



Federal Communications Commission  
Washington, D.C. 20554

June 26, 2009

DA 09-1442

Peter J. Schildkraut, Esq.  
Arnold & Porter, LLP  
555 12<sup>th</sup> Street, NW  
Washington, DC 20004-120636

Re: Request for Waiver and Limited Renewal

Dear Mr. Schildkraut:

As detailed below, this letter addresses applications filed in March 2007 by AT&T for renewal of three 39 GHz licenses, and for an extension of time to demonstrate substantial service for one of the licenses. For the reasons stated herein, we find that the public interest is served by extending the ten-year substantial service requirement for all three licenses until June 1, 2012. We otherwise deny the waiver requests.

On March 27, 2007 and March 30, 2007, Biztel Inc., a subsidiary of AT&T Corporation ("AT&T"), filed applications for renewal of Stations WPNE215, WPNE216 and WPNE362 in the 38.6 – 40.0 GHz band (39 GHz band).<sup>1</sup> In the applications for Stations WPNE215 and WPNE362, AT&T sought waiver of the requirement to demonstrate substantial service at renewal to permit it to continue to serve its existing customers until such time as the spectrum is auctioned and operation of the stations causes interference to the new licensee or until March 27, 2017, whichever occurs first.<sup>2</sup> In addition, on March 27, 2007, AT&T filed an application for extension of time to demonstrate substantial service for Station WPNE216.<sup>3</sup> In the Extension Application, AT&T requests a six month extension of time to demonstrate substantial service.<sup>4</sup> According to AT&T, extending the license terms for Stations WPNE215, WPNE216 and WPNE362 so that AT&T can continue to provide service to its existing customers would serve the public interest.<sup>5</sup> AT&T also notes that the Commission has previously granted extensions of the construction deadline to other licensees in this service.<sup>6</sup>

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<sup>1</sup> See File Nos. 0002969781 (WPNE215), 0002969147 (WPNE216) (filed Mar. 27, 2007) and 0002975399 (WPNE362) (filed Mar. 30, 2007) (Renewal Applications).

<sup>2</sup> See WPNE215 and WPNE362 Renewal Applications, Exhibit 1 at 1.

<sup>3</sup> See File No. 0002969781 (filed Mar. 27, 2007) (Extension Application).

<sup>4</sup> *Id.*

<sup>5</sup> See Renewal Applications, Exhibit 1 at 3.

<sup>6</sup> See WPNE216 Renewal Application, Exhibit 1 at 2-3. See Letter from Joel D. Taubenblatt, Chief Broadband Division, Wireless Telecommunications Bureau, to Philip L. Verveer, Esq., Counsel for FiberTower Corporation (dated Jan. 31, 2007); Letter from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, to Gregory V. Haledjian, Esq. and Michael G. Jones, Esq. Counsel for IDT Spectrum, LLC (dated Jan. 31, 2007).

Pursuant to the Commission's Part 101 rules, 39 GHz licenses are issued for a period not to exceed ten years.<sup>7</sup> 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.<sup>8</sup> Licensees failing to demonstrate that they are providing substantial service will not have their licenses renewed.<sup>9</sup>

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."<sup>10</sup> 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 a transfer of control of the licensee.<sup>11</sup> Section 1.925 of the Commission's Rules<sup>12</sup> 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.<sup>13</sup>

In the time since AT&T filed these applications, the Wireless Telecommunications Bureau (Bureau) has determined it to be in the public interest to extend until June 1, 2012 the construction deadline for other 39 GHz licensees, including IDT Spectrum LLC (IDT) and ART Licensing Corporation (ART).<sup>14</sup> In so doing, the Bureau observed that the 39 GHz band has the potential to serve as a backhaul solution for licensees in the 700 MHz Band, the Advanced Wireless Services (AWS-1), and the Broadband Radio Service/Educational Broadband Service (BRS/EBS). The Bureau noted the relatively recent grant of licenses for the AWS-1 band and auction of licenses in the 700 MHz band, and indicated its anticipation that in the next several years, services in these bands will develop robustly,<sup>15</sup> along with other mobile and fixed wireless broadband services.<sup>16</sup> The Bureau concluded that it would be

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<sup>7</sup> See 47 C.F.R. § 101.67.

<sup>8</sup> See 47 C.F.R. § 101.17(a).

<sup>9</sup> See 47 C.F.R. § 101.17(b).

<sup>10</sup> 47 C.F.R. § 1.946(e)(1).

<sup>11</sup> 47 C.F.R. § 1.946(e)(2),(3).

<sup>12</sup> 47 C.F.R. § 1.925.

<sup>13</sup> *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); 47 C.F.R. § 1.3.

<sup>14</sup> See IDT Spectrum, LLC Request for Waiver of Time to Meet Coverage Requirements and Extension of License Period, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 12005 (WTB 2008) (*IDT Construction Extension Order*); ART Licensing Corporation Requests for Waiver, Extension of Time to Meet Coverage Requirements, and Extension of License Period, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 14116 (WTB 2008) (*ART Construction Extension Order*).

<sup>15</sup> 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-1 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/specrelo/index.htm>.

<sup>16</sup> *IDT Construction Extension Order*, 23 FCC Rcd at 12012 ¶ 16; *ART Construction Extension Order*, 23 FCC Rcd at 14126 ¶ 20.

in the public interest to give the 39 GHz licensees at issue 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 and AWS bands.”<sup>17</sup>

In this instance, AT&T is in a situation similar to that faced by IDT and ART. Despite its ongoing efforts to build out its licenses, we find that AT&T faced factors beyond its control that warrant granting a limited extension of time to permit it to continue to serve its customers and to build out its licenses. Under these circumstances, we determine that strict enforcement of Section 101.17 of the Commission’s rules<sup>18</sup> would not serve the rule’s underlying purpose, as it would tend to slow, rather than accelerate service deployment. Accordingly, we will extend the deadline for AT&T to demonstrate that it is providing substantial service to the areas covered by the licenses for Stations WPNE215, WPNE216 and WPNE362 until June 1, 2012 which is currently the uniform build out deadline required of other 39 GHz licensees. We will process the renewal applications AT&T has filed for the stations in question, and any grant of renewal applications for which AT&T has not demonstrated substantial service will be conditioned on AT&T demonstrating substantial service by June 1, 2012. The licenses will automatically cancel if A&T fails to demonstrate substantial service by the revised substantial service deadline.

ACCORDINGLY, IT IS 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 1.925 and 1.946 of the Commission’s Rules, 47 C.F.R. §§ 1.925, 1.946, that the applications for waiver of the Commission’s Rules with respect to Stations WPNE215 and WPNE362 and waiver and extension of time to demonstrate substantial service for station WPNE216 filed by AT&T on March 27, 2007 ARE GRANTED only to the extent indicated herein and are otherwise DENIED, and the time for AT&T to demonstrate substantial service for the stations in question IS EXTENDED until June 1, 2012.

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 1.949 of the Commission’s Rules, 47 C.F.R. § 1.949, that the licensing staff of the Broadband Division may process applications for renewal of the license for Stations WPNE215, WPNE216 and WPNE362 (File Nos. 0002969781, 0002969147 and

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<sup>17</sup>*IDT Construction Extension Order*, 23 FCC Rcd at 12012-12013 ¶ 16; *ART Construction Extension Order*, 23 FCC Rcd at 14126 ¶ 20, *quoting* 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, 5906 ¶ 26 (WTB 2008).

<sup>18</sup> 47 C.F.R. § 101.17.

0002975399), as well as the application for extension of time to demonstrate substantial service for Station WPNE 216 (File No. 0002969114) in accordance with this letter and the Commission's Rules.

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 and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
Deputy Chief, Broadband Division  
Wireless Telecommunications Bureau