

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

In re Matter of)	
)	
SWAYZEE TELEPHONE COMPANY)	File No. 0005238614
)	
Request for Extension of Time, or in the)	
alternative, Limited Waiver of Substantial Service)	
Requirements for Local Multipoint Distribution)	
Service Station WPLM321)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2012

Released: November 16, 2012

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny Swayzee Telephone Company’s (“Swayzee”) request for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service (“LMDS”) license for Station WPLM321, in the Marion, Indiana Basic Trading Area (BTA). Because we deny Swayzee’s request, the license for Station WPLM321 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 WPLM321 was originally issued to Swayzee on June 5, 1998, as a result of Auction No. 17.¹³

5. Swayzee was originally required to demonstrate substantial service on June 5, 2008, or 10 years after the initial license grant date.¹⁴ On March 17, 2008, Swayzee filed an application for an extension of time to demonstrate substantial service for its LMDS license.¹⁵ On April 11, 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. 0000000026 (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. 0003363577 (filed Mar. 17, 2008).

Wireless Telecommunications Bureau (the “Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees – including Swayzee – to extend their deadlines to meet the substantial service requirements to June 1, 2012, resulting in a nearly four-year construction extension for Swayzee’s license.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 Swayzee 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 Swayzee and the other LMDS licensees, under the extended buildout deadline set by the Bureau.²⁰

7. On May 30, 2012, Swayzee filed an application seeking a further three-year extension of time, until June 6, 2015, to construct Station WPLM321.²¹ Swayzee states that the Extension Application “is a direct result of lack of an economic form of delivery technology available for this bandwidth. While [Swayzee] recognizes there is not a viable solution for this technology as of the date of this request, we hope that a solution will be available reasonably soon.”²²

III. DISCUSSION

8. We find that Swayzee has not justified a grant of an extension of time of the construction deadline for its LMDS license. And without such extension, Swayzee’s LMDS license for Station

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 No. 0005238614 (filed May 30, 2012) (Extension Application).

²² Extension Application, Request for Extension.

WPLM321 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules, as of June 1, 2012.²³ We discuss these findings in detail below.

9. Swayzee requests a further three-year extension of time, until June 6, 2015, to demonstrate substantial service.²⁴ As noted above, this is the second extension that Swayzee has requested for constructing Station WPLM321. To be eligible for an extension of time to construct, Swayzee must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."²⁵ We conclude that Swayzee has not met this threshold.

10. Swayzee claims that it has been unable to find economic equipment.²⁶ Swayzee does not attempt to show that it made any active attempt to develop LMDS equipment, either through its own efforts or by working with equipment suppliers. It also does not describe its proposed use of LMDS. We find that the pace of the development of the market for LMDS equipment does not justify granting an extension. Many LMDS licensees did meet the June 1, 2012 deadline and built facilities.²⁷ Furthermore, to the extent Swayzee was considering using its licenses for wireless backhaul, the market for wireless backhaul has been developing steadily. In 2005, 8.7 percent of backhaul traffic was sent by fixed wireless.²⁸ By 2009, that figure increased to 12.3 percent.²⁹ Despite that fact, Swayzee has made no attempt to use LMDS spectrum for any purpose. Under those circumstances, we conclude that Swayzee made a voluntary decision not to actively pursue development of LMDS facilities.

11. 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.³⁰ 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, Swayzee made no attempt to construct LMDS facilities. We therefore

²³ 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).

²⁴ Extension Application.

²⁵ 47 C.F.R. § 1.946(e)(1).

²⁶ Extension Application, Request for Extension.

²⁷ 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.

²⁸ 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).

²⁹ *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.

³⁰ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 25.

conclude that the decision to grant an extension to LMDS licensees in 2008 does not support Swayzee's request for yet more time.

12. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.³¹ In light of our decision to deny Swayzee'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, Swayzee's license automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules,³² as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

13. Swayzee 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 Application. Accordingly, Swayzee's license to operate LMDS Station WPLM321 automatically terminated, by operation of Commission rule, as of June 1, 2012.

14. 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 application for extension of time to demonstrate substantial service (File No. 0005238614) filed by Swayzee Telephone Company on May 30, 2012 IS DENIED.

15. 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 Swayzee Telephone Company for Local Multipoint Distribution Service Station WPLM321 TERMINATED as of June 1, 2012.

16. 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

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

³² *Id.*