

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

In the Matter of
WIRELESS AMERICA, L.L.C.
476 Applications For Extension of Time to Meet
First Buildout Requirement for Multiple Address
System Licenses
File Nos. 0002971461, et al.

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 2009

Released: June 25, 2009

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address 476 applications filed by MilkyWay Communications, L.L.C. ("MilkyWay") on behalf of Wireless America, L.L.C. ("Wireless America") for extension of time to meet the first buildout requirement for Multiple Address System (MAS) licenses. Wireless America seeks an extension of the first buildout requirement for five years, until March 28, 2012. For the reasons discussed below, we deny the Extension Requests and note that Wireless America's licenses automatically cancelled on March 28, 2007.

II. BACKGROUND

2. MAS is a radio communications service that consists of 3.2 megahertz of spectrum in the 900 MHz band and is licensed under Part 101 of the Commission's rules. In 2000, the Commission designated the 928/959 MHz bands and twenty of the forty paired channels in the 932/941 MHz bands to be licensed on a geographic area basis using Economic Areas. The Commission held an auction for MAS licenses from November 14, 2001 to November 27, 2001.

3. MilkyWay was the winning bidder for 476 MAS licenses. Subsequently, on March 28, 2002, MilkyWay's long form application was granted, and it was issued licenses for each of the markets for which it was the winning bidder. Under the Commission's Rules, MilkyWay had until March 28,

1 See Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, Report and Order, 15 FCC Rcd 11956 (2000) ("MAS Report and Order").

2 MAS Report and Order, 15 FCC Rcd at 11957-58 ¶ 2.

3 See Multiple Address Systems Spectrum Auction Closes - Winning Bidders Announced, Public Notice, 16 FCC Rcd 21011 (WTB 2001).

4 Id. at 21019-21061 Attachment A.

5 See The Wireless Telecommunications Bureau Announces the Grant of Licenses to Operate in the Multiple Address Systems Bands, Public Notice, DA 02-740 (WTB 2002).

2007, or five years after its licenses were granted, to either provide service to at least one-fifth of the population within its service area or demonstrate “substantial service.”⁶

4. On April 5, 2006, MilkyWay and Wireless America filed an application to disaggregate 6.25 kilohertz of each of MilkyWay’s licenses to Wireless America.⁷ Wireless America made the following representations:

Wireless America contemplates the possible provision of a multitude of services, including utility (water, gas, electricity) monitoring; “Wireless DSL;” real time video surveillance and other security, police and public safety-related services; two-way telemetry; and other services on the spectrum at issue. At least initially, 6.25 kHz bandwidth should be sufficient to provide such service in most markets. In those markets where additional bandwidth is necessary, Wireless America, through this Application, is obtaining multiple 6.25 kHz authorizations and is confident that this will provide sufficient capacity for service, at least in the early years of operation.⁸

5. In connection with that application, MilkyWay and Wireless America certified that Wireless America would be responsible for meeting the construction requirements contained in Section 101.1325 of the Commission’s Rules for each of the licenses.⁹ The parties also requested a waiver of the filing fees associated with that application.¹⁰ On December 15, 2006, the Office of Managing Director denied the request for waiver of filing fees.¹¹ Subsequently, MilkyWay and Wireless America paid the requisite filing fees. On January 26, 2007, the Disaggregation Application was granted.¹² On March 23, 2007, the parties consummated the disaggregation.¹³

6. On March 28, 2007, MilkyWay, on behalf of Wireless America, filed the Extension Applications.¹⁴ The parties argue that their request would make the MAS construction requirements consistent with bands where the Commission has only imposed a construction requirement ten years after initial license grant.¹⁵ They also complain about the length of time the Disaggregation Application was

⁶ See 47 C.F.R. § 101.1325(b).

⁷ File No. 0002561510 (filed Apr. 5, 2006) (Disaggregation Application).

⁸ *Id.*, Exhibit 1, Description of Transaction and Public Interest Considerations at 1.

⁹ Disaggregation Application, Response to Schedule B, Item 7.

¹⁰ *Id.*, Request for Waiver of Filing Fees. Under 47 C.F.R. § 1.1117, applicants may file requests for waiver or deferral of application filing fees, which will be acted on by the Office of Managing Director. The Commission’s Rules specify that “[t]he Commission will not be responsible for delays in acting upon these requests.” 47 C.F.R. § 1.1117(e).

¹¹ See Fee Decisions of the Managing Director Available to the Public, *Public Notice*, 22 FCC Rcd 2166 (OMD 2007).

¹² See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, *De Facto* Transfer Lease Applications and Spectrum Manager Lease Notifications, Designated Entity Reportable Eligibility Event Applications, and Designated Entity Annual Reports Action, Report No. 2898, *Public Notice* (WTB rel. Jan. 31, 2007) at 3.

¹³ See File No. 0002963915 (filed Mar. 23, 2007).

¹⁴ MilkyWay represented that it was filing the Extension Applications on behalf of Wireless America because the Universal Licensing System had not been updated to reflect Wireless America as the licensee of the spectrum at issue. See Extension Applications, Exhibit A – Request for an Extension of Deadline for Establishing Wireless America L.L.C.’s Compliance with Section 101.1325(b) (Exhibit A) at 1 n.1.

¹⁵ Exhibit A at 1.

pending before it was acted on.¹⁶ The parties contend that the Commission has extended construction deadlines where deployment is not technically or economically feasible.¹⁷ They cite the decisions to grant buildout extensions in the 220 MHz Phase II service,¹⁸ the 900 MHz Specialized Mobile Radio licenses,¹⁹ the former Interactive Video and Data Service,²⁰ and the former Multipoint Distribution Service.²¹ MilkyWay and Wireless America also contend that while the Commission has encouraged licensees to move to 6.25 kilohertz technology, the Commission has held that 6.25 kilohertz channel width technology “is not mature enough to warrant setting a migration schedule.”²² The Extension Applications are unopposed.

III. DISCUSSION

7. MAS licensees may engage in terrestrial point-to-point and point-to-multi-point fixed and limited mobile operations.²³ The Commission determined that in order to meet the statutory requirement to include safeguards to protect the public interest in the use of spectrum, it would impose two buildout requirements on geographic area MAS licenses.²⁴ Within five years of license grant, geographic area MAS licensees were required to provide coverage to at least one-fifth of the population in their service areas or demonstrate substantial service.²⁵ At the end of the ten year period, licensees are required to make a continued showing of substantial service in each licensed area.²⁶ The Commission has defined “substantial service” as “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.”²⁷ The Commission concluded that the coverage requirements it adopted were consistent with rules for other services and would “hinder warehousing, promote the rapid development of new technologies, and promote service to rural areas.”²⁸

8. 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.”²⁹ The rule prohibits granting extensions based

¹⁶ *Id.*

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2-3, *citing* Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *et al.*, *Memorandum Opinion and Order*, 19 FCC Rcd 12994 (WTB 2004).

¹⁹ *Id.* at 3, *citing* FCI 900, Inc. Expedited Request For 3-Year Extension Of 900 MHz Band Construction Requirements, *et al.*, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (WTB 2001).

²⁰ *Id.* at 4, *citing* Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (1997).

²¹ *Id.* at 4-5, *citing* Extension of the Five-Year Build-Out Period For BTA Authorization Holders in the Multipoint Distribution Service, *Memorandum Opinion and Order*, 16 FCC Rcd 12593 (MMB 2001).

²² *Id.* at 3-4, *citing* FCC Addresses Rules for Private Land Mobile Radio Systems to Transition to 6.25 kHz Narrowband Technology, *News Release* (Mar. 22, 2007).

²³ *See* 47 C.F.R. § 101.1307.

²⁴ *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94, *citing* 47 U.S.C. § 309(j)(3).

²⁵ *Id.*, *see also* 47 C.F.R. § 101.1325(b).

²⁶ *Id.*, *see also* 47 C.F.R. § 101.1325(b).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 47 C.F.R. § 1.946(e)(1).

on a failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of a transfer of control of the licensee.³⁰

9. We conclude that Wireless America has failed to justify an extension of time to meet the first construction requirement. Specifically, we conclude that Wireless America's failure to meet the buildout deadline was attributable to factors wholly within its control. While Wireless America now claims that it is unable to construct a viable system in a 6.25 kilohertz channel,³¹ it applied to obtain through disaggregation just this size channel less than a year before the construction deadline, asserting that it could provide a variety of services in this amount of spectrum.³² Indeed, Wireless America was sufficiently confident of its ability to provide service that it voluntarily agreed to assume the buildout obligations for all of MilkyWay's licenses at the risk of losing its licenses.³³ Notably, Wireless America does not indicate that it has taken any actions aimed at meeting its construction obligations. It offers no evidence of the efforts it made to search for equipment or to develop workable equipment, either before or after it acquired the licenses in question. Under these circumstances, we conclude that Wireless America's failure to meet its buildout deadline was a consequence of its voluntary business decision to acquire a 6.25 kilohertz channel close to the buildout deadline and to assume buildout obligations on MilkyWay's 476 MAS licenses. "[I]n its licensing of various wireless telecommunications services, the Commission has repeatedly ruled that business decisions made by licensees which ultimately prove misguided should not influence Commission determinations made in the course of managing the spectrum."³⁴ In this case, we conclude that Wireless America's voluntary business decisions led directly to the situation in which it now finds itself, and that an extension of the construction deadline is not justified.

10. Wireless America's situation is readily distinguishable from the cases it cites. In the cases it cites, there were systemic problems throughout the services that affected all licensees.³⁵ With respect to MAS, there is no evidence that any such systemic problems exist. Other MAS licensees have

³⁰ 47 C.F.R. § 1.946(e)(2), (3).

³¹ Exhibit A at 2.

³² Disaggregation Application, Exhibit 1, Description of Transaction and Public Interest Considerations at 1.

³³ Disaggregation Application, Response to Schedule B, Item 7.

³⁴ See Bristol MAS Partners, Request for Extension of Time in which to Construct and Place into Operation Multiple Address System Stations WPJF864 through WPJF870, *Order*, 14 FCC Rcd 5007, 5009 (WTB PSPWD 1999) (denying a request for extension of time to construct where the construction delays resulted from business decisions and therefore could not be attributed to causes beyond the licensee's control).

³⁵ See Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *et al.*, *supra* (extension granted where equipment manufacturers stopped making equipment for band and "the small amount of narrowband spectrum in non-contiguous blocks has presented unique challenges . . ."); FCI 900, Inc., *supra* (record showed that future of band was digital voice equipment and extension would help all licensees overcome near-term lack of digital 900 MHz voice equipment); Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline, *supra* (extension appropriate where Commission was in process of reviewing buildout and service rules); Extension of the Five-Year Build-Out Period For BTA Authorization Holders in the Multipoint Distribution Service, *supra* (two year extension would allow licensees to take advantage of recent rule changes and provide broadband service).

been able to meet their first buildout requirement and place their licenses in use.³⁶ In the absence of any evidence of a systemic problem, we decline to grant a five year buildout extension.

11. We reject the parties' remaining arguments. The argument that granting an extension would harmonize the MAS buildout requirement with other services effectively constitutes an improper and untimely request for reconsideration of the Commission's decision to impose a five year buildout requirement on MAS licensees, which we cannot and will not revisit. Their complaint about the delay in processing the Disaggregation Applications is also unavailing. The Commission's rules state that the Commission shall not be responsible for delays caused by processing requests for waivers of application fees.³⁷ Finally, the Commission's decision not to set a migration schedule to 6.25 kilohertz technology in another service has no bearing on these Extension Requests, where Wireless America voluntarily assumed the risks inherent in taking assignment of a 6.25 kilohertz channel and assuming the buildout requirements for the licenses.

12. Under Section 1.955(a)(2) of the Commission's Rules, authorizations automatically terminate if the licensee fails to meet construction or coverage requirements.³⁸ In light of our conclusion that grant of an extension to Wireless America is not in the public interest, we find that Wireless America's licenses automatically terminated on March 28, 2007, the buildout deadline.

IV. CONCLUSION AND ORDERING CLAUSES

13. MilkyWay and Wireless America have failed to justify an extension of time to meet the first buildout deadline for the MAS licenses in question. We therefore deny the Extension Applications and declare that Wireless America's licenses automatically terminated as of March 28, 2007.

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the applications for extensions of time to demonstrate substantial service listed in the Appendix to this *Memorandum Opinion and Order* ARE DENIED.

15. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 303(r) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 303(r), and Section 1.955(a)(2) of the Commission's rules, 47 C.F.R. § 1.955(a)(2), that the licenses issued to Wireless America, L.L.C. and listed in the Appendix to this *Memorandum Opinion and Order* ARE DECLARED TERMINATED as of March 28, 2007.

FEDERAL COMMUNICATIONS COMMISSION

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³⁶ See, e.g., construction notifications filed by Georgia Power Company (File Nos. 0002951489, *et al.*), Paging Systems, Inc. (File Nos. 0002961454, *et al.*), and ConocoPhillips Communications, Inc. (File Nos. 0002971368, *et al.*).

³⁷ See 47 C.F.R. § 1.1117(e).

³⁸ See 47 C.F.R. § 1.955(a)(2).