

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

In the Matter of	)	
	)	
TRUSTEE IN BANKRUPTCY FOR	)	File No. 0000594028
MAGNACOM WIRELESS, LLC and	)	
	)	
TELECOM WRAP UP GROUP, LLC	)	
	)	
Petition for Waiver and Extension of	)	
Broadband PCS Construction Requirements	)	
	)	

**ORDER**

**Adopted: May 23, 2002**

**Released: May 24, 2002**

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

**I. INTRODUCTION**

1. In this Order, we address requests by the Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecom Wrap Up Group, LLC (TWU) to extend the five-year construction deadline for four C-block broadband Personal Communications Services (PCS) licenses.<sup>1</sup> For the reasons set forth below, we grant a limited extension of time to meet the construction requirements as modified herein.

**II. BACKGROUND**

2. On September 17, 1996, the Commission granted four C-block broadband PCS licenses, among others, to PCS Plus, LLC (PCS Plus) in the following Basic Trading Areas (BTAs): Harrison, Arkansas BTA (BTA182); Hot Springs, Arkansas BTA (BTA193); Russellville, Arkansas BTA (BTA387); and St. George, Utah BTA (BTA392).<sup>2</sup> In May 1997, the Commission consented to an assignment of these four licenses, among others, from PCS Plus to Magnacom Wireless, LLC (Magnacom). The following year, Magnacom disaggregated the four licenses pursuant to the Commission’s restructuring of installment payment obligations for broadband PCS C-block licenses.<sup>3</sup> As part of the restructuring, Magnacom was allowed to retain 15 MHz of the spectrum in each market and

<sup>1</sup> See FCC Form 601, Attachment entitled “Petition for Expedited Waiver and Extension of the Broadband PCS Construction Requirements of Section 24.203 of the Commission’s Rules,” filed manually on July 10, 2001 by Telecom Wrap Up Group, LLC (TWU Extension Request) and FCC Form 601, File No.0000594028 (Trustee Extension Request).

<sup>2</sup> The call signs for the Licenses are KNLF749, KNLF750, KNLF751, and KNLF753, respectively.

<sup>3</sup> See Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket 97-82, 12 FCC Rcd. 16436 (1997), as modified on reconsideration, 13 FCC Rcd. 8345 (1998). When the licenses were disaggregated, the Commission maintained the same call signs for the Licenses but re-designated the markets with a “C1” description (*i.e.*, BTA182C1, BTA193C1, BTA387C1, and BTA392C1).

return the other 15 MHz of the spectrum in each market to the Commission for relicensing.<sup>4</sup> Also as part of the restructuring, the Commission modified the construction requirements for the new 15 MHz licenses so that the licensee must provide service to at least one-quarter of the population of each BTA or make a showing of substantial service within five years of initial license grant.<sup>5</sup> In the case of the instant licenses, the five-year construction deadline was September 17, 2001.

3. On October 28, 1998, Magnacom filed for bankruptcy under Chapter 11 of the Bankruptcy Code.<sup>6</sup> On May 21, 2001, Magnacom filed an application with the Commission to assign its licenses to TWU,<sup>7</sup> which according to TWU, is an entity formed out of PCS Plus with the same ownership and management.<sup>8</sup> Shortly thereafter, the Trustee in Bankruptcy for Magnacom Wireless, LLC (Trustee) filed a *pro forma* transfer of control application with the Commission indicating that the Trustee, not Magnacom, was the proper holder of the licenses.<sup>9</sup>

4. On July 10, 2001, TWU filed a request for a twelve-month extension of time (*i.e.*, until September 17, 2002) to meet the five-year construction requirements for the licenses.<sup>10</sup> The Trustee filed a similar extension request for the licenses on September 17, 2001, incorporating TWU's request. On January 24, 2002, TWU provided more specific information on its plans for building out the markets if the licenses are assigned to it and modified its request to ask that the construction deadline (which had passed while the extension request was pending) be extended for six months from the date that the Commission grants an extension of time.<sup>11</sup> Thereafter, TWU filed two additional supplements to provide further information about the areas that it plans to cover if the licenses are assigned to it, including the specific rural communities and tribal lands within the four BTAs listed in Attachment A.<sup>12</sup>

### III. DISCUSSION

5. Without grant of an extension request or waiver of the PCS construction rules, the licenses are subject to automatic termination as of the September 17, 2001 construction deadline for failure to

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<sup>4</sup> *Id.*

<sup>5</sup> See 47 C.F.R. § 24.203(b). See Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket 97-82, *Second Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd. 6571, 6584-85 (1999).

<sup>6</sup> TWU Extension Request at 3. The case was converted to a Chapter 7 proceeding on July 9, 1999.

<sup>7</sup> See File No. 0000461700. We note that the assignment application remains pending as of the release of this Order. This application will be acted upon shortly by the Commission. The relief granted in this Order is conditioned upon the Commission consent to, and the parties consummation of, the assignment of the licenses.

<sup>8</sup> TWU Extension Request at 2.

<sup>9</sup> See File No. 0000517077.

<sup>10</sup> Even though TWU was not the holder of the licenses at the time it sought the extension, TWU argues that it has standing to make the request. We need not address the sufficiency of TWU's standing argument, however, because the Trustee, as the current holder of the licenses, timely filed its extension request seeking the same relief for the licenses and incorporating TWU's earlier filing by reference. Therefore, we will address the merits of the Trustee's extension request, including the information filed by TWU.

<sup>11</sup> See Letter to Magalie Roman Salas, Secretary, Federal Communications Commission from Mitchell F. Brecher, counsel for TWU, dated January 24, 2002 (Extension Supplement).

<sup>12</sup> See Letter to William F. Caton, Acting Secretary, Federal Communications Commission from Mitchell F. Brecher, counsel for TWU, dated March 18, 2002 (Second Supplement), and Letter to William F. Canton, Acting Secretary, Federal Communications Commission from Mitchell F. Brecher, counsel for TWU, dated April 8, 2002 (Third Supplement).

meet the construction requirements.<sup>13</sup> Pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules,<sup>14</sup> however, an extension of time to complete construction may be granted if the licensee timely makes a request for extension and demonstrates that the failure to complete construction is due to causes beyond its control.<sup>15</sup> Moreover, the Commission has stated that in situations in which the circumstances are unique and the public interest would be served, it would consider waiving the PCS construction requirements on a case-by-case basis.<sup>16</sup> Pursuant to section 1.925 of the Commission's rules, waiver may be granted if the petitioner establishes either that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that grant of the waiver would be in the public interest; or (2) where the petitioner establishes unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>17</sup>

6. As discussed below, we find that a limited waiver of the broadband PCS construction requirements is warranted in this case due to the unique circumstances involved and because the public interest would be served by granting a brief extension of time to allow TWU to implement its proposed build-out plan. We find this situation unique due to the combination of a number of factors. First, the four BTAs in question are small markets in terms of both population and population density,<sup>18</sup> and TWU specifically proposes to bring service to small towns and rural areas within each of the four BTAs that are not readily served by other commercial wireless carriers.<sup>19</sup> TWU's proposed service to these small communities is consistent with statutory and Commission policy directives to ensure service to rural areas

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<sup>13</sup> See 47 C.F.R. §§ 1.946(c), 1.955(a)(2).

<sup>14</sup> 47 C.F.R. §§ 1.946, 24.843.

<sup>15</sup> Requests for extensions of time must be made before the expiration of the construction period. See 47 C.F.R. § 1.946(e). Section 1.946(e) also includes examples of specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

<sup>16</sup> See Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd. 4957, 5019 (1994) (*PCS MO&O*), citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>17</sup> 47 C.F.R. § 1.925. Alternatively, pursuant to section 1.3, the Commission has authority to waive its rules if there is "good cause" to do so. 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

<sup>18</sup> None of the four BTAs have a total population within the top 100 markets and all fall within the lower third of markets in the U.S. in terms of population density. Also, none of the counties that comprise the four BTAs fall within the top 500 U.S. counties in terms of population, and 12 of the 17 counties have a population density below 30 persons per square mile, ranking in the lower 25 percent of all counties in terms of populations density. Our analysis herein focused on the 487 BTAs encompassing the 50 States and was calculated using 1990 Census figures. We note that there are an additional six BTAs that make up U.S. territories and possessions.

<sup>19</sup> TWU asserts that it will initially serve the "core cities" of the four BTAs (*i.e.*, Harrison, Hot Springs, Russellville, and St. George) which will meet the 25 percent coverage benchmark, but will also quickly begin service in smaller towns in Arkansas within six months and in smaller towns and tribal lands in Utah within twelve months. Extension Supplement at 2. Specifically, TWU identified the following towns in Arkansas: Mountain Home, Flat, Calico Rock, Jasper, Heber Springs, Conway, Aplin, Morrilton, Piney (in Pope County), and Glenwood. *Id.* TWU identified the following towns in Utah: Kanab, Orderville, Alton, Ivins, Shem, Shivwits, Santa Clara, Washington, Harrisburg Junction, Silver Reef, and Anderson Junction. *Id.* at 3. TWU later acknowledged that six of the small towns in Arkansas that it planned to cover were not within the BTAs that were subject of the extension request, but were in neighboring BTAs held by TWU's strategic partners. Second Supplement at 2. TWU provided a list of seven additional rural communities within the three instant BTAs that it plans to serve: Green Forest and Berryville in the Harrison, AR BTA; Bismarck, Marcus, and Social Hill in the Hot Springs, AR BTA; and London and Piney (in Johnson County) in the Russellville, AR BTA. Third Supplement at 2.

using licenses that are awarded through competitive bidding,<sup>20</sup> as well as Commission statements encouraging PCS service to rural areas.<sup>21</sup> Even to the extent that some commercial wireless carriers are providing service in parts of the BTAs, TWU's proposed expansion of PCS service beyond those areas will benefit consumers in terms of the choices available to them and is likely to promote vigorous competition in the marketplace.<sup>22</sup>

7. Second, TWU's proposed service to tribal areas in the St. George, Utah BTA<sup>23</sup> is consistent with the Commission's goal to encourage wireless telecommunications services to tribal lands.<sup>24</sup> As part of the effort to encourage service to tribal lands, the Commission stated that it will entertain waivers of regulatory requirements – including, specifically, construction requirements – that would facilitate the deployment of service to such areas.<sup>25</sup> We believe that TWU's commitment to bringing wireless service to tribal lands in Utah achieves the public interest objective that the Commission had in mind when it established this policy.

8. Third, although TWU submitted its extension request to the Commission only five months before the expiration of the five-year construction period, the record indicates that TWU has been engaged in diligent efforts to acquire and build out the BTAs for over two and a half years. These efforts have included seeking and obtaining consent to the voluntary transfer of the licenses in the Magnacom bankruptcy proceeding, and undertaking significant preliminary work for meeting the license construction requirements, including performing market surveys and research, identifying specific transmitter sites, and seeking local zoning approvals necessary for temporary and permanent locations of operation.<sup>26</sup> As a result of these efforts, TWU requires only a relatively short extension to complete its proposed build-out.

9. We believe that all of these factors taken together present a unique situation that warrants a limited extension of the construction period. We conclude that the underlying purpose of the PCS construction requirements – to ensure that the PCS spectrum is used effectively and made available to as many communities as possible<sup>27</sup> – would not be served by strict application of rule in this case and that grant of the requested extension would serve other statutory and Commission goals.

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<sup>20</sup> See Section 309(j)(4)(B) (“...the Commission shall...include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas...”).

<sup>21</sup> See, e.g., *PCS MO&O* at 5019-5020.

<sup>22</sup> See *Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, Memorandum Opinion and Order*, 16 FCC Rcd. 19573, 19577 (WTB Comm. Wir. Div. 2001) (*Leap*).

<sup>23</sup> TWU identified the Ute Tribal Reservation community and the following tribal lands: Mexican Hat, Bluff, and Aneth. See *Extension Request* at 7; *Extension Supplement* at 3. TWU later acknowledged that these tribal lands are not located in the St. George BTA, but in the neighboring Farmington, NM – Durango, CO BTA (BTA139). *Second Supplement* at 2. TWU states that it plans to continue to serve these tribal lands as part of its strategic alliances. *Id.* TWU added that it does intend to cover the Shivwits Band and Cedar City tribal lands within 6 months and the Indian Peaks Band tribal land “in the second phase of construction.” *Id.*

<sup>24</sup> See, generally, *In the Matter of Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 11794 (2000).

<sup>25</sup> *Id.* at 11808-09.

<sup>26</sup> TWU *Extension Request* at 13, and *Extension Supplement* at 5-6. TWU claims, however, that further pre-authorization activities are limited by certain barriers, such as issues with zoning, leasing, and antenna placement, which require a license to proceed. *Id.* at 6. While we do not find that such preliminary work alone would justify a waiver of the construction requirements, we do find it relevant as one factor in granting a short extension of the construction period.

<sup>27</sup> *PCS MO&O* at 5018.

10. Because TWU's planned service to rural and tribal areas is a critical component to grant of an extension, we do so on the condition that TWU must, in addition to the 25 percent coverage benchmark, provide service to the portions of the four BTAs that it has committed to serve in its request. Specifically, in Arkansas, the licensee must, within six months of this Order (*i.e.*, November 24, 2002), provide service to (i) 25 percent of the population of each of the three BTAs, and (ii) to the rural communities provided by TWU and listed in Attachment A. In Utah, the licensee must provide service to (i) 25 percent of the population of the BTA within six months (*i.e.*, November 24, 2002), and (ii) the rural communities and tribal lands provided by TWU and listed in Attachment A within twelve months of this Order (*i.e.*, May 24, 2003). As with construction requirements in general, we require TWU to notify the Commission no later than fifteen days following the deadlines that it has met the requirements set forth herein.<sup>28</sup> Failure to meet any of these construction benchmarks will result in automatic termination of the particular license as of the new construction deadline.

11. Finally, as we have done with other extensions of time to meet the construction requirements,<sup>29</sup> we extend the restrictions on broadband PCS C-block licenses that were intended to coincide with the completion of the five-year construction requirement.<sup>30</sup> Specifically, section 24.839(a) of the Commission's rules prohibits the transfer of control or assignment of C-block broadband PCS licenses unless the filing of the application for assignment or transfer of control occurs five years after the date of the initial license grant or following the licensee's notification to the Commission that its five-year construction requirement has been satisfied.<sup>31</sup> Moreover, section 1.2111 of the Commission's rules requires that unjust enrichment payments be made to the Commission in circumstances in which C-block licenses are transferred or assigned prior to five years from the date of initial license grant.<sup>32</sup> Because both of these restrictions were intended to coincide with the licensee meeting the five-year construction requirement,<sup>33</sup> we extend the prohibition of section 24.839 against the transfer of control or assignment of the instant licenses to non-eligible entities, and the unjust enrichment payment requirements of section 1.2111, until the licensee notifies the Commission that it has satisfied the construction requirements set forth herein with regard to each license individually.

#### IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and sections 0.331, 1.925, and 1.946(e) of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946(e), that the Petition for Expedited Waiver and Extension of the Broadband PCS Construction Requirements of Section 24.203 of the Commission's Rules filed by Telecom Wrap Up Group, LLC, on July 10, 2001, and the Petition for Expedited Waiver and Extension of the Broadband PCS Construction Requirements of Section 24.203 of the Commission's Rules filed by the Trustee in Bankruptcy for Magnacom Wireless, LLC on September 17, 2001, ARE CONDITIONALLY GRANTED to the extent provided herein.

13. IT IS FURTHER ORDERED, pursuant to authority delegated by section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and by section 0.331 of the Commission's rules,

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<sup>28</sup> See 47 C.F.R. § 1.946(d).

<sup>29</sup> See, e.g., *Leap* at 19580-81.

<sup>30</sup> See Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd. 16266, 16290-91 (2000) (*PCS Restructuring Order*).

<sup>31</sup> 47 C.F.R. § 24.839(a).

<sup>32</sup> 47 C.F.R. § 1.2111.

<sup>33</sup> *PCS Restructuring Order* at 16290-91.

47 C.F.R. § 0.331, that the requirements of sections 1.2111 and 24.839 of the Commission's rules, 47 C.F.R. §§ 1.2111, 24.839, BE EXTENDED for the licenses that were the subject of the instant request until the licensee notifies the Commission that the construction requirements set forth herein have been met.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel  
Deputy Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

## ATTACHMENT A

**Rural Communities and Tribal Lands That Telecom Wrap Up, LLC Proposes to Serve**Harrison, Arkansas BTA (BTA182)

Flat, AR

Jasper, AR

Green Forest, AR

Berryville, AR

Hot Springs, Arkansas BTA (BTA193)

Glenwood, AR

Bismarck, AR

Marcus, AR

Social Hill, AR

Piney, AR (in Pope County)

Russellville, Arkansas BTA (BTA387)

London, AR

Piney, AR (in Johnson County)

St. George, Utah BTA (BTA392)

Kanob, UT

Orderville, UT

Alton, UT

Ivins, UT

Shem, UT

Shivwits, UT

Santa Clara, UT

Washington, UT

Harrisburg Junction, UT

Silver Reef, UT

Anderson Junction, UT

Paiute Shivwits Band tribal land

Paiute Cedar City tribal land

Paiute Indian Peaks tribal land