

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

In re Matter of
GLENWOOD TELEPHONE MEMBERSHIP CORPORATION
Requests for Extension of Time, or in the alternative, Limited Waiver of Substantial Service Requirements for Local Multipoint Distribution Service Stations WPOH457 and WPOH458
File Nos. 0005218725-0005218726

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2013

Released: August 2, 2013

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny Glenwood Telephone Membership Corporation's ("Glenwood") requests for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service ("LMDS") license for Station WPOH457 and WPOH458, in the Grand Island-Kearney, Nebraska and Hastings, Nebraska, Basic Trading Areas (BTA). Because we deny Glenwood's request, the license for Stations WPOH457 and WPOH458 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 for Station WPOH457 and WPOH458 were originally issued to Glenwood on June 17, 1998, as a result of Auction No. 17.¹³

5. Glenwood was originally required to demonstrate substantial service on June 17, 2008, or 10 years after the initial license grant date.¹⁴ On June 15, 2007, Glenwood 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. 0000000071 (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 Glenwood – 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 LMDS licenses could 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 LMDS licensees, under the extended buildout deadline set by the Bureau.²⁰

7. On May 16, 2012, Glenwood filed applications seeking a further extension of time, until December 31, 2012, to construct Stations WPOH457 and WPOH458.²¹ Glenwood states that it has “experienced extreme difficulties locating suitable available equipment.”²² It was told by distributors that equipment should hopefully be available by the end of August.²³ Glenwood claimed it had several projects planned for deploying the spectrum once equipment was available, including a project to educate students at a local college on wireless fundamentals.²⁴ On December 4, 2012, Glenwood amended the Extension Applications to request an extension until July 31, 2013.²⁵ It reiterated that it was having

¹⁵ File Nos. 0003073367-0003073368 (filed June 15, 2007).

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. 0005218725-0005218726 (filed May 16, 2012) (Extension Applications).

²² Extension Applications, First Build-out Waiver.

²³ *Id.*

²⁴ *Id.*

²⁵ Extension Applications, Amendment.

difficulty locating equipment but that equipment had been identified.²⁶ It also repeated that it had several projects planned for development.²⁷

III. DISCUSSION

A. Extension Applications

8. We find that Glenwood has not justified a grant of an extension of time of the construction deadline for its LMDS licenses. And without such extension, Glenwood's LMDS licenses for Station WPOH457 and WPOH458 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission's Rules, as of June 1, 2012.²⁸ We discuss these findings in detail below.

9. Glenwood requests a further extension of time, until July 31, 2013, to demonstrate substantial service.²⁹ As noted above, this is the second extension that Glenwood has requested for constructing Stations WPOH457 and WPOH458. To be eligible for an extension of time to construct, Glenwood must show that its "failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control."³⁰ We conclude that Glenwood has not met this threshold.

10. Glenwood claims that it has been unable to obtain equipment from vendors.³¹ Glenwood does not state, however, when it first attempted to order equipment. Under the Commission's rules, a licensee is presumed to be diligent if it orders equipment in the first ninety days of its license term.³² While we could imagine circumstances under which Glenwood would have acted diligently while ordering equipment at a later time, we lack sufficient information to make such a conclusion. Furthermore, we note that many LMDS licensees did meet the June 1, 2012 deadline and built facilities.³³ Accordingly, Glenwood has failed to show that its failure to obtain equipment was a matter beyond its control, and the Extension Requests must be denied.

B. Waiver Request

11. To be granted a waiver of the June 1, 2012 construction deadline, Glenwood 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

²⁶ *Id.*, LMDS 1st Buildout Waiver Update.

²⁷ *Id.*

²⁸ 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).

²⁹ Extension Application.

³⁰ 47 C.F.R. § 1.946(e)(1).

³¹ Extension Application, Request for Extension.

³² *See* 47 C.F.R. § 1.946(e)(2).

³³ As of May 23, 2013, the Broadband Division had accepted 156 LMDS buildout notifications from at least 26 different licensees. Another 167 showings were pending and undergoing review.

inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.³⁴ As is discussed more fully below, we conclude that Glenwood has failed to make the requisite showing, and we therefore deny its waiver request.

12. 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.”³⁵ While Glenwood claims it was unable to obtain equipment in a timely fashion, many other licensees obtained equipment and built their facilities. Granting Glenwood a further extension under those circumstances would be inconsistent with the underlying purpose of the substantial service requirement.

13. We also conclude that Glenwood has not shown that requiring it to comply with the substantial service requirements is inequitable, unduly burdensome, and contrary to the public interest. As we have previously discussed, Glenwood has failed to show that it acted diligently in attempting to obtain equipment. Other licensees were able to obtain equipment in a timely fashion and built out their licenses.

14. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.³⁶ In light of our decision to deny Glenwood’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, Glenwood’s licenses for Stations WPOH457 and WPOH458 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,³⁷ as of June 1, 2012.

IV. CONCLUSION AND ORDERING CLAUSES

15. Glenwood 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 Applications. Accordingly, Glenwood’s licenses to

³⁴ See 47 C.F.R. § 1.925(b)(3); 47 C.F.R. § 1.3; 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).

³⁵ 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.”); *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.”).

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

³⁷ *Id.*

operate LMDS Stations WPOH457 and WPOH458 automatically terminated, by operation of Commission rule, as of June 1, 2012.

16. 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 applications for extension of time to demonstrate substantial service (File Nos. 0005218725-0005218726) filed by Glenwood Telephone Membership Corporation on May 16, 2012 ARE DENIED.

17. 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 Glenwood Telephone Membership Corporation for Local Multipoint Distribution Service Stations WPOH457 and WPOH458 TERMINATED as of June 1, 2012.

18. 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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