

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

In re Matter of)
STAR SEARCH RURAL TV & CELLULAR,) File Nos. 0005234510, 0005234512
INC.)
Requests for Extension of Time, or in the)
alternative, Limited Waiver of Substantial Service)
Requirements for Local Multipoint Distribution)
Service Licenses WPLM538 and WPLM539)

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 requests from Star Search Rural TV & Cellular, Inc. ("Star Search") for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service ("LMDS") licenses WPLM538, Paris, Texas; and WPLM539, McAlester, Oklahoma ("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 Star Search on June 17, 1998, as a result of Auction 17.¹³

5. Star Search was originally required to demonstrate substantial service by June 17, 2008, or 10 years after the initial license grant date.¹⁴ On February 1, 2008, Star Search filed applications for an

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. 0000000100 (granted June 17, 1998); see also FCC Announces the Conditional Grant of 199 Local Multipoint Distribution Service Licenses, *Public Notice*, 13 FCC Rcd 16730 (WTB 1998).

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

extension of 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 Star Search – 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 Star Search 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 Star Search and the other LMDS licensees, under the extended buildout deadline set by the Bureau.²⁰

7. On May 26, 2012, Star Search filed applications pursuant to Section 1.946(e) of the Commission’s Rules seeking a further two year extension of time until June 1, 2014, to construct its two LMDS licenses.²¹ Invoking the Commission’s general waiver authority under Section 1.925 of the Commission’s Rules, Star Search 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, 2014.²² Star Search states that it is owned by the principals of Oklahoma Western Telephone Co. (“OWTC”), a local exchange telephone company and provider of wireless and cable services in rural southeastern Oklahoma, and that it obtained LMDS licenses with the intent of using them to supplement the services that OWTC

¹⁵ File Nos. 0003310466, 0003310486 (filed Feb. 1, 2008).

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. 0005234510, 0005234512 (filed May 29, 2012) (Extension Applications). With each Extension Application, Star Search filed an exhibit entitled “Request for Extension of Time to Demonstrate Substantial Service” (Extension and Waiver Request).

²² Extension and Waiver Request at 1.

provides.²³ However, Star Search says that it has been unable to procure the equipment necessary to build a viable network to provide its existing customer base with wireless broadband service, and that it has been further hindered by the propagation characteristics of LMDS.²⁴ Typically, it says, an LMDS site can only reach customers within a range of one to five miles, a limitation that would require Star Search to construct several hundred towers and purchase the necessary equipment for each tower in order to serve its customer base.²⁵ This, it contends, is not economically feasible given the high cost and scarcity of LMDS equipment.²⁶

III. DISCUSSION

8. We find that Star Search 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, Star Search'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, 2012.²⁷ We discuss these findings in detail below.

A. Extension Requests

9. Star Search requests a further two year extension of time, until June 1, 2014, to demonstrate substantial service.²⁸ As noted above, this is the second extension that Star Search has requested for constructing these licenses. To be eligible for an extension of time to construct, Star Search must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."²⁹ We conclude that Star Search has not met this threshold.

10. Star Search argues that it has not built out its license areas because LMDS equipment is not available at a price that would enable it to construct the several hundred transmission stations that would be necessary to provide wireless broadband service to its intended customer base. 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.³⁰ In view of

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ 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).

²⁸ Extension and Waiver Request at 1.

²⁹ 47 C.F.R. § 1.946(e)(1).

³⁰ *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

(continued....)

these precedents, we find that none of the factors cited by Star Search demonstrate that its failure to construct was caused by circumstances beyond its control.

11. Star Search contends that the prices currently being charged for LMDS equipment make it economically infeasible to provide LMDS wireless broadband service to OWTC's geographically dispersed rural customer base. Specifically, Star Search contends that implementing its original business plan would require it to deploy hundreds of LMDS stations to reach the limited number of potential customers in the OWTC service area. While Star Search may be correct, its inability to execute that particular plan does not justify granting an extension, because Star Search has had other ways to make productive use of LMDS spectrum.

12. For LMDS licensees, Rule 101.1011(a) defines "substantial" service as service that is "sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal."³¹ LMDS licensees may choose from among "any kind of communications service consistent with the Commission's rules and the regulatory status of the station to provide services on a common carrier or non-common carrier basis."³² Thus, for example, Star Search could have used LMDS to provide wireless backhaul service, the market for which has been developing steadily. In 2005, 8.7 percent of backhaul traffic was sent by fixed wireless.³³ By 2009, that figure increased to 12.3 percent.³⁴ Moreover, Star Search need not have looked far afield for a potential backhaul customer because its sister company, OWTC, has licenses in the Cellular, PCS Broadband, and Broadband Radio Services in Star Search's LMDS license areas.³⁵ Despite such obvious opportunities to make immediate and effective use of its LMDS spectrum, Star Search has apparently decided to put its LMDS spectrum on the shelf until such time as the prices for LMDS equipment fall so low that it will be economically feasible to deploy hundreds of LMDS stations throughout the OWTC service area. This constitutes a business decision voluntarily made by Star Search, not an inevitable result of circumstances beyond its control.

13. Despite the continued vigorous growth of the wireless industry, Star Search has presented no deployment plans or identified any specific categories of potential customers for its services, limiting its analysis to the observation that the market will not support the deployment of hundreds of LMDS stations in the OWTC service area.³⁶ In essence, Star Search has apparently concluded that, because it cannot make LMDS service available throughout OWTC's service area, it will not make use of the

(...continued from previous page)

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).

³¹ 47 C.F.R. § 101.1011(a).

³² 47 C.F.R. § 101.1013(b).

³³ 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).

³⁴ *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.

³⁵ As of November 6, 2012, OWTC held active radio licenses in the Cellular (KNKN972), PCS Broadband (KNLH307), and Broadband Radio (WLK382, WNTC500, WNTC664 and WNTD797) services.

³⁶ Extension and Waiver Request at 1-2.

spectrum. Finally, we note that many other LMDS licensees did meet the June 1, 2012 deadline and built facilities.³⁷ Under those circumstances, we conclude that Star Search made a voluntary decision not to actively pursue development of LMDS facilities.

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.³⁸ In the years since then, 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 and its unique opportunity to provide backhaul services to a sister company, Star Search made no attempt to develop its LMDS spectrum. We therefore conclude, contrary to Star Search's argument,³⁹ that the decision to grant an extension to LMDS licensees in 2008 does not support Star Search's request for yet more time.

15. Finally, Star Search cites the Commission's decision in 2006 to grant an extension of time to build out to Wireless Communications Service (WCS) licensees.⁴⁰ That decision is readily distinguishable from Star Search's situation. In WCS, there were problems with both equipment and the service rules that prevented licensees in general from providing service.⁴¹ In contrast, many LMDS licensees have been able to provide service, and nobody has argued that the LMDS service rules have hindered deployment.

B. Waiver Request

16. To be granted a waiver of the June 1, 2012 construction deadline, Star Search 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 Star Search has failed to make the requisite showing, and we therefore deny its waiver request.

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

³⁹ See Extension and Waiver Request at 2.

⁴⁰ *Id.*

⁴¹ See 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", also noting that restrictive out-of-band emission limits may have impeded development of WCS equipment).

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).

17. 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 Star Search argues that the current generation of LMDS equipment is not affordable for its purposes.⁴⁴ In fact, many other licensees have concluded that LMDS equipment is sufficiently evolved and affordable for their purposes and have built their facilities. Granting Star Search a further extension despite its lack of effort in attempting to develop its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

18. We also conclude that Star Search has not shown that requiring compliance with the substantial service rules is inequitable, unduly burdensome, and contrary to the public interest. As we have previously discussed, Star Search’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.⁴⁵

19. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁴⁶ In light of our decision to deny Star Search’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, Star Search’s licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,⁴⁷ as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

20. Star Search 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, Star Search’s licenses to operate LMDS stations WPLM538 and WPLM539 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

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*, 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 1-2.

⁴⁵ See note 30, *supra*.

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

⁴⁷ *Id.*

demonstrate substantial service (File Nos. 0005234512 and 0005234510) filed by Star Search Rural TV & Cellular, Inc., 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 Star Search Rural TV & Cellular, Inc., for Local Multipoint Distribution Service Stations WPLM538 and WPLM539 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