

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

In re Matter of)
)
PROGRESSIVE COMMUNICATIONS, INC.) File No. 0005241577
)
Request for Extension of Time, or in the)
alternative, Limited Waiver of Substantial Service)
Requirements for Local Multipoint Distribution)
Service Station WPLM324)
)

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 Progressive Communications, Inc. ("Progressive") seeking reconsideration of our prior action denying Progressive's request for extension of time to demonstrate compliance with the substantial service requirements for its Local Multipoint Distribution Service ("LMDS") license WPLM324, Anderson, Indiana.

II. BACKGROUND

2. On June 5, 1998, Progressive was issued the license for Station WPLM324 as a result of Auction No. 17. At the end of its initial ten-year license term, by June 5, 2008, Progressive was required to submit an acceptable showing to the Commission demonstrating that 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.

3. On May 1, 2008, Progressive filed an application for an extension of time to demonstrate substantial service for its LMDS license. On June 13, 2008, the Bureau granted Progressive an extension

1 See File No. 0000000131 (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 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").

3 See 47 C.F.R. § 101.1011(a).

4 File No. 0003422762 (filed May 1, 2008).

until June 1, 2012 to construct its LMDS license, resulting in a nearly four-year construction extension.⁵ The application was granted with a comment referring to a 2008 Bureau order where the Bureau granted extensions to other LMDS licensees.⁶

4. In the *LMDS Order*, the Bureau found that LMDS licensees faced factors beyond their control, including difficulties in obtaining viable and affordable equipment, that warranted an extension.⁷ 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.⁸ 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 licensees 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.⁹ 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.¹⁰

5. On May 31, 2012, Progressive filed an application seeking a further seven-month extension of time, until December 31, 2012, to construct Station WPLM324.¹¹ Invoking the Commission's general waiver authority under Section 1.925 of the Commission's Rules, Progressive argued that it made substantial effort to develop its LMDS business, including spending several years pursuing a project contemplating RUS funding which did not become available, partly because of questions about the availability of suitable equipment.¹² Progressive explained that it recently identified and ordered point-to-point equipment that can “probably provide reliable backhaul service” and which was due to arrive in June 2012.¹³ Progressive further explained that although it had not identified a user

⁵ File No. 0003422762 (granted June 13, 2008).

⁶ *Id.*, citing 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*).

⁷ *LMDS Order*, 23 FCC Rcd at 5905 ¶ 24.

⁸ *Id.*

⁹ *Id.* at 5905 ¶ 25.

¹⁰ *Id.*

¹¹ See File No. 0005241577 (filed May 31, 2012) (Extension Application). With the Extension Application, Progressive filed an exhibit entitled “Request for Limited Extension of Substantial Service Deadline” (Extension & Waiver Request).

¹² Extension and Waiver Request at 2.

¹³ *Id.* at 2.

for its services, it was actively seeking potential users, and believed it could be operational within sixty days of entering into an agreement with a potential customer.¹⁴

6. On October 17, 2012, Progressive filed a Supplement to its Extension and Waiver Request.¹⁵ Therein, Progressive stated that it had received the LMDS equipment that would allow it to construct a facility, and would begin construction when it had identified a customer.¹⁶ Progressive also stated that it had approached a number of potential customers, but was unsuccessful in establishing any business relationships, due mainly to a lack of demand and economic considerations.¹⁷ Notwithstanding these unsuccessful attempts, Progressive felt confident that it would identify a customer prior to the end of 2012, and if it did not, it intended to seek a further extension.¹⁸

7. On November 15, 2012, the Bureau's Broadband Division ("Division") denied Progressive's Extension and Waiver Request and found that the license for Station WPLM324 automatically terminated as of June 1, 2012.¹⁹ The Division concluded that Progressive had not made the requisite showing that its failure to meet the substantial service deadline was caused by factors beyond its control.²⁰ The Division noted that while Progressive investigated and eventually acquired equipment, Progressive admitted that it had "no intention of placing such equipment into operation without signing a contract with a potential customer."²¹ It therefore concluded, "the mere act of securing equipment that would 'probably provide reliable backhaul service' without concrete plans or commitment to placing such equipment into service does not justify granting Progressive a further extension."²² The Division also held that Progressive had not justified a waiver of the substantial service deadline because an extension would be inconsistent with the underlying purpose of the substantial service standard, *i.e.*, to provide "a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public."²³ The Division further held that Progressive had not shown that requiring compliance with the substantial service rules was inequitable, unduly burdensome, and contrary to the public interest because its decision not to construct Station WPLM324 was a business decision.²⁴

¹⁴ *Id.* at 3.

¹⁵ Progressive Communications, Inc., Supplement to Request for Extension of Time (filed Oct. 17, 2012) (Supplement).

¹⁶ *Id.* at 1.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Progressive Communications, Inc., *Memorandum Opinion and Order*, 27 FCC Rcd 14193 (WTB BD 2012) (*MO&O*).

²⁰ *Id.* at 14196 ¶ 9.

²¹ *Id.* at 14197 ¶¶ 11-12.

²² *Id.* at 14197 ¶ 12 (footnote omitted).

²³ *Id.* at 14198-14199 ¶ 15, *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).

²⁴ *MO&O*, 27 FCC Rcd at 14199 ¶ 16.

8. Progressive timely sought reconsideration of the *MO&O* on December 11, 2012.²⁵ Progressive now reports that it assumed that its Extension and Waiver Request would be granted, took delivery of equipment, and constructed a link for the City of Anderson and Madison County, Indiana, between the County Administration Building and the County Jail.²⁶ Progressive argues that the test for granting an extension should be whether an applicant ordered equipment prior to the June 1, 2012 deadline.²⁷ It claims that it is entitled to a waiver because it could not have acted any sooner because it could not identify a user until equipment was available.²⁸ Progressive also contends that a waiver is warranted so that it can continue to serve the public safety needs of the City of Anderson and Madison County.²⁹ Progressive also claims it has a record of timely constructing facilities and that this license is the only instance where it has requested an extension.³⁰ Finally, Progressive claims that it is similarly situated to 2 Lightspeed LP (2 Lightspeed) and TWG LMDS, LLC (TWG), which did receive extensions of time to construct their LMDS stations.³¹ The City of Anderson and Madison County, Indiana support the Petition.³²

III. DISCUSSION

9. Progressive's Petition raises two main issues. First, should we now consider the fact that Progressive subsequently constructed a link for the City of Anderson and Madison County, Indiana? Second, did the Division error in analyzing the showing Progressive had made at the time it acted on the Extension and Waiver Request? We conclude that it would be inappropriate and inconsistent with precedent to consider Progressive's after-the-fact construction. We also conclude that the *MO&O* properly analyzed the Extension and Waiver Request. We therefore deny the Petition.

A. Subsequent Construction

10. Section 1.106(c) of the Commission's Rules provides that we will accept a petition for reconsideration relying on facts not previously presented to the Commission only in one of three scenarios: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters;³³ (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity;³⁴ or (3) the designated authority determines that consideration of the facts relied on is required in the public interest.³⁵ Our analysis must

²⁵ Petition for Reconsideration and Reinstatement, Progressive Communications, Inc. (filed Dec. 11, 2012) ("Petition").

²⁶ *Id.* at 4.

²⁷ *Id.* at 5.

²⁸ *Id.* at 6.

²⁹ *Id.* at 7.

³⁰ *Id.*

³¹ *Id.* at 7-8. See File Nos. 0005222510-0005222513 (filed May 17, 2012, granted July 23, 2012) (2 Lightspeed); File Nos. 0005230151-0005230153 (filed May 23, 2012, granted July 23, 2012) (TWG).

³² *Id.* at Exhibit 2.

³³ 47 C.F.R. § 1.106(c)(1)(i).

³⁴ 47 C.F.R. § 1.106(c)(1)(ii).

³⁵ 47 C.F.R. § 1.106(c)(2).

focus on whether reconsideration of the prior order is appropriate. While Progressive's Petition does not state the specific date on which the link was constructed,³⁶ it appears that the link was constructed while the Extension and Waiver Request was still pending.³⁷ Progressive knew that it could supplement its Extension and Waiver Request to report the construction because it had previously filed a supplement. Accordingly, since Progressive had the opportunity to present the fact of construction prior to release of the *MO&O*, Section 1.106(c)(1)(i) of the Commission's Rules, which allows reconsideration where facts or circumstances have changed since the last opportunity to present them, is not applicable here. Further, since Progressive obviously knew that the link was being constructed, it cannot rely on reconsideration pursuant to Section 1.106(c)(1)(ii), which allows reconsideration based upon previously unknown facts.

11. The remaining issue is whether it is in the public interest to consider Progressive's after-the-deadline construction. We conclude it is not. The Bureau recently held that after-the-fact construction (or a promise to construct after-the-fact) is insufficient to support a waiver of a construction deadline because considering such construction would make enforcement of the underlying construction requirement "a meaningless or arbitrary exercise."³⁸ We believe that precedent is controlling here.

12. Finally, while we acknowledge the City of Anderson's and Madison County's letter of support, it does not alter our analysis. The City of Anderson and Madison County knew or should have known when the link was being built that there was no guarantee that Progressive would receive an extension of the buildout deadline. Furthermore, the parties can utilize point-to-point spectrum to continue operating the link.

B. The *MO&O*'s Analysis

13. Progressive also argues that it should have received an extension even if its subsequent construction is not considered. Specifically, Progressive argues that its ordering of equipment, the delays it encountered in obtaining equipment, and its track record of building other Commission authorizations in a timely manner justify an extension. While these factors are often taken into account by the Bureau when granting construction extension requests, Progressive had also made it clear that even once it received equipment and the construction deadline was extended, it would not construct facilities until it had a customer. This lack of commitment to building out its license was a key factor in the Division's decision to deny Progressive's Extension and Waiver Request. Accordingly, we conclude that in the instant case, the favorable factors cited by Progressive were not sufficiently compelling to overcome Progressive's lack of commitment to building out its license by the newly requested deadline without condition.

14. Progressive claims it is similarly situated to two other LMDS licensees that were granted construction extensions, 2 Lightspeed and TWG. However, 2 Lightspeed is distinguishable from the case at bar because in that case, the majority of the licenses in question had been built out prior to 2 Lightspeed's extension request, which was submitted due to a medical emergency.³⁹ Likewise, TWG's case is distinguishable from the instant case because TWG requested a short, three-month extension after

³⁶ Progressive states that the link was constructed after it filed its Supplement. *See* Petition at 4 n.4.

³⁷ *See* Petition at 4 ("While Progressive's request was pending, Progressive continued to move forward on the assumption that its extension request would be granted.")

³⁸ *See* FiberTower Spectrum Holdings LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 13562, 13575 ¶ 34 (WTB 2012), *affirmed* 28 FCC Rcd 6822 (2013).

³⁹ *See* File Nos. 0005222510-0005222513, Request for Limited Extension, 2 Lightspeed LP (filed May 17, 2012) at 7-8.

it had taken substantial steps towards developing a network, and represented that it would be able to “perfect the development of its network” and meet its performance obligations in the requested time period.⁴⁰ In contrast, Progressive made no such representations, and in fact, would not commit to building its network without a customer.

15. We also reject Progressive’s attempts to distinguish itself from “other LMDS licensees that did nothing prior to the deadline and asked for long additional extensions of time without making any promises for the future (except to probably file more extension requests later on).”⁴¹ While Progressive did order equipment prior to the substantial service deadline, it nonetheless would not make any unconditional buildout commitments by the requested extension date. Accordingly, Progressive has not sufficiently distinguished itself from other licensees that were denied extension requests to construct their LMDS licenses.

IV. CONCLUSION AND ORDERING CLAUSES

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

17. 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 and Reinstatement filed by Progressive Communications, Inc. on December 11, 2012 IS DENIED.

18. 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
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⁴⁰ See File Nos. 0005230151-0005230153, Waiver Request at 5. TWG’s licenses were later cancelled after it requested a third extension claiming that it was unable to secure equipment. See TWG LMDS, LLC, *Memorandum Opinion and Order*, 27 FCC Rcd 15023 (WTB BD 2012).

⁴¹ Petition at 7-8.