

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

In the Matter of	)	
	)	
ALLIGATOR COMMUNICATIONS, INC.	)	File Nos. 0004416819–0004416832
	)	
14 Applications For Waiver and Extension of Time to Meet First Buildout Requirement for Multiple Address System Licenses	) ) ) ) ) )	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 31, 2015**

**Released: April 1, 2015**

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

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we address the request for waiver and applications for extensions of time to demonstrate substantial service filed by Alligator Communications, Inc. (“Alligator”) to meet the first buildout requirement for 14 Multiple Address System (“MAS”) licenses. Alligator seeks an extension of the first construction requirement for two years, until October 12, 2012.<sup>1</sup> For the reasons discussed below, we deny the waiver request and extension applications and note that Alligator’s licenses automatically cancelled on October 12, 2010.

**II. BACKGROUND**

2. MAS is a radio communications service that consists of 3.2 megahertz of spectrum in the 900 MHz band and is licensed under Part 101 of the Commission’s rules.<sup>2</sup> In 2000, the Commission designated the 928/959 MHz bands and twenty of the forty paired channels in the 932/941 MHz bands to be licensed on a geographic area basis using Economic Areas.<sup>3</sup> The Commission held an auction for MAS licenses from April 26, 2005 to May 18, 2005.<sup>4</sup> MAS licensees may engage in terrestrial point-to-point and point-to-multi-point fixed and limited mobile operations.<sup>5</sup>

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<sup>1</sup> Petition for Waiver and Limited Extension of Deadline for Compliance with Section 101.1325 MAS Construction Requirement, Alligator Communications, Inc., File Nos. 0004416819–0004416832 (filed Oct. 12, 2010) (Extension Request). A list of the relevant licenses and applications is contained in the Appendix to this *Memorandum Opinion and Order*.

<sup>2</sup> See Amendment of the Commission’s Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Report and Order*, 15 FCC Rcd 11956 (2000) (*MAS Report and Order*).

<sup>3</sup> *MAS Report and Order*, 15 FCC Rcd at 11957-11958 ¶ 2.

<sup>4</sup> See Multiple Address Systems Spectrum Auction Closes – Winning Bidders Announced for Auction No. 59, *Public Notice*, 20 FCC Rcd 9551 (2005) (*Auction 59 PN*).

<sup>5</sup> See 47 C.F.R. § 101.1307.

3. Alligator was the winning bidder for 34 MAS licenses.<sup>6</sup> Subsequently, on October 12 2005, Alligator's long form application was granted, and it was issued licenses for each of the markets for which it was the winning bidder.<sup>7</sup> Under the Commission's Rules, Alligator had until October 12, 2010, or five years after its licenses were granted, to either provide service to at least one-fifth of the population within its service area or demonstrate "substantial service."<sup>8</sup>

4. For 12 of its licenses, Alligator successfully demonstrated compliance with the five-year buildout deadline.<sup>9</sup> One license was assigned to a third party.<sup>10</sup> Seven of the licenses automatically terminated for failure to meet the five-year buildout requirement.<sup>11</sup> On October 12, 2010, Alligator filed requests for waiver and applications for extensions of time to demonstrate substantial service for 14 of its MAS licenses.<sup>12</sup> Alligator argued that granting the extensions would allow continued development and implementation of Shared Use Repeater Stations ("SURS"), which would be a "more efficient use of . . . MAS spectrum . . . than to have to employ stop gap [sic] implementation."<sup>13</sup> It also cited "the lack of a developed market for MAS"<sup>14</sup> and the general economic downturn occurring across the United States at the time as contributing to the lack of buildout.<sup>15</sup>

### III. DISCUSSION

5. We conclude that Alligator has not justified grant of an extension of time or waiver of the construction requirement for these licenses. Specifically, Alligator's failure to meet its construction requirement was attributable to factors within its control. Any waiver or extension of the construction requirement would not be in the public interest.

6. The Commission determined that in order to meet the statutory requirement to include safeguards to protect the public interest in the use of spectrum, it would impose two construction requirements on geographic area MAS licenses.<sup>16</sup> Within five years of license grant, geographic area MAS licensees were required to provide coverage to at least one-fifth of the population in their service areas or demonstrate substantial service.<sup>17</sup> At the end of the ten year period, licensees are required to make a continued showing of substantial service in each licensed area.<sup>18</sup> The Commission has defined "substantial service" as "service that is sound, favorable, and substantially above a level of mediocre

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<sup>6</sup> *Auction 59 PN*, 20 FCC Rcd at 9560 Attachment A.

<sup>7</sup> Alligator Communications, Inc., File No. 0002178325.

<sup>8</sup> See 47 C.F.R. § 101.1325(b).

<sup>9</sup> See File Nos. 0004429338, 0004429339, 0004429348, 0004429349, 0004429353, 0004429369, 0004429371, 0004429374, 0004429375, 0004429382, 0004429386, 0004429392 (filed Oct. 12, 2010, accepted June 3, 2011).

<sup>10</sup> See call sign WQDN995.

<sup>11</sup> See call signs WQDN968, WQDN975, WQDN976, WQDN982, WQDN983, WQDN984, and WQDN996.

<sup>12</sup> Extension Request at 1.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 1.

<sup>15</sup> *Id.* See generally U.S. Bureau of Labor Statistics, *The Recession of 2007-2009*, SPOTLIGHT ON STATISTICS (Feb. 2012) (discussing the most recent economic recession and comparing it to past recessions), available at [http://www.bls.gov/spotlight/2012/recession/pdf/recession\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf).

<sup>16</sup> *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94, citing 47 U.S.C. § 309(j)(3).

<sup>17</sup> *Id.* See also 47 C.F.R. § 101.1325(b).

<sup>18</sup> *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94. See also 47 C.F.R. § 101.1325(b).

service that just might minimally warrant renewal.”<sup>19</sup> The Commission concluded that the coverage requirements it adopted were consistent with rules for other services and would “hinder warehousing, promote the rapid development of new technologies, and promote service to rural areas.”<sup>20</sup>

7. Section 1.946 of the Commission’s Rules provides that a request for extension of time to construct “may be granted if the licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.”<sup>21</sup> The rule prohibits granting extensions based on a failure to obtain financing, failure to obtain an antenna site, failure to order equipment, or because of a transfer of control of the licensee.<sup>22</sup>

8. Section 1.925 of the Commission’s rules provides that to be granted a waiver of the construction deadline, Alligator 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 inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>23</sup>

9. Alligator failed to justify an extension of time to meet the first construction requirement or a waiver of the construction requirement. Alligator argues that three factors impeded its ability to construct the licenses at issue: (1) “the slower than expected deployment of [its SURS] technology;”<sup>24</sup> (2) “lack of developed market for MAS;”<sup>25</sup> and (3) “the [2007–2009] financial crisis where there has been an unprecedented lack of capital expenditures.”<sup>26</sup> The Commission has consistently found that a licensee’s own business decisions are not circumstances beyond the licensee’s control and are therefore not an appropriate basis for regulatory relief.<sup>27</sup> In view of this precedent, we find that none of the factors cited by Alligator demonstrates that its failure to construct was caused by circumstances beyond its control, and thus, do not provide a valid basis for granting an extension. Moreover, even if such factors were a valid

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<sup>19</sup> *MAS Report and Order*, 15 FCC Rcd at 11994 ¶ 94.

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

<sup>21</sup> 47 C.F.R. § 1.946(e)(1).

<sup>22</sup> 47 C.F.R. § 1.946(e)(2), (3).

<sup>23</sup> 47 C.F.R. § 1.925(b)(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); 47 C.F.R. § 1.3.

<sup>24</sup> Extension Request at 1.

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

<sup>26</sup> *Id.*

<sup>27</sup> *See, e.g., Redwood Wireless Minnesota, LLC, Order*, 17 FCC Rcd 22416 (WTB CWD 2002) (construction delays resulting from business disputes were exercise of business judgment and were not outside Petitioner’s control); *Eldorado Communications LLC, Order*, 17 FCC Rcd 24613 (WTB CWD 2002) (licensee’s determination to initially deploy TDMA system and subsequently to adopt GSM with months remaining before construction deadline was business decision within its control); *Bristol MAS Partners, Order*, 14 FCC Rcd 5007 (WTB PSPWD 1999) (equipment installation or delivery not delayed for some unique reason and licensee failing to obtain equipment was business decision); *AAT Electronics Corporation*, 93 FCC 2d 1034 (1983) (decision not to market service aggressively because of equipment uncertainties is within licensee’s control); *Business Radio Communications Systems, Inc.*, 102 FCC 2d 714 (1985) (construction delay caused by zoning challenge not a circumstance beyond licensee’s control); *Texas Two-Way, Inc.*, 98 FCC 2d 1300 (1984), *aff’d sub nom., Texas Two-Way, Inc. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985) (licensee is responsible for delay resulting from interference caused by construction adjacent to construction site because site selection was an independent business decision).

consideration for an extension request, we find that even on those terms Alligator has failed to provide the facts to support its reliance on those factors.

10. First, we find that delays in the development of Alligator's SURS technology is not a valid reason for granting an extension in this case. Despite the delays in the development of this technology, Alligator was able to meet construction requirements for 12 of its 34 MAS licenses.<sup>28</sup> Also, Alligator states that it was possible to deploy equipment other than SURS.<sup>29</sup> In choosing to wait until the SURS technology was developed, Alligator made a business decision that is not a sufficient basis for the grant of an extension.

11. Second, we find that the pace of development of the MAS market, by itself, is not a relevant consideration for granting an extension because the decision to enter that market was a business decision made by Alligator. The MAS band was designed to provide flexibility in uses and eligibility.<sup>30</sup> Moreover, even if the market for MAS were a valid consideration, we find that Alligator has failed to provide the facts in support of its claim of an under-developed market. On the contrary, a search of the Universal Licensing System shows the Commission has accepted over 1,000 construction notifications from MAS licenses.<sup>31</sup>

12. Third, we find that "the financial crisis where there has been an unprecedented lack of capital expenditures,"<sup>32</sup> by itself, is not a relevant consideration for granting an extension. The Commission will not grant an extension if a delay in construction is caused by a failure to obtain financing.<sup>33</sup> Moreover, even if it were a valid consideration, we find that Alligator has failed to detail its efforts to obtain financing or explain how it was able to build some but not all of its licenses.

13. Finally, we disagree that "it would be a more efficient use of limited . . . MAS spectrum" and in the public interest to grant a waiver of the construction deadline to allow Alligator to develop and implement its SURS technology.<sup>34</sup> The Commission has rejected the argument that after-the-fact construction, by itself, is sufficient to justify a waiver of buildout requirements.<sup>35</sup> It follows that an after-the-fact promise to construct in the future cannot be credited.<sup>36</sup> We agree with the Commission's observation in *Anderson* that, if we credit untimely construction (or an untimely promise to construct),

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<sup>28</sup> See n.9, *supra*.

<sup>29</sup> *Id.* at 3 (stating that Alligator could "employ a stop gap [sic] implementation...").

<sup>30</sup> See *MAS Report and Order*, 15 FCC Rcd at 11964, 11967, 11968 ¶¶ 17, 26, 31 (establishing a flexible regulatory framework for MAS spectrum that provides opportunities for continued development of competitive service offerings by allowing a variety of services).

<sup>31</sup> See, e.g., construction notifications filed by Joe Wheeler Electric Membership Corporation (File Nos. 0004348596, *et al.*), Paging Systems, Inc. (File Nos. 0002961454, *et al.*), and ConocoPhillips Communications, Inc. (File Nos. 0002971368, *et al.*).

<sup>32</sup> Extension Request at 1.

<sup>33</sup> 47 C.F.R. § 1.946(e)(2).

<sup>34</sup> Extension Request at 3.

<sup>35</sup> See Richard Duncan d/b/a Anderson Communications, *Memorandum Opinion and Order and Order on Remand*, 18 FCC Rcd 4819, 4193–4194 ¶ 11 (2003) (*Anderson*) (denying request for waiver of construction deadline where facilities were built more than four years after deadline); Mr. Tom Holst, City of Springfield, *Letter*, 27 FCC Rcd 2184, 2185 (WTB MD 2012) (request to waive construction deadline denied where facilities were built well after the construction deadline).

<sup>36</sup> See Mumford Independent School District, 27 FCC Rcd 3034, 3039 ¶ 9 (WTB 2012) (promise to build out licenses after the expiration of the construction deadline does not justify an extension).

enforcement of the underlying construction requirement “becomes a meaningless or arbitrary exercise.”<sup>37</sup> In this case, Alligator’s assurances that they will develop and deploy the SURS technology amounts to an after-the-fact promise to construct. As such, a waiver grant would undermine the public interest safeguards of establishing construction requirements to ensure the efficient use of spectrum, hinder warehousing, promote the rapid development of new technologies and services, and promote service to rural areas. Accordingly, we deny Alligator’s request for waiver of the construction requirement.

14. Under Section 1.955(a)(2) of the Commission’s Rules, authorizations automatically terminate if the licensee fails to meet construction or coverage requirements.<sup>38</sup> In light of our conclusion that grant of an extension to Alligator is not in the public interest, we find that Alligator’s licenses automatically terminated on October 12, 2010, the first build out deadline under Section 101.1325(b) of the Commission’s rules.

#### IV. CONCLUSION AND ORDERING CLAUSES

15. Alligator has failed to justify an extension of time to meet the first buildout deadline for the MAS licenses in question or a waiver of the construction deadline. We therefore deny the request for waivers and applications for extensions of time to demonstrate substantial service and declare that Alligator’s licenses automatically terminated as of October 12, 2010.

16. Accordingly, IT IS ORDERED that, 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. §§ 1.925, 1.946, that the request for waivers and applications for extensions of time to demonstrate substantial service (File Nos. 0004416819–0004416832) filed by Alligator Communications, Inc. and listed in the Appendix to this *Memorandum Opinion and Order* 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 licenses issued to Alligator Communications, Inc. and listed in the Appendix to this *Memorandum Opinion and Order* ARE DECLARED TERMINATED as of October 12, 2010.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble  
Deputy Chief, Broadband Division  
Wireless Telecommunications Bureau

<sup>37</sup> *Anderson*, 18 FCC Rcd at 4194 ¶ 11.

<sup>38</sup> *See* 47 C.F.R. § 1.955(a)(2).

## APPENDIX

<b>Call Sign</b>	<b>File Number of Extension</b>
WQDN963	0004416819
WQDN964	0004416820
WQDN965	0004416821
WQDN966	0004416822
WQDN967	0004416823
WQDN969	0004416824
WQDN970	0004416825
WQDN971	0004416826
WQDN972	0004416827
WQDN979	0004416828
WQDN980	0004416829
WQDN986	0004416830
WQDN987	0004416831
WQDN994	0004416832