

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

In re Matter of )
AIRCOM CONSULTANTS, INC. ) File Nos. 0005042963-0005042967
Requests for Extension of Time, or in the )
alternative, Limited Waiver of Substantial Service )
Requirements for Five Local Multipoint )
Distribution Service Licenses )

ORDER ON RECONSIDERATION

Adopted: August 1, 2013

Released: August 2, 2013

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

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a request filed by Aircom Consultants, Inc. ("Aircom") seeking reconsideration of our prior action denying Aircom's request for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service ("LMDS") licenses WPLM235 (Clovis, NM), WPLM236 (Prescott, AZ), WPLM237 (Yuma, AZ), WPLM238 (Roseburg, OR), and WPLM239 (Longview, WA) ("Licenses").

II. BACKGROUND

2. On June 5, 1998, the Licenses were originally issued to AirCom Consultants, Inc., d/b/a InAirNet as a result of Auction No. 17. After some intermediate name changes, on June 15, 2011, the name of the licensee was changed to Aircom Consultants, Inc. At the end of the initial ten-year license period, by June 5, 2008, Aircom was required to submit an acceptable showing to the Commission demonstrating it was providing "substantial service" in each licensed area. Failure by any licensee to meet the substantial service requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.

1 See File No. 0000000128 (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).

2 See File Nos. 0004764479-0004764483 (filed June 14, 2011, granted June 15, 2011).

3 See 47 C.F.R. § 101.1011(a); 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, Second Report and Order, Order on Reconsideration and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, 12658 ¶¶ 261-262 (1997) ("LMDS Second Report and Order").

4 See 47 C.F.R. § 101.1011(a).

3. On June 25, 2007, Aircom filed applications for extension of time to demonstrate substantial service for its LMDS licenses.<sup>5</sup> On April 11, 2008, the Wireless Telecommunications Bureau (“Bureau”) granted the requests for extension of the construction deadlines filed by a large group of LMDS licensees – including Aircom – 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.<sup>6</sup>

4. The Bureau found that these LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.<sup>7</sup> 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.<sup>8</sup> 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 Aircom 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.<sup>9</sup> 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 Aircom and the other LMDS licensees, under the extended buildout deadline set by the Bureau.<sup>10</sup>

5. On January 23, 2012, Aircom filed applications pursuant to Section 1.946(e) of the Commission’s Rules seeking a further five year extension of time until December 1, 2017, to construct its five LMDS licenses.<sup>11</sup> Aircom later revised its request to seek an extension of at least two years.<sup>12</sup> Invoking the Commission’s general waiver authority under Section 1.925 of the Commission’s Rules, Aircom alternatively sought 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, 2014.<sup>13</sup> Aircom

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<sup>5</sup> File Nos. 0003085307-0003085311 (filed June 25, 2007).

<sup>6</sup> 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*).

<sup>7</sup> *LMDS Order*, 23 FCC Rcd at 5905 ¶ 24.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5905 ¶ 25.

<sup>10</sup> *Id.*

<sup>11</sup> See File Nos. 0005042963-0005042967 (filed Jan. 23, 2012) (Extension Applications). With each Extension Application, Aircom filed an exhibit entitled “Construction Deadline Extension Request-Waiver.”

<sup>12</sup> Aircom twice amended its Extension Applications to provide a revised exhibit. The most recent exhibit was filed on August 7, 2012 and is entitled “Revised Waiver Request for Construction Deadline Extension” (Extension and Waiver Request). This *Order on Reconsideration* will focus on the most recent exhibit filed by Aircom.

<sup>13</sup> Extension and Waiver Request at 1.

reported that it launched service in the Yuma market but the service failed.<sup>14</sup> Aircom was attempting to deploy a rural health care broadband network for telemedicine, medical distance learning, and electronic medical record information technology infrastructure into rural communities and tribal lands within its service areas.<sup>15</sup> Although Aircom had spoken to a variety of vendors, it had been unable to find equipment that complied with the Office of the National Coordinator for Health Information Technology's requirements for secure transmission of medical information.<sup>16</sup> Compliance with such requirements is necessary to conform with the privacy provisions of the Health Insurance Portability and Accountability Act (HIPPA).<sup>17</sup> Aircom had also investigated cloud providers but was unable to find a provider that could meet HIPPA requirements.<sup>18</sup> Aircom had met with a variety of tribal councils, medical institutions, universities, communications providers, and state and federal officials in attempting to create a medical team of professionals to provide remote diagnostics, medical training, and medical imaging.<sup>19</sup> Aircom also detailed various expenses it incurred and attempts it made to obtain funding to support its proposed business plan.<sup>20</sup> Aircom asked for more time to develop a "specialized and technologically sophisticated broadband telehealth infrastructure . . ."<sup>21</sup>

6. On November 16, 2012, the Bureau's Broadband Division ("Division") denied Aircom's Extension and Waiver Request and noted that the Licenses automatically terminated as of June 1, 2012.<sup>22</sup> The Division concluded that Aircom had not made the requisite showing that its failure to meet the substantial service deadline was caused by factors beyond its control.<sup>23</sup> The *MO&O* stated that while Aircom had apparently made serious efforts to locate equipment, it had not made any progress in obtaining equipment that would meet its specific business plan.<sup>24</sup> The Division noted that many other licensees did meet the June 1, 2012 substantial service deadline and concluded that Aircom's failure to meet that deadline was a result of its voluntary decision to pursue a specific business plan that it was not able to implement in a timely fashion.<sup>25</sup> The Division also denied Aircom's request for waiver because it was inconsistent with the underlying purpose of the substantial service requirement, *i.e.*, providing "a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public," and because Aircom's failure to construct was the product of its business decisions.<sup>26</sup>

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<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 1-2.

<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See Aircom Consultants, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 14274 (WTB BD 2012) (*MO&O*).

<sup>23</sup> *Id.* at 14278 ¶ 9.

<sup>24</sup> *Id.* at 14278 ¶ 10.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 14278-14279 ¶¶ 12-13.

7. Aircom timely sought reconsideration of the *MO&O* on December 15, 2012.<sup>27</sup> Aircom emphasizes the efforts it has made to develop the Licenses, including unsuccessfully launching service in Yuma in 2007, spending over \$750,000 in funds, applying for state and federal grants, obtaining a graduate degree in healthcare informatics, and meeting with various stakeholders (including rural communities, tribal officials, and state and federal governments).<sup>28</sup> It argues that its extensive efforts show that it would be inequitable to apply the substantial service deadline.<sup>29</sup> Aircom notes the *MO&O*'s discussion of the use of LMDS for wireless backhaul and objects to "a government agency mandating to a private business how to make their business decisions."<sup>30</sup> Finally, Aircom argues that its business plan is "innovative, creative, and visionary" and that Aircom is attempting "to provide dedicated, infrastructure to transmit enhanced health care for underserved rural Americans . . ."<sup>31</sup>

### III. DISCUSSION

8. "It is well established that reconsideration is appropriate 'only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.'"<sup>32</sup> After careful consideration of the Petition, we conclude that Aircom does not meet that standard. We have reviewed Aircom's arguments and conclude that they provide no basis for reconsidering the *MO&O*. We therefore deny the Petition.

9. We believe two points warrant further discussion. First, we do not question Aircom's good faith in its efforts to develop its Licenses. It has held the licenses for 14 years, however, and by its own admission, it has been unable to obtain the equipment it needs to build its proposed network.<sup>33</sup> While it claims to be "confident" that it could develop its network with additional time,<sup>34</sup> it provides no basis for that confidence. As we explained in the *MO&O*, the underlying purpose of the substantial service standard is to provide "a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public."<sup>35</sup> We believe that granting Aircom a further extension on the mere hope that circumstances will change would be inconsistent with the public interest in making sure that service is being provided to the public. Given the amount of time Aircom has had to meet the

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<sup>27</sup> Petition for Reconsideration of the Denial of Aircom Consultants, Inc.'s requests for Extension of Construction Deadline (filed Dec. 15, 2012) ("Petition").

<sup>28</sup> *Id.* at 1-3.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> See Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket No. 08-95, *Order on Reconsideration*, FCC 12-155 (rel. Dec. 19, 2012) at ¶ 2, *citing* General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control, MB Docket No. 03-124, *Order on Reconsideration*, 23 FCC Rcd 3131, 3132 ¶ 4 (2008).

<sup>33</sup> See Petition at 3.

<sup>34</sup> *Id.*

<sup>35</sup> *MO&O*, 27 FCC Rcd at 14278 ¶ 12, *citing* 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).

substantial service deadline and its lack of progress, we see nothing inequitable in denying its Extension and Waiver Request.

10. Second, we reject Aircom's argument that the Commission is attempting to dictate that it provide a particular type of service, such as wireless backhaul. We readily agree with Aircom that there could have been substantial benefits from its proposed wireless broadband network in support of rural telehealth services. Furthermore, Aircom was perfectly free to choose to provide that service, so long as it complied with the applicable service rules. Like all LMDS licensees, no matter what service it provided, Aircom was required to comply with the substantial service deadline. The point of the *MO&O*'s discussion of wireless backhaul was that Aircom's choice of service could not provide the basis for a further extension because it was possible for other LMDS licensees to meet the June 1, 2012 substantial service deadline.

#### IV. CONCLUSION AND ORDERING CLAUSES

11. Aircom has failed to justify reconsideration of our earlier decision to deny its Extension and Waiver Request. We therefore deny the Petition.

12. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration of the Denial of Aircom Consultants, Inc.'s requests for Extension of Construction Deadline filed by Aircom Consultants, Inc. on December 15, 2012 IS DENIED.

13. This action is 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