

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

In the Matter of)
Requests of Three Licensees of 22 Licenses in the)
Multichannel Video and Data Distribution Service) File Nos. 0007219617-0007219636
for Extension of Time to Meet the Final Buildout) 0007221703, 0007226755
Requirement for Providing Substantial Service)
under Section 101.1413 of the Commission's)
Rules)
Applications of Three Licensees for Renewal of) File Nos. 0007214632-0007214651,
22 Licenses in the Multichannel Video and Data) 0007090626, 0007222445
Distribution Service)

ORDER

Adopted: October 29, 2018

Released: October 29, 2018

By the Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this Order, we address the requests of three Multichannel Video and Data Distribution Service (MVDDS) licensees¹ (Licensees) for waiver and extension of the 10-year, final construction requirement for 22 MVDDS licenses granted in 2006, and the 22 applications to renew these licenses.² The Licensees seek a five-year extension of time, until April 3, 2021, to meet the construction requirement. For the reasons discussed below, we deny the waiver and extension requests, dismiss the renewal applications, and note that the Licenses automatically cancelled on April 3, 2016.

II. BACKGROUND

2. MVDDS is a fixed wireless terrestrial service at 12.2-12.7 GHz that may be used for any digital fixed non-broadcast service, including one-way direct-to-home/office wireless service.³ MVDDS is authorized on a co-primary, non-harmful interference basis with incumbent Direct Satellite Services (DBS) providers and on a co-primary basis with non-geostationary satellite orbit fixed-satellite service (NGSO FSS) stations.⁴ MVDDS is licensed on a geographic area basis according to Nielsen's 2002

¹ MDS Operations Waiver and Extension Request (filed Apr. 6, 2016). Braunston Spectrum LLC Waiver and Extension Request (filed Apr. 7, 2016). Montana Internet Corporation Waiver and Extension Request (filed Apr. 8, 2016).

² The three licensees of the 22 MVDDS licenses are: Braunston Spectrum LLC (WQES369); Montana Internet Corporation (WQES397); and MDS Operations, Inc. (WQES348, WQES349, WQES350, WQES351, WQES352, WQES353, WQES354, WQES355, WQES356, WQES357, WQES358, WQES359, WQES360, WQES361, WQES362, WQES363, WQES364, WQES365, WQES366, and WQES367). MDS Operations Inc. holds an additional 60 MVDDS licenses that are not the subject of the instant Order. See, e.g., MDS Operations, Inc., Request for Waiver, (filed Apr. 6, 2016) at 2.

³ See 47 CFR § 101.1407. Two-way services can be provided using spectrum in other bands for the return link. See id.

⁴ See, e.g., Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, ET Docket No. 98-206, First

Designated Market Areas (DMAs)⁵ and four FCC-defined areas.⁶ The Commission adopted specific service and technical rules to permit MVDDS operators to share the 12.2-12.7 GHz band with DBS and NGSO FSS without causing harmful interference.⁷

3. In 2002, the Commission adopted a ten-year license term for MVDDS and gave licensees a renewal expectancy upon a showing of substantial service at license renewal, *i.e.*, ten years after license grant.⁸ Substantial service means “service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal.”⁹ The Commission also adopted safe harbors to assist MVDDS licensees in satisfying the substantial service requirement, as well as additional factors that it would take into consideration in determining whether a licensee satisfies the substantial service standard.¹⁰ The Commission declined to adopt an interim deadline, stating that because of various operating restrictions and the complexity and contention surrounding the issues involving band sharing, a ten-year buildout period was appropriate.¹¹ In 2003, however, the Commission added a five-year interim build-out requirement in response to commenters’ contentions that five years was sufficient time to deploy and that imposing an interim requirement would prevent spectrum warehousing and promote the rapid deployment of service to the public.¹² The Commission applies a renewal expectancy to MVDDS licenses based on a showing of substantial service within five years into the license term and again at ten years into the license term.¹³

4. In 2004, the Commission held Auction No. 53,¹⁴ and subsequently granted eleven licensees 192 of the 214 MVDDS licenses for ten years. The interim, five-year deadlines for demonstrating substantial service for these licenses were in 2009 but the Bureau extended these deadlines

(...continued from previous page)

Report and Order and Further Notice of Proposed Rule Making, 16 FCC Rcd 4096, 4099-4100 ¶ 2 (2000) (*First R&O*); *see also* 47 CFR § 2.106.

⁵ *See* 47 CFR § 101.1401. Designated Market Area (DMA®) is a registered trademark of Nielsen Media Research, Inc. (Nielsen). Although Nielsen revises DMAs periodically, the MVDDS license areas remain fixed to the boundaries of the 2002 DMAs. To avoid confusion with Nielsen’s current DMAs, MVDDS license areas are designated as “MVDs” in the Universal Licensing System.

⁶ There are four FCC-defined areas: Alaska—Balance of State (all geographic areas of Alaska not included in Nielsen’s three DMAs for the state: Anchorage, Fairbanks, and Juneau); Guam and the Northern Mariana Islands; Puerto Rico and the United States Virgin Islands; and American Samoa. *Id.* § 101.1401(a)-(d).

⁷ *See Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operations of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band with Frequency Range*; ET Docket No. 98-206, Second Report and Order, 17 FCC Rcd 9614 (2002) (*Second Report and Order*).

⁸ *Second Report and Order*, 17 FCC Rcd 9614, 9684 ¶ 177. *See also* 47 CFR § 101.1413(b) (2016).

⁹ 47 CFR § 101.1413(b).

¹⁰ *Second Report and Order*, 17 FCC Rcd 9614, 9684 ¶ 177. *See also* 47 CFR § 101.1413(b) (2016).

¹¹ *Second Report and Order*, 17 FCC Rcd at 9684 ¶ 176.

¹² *Amendment of Parts 2 and 25 of the Commission’s Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, ET Docket No. 98-206, Third Report and Order, 18 FCC Rcd 13468, 13475 ¶¶ 15-16 (2003) (*Third Report and Order*). “Although we previously believed that a longer build out period was necessary in order to provide MVDDS licensees ample time and flexibility to work with other service providers in the 12 GHz band, the commenters contend that a five-year period is sufficient time to deploy MVDDS services in this band.” *Id.* at 13475 ¶¶ 15, 16 (*citing* comments of MDS America (an affiliate of MDS Operations Inc.) and other commenters, *see id.*, n.33, that argued that a shorter build out deadline would prevent spectrum warehousing and promote the rapid deployment of service to the public).

¹³ 47 CFR § 101.1413(a).

¹⁴ *Auction of Multichannel Video Distribution and Data Services Licenses*, Public Notice, 17 FCC Rcd 9612 (WTB 2002).

for all ten licensees of a total of 191 licenses¹⁵ because it found that the record demonstrated that there was a lack of viable, affordable equipment for MVDDS that could be deployed in the 12.2-12.7 GHz band and that the lack of equipment and the resulting challenge in deploying MVDDS service affects every MVDDS licensee and was thus widespread.¹⁶ In 2014, the ten licensees of the 191 licenses requested extensions of the final, 10-year deadlines and license renewals, which the Bureau granted based on a finding that the record, *in toto*, reflected circumstances beyond the licensees' control: a lack of commercially viable MVDDS equipment. The Bureau also granted the 191 license renewal applications subject to the following condition: "If the licensee fails to meet its substantial service obligations (as defined in 47 CFR § 101.1413) by the [2019] buildout deadline date appearing on [each] license, the authorization terminates automatically (in whole) without specific Commission action. . . ."

5. In 2005, the Commission held Auction No. 63 for the 22 MVDDS licenses that remained unsold in Auction No. 53¹⁷ and, on April 3, 2006,¹⁸ the Bureau granted the 22 licenses to three licensees for ten-year terms. The interim, five-year deadline for demonstrating substantial service was April 3, 2011, but the Bureau granted the three licensees' requests for waiver and extension of this deadline based on its 2010 finding. In so doing, however, the Bureau also made clear that each licensee "must demonstrate substantial service ten years from license grant (April 3, 2016), i.e., at license renewal."¹⁹

6. In April 2016, the three Licensees filed 22 requests for extension of the MVDDS final, 10-year construction requirement under Section 1.946(e)(1) of the Commission's Rules and 22 license renewal applications.²⁰ The Licensees ask for a five-year extension of time to construct, which would be April 3, 2021.

¹⁵ See *Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service*, Order, 25 FCC Rcd 10097 at para. 10 (2010). One licensee of one of the 192 licenses granted in 2004 neither reported that it satisfied the five-year buildout requirement nor requested an extension of time to meet the five-year deadline. Accordingly, the license, MVD202 – Zanesville (Call Sign WQAR709) cancelled automatically and was terminated effective July 26, 2009.

¹⁶ *Id.*

¹⁷ *Auction of Multichannel Video Distribution and Data Services Licenses*, Public Notice, 20 FCC Rcd 10481 (WTB 2005).

¹⁸ See *Wireless Telecommunications Bureau Grants Multichannel Video Distribution and Data Service Licenses; Auction Event No. 63*, Public Notice, 21 FCC Rcd 3524 (WTB 2006).

¹⁹ See *Requests for Extension of Time*, MDS Operations, Inc., File Nos. 0004586297-0004586316 (filed Jan. 25, 2011, granted March 31, 2011), Montana Internet Corporation, File No. 0004614974 (filed Feb. 15, 2011, granted March 31, 2011), Braunston Spectrum LLC, File No. 0004625754 (filed Feb. 22, 2011, granted March 31, 2011).

²⁰ 47 CFR § 1.946(e). MDS Operations, Inc. filed 20 extension requests on April 6, 2016, Braunston Spectrum LLC, and Montana Internet Corporation each filed one request on April 7 and 12, 2016, respectively. MDS Operations, Inc. filed 20 license renewal applications on April 4, 2016, Montana Internet Corporation and Braunston Spectrum LLC each filed one renewal application on April 8 and 11, 2016, respectively. Under its policy regarding late-filed renewal applications in wireless services, the Commission has acknowledged that there may be circumstances when a renewal filing is missed and that the subsequent denial of the renewal application and termination of the license would be too harsh a result in proportion to the nature of the violation. See *In the Matter of Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 11476, 11485, para. 22 (1999). To mitigate a harsh result, under the Commission's policy regarding late-filed renewal applications in wireless services, where a renewal application is filed up to 30 days after the license expiration date, a waiver of the filing deadline and the renewal application will be granted as long as the application is otherwise sufficient under Commission rules, but the licensee may be subject to enforcement action. Because we are dismissing the renewal applications as moot we need not address the late-filed renewal application waiver requests.

7. MDS Operations holds a total of 80 MVDDS licenses: 60 licenses granted in 2004 with a 2014 final deadline that we previously extended until 2019, and 20 licenses granted in 2006 with a 2016 final deadline. MDS Operations contends that we should extend the 2016 deadline applicable to 20 of its licenses based on the showing that it made in 2014 for its 60 licenses with the 2014 final deadline.²¹ Braunston Spectrum LLC and Montana Internet Corporation similarly note that we extended MVDDS final deadlines in 2014 and maintain that “providing substantial service is not practical at present” because of the unavailability of reasonable priced commercially deployable equipment and because of unavoidable technical constraints beyond their control.²² There were no oppositions filed.

III. DISCUSSION

8. We find that the Licensees have not justified grant of an extension of time, or waiver of the construction deadline, for the 22 Licenses. Without such extension or waiver, the 22 Licenses automatically terminated, by operation of Sections 1.946(c) and 1.955(a)(2) of the Commission’s Rules, as of April 3, 2016. We explain these findings in detail below.

9. Licensees may request a waiver of the performance requirement under Section 1.925(b)(3) or Section 1.3 of the Commission’s rules, or an extension pursuant to Section 1.946(e).²³ Section 1.925(b)(3) of the Commission’s rules states that the Commission may grant a waiver when either “(i) [t]he 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 “(ii) in view of unique or unusual factual 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.”²⁴

10. As with other Commission rules, requests to waive a performance requirement must “meet a high hurdle at the starting gate.”²⁵ We note that the waiver standard must be applied in light of Section 309(j) of the Communications Act, which provides that the Commission shall include performance requirements to ensure intensive use of valuable spectrum and to prevent the stockpiling and warehousing of spectrum by licensees.²⁶ While each case must be determined in light of its specific circumstances, waivers of performance requirements are granted infrequently and are only appropriate when consistent with the statute and the public interest.²⁷ The Commission also may waive its rules for good cause shown under Section 1.3 of its rules.²⁸ Alternatively, the Commission may grant a licensee an extension of time pursuant to Section 1.946(e), but only “if the failure to commence service is due to causes beyond its control.”²⁹ We further observe that it is a licensee’s responsibility to exercise due diligence to confirm that it can satisfy performance requirements in advance of acquiring spectrum, a fact of which we routinely remind licensees prior to auctioning licenses.³⁰

²¹ MDS Operations Waiver and Extension Request (filed Apr. 6, 2016) at 3.

²² Braunston Spectrum LLC Waiver and Extension Request (filed Apr. 7, 2016) at 1. Montana Internet Corporation Waiver and Extension Request (filed Apr. 8, 2016) at 1.

²³ See 47 CFR §§ 1.3, 1.925(b)(3), 1.946(e).

²⁴ *Id.* § 1.925(b)(3)(i)-(ii).

²⁵ *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

²⁶ See 47 U.S.C. § 309(j).

²⁷ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 93 S. Ct. 461 (1972).

²⁸ 47 CFR § 1.3.

²⁹ *Id.* § 1.946(e)(1).

³⁰ See *Auction of Multichannel Video Distribution and Data Services Licenses*, Public Notice, 20 FCC Rcd 18016, 18019-21 (WTB 2005) (*Auction-63 Public Notice*). “Potential bidders are reminded that they are solely responsible

11. The Licensees were on notice of the obligation to build out their respective markets by the end of their respective license terms and of the technical requirements applicable to the MVDDS before they acquired their licenses. As a general matter, it is a licensee's responsibility to conduct adequate due diligence prior to acquisition of licenses: potential licensees are required to familiarize themselves with all applicable rules (including any technical restrictions) with respect to deployment of the relevant spectrum, to assure that they can timely construct as specified per service rules, and to confirm that the spectrum is suitable for the licensee's business plans and needs. The Commission's rules do not contemplate generally waiving rules (including those involving deadlines) for types of considerations that licensees should take into account as part of this type of due diligence. Indeed, the Commission has repeatedly reminded prospective licensees that each licensee has an obligation to conduct adequate research in order to assess whether it has the ability to fully comply with all applicable technical and legal requirements, and the wherewithal to shoulder the inherent risks of taking on the responsibilities of a licensee.³¹ With respect to MVDDS licenses specifically, the Bureau, upon establishing the auction bidding procedures for this spectrum in 2005, cautioned potential applicants that Commission rules as well as incumbent operations may affect how MVDDS licensees use the spectrum, and directed bidders to become familiar with any applicable rules, orders, pending proceedings and incumbent operations prior to participating in the auction.³²

12. In addition to the notice provided by the rules themselves, as well as the auction notices, the Bureau specifically cautioned that "Licensee must demonstrate substantial service ten years from license grant (April 3, 2016), i.e., at license renewal" when it extended the April 3, 2011, interim deadline for each of the 22 licenses.³³

13. In considering each extension request, we evaluate the licensee's efforts since the grant of the prior extension request in 2011.³⁴ Based on the record of each of the captioned extension requests, we find that the Licensees have offered no evidence of any efforts to meet their April 3, 2016, final deadline—either since 2011 or since we last granted extensions for MVDDS licenses based on filings in 2014. Accordingly, we are not persuaded that the Licensees would be able to meet an extended final

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for investigating and evaluating all technical and marketplace factors that may have a bearing on the value of the licenses being offered in this auction. The Commission makes no representations or warranties about the use of this spectrum for particular services. . . . Additionally, potential bidders should perform technical analyses sufficient to assure them that, if they prevail in competitive bidding for a particular license, they will be able to build and operate facilities that will comply fully with the Commission's technical and legal requirements. As part of their due diligence efforts, potential applicants should physically inspect any sites located in, or near, the service area for which they plan to bid." *Id.* at 18019.

³¹ See, e.g., *NTCH, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16108, 16144, para. 19 (WTB ASAD 2013) ("Prior to an auction, we consistently advise bidders that they are solely responsible for conducting due diligence to investigate and evaluate all technical and marketplace factors that may bear upon their decision to bid upon a license being offered"); *Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97*, Public Notice, 29 FCC Rcd 8386, 8403-8404, paras. 46-48 (WTB 2014) ("As always, the burden is on the potential bidder to determine how much research to undertake, depending on specific facts and circumstances related to its interests.").

³² See *Auction-63 Public Notice*, 20 FCC Rcd at 18019. See also *Auction of Multichannel Video Distribution and Data Service Licenses Scheduled for December 7, 2005; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 63*, Public Notice, 20 FCC Rcd 13327, 13334-37 (WTB 2005).

³³ See *supra* note 19.

³⁴ See *SPEEDUSNY.COM, L.P.*, Memorandum Opinion and Order, 27 FCC Rcd 15321, 15327-28 para. 15 (WTB BD 2012). *Cope Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14564, 14565 para. 5 (1998).

deadline and we find no basis for concluding that the Licensees have met the waiver standard under section 1.925 of the Commission's rules.³⁵ Additionally, apart from their general reliance on findings made regarding MVDDS in 2014, the Licensees offer no evidence to support their assertions that failure to meet their 2016 deadline was caused by circumstances beyond their control. Under these circumstances, we find that the Licensees have not met their burden under section 1.946(e).

IV. CONCLUSION

14. The Licensees have failed to justify a waiver or extension of time to meet the April 3, 2016, construction requirement applicable to 22 MVDDS licensees under Section 101.1413 of the Commission's Rules. We therefore deny the above-captioned Extension Applications and declare that the 22 licenses automatically terminated on April 3, 2016.

V. ORDERING CLAUSES

15. 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 Sections 1.925 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the above-captioned 22 requests for waiver or extension of time to demonstrate substantial service ARE DENIED.

16. IT IS FURTHER 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 Sections 1.925 and 1.946 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.946, that the above-captioned applications for renewal of 22 licenses ARE DISMISSED.

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 22 licenses of MDS Operations, Inc. (20 licenses), Montana Internet Corporation (1 license), and Braunston Spectrum LLC (1 license) listed in note 2, *supra*, ARE DECLARED TERMINATED as of April 3, 2016.

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

Blaise A. Scinto
Chief, Broadband Division
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³⁵ 47 CFR § 1.925.