

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

In re Matter of	)	
	)	
RUVIN I. LERMAN	)	File Nos. 0005237278-0005237281
	)	
Requests for Extension of Time, or in the	)	
alternative, Limited Waiver of Substantial Service	)	
Requirements for Local Multipoint Distribution	)	
Service Licenses WPOH479, WPOH480,	)	
WPOH481, and WPOH482	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 22, 2012**

**Released: October 22, 2012**

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

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny Ruvin I. Lerman’s (“Lerman”) requests for extension of time to demonstrate compliance with the substantial service requirements for his Local Multipoint Distribution Service (“LMDS”) 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.<sup>1</sup> Specifically, the Commission allocated two LMDS licenses per BTA – an “A Block” and a “B Block” license in each.<sup>2</sup> 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

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<sup>1</sup> 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.

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

bandwidth.<sup>3</sup> 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).<sup>4</sup> The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).<sup>5</sup> 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,<sup>6</sup> subject to a ten-year term from the initial license grant date.<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" in each licensed area.<sup>8</sup> Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.<sup>9</sup>

4. The final LMDS band allocation was adopted by the Commission on March 20, 1997.<sup>10</sup> Since allocating the LMDS spectrum, the Commission has thus far held two LMDS auctions: Auction 17 and Auction 23.<sup>11</sup> Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998.<sup>12</sup> The licenses in question here were originally issued to Mr. Lerman on June 24, 1998 as a result of Auction No. 17.<sup>13</sup>

5. Lerman was originally required to demonstrate substantial service by June 24, 2008, or 10 years after the initial license grant date.<sup>14</sup> On April 14, 2008, Mr. Lerman filed applications for an

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<sup>3</sup> See *id.*

<sup>4</sup> See 47 C.F.R. § 101.1005.

<sup>5</sup> See *id.*

<sup>6</sup> See 47 C.F.R. § 101.1013(b).

<sup>7</sup> 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.

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

<sup>9</sup> See 47 C.F.R. § 101.1011(a).

<sup>10</sup> 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).

<sup>11</sup> 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*).

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

<sup>13</sup> See File No. 0000000122 (granted June 24, 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 WPOH479 (Sheboygan, WI), WPOH480 (Rock Springs, WY), WPOH481 (Flagstaff, AZ), and WPOH482 (Logan, UT).

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

extension of time to demonstrate substantial service for his LMDS licenses.<sup>15</sup> The applications were granted on June 13, 2008 with a comment referring to a 2008 Bureau order where the Bureau granted extensions to other LMDS licensees.<sup>16</sup> In the *LMDS Order*, the Wireless Telecommunications Bureau (the “Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees 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.<sup>17</sup> The Bureau found that these LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.<sup>18</sup> 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.<sup>19</sup> 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 licensees could potentially use their 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.<sup>20</sup> 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 licensees, under the extended buildout deadline set by the Bureau.<sup>21</sup>

6. On May 29, 2012, Mr. Lerman filed applications pursuant to Section 1.946(e) of the Commission’s Rules seeking a further two or 2.5 year extension of time to construct his four LMDS licenses.<sup>22</sup> Mr. Lerman is a telecommunications engineer with almost 50 years of experience.<sup>23</sup> His plan was to use his LMDS licenses to sell backhaul services to wireless operators.<sup>24</sup> In 2010, he purchased land in Colorado.<sup>25</sup> In 2011, he contracted with Orion Building Systems to build a road and building that would be used to house equipment for his proposed operations.<sup>26</sup> According to Lerman, the supplier

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<sup>15</sup> File Nos. 0003396207, 0003396251- 0003396253 (filed Apr. 14, 2008).

<sup>16</sup> *Id.*, citing 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*).

<sup>17</sup> *LMDS Order*.

<sup>18</sup> *Id.* at 5905 ¶ 24.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 5905 ¶ 25.

<sup>21</sup> *Id.*

<sup>22</sup> See File Nos. 0005237278-0005237281 (filed May 29, 2012) (Extension Applications). With each Extension Application, Lerman filed an exhibit entitled “Request for Buildout Extension” (Extension Request).

<sup>23</sup> Extension Request.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

declared bankruptcy and received a discharge in bankruptcy without performing the contracted work.<sup>27</sup> Mr. Lerman seeks an extension based on the financial hardship caused by the supplier's bankruptcy.<sup>28</sup> He states that the income from his employment and his wife's employment should allow them to construct the licenses in two or 2.5 years.<sup>29</sup>

### III. DISCUSSION

7. We find that Lerman has not justified a grant of an extension of time for its LMDS licenses. And without such extension, Lerman's LMDS licenses have automatically cancelled, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules, as of June 1, 2012.<sup>30</sup>

8. Lerman requests a further extension of time of at least two years, or until June 1, 2014, to demonstrate substantial service.<sup>31</sup> As noted above, this is the second extension that Lerman has requested for constructing these licenses. To be eligible for an extension of time to construct, Lerman must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."<sup>32</sup> We conclude that Lerman has not met this threshold.

9. Lerman's Extension Request suffers from two fatal defects. First, the Commission's rules prohibit granting extensions based on a failure to have financing.<sup>33</sup> Second, "[i]t is well established that failed business decisions do not qualify as grounds for relief of our regulatory requirements."<sup>34</sup> While it is unfortunate that Lerman's supplier did not perform, Lerman made the business decision to rely on that supplier. 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.<sup>35</sup> Accordingly, we deny the Extension Request.

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 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).

<sup>31</sup> Extension and Waiver Request at 1.

<sup>32</sup> 47 C.F.R. § 1.946(e)(1).

<sup>33</sup> See 47 C.F.R. § 1.946(e)(2) ("Extension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing...").

<sup>34</sup> See Stephen E. Coran, Esquire, *Letter*, 22 FCC Rcd 1921, 1923 (WTB MD 2007).

<sup>35</sup> 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*,

10. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.<sup>36</sup> In light of our decision to deny Lerman's requests for an extension of the construction requirements on the ground that grant of such request is not in the public interest, Lerman's licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,<sup>37</sup> as of June 1, 2012.

#### IV. CONCLUSION AND ORDERING CLAUSES

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

12. 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 Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the applications for extension of time to demonstrate substantial service (File Nos. 0005237278-0005237281) filed by Ruvin I. Lerman on May 29, 2012 ARE DENIED.

13. 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 Ruvin I. Lerman for Local Multipoint Distribution Service Stations WPOH479, WPOH480, WPOH481, and WPOH482 TERMINATED as of June 1, 2012.

14. 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  
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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).

<sup>36</sup> 47 C.F.R. §§ 1.946(c) and 1.955(a)(2).

<sup>37</sup> *Id.*