

are providing “substantial service” in each licensed area.⁷ The Commission defined “substantial service” as “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.”⁸ The purpose of the substantial service showing is to “promote efficient use of the spectrum, encourage the provision of service to rural, remote, and insular areas, and prevent the warehousing of spectrum.”⁹ Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.¹⁰

3. The Commission elaborated on what may constitute “substantial service” for LMDS by offering some specific examples, which are sometimes referred to as “safe harbors,” to provide LMDS licensees with a degree of certainty as to how to comply with the substantial service requirement by the end of the initial license term.¹¹ The Commission explained that an LMDS licensee that chooses to offer fixed, point-to-point services may fall within a “safe harbor” by constructing four permanent links per one million people in its licensed service area.¹² The Commission also elaborated that an LMDS licensee electing to deploy point-to-multipoint services may fall within a “safe harbor” by demonstrating coverage to 20 percent of the population in the licensed BTA.¹³ The “safe harbors” only serve as examples of what may constitute substantial service, and the Commission reviews licensees’ showings on a case-by-case basis.¹⁴

4. On March 14, 2008, Nextlink filed the Notifications. Nextlink is using each of the stations in question to provide both point-to-point links and point-to-multipoint services such as wireless Ethernet, private line access, and high-speed, wide-area networking to customers.¹⁵ In the Dallas-Fort Worth BTA (population 5,571,828), Nextlink is providing nine point-to-point links, and its point-to-multipoint services cover a geographic area encompassing 1,059,663 people.¹⁶ Nextlink began providing service in the Dallas-Fort Worth market in May 2006.¹⁷ In the Miami-Fort Lauderdale BTA (population 3,955,969), Nextlink is providing eight point-to-point links, and its point-to-multipoint services cover a geographic area encompassing 479,418 people.¹⁸ Nextlink began providing service in the Miami-Fort Lauderdale market in November 2005.¹⁹ In the Tampa-St. Petersburg-Clearwater BTA (population 2,628,386), Nextlink is providing four point-to-point links, and its point-to-multipoint services cover a geographic area encompassing 453,809 people.²⁰ Nextlink began providing service in the Tampa-St. Petersburg-

⁷ See 47 C.F.R. § 101.1011(a); see also *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262.

⁸ *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶ 261; see also *id.* at 12660 ¶ 269.

⁹ *Second LMDS Report and Order*, 12 FCC Rcd at 12659 ¶ 266.

¹⁰ See 47 C.F.R. § 101.1011(a).

¹¹ See *Second LMDS Report and Order*, 12 FCC Rcd at 12660-12661 ¶¶ 269-270.

¹² See *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶ 270.

¹³ See *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶ 270.

¹⁴ See *Second LMDS Report and Order*, 12 FCC Rcd at 12660-12661 ¶ 270. For example, the Commission may also consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets or focus on serving populations outside of areas served by other licensees. See *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶ 270.

¹⁵ Notifications at 1.

¹⁶ Dallas Notification at 1.

¹⁷ *Id.*

¹⁸ Miami Notification at 1.

¹⁹ *Id.*

Clearwater market in December 2005.²¹ Finally, in the Atlanta BTA (population 4,406,826), Nextlink is providing six point-to-point links, and its point-to-multipoint services cover a geographic area encompassing 689,058 people.²² Nextlink began providing service in the Atlanta market in July 2006.²³

III. DISCUSSION

5. Nextlink argues that for each of the stations in question, it has demonstrated that it has provided substantial service by meeting a combination of the point-to-point and point-to-multipoint safe harbors.²⁴ It uses the following methodology to reach that conclusion. It takes the number of point-to-point links that are providing service and multiplies that figure by 250,000 (based on the four links per million safe harbor) to provide a figure for the population that receives substantial service from the point-to-point links.²⁵ For its point-to-multipoint service, Nextlink takes the population covered by those services, and then subtracts the population that it estimates receives substantial service from the point-to-point links from the total population in the BTA.²⁶ Nextlink concludes that each of the stations in question provides substantial service because the population covered by its point-to-multipoint services is greater than 20 per cent of the population that does not receive attributable service from the point-to-point links.²⁷

6. We reject Nextlink's attempt to mathematically combine the point-to-point safe harbor and point-to-multipoint safe harbor in a manner that would guarantee a conclusion that it provided substantial service. Nextlink cites no precedent that would support its approach. Furthermore, adopting such an approach could allow licensees to meet a substantial service test by providing minimal levels of multiple services that, by themselves, would not meet the underlying purposes of the substantial service requirement. Accordingly, we reject Nextlink's argument that it has demonstrated substantial service by means of its mathematical formula.

7. As noted above, however, the Commission's "safe harbors" only serve as examples of what may constitute substantial service, and the Commission reviews licensees' showings on a case-by-case basis.²⁸ In this case, while Nextlink's showing does not meet the safe harbors established by the

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²⁰ Tampa Notification at 1.

²¹ *Id.*

²² Atlanta Notification at 1.

²³ *Id.*

²⁴ Notifications at 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* For example, in the Tampa-St. Petersburg-Clearwater BTA, where the total population is 2,628,386, Nextlink claims that 1,000,000 people (four links X 250,000 people for each link) receive substantial service from its point-to-point links. It then subtracts those 1,000,000 people from the total BTA population and concludes that it provides substantial service because the 453,809 people encompassed by its point-to-multipoint services is greater than 20 per cent of the remaining population in the BTA (1,628,386). Tampa Notification at 1.

²⁸ See *Second LMDS Report and Order*, 12 FCC Rcd at 12660-12661 ¶ 270. For example, the Commission may also consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets or focus on serving populations outside of areas served by other licensees. See *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶ 270. The substantial service requirements may also be met in other ways. *Id.*

Commission for point-to-multipoint service or for point-to-point service, we find that Nextlink has demonstrated substantial service based on a number of factors.

8. Nextel's provision of point-to-multipoint service approaches the level needed to be considered substantial. In Dallas-Fort Worth, Tampa-St. Petersburg-Clearwater, and Atlanta, Nextlink covers over 15% of the population, which is over three-quarters of the way towards meeting the 20 percent coverage safe harbor.²⁹ Nextlink covers over 12% of the population in Miami. Nextlink's level of point-to-multipoint service must also be evaluated in light of the challenges that all LMDS licensees faced in endeavoring to deploy point-to-multipoint service. We recently granted extensions of time to demonstrate substantial service to multiple LMDS licensees, based on the fact that those licensees "faced factors beyond their control, including difficulties in obtaining viable, affordable equipment" that prevented them from being able to deploy service.³⁰ The history, propagation characteristics and technical limitations of LMDS spectrum make it fundamentally different from lower frequency bands.³¹ We believe Nextlink's level of point-to-multipoint coverage must be favorably considered in light of the unique nature and history of LMDS.

9. In addition to its point-to-multipoint service, Nextlink's provision of between four and nine links in each market is significant. When we add the number of point-to-point links Nextlink has provided to the amount of point-to-multipoint population coverage that Nextlink has demonstrated and the unique nature and history of LMDS, we conclude that Nextlink's service, while not sufficient to meet the Commission's articulated safe harbors, is "substantially above a level of mediocre service." In taking into account all of the factors noted above, we find that Nextlink has demonstrated that it is using this spectrum to provide service to the public, in keeping with the Commission's policy objectives for adopting construction requirements in this band – promoting efficient use of spectrum, encouraging the provision of service and preventing spectrum warehousing.³²

10. Our conclusion that Nextlink has demonstrated substantial service is not based upon any single factor. It is based on our review of the record as a whole, including the level of point-to-multipoint coverage, the number of point-to-point links, the unique nature and history of LMDS, and our review of the services and markets in question. We therefore accept Nextlink's construction notifications.

IV. CONCLUSION AND ORDERING CLAUSES

11. Based upon our review of a record as a whole, we conclude that Nextlink has demonstrated that LMDS Stations WPOH953, WPOH967, WPOH965, and WPOH963 are providing substantial service. We therefore accept the construction notifications Nextlink has filed for those stations.

12. 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 Sections 1.946(d) and 101.1011(a) of the Commission's Rules, 47 C.F.R. §§ 1.946(d), 101.1011(a), that the construction notifications filed by Nextlink Wireless, Inc. on March 14, 2008 (File Nos. 0003362519, 0003362528, 0003362532, and

²⁹ The numbers in these markets are Dallas-Fort Worth (19 percent), Tampa-St. Petersburg-Clearwater (17.3%), and Atlanta (15.6%).

³⁰ See 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, 5905 ¶ 24 (WTB 2008) (*LMDS Extension Order*).

³¹ For a detailed discussion of the characteristics and history of LMDS, see LMDS Coalition, Request for Waiver and Limited Extension of Deadline for Establishing Compliance with Section 101.1011(a) LMDS Substantial Service Requirements (filed Jun. 14, 2007) at 3-9.

³² *Second LMDS Report and Order*, 12 FCC Rcd at 12659 ¶ 266.

0003362540) ARE ACCEPTED, and it IS FOUND that LMDS Stations WPOH953, WPOH967, WPOH965, and WPOH963 are providing substantial service.

13. This action is 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.

FEDERAL COMMUNICATIONS COMMISSION

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