

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

In re Matter of)
)
PROGRESSIVE COMMUNICATIONS, INC.) File No. 0005241577
)
Request for Extension of Time, or in the)
alternative, Limited Waiver of Substantial Service)
Requirements for Local Multipoint Distribution)
Service Station WPLM324)
)

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 Progressive Communications, Inc.’s (“Progressive”) request for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service (“LMDS”) license for Station WPLM324, in the Anderson, Indiana Basic Trading Area (BTA), as well as its associated request for waiver of the June 1, 2012 substantial service deadline. Because we deny Progressive’s request, the license for Station WPLM324 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 licenses per BTA – an “A Block” and a “B Block” in each.² The A Block license is comprised of 1,150

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.

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 license for Station WPLM324 was originally issued to Progressive on June 5, 1998, as a result of Auction No. 17.¹³

5. Progressive was originally required to demonstrate substantial service on June 5, 2008, or 10 years after the initial license grant date.¹⁴ On May 1, 2008, Progressive filed an application for an extension of time to demonstrate substantial service for its LMDS license.¹⁵ On June 13, 2008, the

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. 0000000131 (granted June 5, 1998); see also FCC Announces the Conditional Grant of Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 16518 (WTB 1998).

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

¹⁵ File No. 0003422762 (filed May 1, 2008).

Bureau granted Progressive an extension until June 1, 2012 to construct its LMDS licenses, resulting in a nearly four year construction extension.¹⁶ The application was granted with a comment referring to a 2008 Bureau order where the Bureau granted extensions to other LMDS licensees.¹⁷ 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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

6. On May 31, 2012, Progressive filed an application (Extension & Waiver Request), seeking a further seven-month extension of time, until December 31, 2012, to construct Station WPLM324.²² Invoking the Commission's general waiver authority under Section 1.925 of the Commission's Rules, Progressive argues that it has made substantial effort to develop its LMDS business, including spending several years pursuing a project contemplating RUS funding which did not become available, partly because of questions about the availability of suitable equipment.²³ Progressive explains that it recently identified and ordered point-to-point equipment that can “probably provide reliable backhaul service” and which was due to arrive in June 2012.²⁴ Progressive further explains that although it has not identified a user for its services, it is actively seeking potential users, and believes it can be operational within sixty days of entering into an agreement with a potential customer.²⁵

¹⁶ File No. 0003422762 (granted June 13, 2008).

¹⁷ *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*).

¹⁸ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 24.

¹⁹ *Id.*

²⁰ *Id.* at 5905 ¶ 25.

²¹ *Id.*

²² See File No. 0005241577 (filed May 31, 2012) (Extension Application). With the Extension Application, Progressive filed an exhibit entitled “Request for Limited Extension of Substantial Service Deadline” (Extension & Waiver Request).

²³ Extension and Waiver Request at 2.

²⁴ *Id.* at 2.

²⁵ *Id.* at 3.

7. On October 17, 2012, Progressive filed a Supplement to its Extension and Waiver Request.²⁶ Therein, Progressive states that it has received the LMDS equipment that will allow it to construct a facility, and will begin construction when it has identified a customer.²⁷ Progressive also states that it has approached a number of potential customers, but has been unsuccessful in establishing any business relationships, due mainly to a lack of demand and economic considerations.²⁸ Notwithstanding these unsuccessful attempts, Progressive feels confident that it will identify a customer prior to the end of 2012, and if it does not, it intends to seek a further extension.²⁹

III. DISCUSSION

8. We find that Progressive 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, Progressive's LMDS license for Station WPLM324 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules, as of June 1, 2012.³⁰ We discuss these findings in detail below.

A. Extension Requests

9. Progressive requests a further seven-month extension of time, until December 1, 2012, to demonstrate substantial service.³¹ As noted above, this is the second extension that Progressive has requested for constructing these licenses, and Progressive is already anticipating that yet a third extension might be necessary if it does not locate a customer prior to expiration of the extension it now seeks.³² To be eligible for an extension of time to construct, Progressive must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."³³ We conclude that Progressive has not met this threshold.

10. Progressive asserts that it has made substantial efforts to develop its LMDS business, including the pursuit of RUS funding for several years, which it did not receive, and the pursuit of customers such as AT&T Mobility and a local school district.³⁴ Progressive further explains that it has not constructed any LMDS service due to the lack of development of LMDS equipment for backhaul, and due to its inability to secure a customer.³⁵ The Commission has consistently found that a licensee's own

²⁶ Progressive Communications, Inc., Supplement to Request for Extension of Time (filed Oct. 17, 2012) (Supplement).

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 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).

³¹ Extension and Waiver Request at 1.

³² Supplement at 1.

³³ 47 C.F.R. § 1.946(e)(1).

³⁴ Extension and Waiver Request at 2-3.

³⁵ *Id.*

business decisions are not circumstances beyond the licensee's control and are therefore not an appropriate basis for regulatory relief.³⁶ In view of this precedent, we find that none of the factors cited by Progressive demonstrate that its failure to construct was caused by circumstances beyond its control.

11. Specifically, while Progressive has investigated equipment and eventually acquired equipment, Progressive has clearly stated that it will not construct facilities until it has a customer. While Progressive has made some efforts to locate a customer, we note that many other licensees were able to develop business plans and make the case for building facilities.³⁷ Progressive's decision to use its LMDS facilities for backhaul and to not construct facilities until it had a customer were voluntary business decision. Progressive had other ways to develop its service independent of the backhaul market. Thus, its decision to put its LMDS spectrum on the shelf until the market for wireless backhaul improved constituted a business decision voluntarily made by Progressive, not an inevitable result of circumstances beyond its control. Moreover, even if wireless backhaul presented the only feasible use of LMDS spectrum, Progressive'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.³⁸ By 2009, that figure increased to 12.3 percent.³⁹ Under those circumstances, we conclude that Progressive made a voluntary decision not to construct LMDS facilities.

12. We find that Progressive, which made no attempt to commence construction of its LMDS licenses in advance of the construction deadline, nor subsequent to receiving the necessary equipment, 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. Although Progressive has received the equipment it ordered, it nonetheless admits that it has no intention of placing such equipment into operation without signing a contract with a potential customer. Thus, the mere act of securing equipment that would "probably provide reliable backhaul service"⁴⁰ without concrete plans or commitment to placing such equipment into service does not justify granting Progressive a further extension.

³⁶ 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*, 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).

³⁷ 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.

³⁸ 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).

³⁹ *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.

⁴⁰ Extension and Waiver Request at 2.

13. 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.⁴¹ 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, Progressive made no attempt to construct LMDS facilities. We therefore conclude that the decision to grant an extension to LMDS licensees in 2008 does not support Progressive's request for yet more time.

B. Waiver Request

14. To be granted a waiver of the June 1, 2012 construction deadline, Progressive 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.⁴² As is discussed more fully below, we conclude that Progressive has failed to make the requisite showing, and we therefore deny its waiver request.

15. 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.”⁴³ Progressive has secured the equipment that would allow it to construct, yet it will not “physically install point-to-point equipment unless and until the user is identified.”⁴⁴ Progressive further claims that it has “no assurance of finding a user immediately”, but that it believes “additional demand for point-to-point service will develop...during the remainder of this year and during 2013”, and that “by having already

⁴¹ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 25.

⁴² 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).

⁴³ 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 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.”).

⁴⁴ Extension and Waiver Request at 3.

purchased its equipment, [it] intends to hit the ground running and be there at the front of this wave.”⁴⁵ In its Supplement, Progressive demonstrates that it is in the same position it was in prior to receiving its equipment, because although it is “sending a sales representative into the market again in order to obtain a suitable customer,” it has been unsuccessful in its sales solicitations due to the fact that such potential customers already have backhaul solutions and are not in a position to expand due to economic situations.⁴⁶ Indeed, Progressive admits that it does not intend to construct until it obtains a customer. In contrast, many other licensees have built their facilities. Granting Progressive a further extension despite its lack of commitment to develop its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

16. We also conclude that Progressive 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, Progressive’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.⁴⁷

17. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁴⁸ In light of our decision to deny Progressive’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, Progressive’s license automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,⁴⁹ as of June 6, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

18. Progressive has failed to justify an extension of time to meet the substantial service deadline for its LMDS station or to justify a waiver of the June 1, 2012 deadline for establishing substantial service. We therefore deny the Extension and Waiver Request. Accordingly, Progressive’s license to operate LMDS station WPLM324 automatically terminated, by operation of Commission rule, as of June 1, 2012.

19. 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 a waiver and application for extension of time to demonstrate substantial service (File No. 0005241577) filed by Progressive Communications, Inc., on May 31, 2012 IS DENIED.

⁴⁵ *Id.*

⁴⁶ Supplement at 1.

⁴⁷ See note 36, *supra*.

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

⁴⁹ *Id.*

20. 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 license issued to Progressive Communications, Inc. for Local Multipoint Distribution Service Station WPLM324 TERMINATED as of June 1, 2012.

21. 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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