

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

In re Matter of
THE PONDEROSA TELEPHONE CO.
Notification of Construction and Demonstration of
Substantial Service for Local Multipoint
Distribution Service Station WPLM311
File No. 0005263568

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2014

Released: August 4, 2014

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we deny the notification of construction and demonstration of substantial service filed by The Ponderosa Telephone Co. ("Ponderosa") for its Local Multipoint Distribution Service ("LMDS") license for Station WPLM311, in the Bakersfield, California Basic Trading Area (BTA). Because we deny Ponderosa's notification, the license for Station WPLM311 automatically terminated, by operation of Commission's rules, as of June 1, 2012.

II. BACKGROUND

2. In 1997, the Commission allocated 1,300 megahertz of LMDS spectrum in each basic trading area across the United States. Specifically, the Commission allocated two LMDS licenses per BTA - an "A Block" and a "B Block" in each. The A Block license is comprised of 1,150 megahertz of

1 See File No. 0005263568 (filed June 14, 2012, amended Feb. 27, 2013) ("Application").

2 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.

3 See Second LMDS Report and Order, 12 FCC Rcd at 12556 ¶ 13.

total bandwidth, and the B Block license is comprised of 150 megahertz of total bandwidth.<sup>4</sup> 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).<sup>5</sup> The B Block consists of the sub bands 31.00-31.075 (the B1 Band) and 31.225-31.30 GHz (the B2 Band).<sup>6</sup> 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,<sup>7</sup> subject to a ten-year term from the initial license grant date.<sup>8</sup> 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.<sup>9</sup> Failure by any licensee to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.<sup>10</sup>

4. The final LMDS band allocation was adopted by the Commission on March 11, 1997.<sup>11</sup> Since allocating the LMDS spectrum, the Commission has thus far held two LMDS auctions: Auction 17 and Auction 23.<sup>12</sup> Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998.<sup>13</sup> The license for Station WPLM311 was originally issued to Ponderosa on June 5, 1998, as a result of Auction No. 17.<sup>14</sup>

5. Ponderosa was originally required to demonstrate the provision of substantial service for LMDS Station WPLM311 on June 5, 2008, or 10 years after the initial license grant date.<sup>15</sup> On November 9, 2007, Ponderosa filed an application for an extension of time to demonstrate substantial

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<sup>4</sup> See *id.*

<sup>5</sup> See 47 C.F.R. § 101.1005.

<sup>6</sup> See *id.*

<sup>7</sup> See 47 C.F.R. § 101.1013(b).

<sup>8</sup> See *Second LMDS Report and Order*, 12 FCC Rcd at 12656 ¶ 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.

<sup>9</sup> See 47 C.F.R. § 101.1011(a); see also *Second LMDS Report and Order*, 12 FCC Rcd at 12658 ¶¶ 261-262.

<sup>10</sup> See 47 C.F.R. § 101.1011(a).

<sup>11</sup> 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).

<sup>12</sup> 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*).

<sup>13</sup> See *FCC Announces Spectrum Auction Schedule for 1998, Public Notice*, 12 FCC Rcd 19726 (1997); *Auction 17 Closing PN*, 13 FCC Rcd at 18217.

<sup>14</sup> See File No. 0000000099 (granted June 5, 1998); see also *FCC Announces the Conditional Grant of 199 Local Multipoint Distribution Service Licenses, Public Notice*, 13 FCC Rcd 16730 (WTB 1998).

<sup>15</sup> See *Second LMDS Report and Order*, 12 FCC Rcd at 12657 ¶ 259.

service for LMDS Station WPLM311.<sup>16</sup> 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 Ponderosa – 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>17</sup>

6. On June 14, 2012, Ponderosa filed a notification of construction with an attached showing to demonstrate substantial service for LMDS Station WPLM311.<sup>18</sup> Ponderosa states that it initiated operation of its LMDS system using eight Ceragon radios in order to provide high-capacity fixed point-to-point service (*i.e.*, wireless DS3 backhaul service for use in carrying remote Internet service, including Internet data, e-mail communications, Internet video and web browsing services) from 2500 East Belle Terrace, Bakersfield, California to 620 Enterprise Way, Bakersfield, California.<sup>19</sup> Ponderosa states that, by implementing service over the above-described links, it has satisfied the safe-harbor requirement for point-to-point operations by LMDS licensees.<sup>20</sup> Specifically, Ponderosa contends that it has constructed and operates four permanent LMDS fixed wireless links in the Bakersfield, California BTA and that the four links were installed at a customer’s premises in order to provide the needed bandwidth for extending high-speed data and video services.<sup>21</sup> Ponderosa argues that it has constructed one link for each 250,000 of population that are located within the licensed service area because this licensed service area consists of one county with an aggregate population of 839,631 (*i.e.*, less than one million).<sup>22</sup> Ponderosa therefore contends that it has satisfied its construction obligation with respect to LMDS Station WPLM311 because it “has satisfied the four link per million pops safe-harbor (which requires the construction of four fixed links since the aggregate population for the Bakersfield, California BTA is less than 1,000,000).”<sup>23</sup>

7. On January 3, 2013, the Bureau returned the application to afford Ponderosa with an opportunity to provide detailed information that demonstrates it has met the substantial service requirements for LMDS stations as established by the Commission.<sup>24</sup> Specifically, the *Return Letter* explains that “[t]he attached construction requirement document shows one path between 2500 E. Belle Terrace, Bakersfield, California and 620 Enterprise Way, Bakersfield, California. Unfortunately this only constitutes one path. This is not consistent with the four links per one million people in the licensed service area requirement. . . .”<sup>25</sup>

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<sup>16</sup> File No. 0003227469 (filed Nov. 9, 2007).

<sup>17</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).

<sup>18</sup> Application.

<sup>19</sup> Application, Exhibit 1 (“Substantial Service Showing”). The radios transmit and receive on slightly different frequencies using the same RadioWaves antennas installed at each location. Substantial Service Showing at 2-4.

<sup>20</sup> Substantial Service Showing at 4.

<sup>21</sup> Substantial Service Showing at 4. The Ponderosa explains that this initial system configuration provides the customer with a 1.6 Gbps Ethernet path. *Id.*

<sup>22</sup> Substantial Service Showing at 4.

<sup>23</sup> Substantial Service Showing at 4.

<sup>24</sup> See Notice of Return, Ref. No. 551904 (dated Jan. 3, 2013) (*Return Letter*) at 1.

<sup>25</sup> *Return Letter* at 2.

8. On February 27, 2013, Ponderosa amended its application and provided an amended substantial service showing for LMDS Station WPLM311.<sup>26</sup> Ponderosa submits that the configuration of its system at Bakersfield, California meets the requirement of the four-links-per-one-million population safe-harbor established by the Commission.<sup>27</sup> Ponderosa contends the Commission contemplated that “Links” rather than “Paths” would be the determining factor for establishing if a licensee’s construction satisfies the safe-harbor.<sup>28</sup> Ponderosa notes that a single path could have multiple links, including for example those for protection.<sup>29</sup> According to Ponderosa, Section 101.3 of the Commission’s Rules is clear that a “Microwave Link” is either a one-way “circuit” that may or may not be paired with another “circuit” while a microwave path is the distance between two points; namely, the transmit and the receive antennas.<sup>30</sup> Ponderosa’s believes that, “[i]n returning Ponderosa’s build-out notification, the Commission appears to have confused the terms “Microwave Link” and “Path” and is erroneously using the two terms interchangeably when in fact these terms have distinctly separate definitions in the Commission’s Rules.”<sup>31</sup> Ponderosa contends that the installation of four circuits along the same path meets the safe-harbor for an LMDS licensee that seeks to demonstrate substantial service by offering fixed, point-to-point services through the construction of four permanent links per one million people.<sup>32</sup> Because the population of Kern County is 839,631, Ponderosa insists it has met the safe harbor for construction.<sup>33</sup>

9. Ponderosa further explains that it initiated operation of its LMDS system using eight Ceragon radios, which comprise four microwave links, in order to provide high-capacity fixed point-to-point service.<sup>34</sup> Specifically, Ponderosa is providing service to a commercial property with multiple tenants and explains that the system is designed so that as additional tenant “finish-outs” are completed, services can easily be extended to those new tenants.<sup>35</sup> Ponderosa notes that each link has been configured with a maximum data rate of 400 Mbps with an aggregated 1.6 Gbps Ethernet path to meet the landlord’s requirements and this will allow wireless DS3 backhaul service for use in carrying remote Internet service, including: Internet data, e-mail communications and data; high definition closed circuit video surveillance; security alarm access data; point-to-point data on a local area network (LAN) and high-speed Internet to be hauled along the path.<sup>36</sup> Ponderosa argues that, by having a common path for each of these four links, it is able (1) to balance the traffic load through the dynamic allocation of bandwidth across all of these different services; and (2) to establish a protection link so that it can achieve a level of redundancy that will allow for equipment failures without a loss of critical communications services to its customer – thereby ensuring reliable broadband services to its customer.<sup>37</sup>

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<sup>26</sup> See File No. 0005263568, Exhibit 1 (Amended) (“Amended Substantial Service Showing”) (filed Feb. 27, 2013).

<sup>27</sup> Amended Substantial Service Showing at 1.

<sup>28</sup> Amended Substantial Service Showing at 2.

<sup>29</sup> Amended Substantial Service Showing at 2.

<sup>30</sup> Amended Substantial Service Showing at 2.

<sup>31</sup> Amended Substantial Service Showing at 2.

<sup>32</sup> Amended Substantial Service Showing at 2.

<sup>33</sup> Amended Substantial Service Showing at 2.

<sup>34</sup> Amended Substantial Service Showing at 2.

<sup>35</sup> Amended Substantial Service Showing at 2.

<sup>36</sup> Amended Substantial Service Showing at 2-3.

<sup>37</sup> Amended Substantial Service Showing at 3.

### III. DISCUSSION

10. The Commission has defined substantial service as “service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.”<sup>38</sup> The Commission elaborated on this standard in the form of examples of what might constitute substantial service for LMDS licensees by providing safe harbors.<sup>39</sup> Specifically, the Commission explained that “for an LMDS licensee that chooses to offer point-to-multipoint services, a demonstration of coverage to 20 percent of the population of its licensed service area at the 10-year mark would constitute substantial service. In the alternative, an LMDS licensee that chooses to offer fixed, point-to-point services, the construction of four permanent links per one million people in its licensed service area at the 10-year renewal mark would constitute substantial service.”<sup>40</sup> The substantial service requirement can be met in other ways, and the Commission explained that it will review licensees’ showings on a case-by-case basis.<sup>41</sup> For the reasons discussed below, we find that Ponderosa has failed to demonstrate the provision of substantial service for LMDS Station WPLM311.

11. Ponderosa purports to have met the Commission’s fixed, point-to-point safe-harbor by deploying an antenna at 2500 E. Belle Terrace, Bakersfield, California and an antenna at 620 Enterprise Way, Bakersfield, California and installing four Ceragon radios at each site to transmit and receive on slightly different frequencies, thereby, according to Ponderosa constructing four links, including one of which was established as a backup or protection link.<sup>42</sup> Ponderosa claims that, in doing so, it has constructed one link for each 250,000 of population that are located within the licensed service area because this licensed service area consists of one county with an aggregate population of 839,631 and therefore has satisfied the Commission’s safe-harbor for constructing four fixed, point-to-point “links” per one million people in the licensed service area.<sup>43</sup>

12. We disagree. Ponderosa provides no support for the proposition that a licensee can claim separate credit for multiple carriers it operates between the same locations under the same license. The construction of fixed, point-to-point services along only one path in the licensed service area fails to meet Commission’s safe-harbor of four links per one million people because the licensed service area consists of one county with an aggregate population of 839,631 and the licensee was therefore required to construct four discrete fixed, point-to-point services to fall within the applicable safe harbor. Accordingly, we find that Ponderosa has failed to demonstrate substantial service for LMDS Station WPLM311.

13. Ponderosa’s reliance on the definition of “microwave link” in Section 101.3 of the Commission’s rules<sup>44</sup> is misplaced.<sup>45</sup> Initially, we note that the Commission did not use the term

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<sup>38</sup> *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶ 269.

<sup>39</sup> *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶¶ 269-270.

<sup>40</sup> *Second LMDS Report and Order*, 12 FCC Rcd at 12660 ¶ 270 (internal citations omitted). The Commission further noted that it may consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee’s operations serve niche markets or focus on serving populations outside of areas served by other licensees. *Id.*

<sup>41</sup> *Second LMDS Report and Order*, 12 FCC Rcd at 12660-12661 ¶ 270.

<sup>42</sup> Amended Substantial Service Showing at 2-3.

<sup>43</sup> Amended Substantial Service Showing at 2, 6.

<sup>44</sup> See 47 C.F.R. § 101.3.

“microwave link” when describing the LMDS fixed service safe harbor. More importantly, using that definition to allow a licensee to claim credit for multiple carriers between the same communication points would be fundamentally inconsistent with the purpose of the LMDS construction requirements, *i.e.*, to “promote efficient use of the spectrum, encourage the provision of service to rural, remote, and insular areas, and prevent the warehousing of spectrum.”<sup>46</sup> Under Ponderosa’s theory, an LMDS licensee could subdivide the spectrum it is using between two points into a large number of arbitrarily smaller channels and claim credit for each as a separate “link” towards meeting a safe harbor. Presumably, that licensee would be under no obligation to build anywhere else in its service area. On the other hand, if a licensee aggregated the same spectrum into a single larger channel because of customer demand or a desire to use the spectrum more efficiently, the licensee could only count that operation as a single link. Ponderosa provides no precedent or valid policy reason to support such an application of the substantial service standard for LMDS licensees. We find that applying such an interpretation of “link” to the Commission’s substantial service requirement for LMDS licensees would undermine the Commission’s intent in adopting construction requirements.

14. Accordingly, we find that Ponderosa has failed to demonstrate compliance with the LMDS point-to-point safe harbor. Ponderosa also fails to provide any other information concerning its service that would allow us to find substantial service on a case-by-case basis. Ponderosa has not sought a waiver or further extension of time to demonstrate substantial service for WPLM311 beyond the aforementioned July 31, 2012 deadline. Authorizations for LMDS licenses automatically terminate if the licensee fails to meet construction or coverage requirements.<sup>47</sup> In light of our decision to reject Ponderosa’s demonstration of substantial service, Ponderosa’s license for Station WPLM311 automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules,<sup>48</sup> as of June 1, 2012.

#### IV. CONCLUSION AND ORDERING CLAUSES

15. Ponderosa has failed to demonstrate substantial service for LMDS Station WPLM311. We therefore deny the construction notification. Accordingly, Ponderosa’s license to operate LMDS Stations WPLM311 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 1.946 of the Commission’s Rules, 47 C.F.R. § 1.946, that the notification of construction and demonstration of substantial service (File No. 0005263568) filed by The Ponderosa Telephone Co. on February 27, 2013 IS 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

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<sup>45</sup> We note that Ponderosa does not properly apply the definition of “microwave link” to its situation. That rule defines a “microwave link” as “a simplex communications circuit between two points utilizing a single frequency/polarization assignment and stating that a duplex communications circuit would require two links, one link in each direction.” *See* 47 C.F.R. § 101.3. Ponderosa installed four duplex communications circuits (*i.e.*, each Ceragon radio utilizes a single frequency/polarization assignment to transmit and a single frequency/polarization assignment to receive). Therefore, applying its own logic, Ponderosa should have claimed to have demonstrated the construction of eight “links,” not four.

<sup>46</sup> *Second LMDS Report and Order*, 12 FCC Rcd at 12659 ¶ 266.

<sup>47</sup> *See* 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

<sup>48</sup> *Id.*

Commission's Rules, 47 C.F.R. § 1.955(a)(2), that the Universal Licensing System SHALL BE UPDATED to reflect that the license issued to The Ponderosa Telephone Co. for Local Multipoint Distribution Service Stations WPLM311 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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