



Federal Communications Commission
Washington, D.C. 20554

June 13, 2018

DA 18 -603

Karl Blake
Polar Communications Mutual Aid Corporation
P.O. Box 270
110 Fourth Street East
Park River, ND 58270

**RE: Request for Waiver and Extension of Time – 47 C.F.R. § 27.14(g)
(Call Signs WQJS665 and WQJU904)**

Dear Mr. Blake:

This letter addresses the above-referenced request for a waiver of Section 27.14(g) of the Commission's rules¹ filed by Polar Communications Mutual Aid Corporation (Polar).² Polar seeks a waiver of the interim construction benchmark imposed by Section 27.14(g).³ For the reasons discussed below, we find that the underlying purpose of the rule would be frustrated by a strict application of the rule in the instant case and find it in the public interest to revise Polar's interim construction deadline from December 16, 2016 to February 27, 2017.⁴

¹ 47 CFR § 27.14(g).

² Polar Communications Mutual Aid Corporation, Request for Waiver and Extension of Time – 47 CFR § 27.14(g), ULS File Nos. 0007755967 and 0007755965 (filed Apr. 28, 2017) (Waiver Request). Polar also submitted separate requests for alternative relief. See Explanation and Request for Waiver re Timing of Filing – Request for Waiver and Extensions of Time – 47 CFR 1.946(e), ULS File Nos. 0007755967 and 0007755965 (filed Apr. 28, 2017); Request for Modification of License Term and Extension of Time, 47 C.F.R. §§ 27.14(g) & 1.946(e), ULS File Nos. 0007803163 and 0007803092 (filed June 7, 2017) (Supplement). Because we are waiving the interim construction benchmark pursuant to Section 1.925(b)(3)(i), we dismiss the requests for alternative relief as moot. See *infra*.

³ Waiver Request at 1.

⁴ See *id.* at 5. On our own motion, we will treat Polar's Waiver Request as timely filed. Typically, petitions for relief regarding wireless licenses, particularly in the construction context, must be filed prior to the applicable requirement deadline in order to forestall the automatic operation of the rules, e.g. termination of the license, or in the instant case, automatic acceleration of the license term and end-of-term construction requirements. The Commission has emphasized repeatedly that requiring licensees to seek timely relief serves important public policy objectives, and it has dismissed untimely requests for relief. See, e.g., *Vijay Ravenkar, The Port Authority of New York and New Jersey, Requests for Waiver to Permit Untimely Filing and to Extend the Construction Period for Station WQPK961*, ULS File No. 0006191959, Letter Order, 29 FCC Rcd 3729 (WTB MD 2014). The Commission, however, may entertain late-filed petitions where it is in the public interest to grant relief. *Data-Max Wireless, LLC, Request for Waiver and Extension of Time of Tribal Land Bidding Credit Requirements*, Call Sign WQJQ674, File Number 0005662520, Letter Order, 29 FCC Rcd 5149, 5152-3 (WTB MD 2014); *Alex Sene, American Samoa Telecommunications Authority, Petition for Reconsideration, Request for Waiver, and Request for Extension of Time* (Call Signs WQNF697, WQNF698, WQNF699, WQNF700, WQNF703, and WQNF705), Letter Order, 32 FCC Rcd 6436, 6436-6437 (WTB MD 2017). We conclude that the public interest benefits supporting a waiver of Polar's interim construction deadline also support consideration of its late-filed petition.

Background. In the *700 MHz Second Report and Order*, the Commission adopted interim and end-of-license term construction benchmarks for certain 700 MHz band licensees.⁵ The Commission’s rules for the Lower 700 MHz band A and B Blocks require licensees to provide signal coverage and offer service over at least 35 percent of the geographic area of their license at the interim construction deadline (Interim Construction Requirement),⁶ and to provide signal coverage and offer service over at least 70 percent of the geographic area of the license by the final construction deadline (Final Construction Requirement).⁷ Section 27.14(g)(1) provides that, if a licensee does not satisfy the Interim Construction Requirement, its license term will be reduced by two years, thereby requiring it to meet the Final Construction Requirement two years earlier.⁸ Further, if a licensee does not meet its Final Construction Requirement, it will be subject to a “keep-what-you-serve” rule, whereby its “authorization will terminate automatically without Commission action for those geographic portions of its license in which the licensee is not providing service, and those unserved areas will become available for reassignment by the Commission.”⁹

In 2008, Polar acquired from Red River Rural Telephone Association, Inc two partitioned 700 MHz B Block licenses, Call Signs WQJS665 and WQJU904,¹⁰ which together consist of several counties located within CMA582 in North Dakota.¹¹ Polar timely filed interim construction notifications in response to its original June 13, 2013 interim construction deadline for the two licenses; Polar’s interim construction deadline for these licenses was subsequently revised to December 13, 2016.¹² As part of its 2013 construction notification filings, Polar requested a waiver of Section 27.14(g) to the extent necessary to permit the Commission to treat the two partitioned CMA582 licenses as having a single Interim Construction Requirement.¹³ On November 30, 2016, Polar amended its pending construction notifications in order to provide the Commission with required electronic map files.¹⁴ The amendments included new engineering reports showing revised coverage areas, and they stated that Polar had

⁵ See *Service Rules for 698-746, 747-762, and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007) (*700 MHz Second Report and Order*).

⁶ See 47 CFR § 27.14(g).

⁷ See *id.*; *700 MHz Second Report and Order*, 22 FCC Rcd at 15293-94, 15349, paras. 6, 157.

⁸ 47 CFR § 27.14(g)(1).

⁹ 47 CFR § 27.14(g)(2). See also *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.

¹⁰ Call Signs WQJS665 and WQJU904; see also ULS File Nos. 0003566656 (filed Sept. 25, 2008, amended Oct. 22, 2008) and 0003648298 (filed Nov. 13, 2008) (assignment application grants resulting, respectively, in the generation of call signs WQJS665 and WQJU904).

¹¹ Specifically, Polar’s combined license area covers the entirety of five counties (Griggs, Nelson, Pembina, Steele, and Walsh Counties) as well as a portion of Traill County in the northeast corner of the state.

¹² See ULS File Nos. 0005851842 (WQJS665) and 0005851845 (WQJU904) (filed July 9, 2013). For most 700 MHz A and B Block licenses, the interim construction deadline was originally June 13, 2013, but was later extended for all A and B Block licenses to December 13, 2016. See *Promoting Interoperability in the 700 MHz Commercial Spectrum*, Report and Order and Order of Proposed Modification, 28 FCC Rcd 15122, 15151-52, para. 65 (2013) (*Interoperability Order*).

¹³ Polar Communications Mutual Aid Corporation, Conditional Request for Rule Waiver, ULS File Nos. 0005851842 (WQJS665) and 0005851845 (WQJU904) (filed July 9, 2013).

¹⁴ ULS File Nos. 0005851842 (amended Nov. 30, 2016) (WQJS665) and 0005851845 (amended Nov. 30, 2016) (WQJU904). Construction notifications filed by 700 MHz licensees on or after October 16, 2015, are required to contain electronics maps and other supporting documentation in specific formats. See *Wireless Telecommunications Bureau Establishes Electronic Map Format For Covered 700 MHz Band Licensee Construction Notifications*, Public Notice, 30 FCC Rcd 11407 (WTB 2015).

constructed and was providing service sufficient to meet the 35 percent geographic coverage requirement for each call sign.¹⁵ Specifically, the amended construction notifications indicated that Polar was providing signal coverage of 38.4 percent of the licensed area covered by WQJU904 and 62.4 percent of the license area covered under WQJS665; this represented a total coverage of 40.3 percent of the combined license areas. Although the amendments indicated that the interim construction requirement was satisfied for both licenses, Polar reiterated its request that the licenses be treated as a single license for construction purposes.¹⁶ On December 14, 2016, the Division granted Polar's request to combine the coverage area of both call signs when demonstrating compliance with its Interim and Final Construction Requirements, but it conditioned relief on Polar demonstrating significant construction for each license.¹⁷

In reviewing Polar's amended construction notifications, however, the Division discovered that Polar mistakenly had located two base stations just outside of its licensed CMA582 market areas – one base station in CMA581 (Nekoma) and the other in CMA221 (Hunter).¹⁸ The service coverage provided by those sites therefore could not be considered in reviewing Polar's CMA582 700 MHz B Block construction. Without the coverage provided by the Nekoma and Hunter sites, Polar's coverage and service area amounted to slightly less than 32 percent of its geographic market area as of the December 13, 2016 interim construction deadline. After FCC staff communicated this finding to Polar, Polar entered into a spectrum manager leasing arrangement with AT&T, the licensee of the 700 MHz B Block market areas covering the Nekoma and Hunter sites, on February 27, 2017.¹⁹ Polar has since entered into an agreement with AT&T to assign both of its B Block licenses in addition to other 700 MHz licenses that it holds in North Dakota.²⁰

On April 28, 2017, Polar filed a request for waiver of the Interim Construction Requirement for both licenses pursuant to Section 1.925(b).²¹ Polar seeks additional time until February 27, 2017, the effective date of the spectrum manager lease, to meet its Interim Construction Requirement.²² Alternatively, Polar asks that we accept its 31.98 percent coverage of its combined license area as

¹⁵ See ULS File No. 00058551842 (amended Nov. 30, 2016) (WQJS665) and 0005851845 (amended Nov. 30, 2016) (WQJU904).

¹⁶ *Id.*

¹⁷ Letter from Roger S. Noel, Mobility Division, Wireless Telecommunications Bureau, to David L. Dunning, Polar Communications Mutual Aid Corporation (dated Dec. 14, 2016).

¹⁸ Polar states that it mistakenly placed into operation facilities located just outside of its B Block license areas in CMA582. Polar explains that there was staff confusion regarding spectrum holdings with respect to its Nekoma site. Polar holds a C Block license in adjacent CMA 581 that includes the area where the Nekoma site is located; Polar mistakenly put into operation service on its B Block frequencies at that location. Similarly, it appears that there was misunderstanding by Polar's staff as to the use of the Hunter site to replace another tower in CMA 582 that had been decommissioned due to damage from a windstorm. See Waiver Request at 2, footnote 8.

¹⁹ See ULS File No. 0007666727 (filed Feb. 27, 2017). Polar later amended its construction notifications on March 14, 2017. See *supra* note 13.

²⁰ Polar Communications Mutual Aid Corporation, FCC Form 603, Description of Transaction and Public Interest Statement, ULS File No. 0007679650 (filed Mar. 1, 2017) at 2.

²¹ Waiver Request. Polar also submitted a separate but jointly filed request for extension relief pursuant to Section 1.946(e). See *supra* note 2. Because we are granting waiver relief pursuant to Section 1.925(b)(3)(i), we do not address Polar's request for extension of time to construct under Section 1.946(e).

²² Waiver Request at 1.

substantial provision of the required 35 percent geographic area coverage.²³ On June 7, 2017, Polar supplemented its April 2017 Waiver Request with additional information. The June 7, 2017 Supplement requests that, to the extent that we deny its April 2017 Waiver Request and do not accept its interim construction notifications, the Commission extend the license term of each license and provide Polar at least six months from the date of Commission action on the Interim Construction Notifications to allow Polar to meet the accelerated end-of-term construction benchmarks.²⁴

In support of its request for waiver, Polar asserts that grant of a waiver is warranted because: (1) it believed in good faith that it had constructed a network that was providing broadband coverage to its license area within CMA582 in rural North Dakota as of December 13, 2016; (2) even when excluding the service provided by Nekoma and Hunter, Polar was still providing coverage at the interim construction deadline to 31.98 percent of the geographic area of its licenses; (3) as of February 27, 2017, Polar possesses the requisite authorization by way of its spectrum manager leasing arrangement with AT&T to provide service at Nekoma and Hunter; and (4) strict application of Section 27.14(g) would trigger an acceleration of the Final Construction Requirement to June 13, 2017, and would result in a loss of much of the unserved license area, causing significant delay to rural service deployment in the corresponding license area due to Polar's inability to construct a network capable of providing coverage to 70 percent of the geographic area of its license area by that date.²⁵

Discussion. Requests to waive a requirement of the wireless construction and coverage rules must “meet a high hurdle at the starting gate.”²⁶ Under the Commission’s general standard for considering waiver requests, we may grant such a request when: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the 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.²⁷ It is well-established that the Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest,²⁸ and it may take into account unique considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.²⁹

We have carefully reviewed the record before us and find that the underlying purpose of Section 27.14(g), which is “to better promote access to spectrum and the provision of service, especially in rural areas,”³⁰ would be frustrated by strict application of the rule in this instance, and that grant of the requested waiver to provide additional time for Polar to meet its interim construction requirements will serve the public interest.

We find that the totality of the factors involved in the instant case support a limited waiver of Section 27.14(g)(1). The record reflects that Polar constructed with the intent to comply with the Interim Construction Requirement and believed in good faith that it actually was providing coverage and service

²³ *Id.* at 1.

²⁴ Supplement at 1.

²⁵ Waiver Request at 4-5.

²⁶ See *WAIT Radio v. FCC*, 459 F.2d 1203, 1207 (D.C. Cir. 1972).

²⁷ 47 CFR § 1.925(b)(3).

²⁸ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

²⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

³⁰ *700 MHz Second Report and Order*, 22 FCC Rcd at 15348, para. 153.

sufficient to meet the interim 35 percent geographic construction criteria as of the December 13, 2016, deadline. Polar's intent to construct as required is demonstrated by the actual deployment of facilities intended to provide wireless service to its combined CMA582 license areas. The 700 MHz B Block coverage provided by all of Polar's sites, including the Nekoma and Hunter locations, amounted to a little over 40 percent of its combined geographic market area. We note that even without the non-CMA582 sites, Polar's service coverage approximated 32 percent of the geographic area of its combined markets—a significant portion of its required interim construction. Moreover, upon being notified of the issues with its Nekoma and Hunter sites, Polar immediately acted to resolve the issues with respect to these locations by entering into a spectrum leasing arrangement with AT&T to bring itself into compliance. It is apparent from its actions that Polar diligently sought to deploy an advanced wireless network and was not attempting to avoid its construction obligations or warehouse spectrum. We therefore find that strict application of the December 13, 2016, deadline would not serve the underlying purpose of Section 27.14(g)(1) where Polar has sought to comply with coverage requirements.

Additionally, we find that other factors, such as the rural nature of Polar's licensed areas as well as the limited scope of its requested relief, provide additional support for waiver in this instance. As noted, the Commission sought to promote rural service coverage in adopting the construction requirements for the 700 MHz Band.³¹ Polar argues that the area covered by its licenses are extremely rural and difficult to serve, with a population density of 2.3 people per square mile.³² Our own review reveals that none of the underlying counties have a population density greater than 9.4 people per square mile, which falls well within the Commission's definition of a "rural" county as one with a population density of 100 persons per square mile or less.³³ Consistent with the directive of Section 309 of the Communications Act to promote the deployment of wireless services to rural communities,³⁴ we find that grant of the requested relief will facilitate the continued access and deployment in this rural area without undermining the Commission's goal of prompt and efficient provision of service.

We also note the limited nature of its waiver request: its requested relief is just slightly longer than two months in duration. Polar has requested additional time only to the extent necessary to perfect its spectrum leasing agreement; it does not seek time to perform additional construction as the coverage of its combined 700 MHz B Block license areas—including the coverage being provided from the Nekoma and Hunter sites—already exceeds the level required to meet the Interim Construction Requirement.

While we find that the meaningful public benefits to be derived from continued service to rural areas, as well as the limited duration of the waiver are factors that weigh in favor of providing relief, we reject other arguments made by Polar in support of its request—namely Polar's suggestion that an existing agreement to assign its licenses to AT&T provides, by itself, a basis for relief in this case.³⁵ While Polar states that the transaction will result in substantial public interest benefits, it provides no specific information in its Waiver Request as to the benefits that will accrue to consumers in the license

³¹ *700 MHz Second Report and Order*, 22 FCC Rcd at 15349, para. 155.

³² Waiver Request at 3.

³³ See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd 19078, 19087, para. 11 (WTB 2004). See also Waiver Request at 3; 2010 State and Local Census Guide; U.S. Census Bureau, 2010 Census of Population and Housing, Population and Housing Unit Counts, North Dakota: 2010 (June 2012), at 7, <<https://www.census.gov/prod/cen2010/cph-2-36.pdf>>.

³⁴ Section 309(j) directs the Commission to, among other things, ensure "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas." 47 U.S.C. § 309(j)(3).

³⁵ Waiver Request at 5.

areas as a result of that transaction, or how the transaction will ensure the deployment of broadband services to these license areas.

Accordingly, based on the totality of factors, we find that the underlying purpose of Section 27.14(g) would not be served by strict application of the December 13, 2016 deadline, and that waiver of Section 27.14(g) to provide Polar additional time to meet its interim 35 percent geographic coverage requirement is in the public interest. We hereby grant Polar's request to waive its Section 27.14(g) interim construction deadline until February 27, 2017. Because we waive Section 27.14(g) to grant Polar additional time pursuant to Section 1.925(b)(3)(i), we need not address the alternative forms of relief proposed by Polar, and hereby dismiss them as moot.

Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925(b)(3)(i), and 27.14(g) of the Commission's rules, 47 CFR §§ 1.925(b)(3)(i), 27.14(g), the Request for Waiver and Extension of Time – 47 CFR § 27.14(g), filed on April 28, 2017, by Polar Communications Mutual Aid Corporation, ULS File Nos. 0007755967 and 0007755965, IS GRANTED, to the extent provided herein.

IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925(b)(3)(i), 1.946(e), and 27.14(g) of the Commission's rules, 47 CFR §§ 1.925(b)(3)(i), 1.946(e), 27.14(g), alternative requests for relief of the December 16, 2016, Interim Construction Requirement, including requests raised in the Explanation and Request for Waiver re Timing of Filing – Request for Waiver and Extensions of Time – 47 CFR 1.946(e), filed on April 28, 2017, by Polar Communications Mutual Aid Corporation, ULS File Nos. 0007755967 and 0007755965, are DISMISSED as moot.

IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and Sections 1.925(b)(3)(i), 1.946(e), and 27.14(g)(1) of the Commission's rules, 47 CFR §§ 1.925(b)(3)(i), 1.946(e), 27.14(g)(1), the Request for Modification of License Term and Extension of Time – 47 CFR § 1.925 & 1.946(e), filed on June 7, 2017, by Polar Communications Mutual Aid Corporation, ULS File Nos. 0007803163 and 0007803092, IS DISMISSED as moot.

These actions are taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331.

Sincerely,

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau