

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

In the Matter of)
MINNESOTA PCS LIMITED PARTNERSHIP) File No. 0000594478
Notification of Compliance and Request for)
Extension of Broadband PCS Construction)
Requirements for Call Sign KNLF389)
in the Brainerd, Minnesota BTA)

ORDER

Adopted: September 18, 2002

Released: September 19, 2002

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

I. INTRODUCTION

1. On September 17, 2001, Minnesota PCS Limited Partnership ("MN PCS") filed a notification with the Wireless Telecommunications Bureau stating that it failed to meet the Commission's coverage requirements for its broadband Personal Communications Services ("PCS") license identified by call sign KNLF389. In the notification, MN PCS also requested an extension of time to come into compliance with the coverage requirement. For the reasons set forth below, we dismiss the notification as insufficient, deny the extension request, and notify MN PCS that its license automatically terminated on September 17, 2001.

II. BACKGROUND

2. On September 17, 1996, MN PCS's predecessor-in-interest, Western Minnesota PCS Limited Partnership, was authorized to operate a broadband PCS system on the C-block in the Brainerd, Minnesota Basic Trading Area ("Brainerd BTA") under call sign KNLF389. In 1998, pursuant to the Commission's installment payment restructuring for broadband PCS C-block licensees, the license for KNLF389 was disaggregated and 15 MHz of the spectrum was returned to the Commission for relicensing. Pursuant to section 24.203(b) of the Commission's rules, licensees of such disaggregated 15 MHz blocks are required to provide service to at least one-quarter of the population of their licensed area or make a showing of substantial service within five years of initial license grant. In this case, MN PCS

1 See ULS File No. 0000594478 (Notification).

2 See ULS File No. 0000594478, Attachment entitled "Request for Extension of Time to Come into Compliance with the Five-Year Construction Requirement" (Extension Request).

3 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).

4 See 47 C.F.R. § 24.203(b). Otherwise, C-block licensees must provide service to one-third of the population of their licensed area within five years and two-thirds of the population within ten years. See 47 C.F.R. § 24.203(a). Furthermore, pursuant to 47 C.F.R. § 1.946(d), MN PCS was required to submit a notification of its compliance with the coverage or substantial service obligations within fifteen days of the construction deadline, i.e.,

(continued...)

was required to satisfy its five-year construction requirement by September 17, 2001. On September 17, 2001, MN PCS electronically filed a notification with the Commission, stating that its level of coverage as of the construction deadline was zero percent of the population of the Brainerd BTA.⁵ Noting that it failed to meet the coverage requirement of section 24.203(b) of the Commission's rules, MN PCS requested an additional 12 months to meet the requisite level of coverage.⁶

III. DISCUSSION

3. As an initial matter, we find that MN PCS did not comply with the requirements of section 24.203(b) of the Commission's rules because, as it acknowledged, its coverage as of the five-year construction deadline (*i.e.*, no population coverage) fell well below the minimum coverage of 25 percent required by the rule, and MN PCS did not elect to make a demonstration of substantial service in the market. Therefore, without grant of an extension of time or waiver of the rules, MN PCS's license terminated automatically on the construction deadline, *i.e.*, on September 17, 2001. Because MN PCS timely requested an extension to comply with the 25 percent coverage requirement, we will address the sufficiency of the extension request.⁷

4. Pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, an extension of time to complete construction will be granted if the licensee shows that the failure to complete construction is due to causes beyond its control.⁸ 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.⁹ Furthermore, in recognizing that compliance with

(...continued from previous page)

by October 2, 2001, or have requested an extension of time to meet the obligations, pursuant to 47 C.F.R. § 1.946(e), by the construction deadline (*i.e.*, September 17, 2001).

⁵ See *Notification*, "BTA 54 - Population and Coverage." The Brainerd BTA is comprised of the following three counties: Crow Wing; Aitkin; and Cass. MN PCS states that it is not providing service to any of these counties. *Id.*; see also *Extension Request* at 2 (stating that "there is presently no population coverage in the BTA"). We note that MN PCS includes an exhibit that states that MN PCS is providing coverage to 9.9% of the population (coverage to 12,980 out of a total population of 131,271). See *Notification*, "Exhibit 1 - Population Demonstration" at 1. However, the attachment entitled "BTA 54 - Population and Coverage" states that the total population for the Brainerd BTA is 97,550 and that MN PCS is not providing any coverage. On September 12, 2002, a Commission staff member confirmed with Mr. Christopher K. Sandberg, counsel for MN PCS, that MN PCS is not providing service to the public on the C-block license in the Brainerd BTA.

⁶ 47 C.F.R. § 24.203(b). *Extension Request* at 2.

⁷ We note that MN PCS improperly filed its extension request as part of a "Notification" on the Commission's Universal Licensing System ("ULS"). MN PCS should have filed the request as an "Extension Request" on ULS. Nonetheless, because the extension request was timely and it was related to the construction notification, we will address the merits of the extension request despite the fact that it was improperly filed. We also note that MN PCS did not specifically request a waiver of the PCS construction rules; however, in order to fully address MN PCS's request, we will interpret the extension request as effectively a request for waiver of the timing component of the broadband PCS construction rule.

⁸ 47 C.F.R. §§ 1.946, 24.843. Section 1.946(e) also states specific circumstances that would not warrant an extension of time to complete construction. 47 C.F.R. § 1.946(e)(2)-(3).

⁹ 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); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

the broadband PCS construction requirements may be difficult,¹⁰ 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.¹¹

5. As explained herein, we find that the record does not support grant of an extension or a waiver of the rules for MN PCS to meet the construction requirements for the Brainerd BTA. MN PCS first argues that an extension is warranted because it had difficulties in constructing antennas in the Brainerd BTA because of local opposition to tower construction in that market.¹² MN PCS states that until it “is able to secure tower siting rights in these population centers, [MN PCS] (or any other PCS operator) will not be able to meet the 25 [percent] threshold for BTA coverage.”¹³ Section 1.946(e)(2) of the Commission’s rules, however, expressly prohibits an extension of time to meet the construction requirements for failure “to obtain an antenna site.”¹⁴ Moreover, MN PCS has provided no evidence that its situation is unique or unusual compared to the difficulties experienced by most PCS carriers in constructing their networks. Other licensees in the Brainerd BTA have not mentioned difficulties obtaining tower siting rights, including MN PCS, which was able to timely satisfy its five-year construction obligation in the Brainerd BTA for its D-block license.¹⁵

6. MN PCS also maintains that an extension is warranted because the population of the market is “sparsely settled” and “concentrated in a few centers.” where the opposition to tower construction apparently exists.¹⁶ Again, we note that difficulty in site acquisition is specifically excluded as a reason for granting an extension of time to meet the coverage requirements, and MN PCS failed to provide specific information on any factors that it believed were unique or unusual compared to the circumstances faced by other PCS operators.¹⁷ Moreover, MN PCS knew, or should have known, the population patterns of the market prior to acquiring the license several years ago and could have reasonably taken these patterns into account in constructing its network within the BTA.

7. MN PCS further asserts that an extension will permit it time to secure additional capital for renewed construction efforts or to complete a sale of its PCS licenses to an entity that will be able to provide coverage.¹⁸ Section 1.946(e)(2), however, also specifically excludes lack of financing as grounds for an extension, and section 1.946(e)(3) states that an extension of time to meet construction requirements will not be granted because the licensee intends to assign the authorization.¹⁹ Again, MN PCS fails to cite any unique or unusual circumstances regarding financing or the potential sale that would

¹⁰ 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).

¹¹ *Id.*, citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

¹² *Extension Request* at 2.

¹³ *Extension Request* at 2.

¹⁴ 47 C.F.R. § 1.946(e)(2).

¹⁵ See File No. 0000883748 (notification of satisfaction of the five-year coverage requirement for KNLG955, MN PCS’s 10 MHz D-block license for the Brainerd, Minnesota BTA).

¹⁶ *Extension Request* at 2.

¹⁷ It is worth noting that MN PCS filed its extension request on the last day of the construction period, which although timely, does not support a high level of diligence in meeting the coverage requirement and appraising the Commission of difficulties encountered in constructing its PCS network in the Brainerd BTA.

¹⁸ *Id.* at 2-3.

¹⁹ 47. C.F.R. §§ 1.946(e)(2)-(3).

warrant a waiver of the PCS construction rule. Also, it is unclear how “additional capital” or a sale would remedy the tower difficulties described above.

8. We believe that enforcement of the construction requirement is not contrary to the public interest based upon the circumstances of this case. MN PCS is not presently providing service to the public in the Brainerd BTA using the C-block spectrum; accordingly, termination of this license does not result in loss or reduction of service to subscribers.²⁰ MN PCS also holds the D-block PCS authorization for the Brainerd BTA and has satisfied the construction requirement for the D-block license. We see nothing that would prevent MN PCS from using the 10 MHz of spectrum from the D-block to provide service to potential subscribers within the Brainerd BTA. Furthermore, according to Commission records and our own research, there are several mobile voice service providers offering service in the Brainerd BTA. Two cellular carriers are currently providing service to the three counties that comprise the Brainerd BTA, and at least two other broadband PCS carriers are providing service to portions of these counties.²¹ In light of the totality of the circumstances, including the fact that termination of this license will not affect service to subscribers and that there are multiple mobile voice service providers already providing service, we believe that enforcement of the PCS construction requirement in this case is not contrary to the public interest. Thus, we find that MN PCS’s situation neither meets the standard for an extension of time under section 1.946(e) nor warrants a waiver of the PCS construction rule, and therefore, MN PCS’s license for the C-block authorization in the Brainerd BTA automatically terminated on September 17, 2001, pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission’s rules.²²

9. As a final matter, we note that during the pendency of its waiver request, MN PCS continued to make installment payments pursuant to section 1.2110 of the Commission’s rules.²³ However, MN PCS failed to make its January 2002 installment payment within the two quarterly grace periods allowed by the Commission’s rules.²⁴ Accordingly, even if we had granted MN PCS’s request for an extension of time, MN PCS’s licenses would have cancelled automatically on August 1, 2002.²⁵

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission’s rules, 47 C.F.R. § 0.331, that the

²⁰ *Id.* at 2.

²¹ ACC Minnesota License, LLC is providing service on the cellular A-block under call sign KNKN375 and RCC Minnesota, Inc. is providing service on the cellular B-block under call sign KNKN421 to all three counties. Leap Wireless is providing service to portions of Crow Wing and Cass counties using the E-block spectrum in the Brainerd BTA. *See* File No. 0000869891 (filed April 30, 2002). In addition, VoiceStream Minneapolis, Inc. is providing service to portions of Crow Wing, Aitkin and Cass counties using the B-block spectrum in the Major Trading Area that includes the Brainerd BTA (MTA012). *See* File No. 0000183040 (filed July 7, 2000).

²² 47 C.F.R. § 24.203(b).

²³ *See* 47 C.F.R. § 1.2110.

²⁴ The Commission’s late payment rules installment payments allow licensees to use two quarterly grace periods, subject to late payment fees, if the licensees require additional time to submit payment. 47 C.F.R. § 1.2110(g)(i)-(iv). If a licensee fails to make an installment payment with the associated fees with the two quarterly grace periods, the licensee will be in default, its license(s) will automatically cancel, and it will be subject to debt collection procedures. *Id.*

²⁵ 47 CFR § 1.2110(g)(iv); *see also* In the Matter of Licenses of 21st Century Telesis, Inc. for Facilities in the Broadband Personal Communications Services, *Memorandum Opinion and Order*, 15 FCC Rcd 25113 (2000); Letter to Mr. Kurt Schueler, President; New England Mobile Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 01-2542 (rel. October 30, 2001).

Notification of Construction filed by Minnesota PCS Limited Partnership on September 17, 2001 IS DISMISSED.

11. IT IS FURTHER ORDERED, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, that the Request for Extension of Time to Come into Compliance with the Five-Year Requirement filed by Minnesota PCS Limited Partnership on September 17, 2001 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

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