

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

In re Matter of
LMDS, L.P.
Requests for Extension of Time to Demonstrate
Substantial Service Requirements for Six Local
Multipoint Distribution Service Licenses
File Nos. 0005256227-0005256232

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 2012

Released: October 18, 2012

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny LMDS, L.P.’s request for extension of time to demonstrate compliance with the substantial service requirements for its six Local Multipoint Distribution Service (“LMDS”) licenses (collectively the “Licenses”). Given our denial of these requests, these licenses automatically terminated, by operation of Commission rule, as of June 1, 2012.

II. BACKGROUND

2. In 1997, the Commission allocated 1,300 megahertz of LMDS spectrum in each basic trading area (“BTA”) across the United States. Specifically, the Commission allocated two LMDS licenses per BTA – an “A Block” and a “B Block” in each. The A Block license is comprised of 1,150 megahertz of total bandwidth, and the B Block license is comprised of 150 megahertz of total bandwidth.

1 See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12605 ¶ 136 (1997) (“Second LMDS Report and Order”); see also Rand McNally Commercial Atlas & Marketing Guide 36-39 (123rd ed. 1992). Rand McNally is the copyright owner of the Major Trading Area (MTA) and BTA Listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally’s Trading Area System MTA/BTA Diskette, and geographically represented in the map contained in Rand McNally’s Commercial Atlas & Marketing Guide. The conditional use of Rand McNally copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994 and covers use by LMDS applicants. This agreement requires authorized users of the material to include a legend on reproductions (as specified in the license agreement) indicating Rand McNally ownership. The Commission has allocated the LMDS for operations in a total of 493 BTAs throughout the nation.

2 See Second LMDS Report and Order, 12 FCC Rcd at 12556 ¶ 12.

3 See id.

The A Block consists of the sub bands 27.50-28.35 GHz (the A1 Band); 29.10-29.25 GHz (the A2 Band); and 31.075-31.225 GHz (the A3 Band).⁴ The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).⁵ The same entity may hold the licenses for both the A and B Blocks of spectrum in an individual BTA, but each license is auctioned and licensed separately.

3. LMDS licensees are regulated under Part 101 of the Commission's rules, which generally governs terrestrial microwave operations, and may provide any service consistent with the Commission's rules and the licensee's regulatory status,⁶ subject to a ten-year term from the initial license grant date.⁷ 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" in each licensed area.⁸ Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.⁹

4. The final LMDS band allocation was adopted by the Commission on March 20, 1997.¹⁰ Since allocating the LMDS spectrum, the Commission has thus far held two LMDS auctions: Auction 17 and Auction 23.¹¹ Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998.¹² LMDS, L.P. won the Licenses in Auction No. 17; they were granted on July 15, 1998.¹³

5. LMDS, L.P. was originally required to demonstrate substantial service by July 15, 2008, or 10 years after the initial license grant date.¹⁴ On March 17, 2008, LMDS, L.P. filed applications for an extension of time to demonstrate substantial service for its LMDS licenses.¹⁵ On April 11, 2008, the

⁴ See 47 C.F.R. § 101.1005.

⁵ See *id.*

⁶ See 47 C.F.R. § 101.1013(b).

⁷ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259. Pursuant to 47 C.F.R. § 101.67, LMDS licenses are issued for a period not to exceed ten years, subject to renewal upon demonstration of substantial service.

⁸ See 47 C.F.R. § 101.1011(a); see also *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262.

⁹ See 47 C.F.R. § 101.1011(a).

¹⁰ See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 13; see also Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies For Local Multipoint Distribution Service and For Fixed Satellite Services, CC Docket No. 92-297, *First Report and Order and Fourth Notice of Proposed Rulemaking*, 11 FCC Rcd 19005, 19025 ¶ 45 (1996) (allocating the initial 1 gigahertz of spectrum for LMDS and seeking comment on the allocation of an additional 300 megahertz of spectrum at 31.0-31.3 GHz).

¹¹ See, e.g., LMDS Auction Closes, *Public Notice*, 13 FCC Rcd 18217 (1998) (*Auction 17 Closing PN*); Local Multipoint Distribution Service Auction Closes, *Public Notice*, 14 FCC Rcd 8543 (1999) (*Auction 23 Closing PN*).

¹² See FCC Announces Spectrum Auction Schedule for 1998, *Public Notice*, 12 FCC Rcd 19726 (1997); *Auction 17 Closing PN*, 13 FCC Rcd at 18217.

¹³ File No. 0000000103 (granted July 15, 1998); see also FCC Announces the Conditional Grant of 36 Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 22093 (WTB 1998). The licenses in question are Stations WPOH579 (Sarasota-Bradenton, FL), WPOH580 (Daytona Beach, FL), WPOH581 (Melbourne-Titusville, FL), WPOH582 (Ft. Myers, FL), WPOH583 (Ft. Pierce-Vero Beach-Stuart, FL), and WPOH584 (Naples, FL).

¹⁴ See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259.

¹⁵ File Nos. 0003364135-0003364140 (filed Mar. 17, 2008).

Wireless Telecommunications Bureau (the “Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees – including LMDS, L.P. – to extend their deadlines to meet the substantial service requirements to June 1, 2012, resulting in a nearly four-year construction extension for each of these licensees.¹⁶

6. The Bureau found that these LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.¹⁷ In making this finding, the Bureau noted that the licensees seeking relief from the construction deadlines represented a majority of LMDS licensees for whom buildout requirements were approaching, and that they all faced these same basic obstacles to timely construction.¹⁸ Thus, these obstacles were not a product of an individual licensee’s short-sightedness or its unfortunate business decisions; rather, the difficulties in procuring the basic equipment necessary for LMDS operations were widespread, stemming from the state of the market. Based on the record evidence, the Bureau anticipated that various developments in the market – arising in large part from the rollout of new services that could provide opportunities for LMDS operations – would help rectify these difficulties. Thus, the Bureau found that LMDS, L.P. and others could potentially use their LMDS licenses to provide wireless backhaul services to licensees in the 700 MHz band, the Advanced Wireless Services-1 (“AWS-1”) band, and other bands suitable for mobile broadband service, all of which at that time had recently been auctioned, licensed, or put into use.¹⁹ The Bureau anticipated that these bands would develop robustly, along with other mobile and fixed wireless services, and that resulting opportunities for associated LMDS service (such as wireless backhaul) would help spur production of equipment designed for LMDS use and thus facilitate timely construction by LMDS, L.P. and the other LMDS licensees, under the extended buildout deadline set by the Bureau.²⁰

7. On June 11, 2012, LMDS, L.P. filed applications pursuant to Section 1.946(e) of the Commission’s Rules seeking an open-ended extension of time to construct its six LMDS licenses.²¹ LMDS, L.P., a company comprised of family, friends, and private investors, explains that it did not construct the licenses because it does not have the resources to be tied up unproductively in constructing the Licenses when it had no intention of operating them.²² While they have undertaken many activities, such as requesting equipment financing and government loans and striving to deploy networks in its markets, LMDS, L.P. states has been unsuccessful thus far in developing a business plan for constructing the Licenses.²³ LMDS L.P. further states that it has exhausted its financial capital in an effort to build out in their markets only to learn that the equipment did not perform as specified.²⁴ Finally, LMDS, L.P.

¹⁶ 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*).

¹⁷ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 24.

¹⁸ *Id.*

¹⁹ *Id.* at 5905 ¶ 25.

²⁰ *Id.*

²¹ See File Nos. 0005256227-0005256232 (filed June 11, 2012) (Extension Applications). With each Extension Application, LMDS L.P. filed an exhibit (Extension Request).

²² Extension Request at 1.

²³ Extension Request at 2.

²⁴ Extension Request at 2.

states that it has exhausted a variety of strategies to comply with the Commission's construction requirements for this spectrum.²⁵

III. DISCUSSION

8. Under Section 1.946(e) of the Commission's Rules, LMDS, L.P. was required to file its request for an extension of time to construct on or before June 1, 2012, the date the construction period ended.²⁶ LMDS, L.P., however, did not file an extension request until June 11, 2012, ten days after the construction period ended. Moreover, while LMDS, L.P. could have requested a waiver to permit it to file a late-filed extension request, it did not do so. Nor did LMDS, L.P. seek a waiver of the June 1, 2012 construction deadline in Section 101.1011(a) of the Commission's Rules. Accordingly, the Extension Applications are subject to dismissal as late-filed.²⁷ Despite the late filing, we find that it is in the public interest to consider the merits of LMDS, L.P.'s extension request.

9. In reviewing the substance of LMDS, L.P.'s extension request, we find that LMDS, L.P. has not justified a grant of an extension of time for its LMDS licenses. Without such extension or waiver, LMDS, L.P.'s LMDS licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules, as of June 1, 2012.²⁸ We discuss these findings in detail below.

10. LMDS, L.P. requests an open-ended extension of time. As noted above, this is the second extension that LMDS, L.P. has requested for constructing these licenses. To be eligible for an extension of time to construct, LMDS, L.P. must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."²⁹ We conclude that LMDS, L.P. has not met this threshold.

11. LMDS, L.P. states that it did not construct the Licenses because it does not have the financial resources to commit to building the Licenses.³⁰ Under Section 1.946(e) of the Commission's Rules, however, a licensee's inability to obtain funding is not considered a factor beyond its control.³¹ In fact, Section 1.946(e)(2) specifically states that an extension of time to construct will not be granted for failure to obtain financing.³² Thus, we reject LMDS, L.P.'s assertion that financial considerations justify an extension of time to construct.

²⁵ Extension Request at 2.

²⁶ 47 C.F.R. § 1.946(e).

²⁷ See 47 C.F.R. § 1.934(d)(2) (application may be dismissed when it does not comply with a Commission rule and does not request a waiver of that rule).

²⁸ 47 C.F.R. §§ 1.946(c) (providing that if a licensee in the Wireless Radio Services fails to commence service or operations by the expiration of its construction period or to meet its coverage or substantial service obligations by the expiration of its coverage period, its authorization terminates automatically, without specific Commission action, on the date the construction or coverage period expires) and 1.955(a)(2) (cross-referencing Section 1.946(c) and reiterating that authorizations in the Wireless Radio Services automatically terminate without specific Commission action, if the licensee fails to meet applicable construction or coverage requirements).

²⁹ 47 C.F.R. § 1.946(e)(1).

³⁰ Extension Request at 1.

³¹ 47 C.F.R. § 1.946(e).

³² 47 C.F.R. § 1.946(e)(2).

12. LMDS, L.P. further argues that it has taken various actions to comply with the deadline to comply with the Commission's construction requirements and that it has not developed a business plan to use the Licenses.³³ Many LMDS licensees, however, did meet the June 1, 2012 deadline and built facilities.³⁴ And we note that the use of wireless for backhaul is increasing. In 2005, 8.7 percent of backhaul traffic was sent by fixed wireless.³⁵ By 2009, that figure increased to 12.3 percent.³⁶ Under those circumstances, we conclude that it was possible for LMDS, L.P. to develop a business plan and construct its licenses.

13. LMDS, L.P. further asserts that it did not construct the Licenses because of a lack of equipment suitable for the A band LMDS spectrum. While we acknowledge that LMDS, L.P. has undertaken significant efforts to develop LMDS equipment and a market for the Licenses, including holding countless discussions and demonstrations with equipment vendors, these efforts did not result in the actual construction of the Licenses and, as noted above, other LMDS licensees have constructed their licenses. Thus, we find that LMDS, L.P. has not shown that it failed to construct the Licenses because of a lack of equipment.

14. We find that LMDS, L.P.'s situation is readily distinguishable from several other licensees that attempted to build out their licenses prior to the deadline and that ordered equipment but failed to receive timely delivery of that equipment. While LMDS, L.P. asserts that it attempted to construct its licenses only to find that the equipment did not work as specified, we conclude that LMDS, L.P.'s failure to construct its licenses was the result of its inability to develop a business plan to use this spectrum.³⁷ Furthermore, licensees that had their extension requests approved requested extensions of six months or less, while LMDS, L.P. is requesting an open-ended extension.

15. As noted above, when the Bureau granted an extension to LMDS licensees in 2008, it anticipated that licensees could potentially provide wireless backhaul services to licensees in bands that had recently been auctioned, licensed, or put into use.³⁸ In the years since the Bureau originally extended the construction deadline for these licenses, there has been considerable deployment of wireless broadband service in the 700 MHz, AWS-1, and BRS/EBS bands. Thus, the validity of one of the factors supporting the Bureau's earlier extension of the construction deadline – that with some additional time, productive opportunities for using LMDS licenses would develop as these emerging wireless broadband services create a need for supporting backhaul service – has been substantially confirmed. In light of the development of 700 MHz, the AWS-1 band, and the BRS/EBS band, we find that LMDS, L.P.'s unsuccessful attempts to develop its LMDS spectrum are insufficient to show that its failure to construct was because of factors beyond its control. Thus, we conclude that the decision to grant an extension to LMDS licensees in 2008 does not support LMDS, L.P.'s request for yet more time.

³³ Extension Request at 2.

³⁴ As of October 3, 2012, the Broadband Division had accepted 67 LMDS buildout notifications from at least 18 different licensees. Another 221 showings were pending and undergoing review.

³⁵ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 10-133, *Fifteenth Report*, 26 FCC Rcd 9664, 9845 ¶ 320 (2011).

³⁶ *Id.* In a separate proceeding, Clearwire Corporation has indicated that it uses wireless for over 90 percent of its backhaul needs, including almost 13,000 licenses with over 48,000 paths. See Comments of Clearwire Corporation, WT Docket No. 12-156 (filed July 19, 2012) at 2.

³⁷ Extension Request at 2.

³⁸ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 25.

16. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.³⁹ In light of our decision to deny LMDS, L.P.'s request for an extension of the construction requirements because LMDS, L.P. has not shown that its failure to construct was caused by circumstances beyond its control, LMDS, L.P.'s licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,⁴⁰ as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

17. LMDS, L.P. has failed to justify an extension of time to meet the June 1, 2012 substantial service deadline for its LMDS stations. We therefore deny the Extension Request. Accordingly, LMDS, L.P.'s licenses to operate LMDS stations automatically terminated, by operation of Commission rule, as of June 1, 2012.

18. 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 extension of time to demonstrate substantial service (File Nos. 0005256227-0005256232) filed by LMDS, L.P. on June 11, 2012 ARE DENIED.

19. 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 Universal Licensing System SHALL BE UPDATED to reflect that the licenses issued to LMDS, L.P. for Local Multipoint Distribution Service Stations WPOH579, WPOH580, WPOH581, WPOH582, WPOH583, and WPOH584 ARE TERMINATED as of June 1, 2012.

20. 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.

FEDERAL COMMUNICATIONS COMMISSION

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³⁹ 47 C.F.R. §§ 1.946(c) and 1.955(a)(2).

⁴⁰ *Id.*