Federal Communications Commission
Washington, D.C. 20554

October 2, 2019

DA 19-993

David A. LaFuria
Lukas, LaFuria, Gutierrez & Sachs, LLP
8300 Greensboro Drive, Suite 1200
Tysons, Virginia 22102

RE: Smith Bagley, Inc. - Request for Waiver and Extension of Time for Call Sign WPWV390

Dear Mr. LaFuria:

This letter addresses a request for waiver and extension of time (Request) filed by Smith Bagley, Inc. (SBI) for the above-referenced 700 MHz station (CMA555-New Mexico-Catron) (License).[1] SBI seeks a waiver and a one-year extension of time, until June 13, 2020, to meet its construction requirement. For the reasons discussed herein, we deny the Request and find that the licensee has not shown unique or unusual circumstances to support a waiver, nor has it provided any argument to justify an extension of time to construct.

Background. Pursuant to Section 27.14(a) of the Commission's rules, lower 700 MHz C Block licensees must make a showing of "substantial service" in their license area within the prescribed license term. "Substantial service" is defined as service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal.[2] Failure by any licensee to meet this requirement results in forfeiture of the license and the licensee's ineligibility to regain the license.[3]

SBI acquired the License on February 16, 2012. It subsequently partitioned several counties, while keeping the area of Catron County, New Mexico.[4] On June 13, 2019, more than seven years after acquiring the License, SBI timely filed the Request, seeking an additional year to satisfy the substantial service requirement.[5] In support of its Request, SBI states that it has been focusing on build-out in other

[1] Smith Bagley, Inc. Request for Limited Waiver and Extension of Time to Satisfy the Construction Requirement, Expedited Action Requested, FCC Form 601, Exhibit 1, Call Sign WPWV390 (filed June 13, 2019) (Request).

[2] 47 CFR § 27.14(a).

[3] *Id.*

[4] Request at 2.

[5] *See* Request.

700 MHz markets obtained over the past ten years in the secondary market,[6] and that in mid-2018 its "focus shifted toward providing service on its 700 MHz spectrum in Catron County."[7] SBI indicates that, although it is investigating some potential locations and "just recently" found a new potential location, it "currently does not have any site locations in Catron County," and it adds that there are "few options that would provide the necessary coverage."[8] SBI argues that the remoteness of Catron County and its low population density are unique and unusual circumstances and that, without an extension, there may be a delay in deployment of this spectrum to this rural underserved area, and therefore application of the construction requirement is inequitable and contrary to the public interest.[9]

Discussion. A request for waiver of Commission rules must "meet a high hurdle at the starting gate."[10] It is well-established that the Commission may waive a rule where the particular facts make strict compliance inconsistent with the public interest,[11] and it may take into account unique considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[12] The Commission may grant a waiver pursuant to Section 1.925(b)(3) of the Commission's rules when: (i) the underlying purpose of the rules(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.[13] In determining whether the waiver standard is met, we evaluate each case based on the specific circumstances. For the reasons set forth below, we find that neither the requirements for a waiver nor the requirements for an extension have been satisfied, and we therefore deny the Request.

Contrary to SBI's assertion, strict application of the construction rule in this case does serve the underlying purpose of the rule – ensuring intensive spectrum use – and granting a waiver would be contrary to the public interest.[14] Indeed, the rule is meant to prevent just the type of situation presented here -- *i.e.,* where a licensee chooses to wait until the last moment to consider its construction obligations, and then argues that it needs more time as a result of its own delays. SBI portrays itself as an experienced wireless licensee with a focus on service areas that are "sparsely populated" and "rural."[15] But while it was able to construct four other 700 MHz licenses, it was not until mid-2018 – more than six years after acquiring the License – that the company decided to focus on constructing the Catron County license.[16] Once it did focus on the County, SBI apparently had insufficient time left to construct. It attempted unsuccessfully to lease the spectrum to another entity, and then found a possible site location only in January 2019, six months before the construction deadline.[17] Waiver relief is not warranted where SBI made a business decision to deploy resources elsewhere initially, and, when it finally focused on

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[6] Request at 2.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 3-4.

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

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

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

[13] 47 CFR § 1.925(b)(3). The Commission also has authority to waive its rules if there is "good cause shown." 47 CFR § 1.3.

[14] *See* 47 CFR § 1.925(b)(3)(i).

[15] Request at 1.

[16] *Id.* at 2.

[17] *Id.*

constructing the License only late in the construction period, discovered reasonably foreseeable challenges in locating suitable sites. As a general matter, it remains a licensee's responsibility to conduct its due diligence to ensure that it can meet its performance obligations under the Commission's rules. The Commission also has found that financial considerations or consequences resulting from a licensee's business decisions do not constitute sufficient basis to warrant extension or waiver of a licensee's obligations.[18] The record does not demonstrate that SBI has made material progress toward satisfying the build-out requirement for the License, and SBI's business decisions regarding when to construct the License do not justify waiver relief.

In addition, we find that there are no unique or unusual circumstances in this case that would make application of the construction rule inequitable, unduly burdensome, or contrary to the public interest.[19] While the License covers a county in New Mexico with low population density, SBI has not shown that, in attempting to provide service to Catron county, it has suffered from specific challenges that might justify a waiver.

To support its claim that low population density in its rural market is a unique circumstance, and that strict application of the construction requirement would not be in the public interest, SBI cites two division-level Wireless Telecommunications Bureau (Bureau) cases, both of which are distinguishable.[20] In *Northstar*, the Bureau's former Commercial Wireless Division, after evaluating the totality of circumstances, granted Northstar, the licensee, four additional months to meet the construction requirement for licenses covering rural and suburban Kentucky that were acquired only two months prior to the build-out deadline.[21] The Division found that Northstar "did a significant amount of work toward meeting the coverage requirement" prior to the construction deadline, despite the short deadline and the difficulties it faced in acquiring network equipment.[22] In fact, Northstar already had constructed nine sites that, once made operational, would meet the coverage benchmark.[23] In the second cases cited by SBI, *Eezinet*, the Bureau's Mobility Division granted the licensee several months of additional time to meet enhanced construction requirements,[24] based on its finding that the licensee had made "demonstrable progress" toward meeting its construction requirements, including launching a network operation center, retaining an engineering staff, ordering equipment for all markets, and performing market and site surveys, all of which put Eezinet on the cusp of introducing new service to the relevant markets.[25] In addition, Eezinet had identified core institutions, including schools, local governments, and medical and public safety facilities, that it intended to serve in the near future.[26] The Division's grant in *Eezinet* was based on the totality of circumstances, which included the licensee's good faith efforts to comply with the Commission's construction requirements, not solely the fact that the market areas were

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[18] *See, e.g.,* Letter to Stefan M. Lopatkiewicz, Esq., Counsel for TelAlaska, Inc. from Roger S. Noel, Mobility Division, Wireless Telecommunications Bureau, Letter Order, 24 FCC Rcd 7380, 7384 n.30 (WTB 2006); *Redwood Wireless Minnesota, L.L.C. and Redwood Wireless Wisconsin, L.L.C. Request for Waiver and Extension of the Broadband PCS Construction Requirements*, Order, 17 FCC Rcd 22416, 22419-23, paras. 6-13 (WTB 2002); *see also* 47 CFR § 1.946(e)(2).

[19] *See* 47 CFR § 1.925(b)(3)(ii).

[20] Request at 4.

[21] *Northstar Technology, LLC*, Order, 17 FCC Rcd 10908 (2002) (*Northstar*).

[22] *Id.*, 17 FCC Rcd at 10910, para. 5.

[23] *Id.* at para. 6.

[24] Letter from Thomas Derenge, Deputy Chief, Mobility Div., Wireless Telecom. Bur., to S. Janell Trigg, Esq., dated Oct. 31, 2010 (*Eezinet*).

[25] *Id.* at 2.

[26] *Id.* at 2-3.

sparsely populated.[27] In contrast to these cases, here SBI failed to construct or place into operation any sites, despite having held the License since 2012, and only recently did it find sites that should provide sufficient coverage.[28]

Finally, we note that SBI also requests an extension of time pursuant to Section 1.946(e) of the Commission's rules, which permits the grant of an extension request if a licensee shows that failure to meet the construction deadline is due to involuntary loss of site or other causes beyond its control.[29] SBI makes no argument in the Request that it has met the standard for obtaining an extension of time pursuant to Section 1.946, and as discussed above, its failure to meet the deadline was a voluntary business decision not due to causes beyond its control.[30]

We find that SBI has not demonstrated that grant of a waiver or extension of time to meet its construction requirement is warranted, and therefore we deny the Request. Pursuant to Section 27.14(a) of the Commission's rules, the License automatically terminated as of June 13, 2019.[31]

Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.3, 1.925, and 1.946(e) of the Commission's rules, 47 CFR §§ 1.3, 1.925, and 1.925 the request for waiver of, and an extension of the time period specified in, Section 27.14(a) of the Commission's rules, 47 CFR § 27.14(a), filed June 13, 2019, by Smith Bagley, Inc., is hereby DENIED.

These actions are taken under delegated authority pursuant to Sections 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

cc: Smith Bagley, Inc.
1500 South White Mountain Road
Show Low, AZ 85901
Attn: Chris Letner

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[27] *See id.*

[28] Request at 2.

[29] Request at 1; *see* 47 CFR § 1.946(e)(1).

[30] *See* 47 CFR § 1.946(e).

[31] *See* 47 CFR § 27.14(a).