

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

In re Matter of)
MARK TWAIN COMMUNICATIONS) File No. 0005228613, 0005228643
COMPANY, INC.)
Requests for Extension of Time, or in the)
alternative, Limited Waiver of Substantial Service)
Requirements for Local Multipoint Distribution)
Service Licenses WPOH483 and WPOH484)

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 requests from Mark Twain Communications Company, Inc. ("Twain") for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service ("LMDS") licenses, as well as its associated requests for waiver of the June 1, 2012 substantial service deadline. 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.¹ Specifically, the Commission allocated two LMDS

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.

licenses per BTA – an “A Block” and a “B Block” in each.² 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.³ 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 The licenses in question here were issued to Twain on June 24, 1998, as a result of Auction 17.¹³

5. Twain was originally required to demonstrate substantial service by June 24, 2008, or 10 years after the initial license grant date.¹⁴ On June 26, 2007, Twain filed applications for an extension of

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

³ See *id.*

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 See File No. 0000000065 (granted June 22, 1998); see also FCC Announces the Conditional Grant of 25 Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 17186 (WTB 1998). The licenses in question are Stations WPOH483 and WPOH484 (Kirksville, MO).

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

time to demonstrate substantial service for its LMDS licenses.¹⁵ On April 11, 2008, the Wireless Telecommunications Bureau (the “Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees – including Twain – 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 Twain 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 Twain and the other LMDS licensees, under the extended buildout deadline set by the Bureau.²⁰

7. On May 22, 2012, Twain filed applications pursuant to Section 1.946(e) of the Commission’s Rules seeking a further eighteen month extension of time until December 1, 2013, to construct its two LMDS licenses.²¹ Invoking the Commission’s general waiver authority under Section 1.925 of the Commission’s Rules, Twain seeks a waiver of Section 101.1011(a) of the Commission’s Rules, as a means of extending the construction deadline applicable to the licenses until December 1, 2013.²² Twain argues that lack of demand for services that could be deployed using LMDS -- and, in particular, the lag in the deployment of Long Term Evolution (“LTE”) wireless services in rural areas relative to urban areas – necessitate the grant of its waiver request.²³ Twain states that it recently

¹⁵ File Nos. 0003086826, 0003086827 (filed June 26, 2007).

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. 0005228613, 0005228643 (filed May 22, 2012) (Extension Applications). With each Extension Application, Twain filed an exhibit entitled “Request for Limited Waiver and Extension” (Extension and Waiver Request).

²² Extension and Waiver Request at 1.

²³ *Id.* at 1.

acquired Broadband Radio Service (“BRS”) licenses and Educational Broadband Service (“EBS”) leases and has deployed a 4G wireless network in parts of its service area. Twain further states that, in the near future, it anticipates using its LMDS licenses to extend its existing 4G wireless network into additional unserved and underserved areas. Twain argues that the availability and effectiveness of LMDS equipment continues to evolve and that, if denied its requested further extension, it could be forced to acquire obsolescent equipment only to prevent its LMDS licenses from expiring, and that such an action would be wasteful and inefficient.²⁴

III. DISCUSSION

8. We find that Twain has not justified a grant of an extension of time, or a waiver of the construction deadline, for its LMDS licenses. Without such extension or waiver, Twain’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, 2012.²⁵ We discuss these findings in detail below.

A. Extension Requests

9. Twain requests a further eighteen month extension of time, until December 1, 2013, to demonstrate substantial service.²⁶ As noted above, this is the second extension that Twain has requested for constructing these licenses. To be eligible for an extension of time to construct, Twain must show that its “failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”²⁷ We conclude that Twain has not met this threshold.

10. Twain argues that it has not constructed because market conditions for services that could be deployed using LMDS are not ripe in its license areas and because the availability and effectiveness of LMDS equipment are still evolving. The Commission has consistently found that a licensee’s own business decisions are not circumstances beyond the licensee’s control and are therefore not an appropriate basis for regulatory relief.²⁸ In view of this precedent, we find that none of the factors cited by Twain demonstrate that its failure to construct was caused by circumstances beyond its control.

²⁴ Extension and Waiver Request at 2.

²⁵ 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).

²⁶ Extension and Waiver Request at 1.

²⁷ 47 C.F.R. § 1.946(e)(1).

²⁸ See, e.g., Redwood Wireless Minnesota, LLC, *Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercises of business judgment and were not outside Petitioner’s control); Eldorado Communications LLC, *Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); Bristol MAS Partners, *Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); AAT Electronics Corporation, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties was within licensee’s control); Business Radio Communications Systems, Inc., 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); Texas Two-Way, Inc., 98 FCC 2d 1300 (1984), *aff’d sub nom.*, *Texas Two-Way, Inc. v. FCC*, (continued...)

11. First, we find that the pace of development of LTE wireless services in rural areas, and the market for LMDS backhaul to support them, do not by themselves justify granting an extension, because Twain has had other ways to develop its service independent of the LTE backhaul market. Thus, its decision to put its LMDS spectrum on the shelf until the market for LTE or other wireless backhaul improved constituted a business decision voluntarily made by Twain, not an inevitable result of circumstances beyond its control. Moreover, even if LTE or other wireless backhaul presented the only feasible use of LMDS spectrum, Twain's justification for additional construction time would fail, insofar as the market for wireless backhaul has been developing steadily. In 2005, 8.7 percent of backhaul traffic was sent by fixed wireless.²⁹ By 2009, that figure increased to 12.3 percent.³⁰ Despite the continued vigorous growth of the wireless industry throughout the struggles of the broader economy, Twain has presented no specific deployment plans or identified any customers for its services, other than to express a general belief that the LMDS equipment market is improving and to state that it is "actively looking" to purchase the equipment necessary to deploy wireless backhaul services within the next 18 months.³¹ Finally, we note that many LMDS licensees did meet the June 1, 2012 deadline and built facilities.³² Under those circumstances, we conclude that Twain made a voluntary decision not to actively pursue development of LMDS facilities.

12. We find that Twain, which made no attempt to commence construction of its LMDS licenses in advance of the construction deadline, 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. Twain chose not to build facilities in advance of the deadline. Thus, its failure to construct its licenses was the result of its own business decision. Furthermore, these licensees requested extensions of six months or less, while Twain is requesting an 18 month extension.

13. In this regard, Twain's situation is readily distinguishable from 2 Lightspeed LP, which received an extension of time for four LMDS licenses from the Broadband Division.³³ Unlike Twain, 2 Lightspeed had made significant progress toward the construction benchmarks, having built out the majority of its LMDS licenses prior to the June 1, 2012 deadline.³⁴ However, this progress was impeded when one of the two key partners in the venture was medically incapacitated.³⁵ Furthermore, 2 Lightspeed requested only a nine month extension, which is half the time Twain is seeking.

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762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

²⁹ 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).

³⁰ *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.

³¹ Extension and Waiver Request at 3.

³² 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.

³³ See File Nos. 0005222510-0005222513 (filed May 17, 2012; granted July 23, 2012).

³⁴ See File Nos. 0005245422, 0005245426, 0005257919, 0005257935, 0005257944 (filed June 1 and 11, 2012).

³⁵ Request for Limited Extension, 2 Lightspeed LP (filed May 17, 2012) at 7-8.

14. 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.³⁶ 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. Notwithstanding that progress, Twain made no attempt to develop its LMDS spectrum. We therefore conclude that the decision to grant an extension to LMDS licensees in 2008 does not support Twain's request for yet more time.

B. Waiver Request

15. To be granted a waiver of the June 1, 2012 construction deadline, Twain must show 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.³⁷ As is discussed more fully below, we conclude that Twain has failed to make the requisite showing, and we therefore deny its waiver request.

16. First, we conclude that an extension would be inconsistent with the underlying purpose of the substantial service standard, which, as the Commission has said, is to provide “a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.”³⁸ Twain argues that the current generation of LMDS equipment is neither viable nor affordable, and that the availability and effectiveness of such equipment continues to evolve.³⁹ In fact, many other licensees have concluded that LMDS equipment is sufficiently evolved and affordable for their purposes and have built their facilities. Granting Twain a further extension despite its lack of effort in attempting to develop

³⁶ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 25.

³⁷ See 47 C.F.R. § 1.925(b)(3); see also 47 C.F.R. § 1.3; *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).

³⁸ See Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licensees, WT Docket No. 10-153, *Second Report and Order, Second Further Notice of Proposed Rulemaking, Second Notice of Inquiry, Order on Reconsideration, and Memorandum Opinion and Order*, 27 FCC Rcd 9735, 9773-9774 ¶ 104 (2012) (“*Wireless Backhaul 2nd R&O*”), citing *39 GHz R&O*, 12 FCC Rcd at 18623 ¶ 42; see also *39 GHz R&O*, 12 FCC Rcd at 18625 ¶ 46 (“This approach will permit flexibility in system design and market development, while ensuring that service is being provided to the public.”); *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 46 (“This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings.”); *39 GHz R&O*, 12 FCC Rcd at 18625 ¶ 47 (“[A]pplying 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.”); *39 GHz Renewal Order*, 17 FCC Rcd at 4407 ¶ 11 (“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.”).

³⁹ Extension and Waiver Request at 2.

its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

17. We also conclude that Twain has not shown requiring compliance with the substantial service rules is inequitable, unduly burdensome, and contrary to the public interest. As we have previously discussed, Twain's decision not to construct its LMDS licenses was a business decision. Other licensees made other business decisions that led them to build out their licenses.⁴⁰

18. Twain argues that cancelling the licenses and reauctioining the spectrum would not be in the public interest because such a decision would substantially delay utilization of its licenses, since it would take many years for the Commission to re-license the spectrum and even longer for a new licensee to prepare for deployment."⁴¹ Because this argument could be used to justify virtually every failure to construct, granting an extension of the construction deadlines on this basis would undermine the efficacy of construction deadlines generally, eliminating the incentive for timely construction and the expeditious provision of service to the public. Thus, Twain ignores the broader ramifications of its position: that grant of its request for an extension of time to construct would ultimately serve to defeat the fundamental public interest of ensuring licensee compliance with public interest obligations, including the duty to follow rules designed to bring service to the public as expeditiously as possible.⁴² Twain and its predecessors have had these licenses for fourteen years and have done nothing with them. We agree with Twain that the licenses in question could play an important role in providing wireless backhaul to support 4G services and should not lie fallow. The Bureau will expeditiously take action to re-license the spectrum in an appropriate fashion so that another operator could promptly place the spectrum in use.

19. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁴³ In light of our decision to deny Twain's request for an extension or waiver of the construction requirements on the ground that grant of such request is not in the public interest, Twain's licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,⁴⁴ as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

20. Twain has failed to justify an extension of time to meet the substantial service deadline for its LMDS stations or to justify a waiver of the June 1, 2012 deadline for establishing substantial service. We therefore deny the Extension and Waiver Request. Accordingly, Twain's licenses to operate LMDS stations WPOH483 and WPOH484 automatically terminated, by operation of Commission rule, as of June 1, 2012.

21. 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 request for waivers and the applications for extension of time to

⁴⁰ See note 28, *supra*.

⁴¹ Extension and Waiver Request at 3.

⁴² See *Wireless Backhaul 2nd R&O*, 27 FCC Rcd at 9773-9774¶ 104.

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

⁴⁴ *Id.*

demonstrate substantial service (File Nos. 0005228613, 0005228643) filed by Mark Twain Communications Company, Inc., on May 22, 2012 ARE DENIED.

22. 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 Mark Twain Communications Company, Inc. for Local Multipoint Distribution Service Stations WPOH483 and WPOH484 TERMINATED as of June 1, 2012.

23. 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

John J. Schauble
Deputy Chief, Broadband Division
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