

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

In re Matter of	)	
	)	
HIGHLAND HOLDINGS, LLC	)	File Nos. 0005242777-0005242780
	)	
Requests for Extension of Time, or in the	)	
alternative, Limited Waiver of Substantial Service	)	
Requirements for Local Multipoint Distribution	)	
Service Stations WPOK425, WPOK426,	)	
WPOK427, and WPOK428	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 15, 2012**

**Released: November 15, 2012**

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

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we deny Highland Holdings, LLC’s (“Highland”) requests for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service (“LMDS”) Stations WPOK425, WPOK426, WPOK427, and WPOK428, 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.<sup>1</sup> Specifically, the Commission allocated two LMDS licenses per BTA – an “A Block” and a “B Block” in each.<sup>2</sup> The A Block license is comprised of 1,150

<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.

megahertz of total bandwidth, and the B Block license is comprised of 150 megahertz of total 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> The licenses in question here were originally issued to Highland Cellular Holdings, Inc., on September 2, 1999 as a result of Auction 23,<sup>12</sup> and were later assigned, *pro forma*, to Highland on July 1, 2008.<sup>13</sup>

5. Highland was originally required to demonstrate substantial service by September 2, 2009, or 10 years after the initial license grant date.<sup>14</sup> On April 29, 2008, Highland filed applications for an extension of time to demonstrate substantial service for its LMDS licenses.<sup>15</sup> On June 13, 2008, the

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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 File No. 0000014442 (granted Sep. 2, 1999); see also FCC Announces the Conditional Grant of 7 Local Multipoint Distribution Service Licenses, *Public Notice*, 14 FCC Rcd 14079 (WTB 1999). The licenses in question are Stations WPOK425 (Bluefield, WV), WPOK426 (Gainesville, GA), WPOK427 (Hyannis, MA) and WPOK428 (Staunton-Waynesboro, VA).

<sup>13</sup> File No. 0003511748 (filed July 22, 2008, consented to July 23, 2008).

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

<sup>15</sup> File Nos. 0003418418-0003418421 (filed Apr. 29, 2008).

Bureau granted Highland an extension until June 1, 2012 to construct its LMDS licenses, resulting in a nearly three-year construction extension. The applications were granted 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 Bureau found that LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.<sup>17</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>18</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 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.<sup>19</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>20</sup>

6. On June 1, 2012, Highland filed applications pursuant to Section 1.946(e) of the Commission's Rules seeking a further twelve-month extension of time, until June 1, 2013, to construct its four LMDS licenses.<sup>21</sup> Invoking the Commission's general waiver authority under Section 1.925 of the Commission's Rules, Highland alternatively 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 June 1, 2013.<sup>22</sup> Highland asserts that it has previously not constructed its system due to the unavailability of viable equipment offered at a pricing point that would allow it to build a competitive system.<sup>23</sup> Highland further explains that it “decided it would not serve the public interest to construct a network for the sole purpose of meeting the Commission's LMDS build-out requirement. . . [and] focused its efforts on creating an LMDS network that had commercial viability” instead.<sup>24</sup> Highland argues that in addition to the daunting challenges that LMDS licensees have faced in making productive use of the band and setting up service despite the lack of “viable, affordable, commercially available equipment”,<sup>25</sup> rural carriers, such as itself,

<sup>16</sup> *Id.* (granted June 13, 2008), *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*, 23 FCC Rcd at 5905 ¶ 24.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 5905 ¶ 25.

<sup>20</sup> *Id.*

<sup>21</sup> *See* File Nos. 0005242777-0005242780 (filed June 1, 2012) (Extension Applications). With each Extension Application, Highland filed an exhibit entitled “Request for Waiver and Substantial Service Extension Deadline” (Extension and Waiver Request).

<sup>22</sup> Extension and Waiver Request at 1.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 3.

have been faced with the additional challenge of “identifying the network that provides the service the licensee intends to offer at the right price point.”<sup>26</sup> Highland states that it is now “able to begin considering the build out of its rural LMDS markets . . . because equipment vendors have substantially lowered the cost of . . . [LMDS] equipment during the past years.”<sup>27</sup> At this point, Highland asserts that it has “determined which vendor offers the most suitable LMDS equipment, and has also determined the necessary equipment requirements for each market.”<sup>28</sup> Highland has also “engaged an engineering service to review the markets to determine the most beneficial site locations,” and anticipates deploying a point to multipoint technology solution with its licenses.<sup>29</sup>

### III. DISCUSSION

7. We find that Highland has not justified a grant of an extension of time, or a waiver of the construction deadline, for its LMDS licenses. And without such extension or waiver, Highland’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.<sup>30</sup> We discuss these findings in detail below.

#### A. Extension Requests

8. Highland requests a further twelve-month extension of time, until June 1, 2013, to demonstrate substantial service.<sup>31</sup> As noted above, this is the second extension that Highland has requested for constructing these licenses. To be eligible for an extension of time to construct, Highland 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 Highland has not met this threshold.

9. Highland argues that it has not constructed because of the lack of optimally priced, viable LMDS equipment that could be used to construct without putting itself at a competitive disadvantage, and because of the uncertainty of the LMDS marketplace.<sup>33</sup> 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>34</sup> In view of this precedent, we find that none of the factors

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<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 5.

<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> Extension and Waiver Request at 5.

<sup>34</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

cited by Highland demonstrate that its failure to construct was caused by circumstances beyond its control.

10. First, we find that Highland's decision to put its LMDS spectrum on the shelf until the market improved and equipment prices fell to the optimal point for service constituted a business decision voluntarily made by Highland, not an inevitable result of circumstances beyond its control. Moreover, Highland's justification for additional construction time due to market uncertainty would fail, insofar as the possible uses for LMDS spectrum have been developing steadily. While there were legitimate challenges to establishing LMDS service when Highland received its first construction extension, the opportunities for use of LMDS systems are expanding, including for the use of wireless backhaul. In 2005, 8.7 percent of backhaul traffic was sent by fixed wireless.<sup>35</sup> By 2009, that figure increased to 12.3 percent.<sup>36</sup> Many LMDS licensees have taken advantage of this increasing need and have utilized their LMDS spectrum for wireless backhaul. Moreover, other licensees in rural areas facing the same challenges that Highland has faced have also been able to use their LMDS licenses to deploy point-to-multipoint systems of the type that Highland is contemplating.<sup>37</sup> Under those circumstances, we conclude that Highland made a voluntary decision not to actively pursue development of its LMDS facilities.

11. Highland describes its principals as "experienced wireless operators, having successfully deployed wireless service to subscribers in West Virginia,"<sup>38</sup> where one of the subject stations is located. As an experienced wireless operator in a climate where the need and demand for wireless services continues to soar, Highland would be in a better position than most licensees to develop LMDS equipment or otherwise put its LMDS licenses to use. Despite that fact, Highland has made no attempt to incorporate LMDS spectrum into its plans for the West Virginia market where it is already engaged in the provision of wireless services. Rather, it made a business decision to wait for the market to offer LMDS equipment at the right price point, and also chose to refrain from constructing until it felt it would not be at a competitive disadvantage to other wireless providers. In contrast, many LMDS licensees made contrary decisions and did meet the June 1, 2012 deadline and built facilities.<sup>39</sup>

12. We find that Highland, which has not commenced 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

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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*, 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>35</sup> 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).

<sup>36</sup> *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.

<sup>37</sup> See, e.g., Nextlink Wireless, LLC, Station WPLM421, Ocala, FL; Broadband One North, Station WPOH524, Sault Ste. Marie, MI; Sunshine LMDS Network, Stations WPOK284, Valdosta, GA, and WPOK281, Albany-Tifton, GA; Verso LMDS, LLC, Station WPOJ980, La Salle-Peru-Ottawa-Streator, IL.

<sup>38</sup> Extension and Waiver Request at 2.

<sup>39</sup> 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.

delivery of that equipment. Unlike these licensees, Highland is still in the market exploration stages of development, has not yet formulated any concrete construction plans, and instead chose not to build facilities in advance of the deadline because such buildout “clearly would have put them at a competitive disadvantage against traditional wireless carriers.”<sup>40</sup> In contrast, other licensees had plans to construct but were faced with circumstances beyond their control when they failed to receive delivery of equipment they ordered to implement their construction plans.

13. Highland cites a series of cases in which the Bureau granted extensions of the buildout requirement in other services.<sup>41</sup> Those cases are distinguishable from Highland’s situation. In many of those cases, there was a systemic problem with equipment availability that affected all licensees in the band.<sup>42</sup> Here, by contrast, many LMDS licensees have been able to obtain and deploy equipment. In other cases, there were broader issues with the service rules that delayed or prevented deployment.<sup>43</sup> No party has argued that the LMDS service rules are responsible for delays in deploying service.

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.<sup>44</sup> 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, Highland made no concrete attempt to develop its LMDS spectrum

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<sup>40</sup> Extension and Waiver Request at 4-6.

<sup>41</sup> Extension and Waiver Request at 3 n.5.

<sup>42</sup> See, e.g., Request of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service, *Order*, 25 FCC Rcd 10097, 10102 ¶ 10 (WTB 2010) (waiver of interim substantial service deadline granted to MVDDS licensees because “there is a lack of viable, affordable equipment for MVDDS that can be deployed in the 12.2-12.7 GHz band.”); Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and Monitoring Service Construction Rules, WT Docket No. 08-60, *Order*, 23 FCC Rcd 17250, 17252 ¶ 7 (WTB 2008) (extension of construction requirement granted for Multilateration Location and Monitoring Service Economic Area licenses, Bureau notes that “no M-LMS equipment is commercially available for current deployment in the United States and . . . no M-LMS licensee provides service today.”); Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, WT Docket No. 06-102, *Order*, 21 FCC Rcd 14134, 14139-14140 ¶ 10 (WTB 2006) (*WCS Order*) (construction deadline extended until July 21, 2010 for WCS licensees; “participation by almost all of the licensees in the WCS industry in this proceeding leads us to believe that the technical and equipment challenges in this band are widespread”); Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Part II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13000-13001 ¶ 15 (WTB 2004) (Five-year construction requirement extended until November 5, 2007 for all 220 MHz Phase II EA, regional, and nationwide licensees. “The two companies that originally manufactured five kilohertz voice equipment no longer do so. We find that the loss of that equipment was a unique circumstance that have frustrated licensees’ efforts to meet the construction requirements.”); FCI 900, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11077 ¶ 7 (WTB 2001) (16 month extension of construction deadline granted for 900 MHz Major Trading Area licensees - no digital voice equipment available for the 900 MHz SMR band).

<sup>43</sup> See *WCS Order*, 21 FCC Rcd at 14139 ¶ 10 (noting that restrictive out-of-band emission limits may have impeded development of WCS equipment); Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline, *Order*, 14 FCC Rcd 5190, 5194 ¶ 9 (WTB PS&PWD 1999) (suspending construction benchmark while notice of proposed rulemaking proposing rule changes to service was pending).

<sup>44</sup> *LMDS Order*, 23 FCC Rcd at 5905 ¶ 25.

beyond retaining an engineering firm, exploring its options and waiting for optimal market conditions. We therefore conclude that the decision to grant an extension to LMDS licensees in 2008 does not support Highland's request for yet more time.

#### B. Waiver Request

15. To be granted a waiver of the June 1, 2012 construction deadline, Highland 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.<sup>45</sup> As is discussed more fully below, we conclude that Highland 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."<sup>46</sup> Highland is still exploring buildout locations "to review the markets to determine the most beneficial site locations for the best wireless coverage possible,"<sup>47</sup> has no concrete plans to construct, and has not even ordered equipment. In contrast, many other licensees made a contrary judgment and built their facilities. Granting Highland a further extension despite its lack of commitment to developing its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

17. We also conclude that Highland 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, Highland's decision not to construct its LMDS licenses until the market conditions were optimal was a business decision. Other licensees made other business decisions that led them to build out their licenses.<sup>48</sup>

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<sup>45</sup> 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).

<sup>46</sup> 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*, FCC 12-87, 27 FCC Rcd. 9735, 9773-9774 ¶ 104 (2012) ("*Wireless Backhaul 2<sup>nd</sup> 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.").

<sup>47</sup> Extension and Waiver Request at 5.

<sup>48</sup> See note 3934, *supra*.

18. Highland argues that cancelling the licenses and reauctioining the spectrum would “nullify the substantial progress that has been made toward constructing the facilities.”<sup>49</sup> Highland also argues that “[a]fter completing the protracted preparation and bidding process and selecting a new licensee, the FCC would then have to provide time for the new licensee to complete construction of the facilities, constituting a years-long postponement of construction, if the requested waiver and extension of time is not granted.”<sup>50</sup> 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, Highland 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.<sup>51</sup> Highland has had these licenses for thirteen years and has done nothing with them. Yet, the licenses in question could play an important role in providing wireless backhaul to support 4G services and should not lay fallow. The Bureau will expeditiously take action to relicense 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.<sup>52</sup> In light of our decision to deny Highland’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, Highland’s licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,<sup>53</sup> as of June 1, 2012.

#### IV. CONCLUSION AND ORDERING CLAUSES

20. Highland 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 Requests. Accordingly, Highland’s licenses to operate LMDS Stations WPOK425 (Bluefield, WV), WPOK426 (Gainesville, GA), WPOK427 (Hyannis, MA) and WPOK428 (Staunton–Waynesboro, VA) 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 demonstrate substantial service (File Nos. 0005242777-0005242780) filed by Highland Holdings, LLC on June 1, 2012 ARE DENIED.

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<sup>49</sup> Extension and Waiver Request at 7.

<sup>50</sup> *Id.* at 7.

<sup>51</sup> See *Wireless Backhaul 2<sup>nd</sup> R&O*, 27 FCC Rcd at 9773-9774 ¶ 104.

<sup>52</sup> 47 C.F.R. §§ 1.946(c) and 1.955(a)(2).

<sup>53</sup> *Id.*



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 Highland Holdings, LLC for Local Multipoint Distribution Service Stations WPOK425, WPOK426, WPOK427, and WPOK428 ARE 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  
Wireless Telecommunications Bureau