

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

In the Matter of Applications of)
NEXTLINK WIRELESS, LLC) File Nos. 0005333352, 0005333399 and
Notifications of Completion of Construction for 39) 0005333415
GHz Common Carrier Microwave Licenses)
WPQT939, WPQT944, and WPQT947)

MEMORANDUM OPINION AND ORDER

Adopted: January 15, 2014

Released: January 16, 2014

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

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we find that Nextlink Wireless, LLC ("Nextlink") has failed to demonstrate substantial service for its 39 GHz Common Carrier Microwave Station WPQT947 but has demonstrated substantial service for its 39 GHz Common Carrier Microwave Stations WPQT939 and WPQT944. Based on this determination, the license for Station WPQT947 automatically terminated, by operation of Commission rule, as of July 31, 2012.

II. BACKGROUND

2. Licenses in the 38.6-40.0 GHz band ("39 GHz band") are subject to Part 101 of the Commission's Rules, which generally governs terrestrial microwave operations. Originally, channels in the 39 GHz service were licensed on a licensee-defined Rectangular Service Area ("RSA") basis, but the Commission later revised its rules to provide for Economic Area ("EA") licenses. The Commission auctioned 39 GHz overlay licenses on an EA basis in 2000. Licenses in the 39 GHz band are licensed for ten-year terms and licensees must demonstrate "substantial service" as part of their applications for license renewal. In establishing this substantial service standard, the Commission intended to "ensur[e] that service is being provided to the public," but wanted to provide licensees "a significant degree of

1 47 C.F.R. Part 101.

2 Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40 GHz Bands, Report and Order and Second Notice of Proposed Rulemaking, ET Docket No. 95-183, 12 FCC Rcd 18600 (1997) (39 GHz R&O).

3 See 39 GHz Band Auction Closes, Public Notice, 15 FCC Rcd 13648 (WTB 2000).

4 See 47 C.F.R. §§ 101.17, 101.67. See also, 39 GHz R&O, 12 FCC Rcd at 18626 ¶ 49.

5 39 GHz R&O, 12 FCC Rcd at 18624 ¶ 46.

flexibility in meeting their performance requirement.”⁶ In an effort to give licensees this flexibility, the Commission rejected defining specific build-out benchmarks as “unduly restrictive and burdensome.”⁷ The Commission did provide, however, a safe harbor example of a substantial service showing as “four links per million population within a service area.”⁸

3. Nextlink is the licensee of three 39 GHz common carrier microwave licenses for Economic Area 161, San Diego, CA (“San Diego EA”) whose call signs are WPQT939, WPQT944 and WPQT947 (“the Licenses”). Nextlink was originally required to renew those Licenses and demonstrate substantial service by stations deployed under their authority by October 18, 2010, the expiration date of the Licenses.⁹ On July 27, 2010, the Wireless Telecommunications Bureau (“Bureau” or “WTB”) granted Nextlink extensions until June 1, 2012 to satisfy the substantial service requirements for the Licenses.¹⁰ In 2010, the Bureau granted ten-year renewals of the Licenses until October 18, 2020, on condition that Nextlink demonstrate substantial service by the aforementioned June 1, 2012, deadline.¹¹ On May 9, 2012, the Bureau granted a further extension of the substantial service deadline for the Licenses until July 31, 2012.¹² In accordance with Section 101.17 of the Commission’s Rules, Nextlink submitted substantial service showings for the Licenses on July 31, 2012.¹³ It amended each of the Notifications on August 13, 2013 to provide a supplement (“Supplement”) and on August 26, 2013 to provide additional information (“Amended Supplement”).¹⁴

4. Nextlink says that it operates a 39 GHz point-to-multipoint station in San Diego (“the Hub”) that covers an estimated population of 630,895, or 20.4 percent of the total BEA population of 3,095,313,

⁶ *Id.* at 18623 ¶ 42.

⁷ *Id.* at 18623-18624 ¶ 43.

⁸ *Id.* at 18624-18625 ¶ 46. We note that, although the Commission did not use the specific term of “safe harbor” in the 39 GHz band context, we believe the Commission intended for this example to serve, in fact, as a “safe harbor.” This determination is consistent with similar examples the Commission has provided in other services. *See* Amendments to Parts 1, 2, 87, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934, 16951-16952 ¶ 38 (2000); Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-1538 ¶ 70 (2000); Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19870 ¶ 34 (1998); Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 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, 12660-12661 ¶ 270 (1997); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10843-10844 ¶ 113 (1997).

⁹ *See* 47 C.F.R. § 101.17.

¹⁰ *See* File Nos. 0004259579, 0004259584, and 0004259587 (filed May 25, 2010, granted July 27, 2010).

¹¹ *See* File Nos. 0004422189, 0004422194, and 0004422197 (filed Oct. 14, 2010, granted Dec. 17, 2010).

¹² *See* File Nos. 0005188145, 00051881150 and 0005188153 (filed May 1, 2012, granted May 9, 2012).

¹³ *See* File Nos. 0005333352, 0005333399, 0005333415 (filed July 31, 2012) (“Notifications”).

¹⁴ *See* Notifications (amended Aug. 13, 2013 and Aug. 26, 2013).

using frequencies assigned to it under all three of the Licenses.¹⁵ Nextlink notes that for other wireless services with geographic area licenses the Commission has established 20 percent population coverage as a safe harbor for demonstrating substantial service,¹⁶ and that the Bureau has applied that benchmark in accepting substantial service demonstrations for 39 GHz licenses.¹⁷ In addition, Nextlink says that it provides 16 point-to-point links to the San Diego Port Authority (“SDPA”) on channels assigned to it under call signs WPQT939 and WPQT944.¹⁸ It does not list any point-to-point links on the channels assigned to it under call sign WPQT947.¹⁹

5. Nextlink states that it designed the Hub to provide wireless Ethernet and private line access as well as high-speed, wide-area networking to customers throughout the portion of the San Diego BEA that it covers, but that the actual routes in the network vary depending on customer demand and line-of-sight constraints.²⁰ It further states that, together with its operating affiliate, XO Communications, LLC (“XO”), Nextlink has deployed more than 750 links throughout its licensed geographic areas in the 39 GHz and Local Multipoint Distribution Service (“LMDS”) bands, and that it continues to deploy additional links throughout those service areas.²¹ Nextlink further states that its wireless microwave services are marketed through a 900-person direct sales force and a well-developed network of agents.²² It says that the affiliated companies have developed a wide range of tools, services and processes to install and monitor Nextlink’s wireless network, which are managed by a dedicated staff of radio frequency engineers, material specialists and management personnel.²³

III. DISCUSSION

6. To demonstrate substantial service, Nextlink must show that it meets the Commission’s definition of substantial service or that it meets one of the safe harbors applicable to 39 GHz licenses. Nextlink must demonstrate substantial service “for each channel for which [it holds] a license . . .”²⁴ The same rule requires licensees to describe their “current service” in terms of geographic coverage and

¹⁵ Notifications, Substantial Service Showing, (“Substantial Service Showing”), at 2.

¹⁶ Substantial Service Showing at 1-2 and n.3.

¹⁷ Substantial Service Showing at 2 and n. 4, *citing* Substantial Service Notification of IDT Spectrum, LLC, ULS Application File No. 0004338108, accepted Aug. 23, 2010, with note: “The acceptance of this application is based on a demonstration of point-to-multipoint service to greater than 20% of the population within the service area, based on 99.9% signal availability.”

¹⁸ *See* Amended Supplement at 2-3. Nextlink provides 12 of the point-to-point links on channels assigned to it under call sign WPQT939 (Channel B) and four of the point-to-point links on channels assigned to it under call sign WPQT944 (Channel F), but for each of those links the radio equipment involved is capable of operating on either set of channels. *Id.*

¹⁹ *See* Amended Supplement at 2-3. WPQT947 is authorized to operate on channel N.

²⁰ Substantial Service Showing at 1.

²¹ Substantial Service Showing at 1.

²² Substantial Service Showing at 1.

²³ Substantial Service Showing at 1.

²⁴ 47 C.F.R. § 101.17(a).

population served.²⁵ We find that Nextlink has demonstrated substantial service for WPQT939 and WPQT944 but has failed to demonstrate substantial service for WPQT947, and that the latter license therefore automatically terminated. Under the first two Licenses, Nextlink is providing a combination of services – point-to-multipoint service from the Hub and point-to-point services along other paths. By contrast, Nextlink uses the third license only to provide point-to-multipoint coverage to a small fraction of the population in the San Diego BEA. For the reasons set out below, we find that the point-to-multipoint coverage that Nextlink provides from the Hub does not qualify as substantial service by itself, but that the combination of point-to-point and point-to-multipoint services that Nextlink provides under two of the Licenses do meet the threshold.

7. Nextlink correctly observes that for geographic area licenses in certain frequency bands the Commission has established 20 percent population coverage as a safe harbor for demonstrating substantial service,²⁶ and that the Bureau has applied that benchmark in accepting substantial service demonstrations for 39 GHz licenses.²⁷ While Nextlink claims that the Hub’s coverage area exceeds 20 percent of the San Diego BEA’s population,²⁸ staff analysis indicates that the hub provides line-of-sight coverage to only about 6 percent of the BEA population.²⁹ In response to staff inquiries, Nextlink counters that line-of-sight issues from the hub are minimal but that, in the event a customer is unable to receive service from the hub, Nextlink can address the issue by transmitting the 39 GHz signal to a tower or other facility near the customer location and then relaying the signal to the customer.³⁰

8. To whatever extent Nextlink might be prepared to install repeaters or beam-benders for potential new customers who lack line-of-sight access to the hub, the fact remains that it has not yet installed them. The Commission’s 39 GHz rules clearly define substantial service as service as of the time of license renewal, not at a later, indeterminate time when the licensee might or might not decide to provide that service. Section 101.17(a) of the Commission’s Rules states, “All 38.6-40.0 GHz band

²⁵ 47 C.F.R. § 101.17(a)(1), (2).

²⁶ Substantial Service Showing at 1-2 and n.3, *citing* Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 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; Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission’s Common Carrier Point-to-Point Microwave Radio Service Rules; Suite 12 Group Petition for Pioneer Preference, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12660 ¶ 270 (1997); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1079 ¶ 151 (2002); Amendment of the Commission’s Rules With Regard to the 3650-3700 MHz Government Transfer Band; The 4.9 GHz Band Transferred from Federal Government Use, *First Report and Order and Second Notice of Proposed Rulemaking*, 15 FCC Rcd 20488, 20523-20524 ¶ 83 (2000).

²⁷ Substantial Service Showing at 2 and n.4, *citing* Substantial Service Notification of IDT Spectrum, LLC, File No. 0004338108, accepted Aug. 23, 2010, with note: “The acceptance of this application is based on a demonstration of point-to-multipoint service to greater than 20% of the population within the service area, based on 99.9% signal availability.”

²⁸ Substantial Service Showing at 2.

²⁹ The staff used the information provided by Nextlink in its supplement regarding the ground elevation and antenna height of the hub station to calculate line of sight from the hub station using 3 second terrain data and used the line of sight coverage overlaid on US census block data to estimate the population covered.

³⁰ Supplement at 1.

licensees must demonstrate substantial service at the time of license renewal.”³¹ By contrast, Nextlink is asking us to accept the same line of argument that the Commission considered and rejected in its recent review of an application by FiberTower Spectrum Holdings, LLC: that preparation to provide substantial service is functionally equivalent to substantial service even if the service is not yet being provided.³² While FiberTower’s argument could have some validity in areas where it had some level of service, staff analysis shows that Nextlink does not have service in much of the area it claims because of terrain blockage. Here, Nextlink attempts to characterize connections that it might easily provide in the future as substantial service during the license period, even though the company is not yet providing that service. That, however, does not meet the Commission’s clearly stated and restated position that its substantial service requirements refer to actual service at the substantial service deadline. For that reason, we conclude that Nextlink has fallen short of the 20 percent safe harbor threshold for point-to-multipoint service under each of the three Licenses because its hub provides line-of-sight coverage to only 6 percent of the San Diego BEA’s population.

9. As stated above, Nextlink also provides 16 point-to-point links in the San Diego BEA on the 39 GHz channels licensed to it under WPQT939 and WPQT944.³³ The company says that it provides 12 of those links on channels assigned to it under WPQT939 and four of the links on channels assigned under Station WPQT944.³⁴ In neither case does the number of point-to-point links reach the four-links-per-million population safe harbor level that the Commission described in the *39 GHz R&O*.³⁵ Thus, none of the Licenses meets the Commission’s safe harbor thresholds either for percentage of BEA population covered or number of links per million population.

10. As the Commission emphasized in the *39 GHz R&O*, however, safe harbors do not represent absolute requirements and licensees are accorded a significant degree of flexibility in meeting their performance requirements.³⁶ A more flexible evaluation is particularly appropriate where, as in this case, the licensee is providing a combination of point-to-point and point-to-multipoint services, neither of which reaches a safe harbor threshold on its own.

11. In addition to its point-to-multipoint service to six percent of the population in the San Diego EA, Nextlink’s provision of four or 12 links in each market is significant. With respect to Station WPQT939, the 12 point-to-point links are almost sufficient, by themselves, to meet the safe harbor. While Station WPQT944 only has four operating links, we find the provision of service to SDPA to be meaningful. When we add the number of point-to-point links Nextlink has provided to the amount of point-to-multipoint population coverage that Nextlink has demonstrated and the unique nature and history of the 39 GHz band, we conclude that Nextlink’s service, while not sufficient to meet the Commission’s

³¹ 47 C.F.R. § 101.17(a).

³² See *In the Matter of FiberTower Spectrum Holdings, LLC, Requests for Waiver, Extension of Time, or in the alternative, Limited Waiver of Substantial Service Requirements to Construct 24 GHz Digital Electronic Message Service Licenses, 345 39 GHz Economic Area Licenses, and 250 39 GHz Rectangular Service Area Licenses, Memorandum Opinion and Order*, 28 FCC Rcd 6822 (“*FiberTower MO&O*”), 6840-6841 ¶¶ 38-39 (2013).

³³ Amended Supplement at 2-3.

³⁴ See Amended Supplement at 2-3.

³⁵ *39 GHz R&O* at 18624-18625 ¶ 46. According to Nextlink, the population of the San Diego BEA is 3,095,313. Substantial Service Showing at 2.

³⁶ See *39 GHz R&O*, 12 FCC Rcd at 18623-18624, ¶¶ 42, 43 and 46.

articulated safe harbors, is “substantially above a level of mediocre service.”³⁷ In taking into account all of the factors noted above, we find that Nextlink has demonstrated that it is using this spectrum to provide service to the public, in keeping with the Commission’s policy objectives for adopting construction requirements in this band – promoting efficient use of spectrum, encouraging the provision of service and preventing spectrum warehousing.³⁸

12. Our conclusion that Nextlink has demonstrated substantial service is not based upon any single factor. It is based on our review of the record as a whole, including the level of point-to-multipoint coverage, the number of point-to-point links, the unique nature and history of the 39 GHz band, and our review of the services and markets in question. We therefore accept Nextlink’s construction notifications for Stations WPQT939 and WPQT944.

13. By contrast, Nextlink does not report that it is operating any point-to-point links under the channels assigned to it under its third license, WPQT947, nor does the company represent that any of the point-to-point equipment that it has installed would be capable of operating on those channels. For WPQT947, Nextlink is providing only point-to-multipoint coverage from the hub that reaches approximately 6 percent of the population in the San Diego BEA. That falls far short of the 20 percent safe harbor threshold for population coverage. Nextlink also fails to provide any other information concerning its service that would allow us to find substantial service on a case-by-case basis. Nextlink has not sought a waiver or further extension of time to demonstrate substantial service for WPQT947 beyond the aforementioned July 31, 2012 deadline.³⁹ Without such extension or waiver, that license automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules, on July 31, 2012.⁴⁰

IV. CONCLUSION AND ORDERING CLAUSES

14. Nextlink has demonstrated substantial service under the authority granted to it under licenses WPQT939 and WPQT944 but has failed to demonstrate substantial service for license WPQT947. It has not sought a further extension of time to meet the substantial service deadline for WPQT947, nor has it sought a waiver of the July 31, 2012 deadline for establishing substantial service for that license. Accordingly, Nextlink’s geographic area license WPQT947 automatically terminated, by operation of Commission rule, as of July 31, 2012.

15. 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 Section 1.946 of the Commission’s Rules, 47 C.F.R. § 1.946, that the requests for findings of substantial service made by Nextlink Wireless, LLC, on July 31,

³⁷ See *FiberTower MO&O*, 28 FCC Rcd at 13568 ¶ 20, citing Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16934, 16951 (2000).

³⁸ *Second LMDS Report and Order*, 12 FCC Rcd at 12659 ¶ 266.

³⁹ See File No. 0005188153.

⁴⁰ 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).

2012, as amended ARE GRANTED with respect to Stations WPQT939 and WPQT944 but DENIED with respect to Station WPQT947.

16. IT IS FURTHER ORDERED, 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 licensing staff of the Broadband Division SHALL ACCEPT the notifications of completion of construction filed by Nextlink Wireless, LLC for Stations WPQT939 and WPQT944 (File Nos. 0005333352 and 0005333399) but SHALL DENY the notification of completion of construction filed by Nextlink Wireless, LLC for Station WPQT947 (File No. 0005333415).

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 Nextlink Wireless, LLC's license for Station WPQT947 automatically terminated as of July 31, 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

John J. Schauble
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