for Station WPNI218 at 8-9 (stating that it is providing one link of private line service in Colorado Springs, Colorado); Substantial Service Demonstration for Station WPNG951 at 8-9 (stating that it is providing one link of private line service to Verizon Wireless in Richmond, Virginia); See File No. 0003126740, Substantial Service Demonstration for Station WPND830 at 8-9 (stating that it is providing two links to federal agencies in Miami, Florida); Substantial Service Demonstration for Station WPNH842 at 8-9 (stating that it is providing four links of private line service to Cellular One in San Juan, Puerto Rico).

⁴¹ The Commission elaborated on what may constitute "substantial service" for 39 GHz band by offering some specific examples, which are sometimes referred to as "safe harbors," to provide 39 GHz band licensees with a degree of certainty as to how to comply with the substantial service requirement by the end of the initial license term. *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 46. The Commission explained that a 39 GHz band licensee may fall within a "safe harbor" by constructing four permanent links per one million people in its licensed service area. *Id.*

predecessor has put forth to develop the 39 GHz band” to support a finding that it is providing substantial service in these four license areas.⁴²

11. *IDT Spectrum’s 39 GHz EA licenses.* On April 18, 2008, IDT Spectrum filed Applications to extend the substantial service deadline for its 39 GHz EA licenses from October 18, 2010 to June 1, 2012. In addition to making arguments noted above, IDT Spectrum cites a recent decision by the Bureau to extend the substantial service deadline for Local Multipoint Distribution Service (LMDS) licensees, including IDT Spectrum, to June 1, 2012.⁴³ IDT Spectrum reports that it has hired a new management team that has instituted an online spectrum leasing program.⁴⁴ It contends that this program “serves the public interest by offering a competitive alternative to incumbent wireline backhaul providers and enabling the widespread deployment of wireless broadband services.”⁴⁵ IDT Spectrum believes that demand for wireless backhaul will increase as services are offered in the Advanced Wireless Services (AWS) band, Broadband Radio Service/Educational Broadband Service (BRS/EBS) bands, and 700 MHz band.⁴⁶ In that regard, IDT Spectrum argues that its 39 GHz EA licenses are similarly situated to LMDS.⁴⁷

III. DISCUSSION

A. Extension Requests

12. Pursuant to the Commission’s Rules, 39 GHz licenses are issued for a period not to exceed ten years.⁴⁸ 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” to their service area.⁴⁹ Based on our review of the record, we reconsider the decision in the *Division Letter* and conclude that it would be in the public interest to extend the substantial service deadlines for IDT Spectrum’s 103 rectangular service area licenses to June 1, 2012. We also conclude that an extension of the substantial service deadlines for IDT Spectrum’s 931 EA licenses is warranted.

13. Section 1.946 of the Commission’s Rules provides that a request for extension of time to construct “may be granted if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”⁵⁰ The rule prohibits granting extensions based on a failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of

⁴² *Id.* at 9.

⁴³ EA Extension Applications, Exhibit 1, Request for Waiver of Section 101.17(a) of the Commission’s Rules, or, in the Alternative, Request for Extension of Time to Meet “Substantial Service” Requirements (EA Extension Exhibit) at 1, 4, 6, *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*).

⁴⁴ EA Extension Exhibit at 3.

⁴⁵ *Id.*

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 6, 9.

⁴⁸ 47 C.F.R. § 101.67. Licensees in the 39 GHz Service are licensed under 47 C.F.R. Part 101.

⁴⁹ *See* 47 C.F.R. § 101.17(a).

⁵⁰ 47 C.F.R. § 1.946(e)(1).

a transfer of control of the licensee.⁵¹ Section 1.925 of the Commission's Rules⁵² provides that a waiver of the Commission's Rules may be granted if it is shown 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.⁵³

14. Initially, we agree with the *Division Letter* that the "technological and business issues" that IDT Spectrum claims have hindered the provision of substantial service within the 39 GHz band⁵⁴ are not those that warrant an extension of time or a waiver. Section 1.946(e)(2) of the Commission's Rules⁵⁵ states that an extension will not be granted if the delays are caused by a failure to obtain financing. IDT Spectrum should have been aware of the "technological and business" issues when it acquired the subject licenses from the bankrupt estate of its predecessor in December of 2001. IDT Spectrum exercised its own business judgment in acquiring and retaining its 39 GHz licenses, formulating business plans, and deciding when and how to construct facilities.⁵⁶ The Division correctly explained that IDT Spectrum's realization that the prior business plans of its predecessor (Winstar Communications Inc.) were not commercially viable was not a factor outside of its control that would justify an extension of time to construct.⁵⁷

15. We also find that IDT Spectrum's reliance on the *WCS Extension Order*,⁵⁸ *FCI900*,⁵⁹ and the *220 MHz Extension Order*⁶⁰ is misplaced. In the *WCS Extension Order*, the Bureau found that, in the Wireless Communications Service (WCS), limited deployment attempts using available equipment had been marred by technical problems or proved to be economically infeasible.⁶¹ Moreover, the Bureau was

⁵¹ 47 C.F.R. § 1.946(e)(2), (3). Pursuant to 47 C.F.R. § 1.946(e)(2), extension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner but a presumption of diligence is established if a licensee orders equipment within 90 days of its initial license grant. Pursuant to 47 C.F.R. § 1.946(e)(3), extension requests will not be granted for failure to meet a construction or coverage deadline because the license undergoes a transfer of control, and the Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.

⁵² 47 C.F.R. § 1.925.

⁵³ *Id.*; see also *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).

⁵⁴ See, e.g., Petition at 10.

⁵⁵ 47 C.F.R. § 1.946(e)(2).

⁵⁶ See, e.g., *Eldorado*, 17 FCC Rcd at 24616 ¶ 7.

⁵⁷ See *Id.* (citing *Eldorado Communications, LLC, Order*, 17 FCC Rcd 24613, 24616 (WTB CWD 2002) (*Eldorado*)).

⁵⁸ Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006) (*WCS Extension Order*).

⁵⁹ FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (WTB 2001) (*FCI 900*).

⁶⁰ Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994 (WTB 2004) (*220 MHz Extension Order*).

⁶¹ See *WCS Extension Order*, 21 FCC Rcd at 14139 ¶ 10.

“persuaded . . . that relatively restrictive [out-of-band emission (OOBE)] limits may have impeded the development of WCS equipment and have contributed to the unique circumstances of the band.”⁶² The Bureau therefore concluded that “the WCS licensees have demonstrated that they face factors beyond their control that have limited their options in providing service. . . .”⁶³ The *Division Letter* correctly found that the record in this proceeding does not demonstrate that IDT Spectrum faces the “regulatory uncertainty” or the extensive technical and equipment challenges faced by WCS licensees.⁶⁴

16. We conclude, however, that granting an extension of time to demonstrate substantial service until June 1, 2012 would be in the public interest, with respect to both IDT Spectrum’s rectangular service area licenses and its EA licenses. As IDT Spectrum notes, the 39 GHz band has the potential to serve as a backhaul solution for licensees in the 700 MHz band,⁶⁵ the AWS band,⁶⁶ and the BRS/EBS bands.⁶⁷ We note that the Commission has issued licenses for the AWS band in the past 18 months⁶⁸ and recently has completed an auction for the 700 MHz Band.⁶⁹ We anticipate that, in the next several years, services in these bands will develop robustly,⁷⁰ along with other mobile and fixed wireless broadband services. In the case of LMDS, the Bureau recently concluded that it would be in the public interest to give LMDS licensees additional time “in which to construct their licenses, to allow the equipment market to develop further and to give them the option to coordinate their buildout with licensees in the 700 MHz

⁶² *See Id.*

⁶³ *See Id.* at 14139 ¶ 9 (citing 47 C.F.R. § 1.946(e)(1)).

⁶⁴ *See Division Letter* at 5, n. 44.

⁶⁵ The 700 MHz band licenses may be used for flexible fixed, mobile, and broadcast uses, including fixed and mobile wireless commercial services (including FDD-based and TDD-based services); fixed and mobile wireless uses for private, internal radio needs; and mobile and other digital new broadcast operations. These uses may include two-way interactive, cellular, and mobile television broadcasting services.

⁶⁶ Advanced Wireless Service (AWS) is a collective term for new and innovative fixed and mobile terrestrial wireless applications using bandwidth that is sufficient for the provision of a variety of applications, including those using voice and data (such as Internet browsing, message services, and full-motion video) content. The services ultimately provided by AWS licensees are only limited by the fixed and mobile designation of the spectrum we allocate for AWS and the service rules we ultimately adopt for the bands.

⁶⁷ BRS provides integrated access to broadband technologies, including high-speed digital technologies that provide consumers integrated access to voice, high-speed data, video-on-demand, and interactive delivery services. 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, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, ¶ 9 (2004). EBS is designed primarily for the transmission for providing educational and instructional material to accredited educational institutions and government organizations. *See* 47 C.F.R. § 27.1201(a).

⁶⁸ *See, e.g.,* Wireless Telecommunications Bureau Grants Advanced Wireless Services Licenses, *Public Notice*, 22 FCC Rcd 7293 (WTB 2007).

⁶⁹ *See* Auction of 700 MHz Band Licenses Closes, *Public Notice*, DA 08-595 (WTB rel. Mar. 20, 2008).

⁷⁰ Licensees in the Lower 700 MHz A, B, and E Blocks and in the Upper 700 MHz C Block must meet their first buildout requirement by February 17, 2013 (assuming their licenses are granted before February 17, 2009). *See* 47 C.F.R. § 27.14(g), (h). In addition, we anticipate that AWS service will be rolled out in a number of markets over the next several years as federal incumbents are relocated. For more information on the relocation, see <http://www.ntia.doc.gov/osmhome/reports/spereclo/index.htm>.

and AWS bands.”⁷¹ IDT Spectrum has demonstrated that its 39 GHz licenses are similarly enough situated to LMDS that it would be appropriate to grant similar relief for its 39 GHz licenses.

17. Under those circumstances, we determine that strict enforcement of Section 101.17 of the Commission’s Rules⁷² would not serve the rule’s underlying purpose, as it would tend to slow, rather than accelerate, service deployment. We believe the public interest would best be served by granting IDT Spectrum until June 1, 2012 to demonstrate substantial service for its 103 39 GHz rectangular service area licenses. Accordingly, we grant IDT Spectrum’s petition for reconsideration in part, reinstate their applications for extension of time with respect to the 103 licenses listed in Appendices A and B, and direct the Division to extend the substantial service requirement under Section 101.17 of the Commission’s Rules⁷³ for those licenses listed in Appendices A and B until June 1, 2012. We also conclude that extension of the substantial service deadline for IDT Spectrum’s EA Licenses is warranted, and we direct the Division to process the EA Extension Applications set forth in Appendix C.

18. We authorize the Division to process in due course renewal applications for the stations that have received extensions. Any license that is renewed shall be subject to the condition that IDT Spectrum shall demonstrate substantial service by June 1, 2012. Failure to comply with that condition shall result in automatic termination of the license.⁷⁴

B. Substantial Service Showings

19. Pursuant to the Commission’s Rules, 39 GHz licenses are issued for a period not to exceed ten years.⁷⁵ At the end of the ten-year period, a licensee is required to submit an acceptable showing to the Commission demonstrating that it “is providing service which rises to the level of ‘substantial’” in each area for which it holds a license.⁷⁶ Licensees failing to demonstrate that they are providing substantial service will not have their licenses renewed.⁷⁷ For the reasons explained herein, we find that IDT Spectrum has failed to demonstrate the provision of substantial service with respect to the 103 rectangular service area licenses.

20. We note that, with the exception of Stations WPND830, WPNG951, WPNA368, WPNI218, and WPNH842 discussed below, IDT Spectrum offers no evidence that it is providing any current service – substantial or otherwise – in the rectangular service areas covered by its 39 GHz licenses.⁷⁸ Rather, IDT

⁷¹ *LMDS Order*, 23 FCC Rcd at 5906 ¶ 26.

⁷² 47 C.F.R. § 101.17.

⁷³ *Id.*

⁷⁴ 47 C.F.R. § 1.955(a)(2).

⁷⁵ 47 C.F.R. § 101.67.

⁷⁶ 47 C.F.R. § 101.17(a). A licensee’s substantial service showing should include, but not be limited to, the following information for each license area: (1) a description of the 38.6–40.0 GHz band licensee’s current service in terms of geographic coverage; (2) a description of the 38.6–40.0 GHz band licensee’s current service in terms of population served, as well as any additional service provided during the license term; (3) a description of the 38.6–40.0 GHz band licensee’s investments in its system(s) (type of facilities constructed and their operational status is required). *See* 47 C.F.R. § 101.17(a)(1)-(3).

⁷⁷ *See* 47 C.F.R. § 101.17(b).

⁷⁸ With respect to these 99 licenses, IDT Spectrum fails to provide the Commission with a description of its “current service” in terms of geographic coverage or a description of its “current service” in terms of population served, which if current service were, in fact, being provided by IDT Spectrum, would be required pursuant to 47 C.F.R. § 101.17(a)(1)-(2).

Spectrum asks the Commission to make a finding that it is providing substantial service in each of its license areas based on non-license specific references to IDT Spectrum's generalized costs, investments, unsuccessful financing attempts, discontinued business plans, and possible future uses for this spectrum that IDT Spectrum is now considering.⁷⁹ We decline to do so. Although IDT Spectrum is correct that the Commission adopted the substantial service requirement as the performance standard for 39 GHz licensees to accord licensees flexibility in designing their systems and offering a variety of services to the public, it ignores the Commission's counterbalancing purpose of providing "a clear and expeditious accounting of spectrum use by licensees to ensure that service is indeed being provided to the public."⁸⁰ The record demonstrates that IDT Spectrum is not providing service "which rises to the level of 'substantial'" in the subject 39 GHz license areas.

21. IDT Spectrum's general statement that it has leased spectrum and is providing a private line service is insufficient to demonstrate substantial service. The Commission has held that when a licensee leases spectrum, the licensee remains responsible for meeting its construction obligations and that a licensee may not delegate those obligations to a lessee.⁸¹ Section 101.17 of the Commission's Rules requires specific information to be provided by the licensee with respect to the service offered for each license area, including (1) a description of the 38.6–40.0 GHz band licensee's current service in terms of geographic coverage; (2) a description of the 38.6–40.0 GHz band licensee's current service in terms of population served, as well as any additional service provided during the license term; (3) a description of the 38.6–40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required).⁸² A general statement that spectrum was leased or that service was provided under certain stations does not provide the level of detail required by the substantial service rule. Furthermore, since the obligation to demonstrate substantial service remains with IDT Spectrum, a general statement that spectrum was leased cannot excuse its failure to provide the necessary information.

⁷⁹ See Substantial Service Showing. IDT Spectrum also states that it "currently offers fixed wireless private line and spectrum leasing services using its millimeter wave band spectrum. At present, IDT Spectrum has twenty-seven spectrum manager leases, most of which are in the 39 GHz band, and it also operates a private line services business via its fixed wireless spectrum." See Substantial Service Showing at 7. Pursuant to 47 C.F.R. § 101.17(a), IDT Spectrum is required to specifically identify the current services offered in each license area and the type and operational status of facilities constructed in each license area to permit the Commission to evaluate whether the licensee is providing service which rises to the level of "substantial." IDT Spectrum fails to demonstrate that the referenced spectrum manager leases and private line services pertain to these 39 GHz licenses at issue.

⁸⁰ 39 GHz R&O, 12 FCC Rcd at 18623 ¶ 42; see also *id.* at 18625 ¶ 46 ("This approach will permit flexibility in system design and market development, while ensuring that service is being provided to the public."); *id.* at 18626 ¶ 46 ("This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings."); *id.* at 18625 ¶ 47 ("applying 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."); Renewal of Licenses to Provide Microwave Service in the 38.6-40.0 GHz Band, *Memorandum Opinion and Order*, 17 FCC Rcd 4404, 4407 ¶ 11 (WTB PSPWD 2002) (*Microwave Renewal MO&O*) ("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.").

⁸¹ Promoting Efficient Use of Spectrum Through Eliminations of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17570 ¶¶ 144-146 (2004).

⁸² See 47 C.F.R. § 101.17(a)(1)-(3).

22. We also find that IDT Spectrum has failed to demonstrate that Stations WPNG951, WPNA368, WPNI218, and WPNH842 are providing substantial service in their license areas.⁸³ IDT Spectrum contends that Stations WPNG951, WPNA368, and WPNI218 are providing one link of private line service in their license areas, Station WPND830 is providing two links in its service area, and Station WPNH842 is providing four links of private line service in its service area.⁸⁴ Although IDT Spectrum concedes that its construction in these four license areas fails to satisfy the “safe harbor” standard,⁸⁵ it argues that such construction should be considered in combination with “the considerable investment and effort that IDT Spectrum (and its predecessor) has put forth to develop the 39 GHz band” to support a finding that it is providing substantial service in these four license areas.⁸⁶ IDT Spectrum has failed to provide the information required by Section 101.17(a) of the Commission’s Rules to support a finding of substantial service here.⁸⁷

23. IDT Spectrum’s reliance on the *Biztel*⁸⁸ case is misguided. In *Biztel*, the 39 GHz licensee submitted substantial service showings stating that it had constructed at least four links per million population in two license areas.⁸⁹ However, the licensee explained that, “with respect to both stations, service is dynamic rather than stable. As a result, Biztel indicated that while at some point during the license period it had sufficient number of paths in operation to meet the safe harbor standard, all of the paths may not have been operational throughout the entire license period.”⁹⁰ The former Public Safety and Private Wireless Division (PSPWD) of the Bureau found that Biztel was providing substantial service in the licensed areas even though it did not meet the “safe harbor” standard throughout the entire license

⁸³ See File No. 0003126740, Substantial Service Demonstration for Station WPND830 (Jul. 31, 2007); File No. 0003159817, Substantial Service Demonstration for Station WPNA368 (Aug. 31, 2007); File No. 0003159787, Substantial Service Demonstration for Station WPNI218 (Aug. 31, 2007); File No. 0003137546, Substantial Service Demonstration for Station WPNG951 (Aug. 13, 2007); File No. 0003138490, Substantial Service Demonstration for Station WPNH842 (Aug. 14, 2007).

⁸⁴ See Substantial Service Demonstration for Station WPNA368 at 8-9 (stating that it is providing one link of private line service to a customer who is serving a federal agency in Fresno, California); Substantial Service Demonstration for Station WPNI218 at 8-9 (stating that it is providing one link of private line service in Colorado Springs, Colorado); Substantial Service Demonstration for Station WPNG951 at 8-9 (stating that it is providing one link of private line service to Verizon Wireless in Richmond, Virginia); Substantial Service Demonstration for Station WPND830 at 8-9 (stating that it is providing two links to federal agencies in Miami, Florida); Substantial Service Demonstration for Station WPNH842 at 8-9 (stating that it is providing four links of private line service to Cellular One in San Juan, Puerto Rico).

⁸⁵ IDT Spectrum notes that, in order to fall within the safe harbor, it would need to construct approximately three links in Station WPNI218’s license area (Colorado Springs, Colorado) and approximately two links in Station WPNA368’s license area (Fresno, California). Substantial Service Demonstration for Station WPNI218 at 8, Substantial Service Demonstration for Station WPNA368 at 8. IDT Spectrum does not give corresponding information for Stations WPND830 (Miami, Florida), WPNG951 (Richmond, Virginia), or WPNH842 (San Juan, Puerto Rico).

⁸⁶ Substantial Service Demonstration for Station WPNH842 at 9.

⁸⁷ We note that the existing operations under Stations WPNA368, WPNI218, WPNG951, and WPNH842 will be allowed to continue because those stations have received an extension of time to demonstrate substantial service.

⁸⁸ See, e.g., *Biztel, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 3308 (WTB PSPWD 2003) (*Biztel*); *Microwave Renewal MO&O*, 17 FCC Rcd at 4406-4407 ¶¶ 10-12 (evaluating the construction efforts of 39 GHz licensees that held their licenses for a “truncated” period of less than five years in light of the reduced amount of time to provide substantial service).

⁸⁹ See *Biztel*, 18 FCC Rcd at 3310 ¶ 6.

⁹⁰ *Id.* at 3311 ¶ 7 (internal citations omitted).

period.⁹¹ PSPWD explained that, “[e]ven though all the paths were not operational simultaneously for the entire license period, we believe Biztel has demonstrated that it constructed at least four links per million population in the service area during the license term and that Biztel was utilizing these links to provide service to the public. Moreover, we believe Biztel has sufficiently explained how it is serving the public and why all of its paths may not have been operational during the entire license period.”⁹² In contrast to *Biztel*, IDT Spectrum makes no representation that it has constructed a sufficient number of links to satisfy the safe-harbor standard in each licensed area.

IV. CONCLUSION AND ORDERING CLAUSES

24. With respect to the 103 rectangular service area licenses, we grant the Petition in part and conclude it is in the public interest to extend the deadline for IDT Spectrum to demonstrate substantial service to June 1, 2012. We reject the substantial service showings for all 103 of the subject licenses and find that IDT Spectrum failed to demonstrate that it is providing substantial service in these license areas. Finally, we find it is in the public interest to extend the substantial service deadline for IDT’s 39 GHz EA licenses to June 1, 2012 and direct the Division to process those applications.

25. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission’s Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed on March 2, 2007 by IDT Spectrum, LLC IS GRANTED IN PART and is otherwise DENIED.

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 101.17 of the Commission’s Rules, 47 C.F.R. § 101.17, that the requests for findings of substantial service made by IDT Spectrum, LLC in connection with the construction notifications listed in Appendix A and the renewal applications listed in Appendix B ARE DENIED.

27. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 101.17 of the Commission’s Rules, 47 C.F.R. § 101.17, that the construction notifications filed by IDT Spectrum, LLC on July 31, 2007 and listed in Appendix A ARE DENIED.

28. IT IS FURTHER 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 1.946, 1.949 and 101.17(b) of the Commission’s Rules, 47 C.F.R. §§ 1.946, 1.949, 101.17(b), that the Broadband Division of the Wireless Telecommunications Bureau SHALL REINSTATE the applications for extension of time to demonstrate substantial service listed in Appendices A and B and shall process those applications, as well as the renewal applications listed in Appendices A and B, in accordance with this *Order on Reconsideration and Memorandum Opinion and Order*.

⁹¹ *Id.* at 3311 ¶ 8.

⁹² *Id.*

29. IT IS FURTHER 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 1.946 and 101.17(b) of the Commission's Rules, 47 C.F.R. §§ 1.946, 101.17(b), that the Broadband Division of the Wireless Telecommunications Bureau shall process the applications for extension of time to demonstrate substantial service listed in Appendix C in accordance with this *Order on Reconsideration and Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting
Acting Chief, Wireless Telecommunications Bureau