

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

In the Matter of )
WEST VIRGINIA PCS ALLIANCE, L.C. )
Request for Waiver of Section 24.203(a) of the )
Commission's Rules for Broadband PCS License )
WPOH986 in the Cincinnati-Dayton MTA )
File No. 0000182956

ORDER

Adopted: October 25, 2001

Released: October 26, 2001

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

I. Introduction

1. In this Order, we address the construction notification and request for waiver filed by West Virginia PCS Alliance, LC ("WV PCS") on July 7, 2000, regarding its broadband Personal Communications Service ("PCS") license, identified by call sign WPOH986, partitioned from the Cincinnati-Dayton Major Trading Area ("Cincinnati MTA").

II. Background

2. In 1997, certain rural portions of the broadband PCS B-Block authorization for the Cincinnati MTA were partitioned and licensed under call sign WPOH986 to WV PCS ("Cincinnati Partition").

1 See "Notification of Satisfaction of Five-Year Build-Out Requirement" filed by WV PCS on July 7, 2000, File No. 0000183070, Exhibit A ("Notification/Waiver Request").

2 47 C.F.R. § 24.203(a).

3 See "Supplemental Comments of West Virginia PCS Alliance," filed by WV PCS on September 19, 2000 ("Supplement").

4 Specifically, WV PCS received the following Basic Trading Areas ("BTAs") within the Cincinnati MTA (MTA018): Beckley, WV (BTA035); Bluefield, WV (BTA048); Charleston, WV (BTA073); Huntington, WV-Ashland, KY (BTA197); Logan, WV (BTA259); Portsmouth, OH (BTA359); and Williamson-WV-Pikesville, KY (BTA474).

license grant.<sup>5</sup> At the time of the assignment, WV PCS elected to meet the five- and ten-year construction benchmarks with respect to the partitioned licensed area, while the original licensee maintained responsibility for providing coverage to the area it retained.<sup>6</sup> The five-year construction deadline applicable for the Cincinnati Partition was June 23, 2000.

3. On July 7, 2000, WV PCS filed a notification of construction for the Cincinnati Partition and stated that, as of the filing date, it was providing coverage to a population of 473,346, or 31.2 percent, of its partitioned area.<sup>7</sup> Despite this coverage falling short of the one-third benchmark set forth in section 24.203(a), WV PCS submitted that it should be deemed to have complied with the Commission's coverage requirements, or, in the alternative, should be granted a waiver.<sup>8</sup> As a basis for waiver, WV PCS stated that the Cincinnati Partition constitutes the most rural area of the Cincinnati MTA and that, had no partition occurred, the coverage requirements for the entire Cincinnati MTA could have been met without any coverage to the rural areas within the Cincinnati Partition.<sup>9</sup> WV PCS also noted that if the coverage from its PCS networks in the neighboring BTAs of Morgantown, WV and Clarksburg, WV was aggregated with its coverage in the Cincinnati Partition, then it was providing coverage to 34.2 percent of the population within those aggregated licensed areas.<sup>10</sup> Furthermore, WV PCS indicated that, in conjunction with an affiliated entity which operated a contiguous partition of the Richmond-Norfolk MTA, the two companies provided coverage to 44.4 percent of the population of the combined licensed areas.<sup>11</sup> Finally, WV PCS pointed out that it had less than three years to meet the five-year benchmark.<sup>12</sup>

4. On August 3, 2000, the Bureau issued a public notice seeking comment on WV PCS's waiver request on whether granting WV PCS's waiver request would further the public interest.<sup>13</sup> While no party filed comments in response to the public notice, WV PCS did file Supplemental Comments in which it modified its waiver request. Specifically, in lieu of asserting that it had effectively met the coverage requirements as of the original deadline, WV PCS stated that it had met and exceeded the one-third population benchmark within six weeks of its original five-year deadline.<sup>14</sup> WV PCS reiterated that the

---

<sup>5</sup> 47 C.F.R. § 24.203(a).

<sup>6</sup> Pursuant to 47 C.F.R. § 24.714(f)(1)(i), the partitionee may elect to satisfy the applicable construction requirements for the partitioned licensed area.

<sup>7</sup> Notification/Waiver Request at 1-2.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* WV PCS indicated that coverage to the Cincinnati BTA, which lies outside the Cincinnati Partition, would have meet the one-third coverage requirement for the entire Cincinnati MTA. *Id.*

<sup>10</sup> *Id.* at 2-3.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.*

<sup>13</sup> See Wireless Telecommunications Bureau Seeks Comment on West Virginia PCS Alliance, L.C.'s Request for Waiver of the Five-Year Broadband PCS Construction Requirement for the Partitioned Cincinnati MTA (018), *Public Notice*, 15 FCC Rcd 13388 (2000).

<sup>14</sup> Supplement at 1-2. Specifically, WV PCS stated that it provided service to 34.3 percent of the population within the Cincinnati Partition within six weeks of the five-year build-out deadline. *Id.* at 4.

partitioning arrangement “ensured that sparsely population areas will be targeted for PCS build-out” and that without the partition, these areas could have gone unserved under the Commission’s rules.<sup>15</sup> Therefore, WV PCS argued it should be deemed to have complied with the coverage requirements or should be granted a limited waiver.

### III. Discussion

5. As an initial matter, it is clear from WV PCS’s own notification, that, as of the five-year deadline, it had not complied with the requirement in section 24.203(a) of the Commission’s rules that it must provide service to one-third of the population of its licensed area. Because WV PCS elected to meet the coverage requirements independent of the original partitioner, it cannot count coverage achieved in other markets by affiliated licensees towards its own construction requirements. Therefore, absent grant of a waiver or extension of time, WV PCS failed to comply with the coverage requirement, which would result in automatic termination of the license.<sup>16</sup>

6. In this case, WV PCS did request a waiver of section 24.203(a) as an alternative in its construction notification, and later supplemented its request by indicating that it had achieved more than one-third coverage of the relevant partitioned area within six weeks of the deadline. 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> Moreover, 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.<sup>18</sup> Moreover, when adopting the PCS construction requirements, the Commission recognized that there may be cases when certain factors, such as a high level of microwave incumbency or sparse population density, would make compliance difficult.<sup>19</sup> The Commission stated that in instances 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>20</sup>

7. On the facts before us, we find that a waiver of the five-year coverage requirements for WV PCS’s Cincinnati Partition is warranted due to the combination of several factors. First, WV PCS obtained

---

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *See* 47 C.F.R. § 24.203(a).

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

<sup>18</sup> 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).

<sup>19</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, ¶ 156 (1994) (*PCS MO&O*).

<sup>20</sup> *Id.*, *citing WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

the partitioned license with just three years to provide a level of coverage that licensees must normally meet in five years, made diligent efforts to meet that level of coverage, and required only six additional weeks to achieve the benchmark. Second, WV PCS's goal was to provide coverage to the rural areas of the Cincinnati MTA. The Cincinnati Partition has only approximately 30 percent of the population of the Cincinnati MTA but over 58 percent of the geographic area.<sup>21</sup> Grant of a very brief extension in this case ensures the reasonably rapid provision of PCS service to the population of these rural areas, which is consistent with the Commission's goals in adopting coverage requirements.<sup>22</sup> Finally, as we have indicated in the past, we can exercise a certain degree of flexibility with the interim five-year construction deadline because WV PCS will ultimately need to cover two-thirds of the population of the partitioned markets at the ten-year mark.<sup>23</sup> We find that such flexibility is warranted in such a case as this where the licensee required only an additional six weeks to provide coverage to a rural areas that might have otherwise gone unserved.

8. We do not believe that grant of this waiver will undermine the enforceability of construction benchmarks generally. Instead, we believe that the underlying purposes of the construction requirements – in particular, in this case, the provision of service to rural areas – would be ill-served in this case by strict application of the five-year period to meet one-third coverage. All of the circumstances in this case taken together are unique enough to warrant the grant of an extension of the interim five-year requirement for an additional period of six weeks.

#### IV. Ordering Clause

9. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 309(j)(4)(B) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j)(4)(B), and sections 0.131, 0.331, 1.3, and 1.925 of the Commission's rules, 47 C.F.R. §§ 0.131, 0.331, 1.3, 1.925, the request for waiver of section 24.203(a) for the broadband PCS license identified by call sign WPOH986 in the Cincinnati-Dayton MTA filed by West Virginia PCS Alliance, L.C. IS HEREBY GRANTED by extension of the five-year construction deadline for six additional weeks.

FEDERAL COMMUNICATIONS COMMISSION

William W. Kunze  
Chief, Commercial Wireless Division  
Wireless Telecommunications Bureau

---

<sup>21</sup> Moreover, as WV PCS indicated, these areas might have otherwise gone unserved had the partition not occurred because coverage to the Cincinnati BTA itself would have meet the five-year benchmark for the entire Cincinnati MTA. *See* Notification/Waiver Request at 2.

<sup>22</sup> *See PCS MO&O* at 5018, ¶ 154. Moreover, the Commission recognized that sparse population density could make compliance with the construction requirements difficult and, therefore, may warrant grant of a waiver if the circumstances are unique and the public interest would be served. *Id.* at 5019, ¶ 156.

<sup>23</sup> *See* GTE Wireless of the Pacific, Inc. Request for Waiver of Construction Requirements for PCS Station WPOI208 in the Yakima, Washington BTA, *Memorandum Opinion and Order*, 15 FCC Rcd 11779, 11780-81 (Comm. Wir. Div. WTB 2000).