

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

In the Matter of)	
)	
CLOUDNINE WIRELESS, L.L.C.)	File Nos. 0004398604, <i>et al.</i>
)	
843 Applications For Extension of Time to Meet)	
First Buildout Requirement for Multiple Address)	
System Licenses)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 2012

Released: April 9, 2012

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

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address CloudNine Wireless, L.L.C. (CloudNine)'s request for a waiver of the first buildout requirement for its 843 Multiple Address System licenses and a five-year extension of time to construct its system, until October 13, 2015. For the reasons discussed below, we deny the Waiver and Extension Requests and note that CloudNine's licenses automatically cancelled on October 13, 2010.

II. BACKGROUND

2. Multiple Address System (MAS) is a radio communications service that consists of 3.2 megahertz of spectrum in the 900 MHz band that is licensed under Part 101 of the Commission's rules.¹ MAS licensees may engage in terrestrial point-to-point and point-to-multi-point fixed and limited mobile operations.² In 2000, the Commission designated the 928/959 MHz bands and twenty of the forty paired channels in the 932/941 MHz bands to be licensed on a geographic area basis using Economic Areas.³ The Commission has held two auctions for these MAS licenses.⁴

3. The Wireless Bureau granted 843 MAS licenses to CloudNine on October 13, 2005, in conjunction with Auction 59.⁵ Under the Commission's rules, CloudNine had to either provide service to

¹ See Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11956 (2000) (*MAS Report and Order*).

² See 47 C.F.R. § 101.1307.

³ *MAS Report and Order*, 15 FCC Rcd at 11958 ¶ 2.

⁴ The first, Auction No. 42, was held from November 14, 2001 to November 27, 2001. See Multiple Address Systems Spectrum Auction Closes – Winning Bidders Announced, *Public Notice*, 16 FCC Rcd 21011 (WTB 2001). The second, Auction No. 59, was held from April 26, 2005 to May 18, 2005. See Multiple Address Systems Spectrum Auction Closes – Winning Bidders Announced, *Public Notice*, 20 FCC Rcd 9551 (WTB 2005).

⁵ CloudNine was the winning bidder for these MAS licenses in Auction No. 59. See The Wireless Telecommunications Bureau Announces the Grant of 21 Multiple Address Systems Licenses, *Public Notice*, 20 FCC Rcd 16203 (WTB 2005).

at least one-fifth of the population within its service area or demonstrate “substantial service” by October 13, 2010 (five years after its licenses were granted).⁶ On September 23, 2010, CloudNine filed applications and requests for waiver to extend its buildout deadline until October 13, 2015, for each of its 843 MAS licenses.⁷ No party opposed these requests.

III. DISCUSSION

4. The Commission imposed two buildout requirements on geographic area MAS licensees.⁸ First, within five years receiving their license, licensees are required to provide coverage to at least one-fifth of the population in their service areas or demonstrate “substantial service.”⁹ Second, at the end of the ten-year license period, licensees are required to make a continued showing of substantial service in each licensed area.¹⁰ The Commission concluded that these buildout requirements would “hinder warehousing, promote the rapid development of new technologies, and promote service to rural areas.”¹¹

A. Extension Request

5. Section 1.946 of the Commission’s rules provides that a request for extension of time to construct “may be granted if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”¹² The rule prohibits granting extensions based on a failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of a transfer of control of the licensee.¹³

6. CloudNine argues that it is unable to meet the five-year buildout deadline because of the lack of affordable equipment suitable for MAS systems, the lack of a developed marketplace for MAS services in markets where CloudNine holds licenses, and the lack of access to capital because of the global financial crisis.¹⁴ Further, CloudNine argues that granting its request would make the MAS construction requirements consistent with the ten-year construction requirements for other similarly licensed wireless services.¹⁵

7. We conclude that CloudNine has not shown that it was unable to meet its construction deadline because of causes beyond its control. First, we reject CloudNine’s allegation that there is a lack of equipment suitable for MAS systems.¹⁶ As mentioned above, the Commission has held two spectrum auctions for MAS licenses. In addition to the two MAS licensees noted by CloudNine who received

⁶ See 47 C.F.R. § 101.1325(b).

⁷ Petition for Waiver and Limited Extension of Deadline for Establishing Compliance with Section 101.1325 MAS Substantial Service Requirement, Exhibit 1 (Waiver Request).

⁸ *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94, citing 47 U.S.C. § 309(j)(3).

⁹ The Commission has defined “substantial service” as “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.” *Id.*; see also, 47 C.F.R. § 101.1325(b).

¹⁰ *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94; see also, 47 C.F.R. § 101.1325(b).

¹¹ *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94.

¹² 47 C.F.R. § 1.946(e)(1).

¹³ 47 C.F.R. § 1.946(e)(2), (3).

¹⁴ Waiver Request at 1.

¹⁵ Waiver Request at 3-4.

¹⁶ Waiver Request at 4.

licenses from Auction No. 59,¹⁷ the Bureau has found that eleven other licensees met the first substantial service deadline.¹⁸ Because many other MAS licensees have been able to meet their first substantial service deadline, we do not find that there is a lack of viable, affordable equipment suitable for MAS services that justify an extension.¹⁹

8. Second, we reject CloudNine's allegation that it could not construct by its deadline because the marketplace for MAS services has not yet developed in the markets where CloudNine holds licenses.²⁰ CloudNine has provided no evidence to support this claim. Third, we reject CloudNine's claim that the effects of the global financial crisis on the equity markets prevented CloudNine from building out its system.²¹ As detailed above, Section 1.946(e)(2) of the Commission's Rules specifically precludes us from granting a construction extension request based on a licensee's failure to obtain financing.²² Further, we find that CloudNine's own statements show that it has not built out its license areas because it has not yet developed a business plan for their use.²³

9. CloudNine contends that granting an extension would harmonize the MAS buildout requirement with other wireless services.²⁴ In our view, this argument effectively constitutes an improper and untimely request for reconsideration of the Commission's decision to impose a five-year buildout requirement on MAS licensees, which we cannot and will not revisit.²⁵ Therefore, we reject CloudNine's remaining arguments.

¹⁷ See Waiver Request at 4.

¹⁸ See File Nos. 0004344172-0004344175 (Portland General Electric); 0004348596-0004348602 and 0004359833-0004359837 (Joe Wheeler Electric Membership Corporation); 0004359156, 0004359164 (People's Electric Cooperative); 0004392412, 0004392436, 0004392447 (Tri-State Generation and Transmission Assn. Inc.); 0004411969-0004411980, 0004411982-0004411983, 0004411987-0004411988 (SCANA Services, Inc.); 0004413396, 0004413401, 0004418086 (Northern Indiana Public Service Company); 0004414593-0004414596 (Consolidated Edison Company of New York, Inc.); 0004417589, 0004417594, 0004418342 (Wisconsin Electric Power Company); 21 applications filed by Alabama Power Company; 0004418897-0004418908 (Ameren Services); 19 applications filed by Sensus Spectrum, LLC. In addition, some MAS licensees who were issued licenses from Auction No. 42 have met their first buildout requirement and placed their licenses in use. See, e.g., construction notifications filed by Georgia Power Company (File Nos. 0002951489, *et al.*), Paging Systems, Inc. (File Nos. 0002961454, *et al.*), and ConocoPhillips Communications, Inc. (File Nos. 0002971368, *et al.*).

¹⁹ Because other MAS licensees have been able to obtain MAS equipment and meet their deadlines, CloudNine cannot rely on cases in which we have granted an extension of time to construct based on systemic problems that affected all wireless licensees of a particular service. See Waiver Request at 4-5, *citing* Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006); Request of Warren C. Havens for Waiver of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994 (WTB 2004); FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 11072 (WTB 2001).

²⁰ Waiver Request at 1.

²¹ Waiver Request at 1, 5.

²² 47 C.F.R. § 1.946(e)(2).

²³ CloudNine states: "If the envisioned system requires CPE then the high-cost of MAS Customer Premises Equipment ("CPE") is a substantial constraint on MAS build-out and operations." Waiver Request at 4 (emphasis added).

²⁴ Waiver Request at 3-4.

²⁵ A party must file petition for reconsideration within thirty days from the date of public notice of Commission action. 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f). The United States Court of Appeals for the District of Columbia Circuit has consistently held that the Commission cannot extend or waive this statutory thirty-day filing period,

(continued....)

B. Waiver Request

10. The Bureau may grant a waiver of CloudNine's construction deadline if CloudNine demonstrates that either (1) the underlying purpose of the rule 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 would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²⁶

11. CloudNine asserts that there is no widespread economically viable use for MAS spectrum.²⁷ As a result, CloudNine argues that it cannot meet its substantial service deadline because MAS equipment, while technically available, is designed only to serve uses for which there is no demonstrated need on any large-scale basis; this equipment is not in mass production and is cost-prohibitive for CloudNine's markets; and equity investment is unavailable because of the global financial crisis.²⁸ CloudNine has failed to provide sufficient evidence to support these claims and has failed to demonstrate how its situation is unique from the other MAS licensees that have successfully met their substantial service deadlines. In light of CloudNine's failure to explain how its situation is unique, we do not address whether applying the rule would be contrary to the public interest, including CloudNine's argument that requiring CloudNine to build inefficient, ineffective equipment simply to meet the October 13, 2010, deadline would not be in the public interest.²⁹ We find that CloudNine's showing is insufficient to meet the Commission's waiver standard, and thus, we deny CloudNine's request to waive its buildout deadline and extend it by five years.

C. Automatic Termination of Licenses

12. Under Section 1.955(a)(2) of the Commission's rules, authorizations automatically terminate if the licensee fails to meet construction or coverage requirements.³⁰ In light of our conclusion that CloudNine is not entitled to a waiver and extension of its construction deadline, we find that CloudNine's licenses automatically terminated on October 13, 2010, the buildout deadline.

IV. CONCLUSION AND ORDERING CLAUSES

13. CloudNine has failed to justify an extension of time to meet the first buildout deadline for the MAS licenses in question. We therefore deny the Extension Applications and declare that CloudNine's licenses automatically terminated as of October 13, 2010.

14. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Section 1.946 of the Commission's Rules, 47 C.F.R. § 1.946, that the requests for waiver and applications for extensions of

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except where "extraordinary circumstances indicate that justice would thus be served." *Gardner v. FCC*, 530 F.2d 1086, 1091 (D.C. Cir. 1976). See also, *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986).

²⁶ 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.

²⁷ Waiver Request at 4.

²⁸ Waiver Request at 4-5.

²⁹ Waiver Request at 4-5.

³⁰ See 47 C.F.R. § 1.955(a)(2).

time to demonstrate substantial service listed in the Appendix to this *Memorandum Opinion and Order* ARE 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 licenses issued to CloudNine Wireless, L.L.C. and listed in the Appendix to this *Memorandum Opinion and Order* ARE DECLARED TERMINATED as of October 13, 2010.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
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