

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

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| In the Matter of |) | |
| |) | |
| SPEEDUSNY.COM, L.P. |) | File No. 0005243380 |
| |) | |
| Requests for Extension of Time, or in the |) | |
| alternative, Limited Waiver of Substantial Service |) | |
| Requirements for Local Multipoint Distribution |) | |
| Service Licenses WLT379 |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: December 10, 2012

Released: December 11, 2012

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we deny SpeedUsNY.com, L.P.’s (“SpeedUsNY”) request for extension of time to demonstrate compliance with the substantial service requirements for Local Multipoint Distribution Service (“LMDS”) Station WLT379. Given our denial of that requests, the license for Station WLT379 automatically terminated, by operation of Commission rule, as of June 1, 2012.

II. BACKGROUND

A. The History and Evolution of LMDS

2. The 27.5-29.5 GHz (28 GHz) band had been available for point-to-point microwave radio common carrier use since 1959. However, scant interest was expressed in the use of the band prior to 1991.¹ In 1991, the Commission granted a waiver request filed by Hye Crest Management, Inc. (Hye Crest)² to allow the use of frequencies in the 28 GHz band for the provision of video service within the New York Standard Metropolitan Statistical Area (“SMSA”)³ using a network of broad beam, omni-directional antennas.⁴ The Commission opted to proceed by waiver, rather than by rulemaking, in this

¹ At that time, the 28 GHz band was allocated for fixed, fixed-satellite uplinks, and mobile services. *See* 47 C.F.R. § 2.106.

² *See* Hye Crest Management, Inc., File No. 10380-CF-P-88.

³ We note that SMSAs were eliminated by the Office of Management and Budget, effective June 30, 1993. The New York Primary Metropolitan Statistical Area (“PMSA”) is the successor to the New York SMSA.

⁴ *See* Hye Crest Management, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 332 (1991) (*Hye Crest MO&O*). The authorization permitted Hye Crest to construct a 24 channel video distribution system comprised of multiple, low power transmitters. *See id.* at ¶ 28. Each station was to provide service through transmitters within a 6 to 8 mile cell and be capable of offering discreet programming within its individual service area. *See id.* The Commission subsequently modified Hye Crest’s authorization in 1992 to permit it to operate a 49 channel system. *See* Rulemaking to Amend Part 1 and Part 21 of the Commission’s Rules to Multipoint Distribution Service, CC Docket No. 92-297, *Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 8 FCC Rcd 557, 558 ¶ 6 (1993) (*First LMDS NPRM*).

matter because it found that the waiver approach offered the most efficient and expeditious means available for accommodating Section 7 of the Communications Act of 1934, as amended,⁵ and allowed the introduction of a competitive communications service to New York City.⁶ The Commission noted that no other party had demonstrated the development of technology capable of utilizing the 28 GHz band.⁷ The Commission decided to authorize Hye Crest to provide service throughout the entire New York PMSA because it found that only a designated service area licensing scheme would provide the licensee with the necessary flexibility to select and timely establish antenna locations to facilitate efficient frequency re-use, and thereby, assure continuous signal coverage.⁸ The Commission limited Hye Crest's initial license term to five years because of the unique nature of High Crest's proposed use of the 28 GHz band and because of the Commission's concern over ensuring the efficient use of the spectrum.⁹

3. In 1997, the Commission allocated 1,300 megahertz of LMDS spectrum in each basic trading area ("BTA") across the United States.¹⁰ Specifically, the Commission allocated two LMDS licenses per BTA – an "A Block" and a "B Block" license in each.¹¹ 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.¹² 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).¹³ The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).¹⁴ 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.

⁵ 47 U.S.C. § 157.

⁶ See *Hye Crest MO&O*, 6 FCC Rcd at 334 ¶18.

⁷ *Id.* at 334 ¶ 22. Moreover, the Commission found that the 28 GHz band offered Hye Crest sufficient contiguous spectrum to support its proposed service. See *id.* at 334 ¶ 21.

⁸ *Id.* at 335 ¶ 27. The Commission authorized Hye Crest to provide service on 1 GHz of contiguous spectrum at 27.5- 28.5 GHz.

⁹ *Hye Crest MO&O*, at 335 ¶ 29.

¹⁰ 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.

¹¹ See *Second LMDS Report and Order*, 12 FCC Rcd at 12556 ¶ 12.

¹² See *id.*

¹³ See 47 C.F.R. § 101.1005.

¹⁴ See *id.*

B. Station WLT379 License

4. The LMDS band plan adopted by the Commission differed significantly from the 1 GHz of unencumbered spectrum granted to Hye Crest in 1991 to provide service in the New York PMSA.¹⁵ Therefore, the Commission grandfathered CellularVision (the successor-in-interest to Hye Crest)¹⁶ to allow it to continue operating in the 1 GHz of contiguous spectrum at 27.5-28.5 GHz until the later date of either July 22, 1998 or the launch of the first Geostationary Orbit/Fixed Satellite Service (“GSO/FSS”) satellite licensed to operate in the spectrum.¹⁷ At that time, CellularVision would be required to vacate the 150 MHz of spectrum at 28.35-28.5 GHz and transition to the use of the 150 MHz of spectrum at 29.1-29.25 GHz.¹⁸ While CellularVision was permitted to use the newly allocated 150 MHz of spectrum at 29.1-29.5 GHz during the grandfathered transition period, use of that spectrum was limited to hub-to-subscriber transmissions.¹⁹ Subsequently, in the *Second LMDS Report and Order*, the Commission designated an additional 300 MHz of LMDS spectrum at 31.0-31.3 GHz, including 150 MHz of additional A Block spectrum at 31.075-31.125 GHz.²⁰ Therefore, when the Commission granted CellularVision’s renewal application on September 23, 1997,²¹ it was authorized, pending final outcome of the rulemaking proceeding and subject to the conditions noted above, to operate in the 27.50-28.35, 28.35-28.50, 29.10-29.25 and 31.075-31.225 GHz bands for a total of 1,300 MHz. At the conclusion of the grandfathered period, CellularVision was required to cease operating at 28.35-28.50 GHz, thus transitioning CellularVision to the uniform allocation of 1,150 MHz of A Block spectrum at 27.5-28.35, 29.1-29.25 and 31.075-31.225 GHz.²² The license, under the call sign WLT379, was renewed for a ten-year term with an expiration date of February 1, 2006.

5. CellularVision subsequently disaggregated and assigned two segments of its original A Block of LMDS spectrum. Specifically, CellularVision entered into an agreement with WinStar Wireless Fiber Corp., a fully owned subsidiary of WinStar Communications, Inc., for the assignment, by disaggregation, and sale of 850 MHz of spectrum at 27.50-28.35 GHz (*i.e.*, the A1 Band).²³ The Commission assigned the call sign WPO1485 to the disaggregated spectrum (*i.e.*, the A1 Band) assigned to WinStar Wireless Fiber Corp. Thereafter, CellularVision, now renamed SpeedUsNY.com, L.P. (SpeedUsNY),²⁴ sought to disaggregate and assign the 150 MHz of LMDS spectrum that comprised the A Block of spectrum at 31.075-31.225 GHz (*i.e.*, the A3 Band) to NextLink Communications, Inc.

¹⁵ As noted above, the original license had been granted for a term of five years. A timely renewal application was filed for the license on December 29, 1995. *See* File No. 9701842 (filed Dec. 29, 1995).

¹⁶ On June 23, 1995, the Commission granted a *pro forma* transfer of control from Hye Crest to CellularVision, USA, Inc. (CellularVision), a newly formed corporation. *See* Private Wireless Division Action Taken on Application in the Point-to-Point Microwave Radio Service, *Public Notice*, 11 FCC Rcd 1261 (1995).

¹⁷ *See First LMDS Report and Order*, 11 FCC Rcd at 19028-19029 ¶¶ 55-56.

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See Second LMDS Report and Order*, 12 FCC Rcd at 12565 ¶ 36.

²¹ *See* License for LMDS Station WLT379, File No. 9701842 (granted Sept. 23, 1997).

²² *See First LMDS Report and Order*, 11 FCC Rcd at 19028 ¶ 55.

²³ *See* File No. 0000002138 (filed Aug. 25, 1998); *see also* Agreement to Assign LMDS License (dated, effective, as of July 10, 1998). The Commission consented to the transaction on October 9, 1998. The transaction was consummated on the same date. *See* Report No. 2010, *Public Notice* (rel. Oct. 14, 1998).

²⁴ *See* File No. 0000005778 (filed Feb. 12, 1999; granted Mar. 9, 1999).

(NextLink Communications).²⁵ The Commission assigned call sign WPOL286 to the disaggregated spectrum (*i.e.*, the A3 Band) assigned to NextLink Communications. Consequently, as a result of the disaggregations, three licensees – WinStar Wireless Fiber Corp., SpeedUsNY, and NextLink Communications – each held a portion of the A Block of LMDS spectrum originally granted to CellularVision for the New York PMSA.²⁶ As such, these three licenses are the only LMDS authorizations that were not subject to or won by auction.

C. SpeedUsNY 2006-2008 Filings

6. SpeedUsNY, formerly known as CellularVision,²⁷ holds the license for LMDS Station WLT379, which operates in the A2 Band (29.10-29.25 GHz) across eight of the 26 counties in the New York BTA. Although the expiration date for the license was February 1, 2006, the construction and substantial service deadline for Station WLT379 was March 27, 2007. An application for renewal was filed by SpeedUsNY on January 9, 2006 and was granted through ULS on February 6, 2006.²⁸ The renewal application did not include a substantial service showing because the construction and substantial service deadline for Station WLT379 was March 27, 2007.

7. On March 7, 2007, SpeedUsNY filed a substantial service showing,²⁹ and on March 27, 2007, SpeedUsNY filed an alternative request for waiver of Section 101.1011 of the Commission's Rules³⁰ and for an extension of time.³¹ In its substantial service showing, SpeedUsNY reported that it used 15 base stations to provide hub-to-subscriber video services on 49 channels to approximately 18,000 household and business subscribers from 1996 to 1998.³² The service, which actually began in 1992, was terminated in 1998 for financial reasons.³³ SpeedUsNY also stated that it offered financial institutions throughout its licensed area Bloomberg Information Television programming from 1996 to 2000.³⁴ In

²⁵ See File No. 0000016529 (filed July 9, 1999); *see also* Amended Agreement to Assign LMDS License (dated, effective, as of June 13, 1999). The Commission consented to the transaction on August 30, 1999. Consummation of the transaction occurred on October 12, 1999.

²⁶ Specifically, the A1, A2, and A3 Bands were licensed to WinStar Wireless Fiber Corp, SpeedUsNY, and NextLink Communications, respectively. The license held by SpeedUsNY retained the original call sign of WLT379. However, each license now shared the common expiration of the original license – February 1, 2006. *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, *Fourth Report and Order*, 13 FCC Rcd 11655, 11668 ¶ 22 (1998).

²⁷ See File No. 0000005778 (filed Feb. 12, 1999; granted Mar. 9, 1999).

²⁸ See File No. 0002439954 (filed Jan. 9, 2006).

²⁹ File No. 0002939453, Section 101.1011 Report and Demonstration of Substantial Service (filed Mar. 7, 2007) (SpeedUSNY Substantial Service Showing).

³⁰ 47 C.F.R. § 101.1011.

³¹ File No. 0002968483, Contingent Request for Waiver of Section 101.1011 of the Commission's Rules or, in the Alternative, Extension of Time to Construct (filed Mar. 27, 2007) (SpeedUSNY Waiver Request) (stating that it intends to provide broadband throughout its licensed area within the next three years and estimates that economically viable equipment will be available within the next 18 months).

³² SpeedUSNY Substantial Service Showing at 1-2.

³³ *See, e.g., id.* at 2. SpeedUsNY also attached an engineering statement, dated and signed March 7, 2007, that states, in the present tense, that the "SpeedUsNY LMDS system is comprised of fifteen (15) transmit sites. . . ." *See id.*, Engineering Statement of T. Lauriston Hardin, P.E. (dated Mar. 7, 2007). Therefore, it is unclear whether the 15 transmit sites were dismantled after the termination of service.

³⁴ *See id.*

addition, SpeedUsNY noted that it conducted a pilot program that delivered high-speed broadband internet access via 14 internet broadcast stations “to portions” of its licensed area from 1996 to 2003.³⁵ SpeedUsNY suspended the pilot program in 2003 “due to the lack of equipment on an economically rational basis.”³⁶ Lastly, SpeedUsNY contended that, in 2004, it entered into an agreement with XO whereby XO would utilize Station WLT379’s frequencies “to test various technical applications.”³⁷ According to SpeedUsNY, its plans at the time were to “build upon the lessons of its pilot program and provide . . . [broadband super high-speed Internet service] throughout its licensed area within the next three years.”³⁸ At the time, SpeedUsNY estimated that it expended \$70 million to construct and operate Station WLT379 and was continuing to invest funds in technology development and business planning.³⁹

8. On July 31, 2007, the Wireless Telecommunications Bureau (“Bureau”) rejected SpeedUsNY’s substantial service showing but granted SpeedUsNY an extension of time until October 6, 2008 to demonstrate substantial service.⁴⁰ The Bureau rejected SpeedUsNY’s attempt to demonstrate substantial service based on past service.⁴¹ With respect to its extension request, the Bureau concluded that SpeedUsNY had demonstrated sufficient diligence to warrant a partial grant of its extension request until October 6, 2008.⁴²

9. On January 6, 2008, SpeedUsNY filed a request for further extension of time to demonstrate substantial service until June 1, 2011.⁴³ SpeedUsNY referenced an extension request filed by a coalition of LMDS licensees seeking similar relief.⁴⁴ 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 SpeedUsNY – 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.⁴⁵ The Bureau found that these LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.⁴⁶ 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

³⁵ *See id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 3. However, “[a]s an initial focus, within the next 12 months, SpeedUsNY plans to continue its technology development efforts and its discussions with companies that can manufacture equipment at a price point that will make it attractive for consumers. . . . SpeedUsNY believes that it can deploy broadband services within the next 12 months.” *Id.* at 4.

³⁹ *Id.* at 4.

⁴⁰ SpeedUsNY.com and IDT Spectrum, LLC, *Memorandum Opinion and Order and Order on Reconsideration*, 22 FCC Rcd 13974 (WTB 2007).

⁴¹ *Id.* at 13984-13985 ¶ 17.

⁴² *Id.* at 13985 ¶ 18.

⁴³ File No. 0003278300 (filed Jan. 6, 2008).

⁴⁴ *Id.*, Request for Waiver and Limited Extension of Deadline for Establishing Compliance with Section 101.1011(a) LMDS Substantial Service Requirements.

⁴⁵ 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*).

⁴⁶ *Id.* at 5905 ¶ 24.

approaching, and that they all faced these same basic obstacles to timely construction.⁴⁷ 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 SpeedUsNY 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.⁴⁸ 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 SpeedUsNY and the other LMDS licensees, under the extended buildout deadline set by the Bureau.⁴⁹

D. Current Extension Request

10. On June 1, 2012, SpeedUsNY filed an application pursuant to Section 1.946(e) of the Commission's Rules seeking a further three year extension of time until June 1, 2015, to construct Station WLT379.⁵⁰ Invoking the Commission's general waiver authority under Section 1.925 of the Commission's Rules, SpeedUsNY 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 at least June 1, 2015.⁵¹ SpeedUsNY recites the history that the Bureau relied upon in granting an extension of time back in 2007.⁵² It claims that there is no equipment available to operate just on the frequencies available to SpeedUsNY.⁵³ It contends that the limitation on the use of the 29.1-29.25 GHz band only for hub-to-subscriber limitations “significantly reduces the usefulness and marketability of the spectrum”⁵⁴ It asks for removal of that limitation.⁵⁵ SpeedUsNY also complains about a lack of clarity about its rights to operate in the 28.35-28.5 GHz band and asks for waiver of that condition.⁵⁶

III. DISCUSSION

11. We find that SpeedUsNY has not justified grant of an extension of time, or waiver of the construction deadline, for Station WLT379. Without such extension or waiver, the license for Station WLT379 automatically cancelled, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's

⁴⁷ *Id.*

⁴⁸ *Id.* at 5905 ¶ 25.

⁴⁹ *Id.*

⁵⁰ See File No. 0005243380 (filed June 1, 2012) (Extension Application). With the Extension Application, SpeedUsNY filed an exhibit entitled “Request for Waiver and for Extension of Time to Demonstrate ‘Substantial Service’” (Extension and Waiver Request).

⁵¹ Extension and Waiver Request at 1.

⁵² *Id.* at 1-3; see ¶¶ 4-Error! Reference source not found., *supra*.

⁵³ Extension and Waiver Request at 3-4.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.* at 5.

⁵⁶ *Id.* at 3, 5.

Rules, as of June 1, 2012.⁵⁷ We discuss these findings in detail below.

A. Extension Request

12. SpeedUsNY requests a further three year extension of time, until June 1, 2015, to demonstrate substantial service.⁵⁸ As noted above, this is the third extension that SpeedUsNY has requested for constructing Station WLT379. To be eligible for an extension of time to construct, SpeedUsNY must show that its “failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”⁵⁹ We conclude that SpeedUsNY has not met this threshold.

13. SpeedUsNY argues that it has not constructed because of a lack of equipment and because of conditions placed on its license.⁶⁰ 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.⁶¹ In view of this precedent, we find that none of the factors cited by SpeedUsNY demonstrate that its failure to construct was caused by circumstances beyond its control.

14. It is apparent that SpeedUsNY’s equipment problems are attributable in part to its voluntary decision to disaggregate the A1 Band and A3 Band to different companies while retaining the A2 Band for itself. We note that many LMDS licensees met the June 1, 2012 deadline and built facilities.⁶² While SpeedUsNY complains about the lack of equipment that would operate just within the A2 Band, it could have avoided that problem by retaining the A1 and A3 Bands. Instead, it disaggregated those bands and assumed the risk that equipment that operated just in the A2 Band would be unavailable.

15. Furthermore, while SpeedUsNY demonstrated diligence when the Bureau granted it an extension in 2007,⁶³ it has not demonstrated any actions that it has taken since that time. In evaluating a

⁵⁷ 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).

⁵⁸ Extension and Waiver Request at 1.

⁵⁹ 47 C.F.R. § 1.946(e)(1).

⁶⁰ Extension and Waiver Request at 3-5.

⁶¹ 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).

⁶² 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.

⁶³ SpeedUsNY.com and IDT Spectrum, LLC, *Memorandum Opinion and Order and Order on Reconsideration*, 22 FCC Rcd 13974 (WTB 2007) (granting an extension of time until October 6, 2008 to demonstrate substantial service).

request for extension of a construction deadline, the Commission focuses on a licensee's efforts during the most recent construction period.⁶⁴ SpeedUsNY provides no explanation of actions that it has taken during the most recent construction period (*i.e.*, since 2008). We therefore cannot make a finding based on the record in this proceeding that SpeedUsNY has acted diligently since it last received an extension back in 2008.⁶⁵

16. SpeedUsNY complains that it is hamstrung by the conditions on its license limiting the use of the 28.35-28.5 GHz and 29.1-29.25 GHz bands.⁶⁶ We reject that argument for three reasons. First, in 2007, notwithstanding those conditions, SpeedUsNY represented that it could use Station WLT379 to provide broadband throughout its licensed area by 2010 and estimated that "economically viable equipment will be available within the next 18 months."⁶⁷ SpeedUsNY makes no attempt to reconcile its optimistic 2007 claims with its current claims of inability to provide service. Second, if SpeedUsNY is correct that the conditions prevent it from providing service, it should have sought relief from those conditions at an earlier point in time so that it could have met the June 1, 2012 deadline. SpeedUsNY has been subject to these conditions since 1997. Its failure to raise any issues concerning those conditions until now demonstrates, at best, a severe lack of diligence. Finally, SpeedUsNY waived its right to object to these conditions when it accepted the license for Station WLT379 with these conditions.⁶⁸

17. A final reason for denying the Extension Request is that SpeedUsNY does not demonstrate that it will be able to provide service even if it receives the three-year extension it requests. SpeedUsNY emphasizes the obstacles it faces but provides no explanation as to what it can do to overcome those obstacles and actually provide service to the public.

B. Waiver Request

18. To be granted a waiver of the June 1, 2012 construction deadline, SpeedUsNY 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.⁶⁹ As discussed more fully below, we conclude that SpeedUsNY has failed to make the requisite showing, and we therefore deny its waiver request.

19. 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."⁷⁰

⁶⁴ See Cope Communications, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 14564, 14565 ¶ 5 (1998).

⁶⁵ *LMDS Order*, 23 FCC Rcd at 5894 ¶ 1 (granting an extension of time for a large group of LMDS licensees, including SpeedUsNY, to meet the substantial service requirements to June 1, 2012).

⁶⁶ Extension and Waiver Request at 3-5.

⁶⁷ SpeedUsNY Waiver Request at 2-3.

⁶⁸ See 47 C.F.R. § 1.110, 1.945(e); *Western Cities Broadcasting, Inc.*, MM Docket No. 90-424, *Hearing Designation Order*, 5 FCC Rcd 6177, 6179 ¶ 16 (1990), *citing Central Television, Inc. v. FCC*, 834 F.2d 186 (D.C. Cir. 1987) ("Section 1.110 . . . does not allow applicants first to accept a partial grant, yet later to seek reconsideration of its conditions."); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 739 (D.C. Cir. 1974).

⁶⁹ See 47 C.F.R. § 1.925(b)(3); *see also 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); 47 C.F.R. § 1.3.

⁷⁰ 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 (continued...)

SpeedUsNY claims it has “demonstrated its commitment to serve the New York market by planning new and important wireless services, including super high-speed Internet service.”⁷¹ We disagree. SpeedUsNY has failed to demonstrate that it has taken any actions since 2008 to provide service to the public. As we note above, many other LMDS licensees were able to build their facilities. We therefore find that granting SpeedUsNY a further extension despite its recent lack of effort in attempting to develop its LMDS spectrum would be inconsistent with the underlying purpose of the substantial service requirement.

20. We also conclude that SpeedUsNY has not shown that requiring it to comply with the substantial service requirements is inequitable, unduly burdensome, and contrary to the public interest in view of the unique or unusual circumstances. SpeedUsNY’s unique circumstance in holding only the A2 band was caused by its voluntary business decisions to disaggregate the A1 and A3 bands. It would be inequitable to other licensees that have diligently built out their market areas if we were to grant SpeedUsNY an extension of time to construct Station WLT379 on the basis of a problem that was caused by its own voluntary business decisions. Furthermore, we believe the public interest would be best served by placing the spectrum into the hands of a licensee who is able to provide service.

21. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.⁷² In light of our decision to deny SpeedUsNY’s request for an extension or waiver of the construction requirements, SpeedUsNY’s license for Station WLT379 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,⁷³ as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

22. SpeedUsNY 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, SpeedUsNY’s licenses to operate LMDS station WLT379 automatically terminated, by operation of Commission rule, as of June 1, 2012.

23. 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 waiver and the application for extension of time to

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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), *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.”); *Id.* at 18626 ¶ 46 (“This revised performance standard should ensure that meaningful service will be provided without unduly restricting service offerings.”); *Id.* 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.”); *Renewal of Licenses to Provide Microwave Service in the 38.6 – 40.0 GHz Band, Memorandum Opinion and Order*, 17 FCC Rcd 4404, 4407 ¶ 11 (WTB PS&PWD 2002) (“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.”).

⁷¹ Extension and Waiver Request at 6.

⁷² *See* 47 C.F.R. § 1.955(a)(2).

⁷³ *Id.*

demonstrate substantial service (File No. 0005243380) filed by SpeedUsNY.com, L.P. on June 1, 2012 IS DENIED.

24. 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 SpeedUsNY.com, L.P. for Local Multipoint Distribution Service Station WLT379 TERMINATED as of June 1, 2012.

25. 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