

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

In the Matter of)
MONET MOBILE NETWORKS, INC.) File No. 0000865798
Request for a Waiver and Extension of the)
Broadband PCS Construction Requirements)

ORDER

Adopted: September 26, 2002

Released: September 27, 2002

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

I. INTRODUCTION

1. In this Order, we address a request by Monet Mobile Networks, Inc., on behalf of its wholly-owned subsidiary, BWI Midwest LHC, Inc. ("Monet"), for waiver and extension of time to meet the construction requirements ("Extension Request") for two of its broadband Personal Communications Services ("PCS") licenses. Specifically, pursuant to sections 1.925 and 1.946 of the Commission's rules, Monet asks for a thirty-day extension of time in order to satisfy its construction requirements of section 24.203(b) for stations KNLH770, the E Block 10 MHz license for Willmar-Marshall, Minnesota, BTA477 ("Willmar-Marshall BTA") and KNLH737, the D Block 10 MHz license for Bemidji, Minnesota, BTA037 ("Bemidji BTA"). For the reasons stated below, we grant Monet's waiver request for the Willmar-Marshall and Bemidji BTAs.

II. BACKGROUND

2. Since its formation in 1999, Monet has acquired, through the post-auction secondary market, a number of 10 MHz E- and D-block broadband PCS licenses, including KNLH770 (the E-block license for the Willmar-Marshall BTA, BTA477), KNLH737 (the D-block license for the Bemidji BTA, BTA037), and KNLH771 (the D-block license for the Worthington, Minnesota BTA, BTA481). Pursuant to section 24.203(b) of the Commission's rules, 10 MHz broadband PCS licensees are required to provide service to at least one-quarter of the population of their BTAs or make a showing of substantial service within five years of initial license grant. Based on their original grant date, the five-year deadline for these licenses was April 28, 2002. On December 10, 2001, Monet filed a request for an extension of time to complete construction for a number of licenses, including for stations KNLH770, KNLH737, and

1 See File No. 0000865798, filed April 26, 2002 ("Extension Request") and amended on May 8, 2002 (May Amendment to Extension Request") and August 13, 2002 ("August Amendment to Extension Request").

2 Monet also requests a waiver of section 24.203(a) of the Commission's rules. See id. at 1. Section 24.203(a) sets forth construction requirements for licensees of 30 MHz blocks. We do not address Monet's request for waiver of section 24.203(a) because it is inapplicable to the licenses at issue, which are 10 MHz and therefore subject to section 24.203(b) of the Commission's rules.

3 47 C.F.R. § 24.203(b).

KNLH771, so that it could deploy high-speed data rate (“HDR”) technology in these markets.⁴ On April 10, 2002 the Wireless Telecommunications Bureau (“Bureau”) released an order granting Monet a 180-day extension for these licenses, with certain conditions, including the condition that Monet deploy advanced data services in these markets.⁵

3. On April 26, 2002, Monet filed the subject Extension Request, asking for an additional 30 days, *i.e.*, from April 28, 2002 to May 28, 2002, to complete construction for stations KNLH770, KNLH737 and KNLH771 using CDMA standard IS-95A mobile voice technology.⁶ Monet explained that, absent grant of its Extension Request, these licenses would be “subject to the conditions of the [*Monet HDR Waiver Order*] (assuming that the construction certifications for the Licenses are not otherwise timely filed) and in effect would require that they be built out using HDR technology.”⁷ On May 8, 2002, Monet amended its Extension Request to withdraw station KNLH771, the license for the Worthington BTA, from the scope of its waiver request because it had completed construction for this license by the construction deadline.⁸ Monet indicated that it only needed an extension of time for the Willmar-Marshall and Bemidji BTAs. On May 15, 2002, Monet filed construction notifications for the Willmar-Marshall and Bemidji BTAs, respectively.⁹ Monet stated that it was providing service to 26.42 percent of the population of its licensed service area for the Willmar-Marshall BTA and 33.71 percent of the population of its licensed area for the Bemidji BTA, thereby exceeding the 25 percent coverage requirement for 10 MHz Block licenses.¹⁰ On August 13, 2002, Monet further amended its Extension Request to confirm satisfactory completion of construction for the Willmar-Marshall and Bemidji BTAs by May 14, 2002 and modified its Extension Request to seek only an additional sixteen days to complete construction for these markets, *i.e.*, until May 14, 2002.¹¹

III. DISCUSSION

4. Without grant of extension of time or a waiver of the PCS construction rule, Monet’s licenses for the Willmar-Marshall and Bemidji BTAs automatically terminated as of the April 28, 2002 construction deadline for failure to meet the construction requirements. Pursuant to sections 1.946(c) and 1.955(a)(2) of the Commission’s rules, a broadband PCS license will terminate automatically as of the construction deadline if the licensee fails to meet the requirements of section 24.203, unless the Commission grants an extension request or waives the PCS construction requirements.¹² An extension of

⁴ See File No. 0000707917, filed December 20, 2001 and amended on March 26, 2002. At the time it filed this request for an extension, all of the licenses that were part of the request were held by BWI Midwest LHC, Inc. After the filing, Monet submitted a *pro forma* assignment for two of the licenses. As a result, Monet Mobile Bismark LHC, Inc. and Monet Grand Forks LHC, Inc. filed separate extension requests incorporating the original extension request. See File Nos. 0000826083 and 0000826085, respectively, filed March 27, 2002.

⁵ See In the Matter of Monet Mobile Networks, Inc. Request for Waiver and Extension of the Broadband PCS Construction Requirements, DA 02-820, *Order*, 17 FCC Rcd 6452 (2002) (“*Monet HDR Waiver Order*”).

⁶ Extension Request at 1.

⁷ *Id.* at 7.

⁸ See May Amendment to Extension Request; see also File No. 0000880051, filed May 8, 2002 (construction notification for station KNLH771, Worthington BTA).

⁹ See File No. 0000889693, filed May 15, 2002 (“Willmar-Marshall BTA Construction Notification”); File No. 0000889719 (“Bemidji BTA Construction Notification”).

¹⁰ See Willmar-Marshall Construction Notification, Exhibit II entitled “Covered Population”; Bemidji Construction Notification, Exhibit II entitled “Covered Population.”

¹¹ See August Amendment to Extension Request.

¹² 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203.

time to complete construction may be granted, pursuant to sections 1.946(e) and 24.843(b) of the Commission's rules, if the licensee shows that the failure to complete construction is due to causes beyond its control.¹³ Furthermore, in recognizing that compliance with the broadband PCS construction requirements may be difficult at times, the Commission 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.¹⁴ Waiver may be granted, pursuant to section 1.925 of the Commission's rules, 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.¹⁵

5. In its Extension Request, Monet represents that all base stations for the markets at issue had been installed and tested, and were ready to commence service prior to the original construction deadline.¹⁶ Monet contends that it would have been able to satisfy its construction requirements in a timely manner, but for unforeseen delays in establishing its DS1 backhaul connections.¹⁷ According to Monet, orders were placed for the necessary DS1 connections with requested due dates of April 23rd for both the Willmar-Marshall and Bemidji BTAs.¹⁸ Monet represents that the actual timing and installation of its DS1 connections were entirely within the control of the local exchange carrier ("LEC") and/or competitive access provider ("CAP"), and "Monet's inability to meet the construction deadline arises solely from the LEC's and or CAP's inability to complete installation of a few necessary DS1 backhaul connections to the base stations and the [main switching office] within the reasonable delivery time frames requested by Monet."¹⁹ Monet further contends that a sufficient amount of time was allotted for installation of the backhaul facilities prior to its construction deadline, explaining that "[b]ased upon its experience in the industry, Monet reasonably expected that all DS1 backhaul circuits would be installed prior to the April 28, 2002 deadline."²⁰ Moreover, Monet claims that there was no reasonable substitute for these DS1 backhaul connections.²¹ Monet also argues that grant of a waiver is warranted because it will serve the Commission's construction goal of providing service to rural areas.²² As noted in Monet's Extension Request, Willmar-Marshall has a population density of "less than thirty persons per square mile, ranking [it] in the lower 25th percentile of all markets in terms of population density," while Bemidji has a population density of "eleven persons per square mile, ranking it in the lower 10th percentile of all

¹³ 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).

¹⁴ 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).

¹⁵ 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).

¹⁶ See Extension Request at 8.

¹⁷ See *id.* at 4, 8.

¹⁸ See *id.* at 4.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 4.

²¹ See *id.* at 8.

²² See *id.* at 7.

markets in terms of population density.”²³ Monet argues that a *de minimis* extension of time will result in the provision of PCS services to these rural and underserved populations, providing these communities with the benefit of another telecommunications option.²⁴ Finally, Monet explains that it seeks to use IS-95 technology to provide voice service rather than using HDR technology to provide mobile high-speed data service because its “marketing studies suggest that . . . the demand for voice service within the communities served [in these markets] will exceed the demand for a mobile high-speed data service.”²⁵ Monet states that these market studies, as well as “its experience with its Sioux Falls market” leads Monet to “conclude[e] that it is premature to introduce a data-only offering” in these markets.²⁶ Monet indicates that it ultimately intends to use HDR technology in these markets.²⁷

6. In this case, we find that a short extension of time to meet the PCS construction requirements is warranted based upon the totality of the circumstances, including the delays caused by events that were not reasonably anticipated, the diligent efforts by Monet prior to the deadline and its level of construction at the deadline, the *de minimis* nature of the extension, and Monet’s plan to deploy broadband PCS services in rural areas. While a licensee should reasonably expect last-minute delays and should take those into account when planning the construction of its system, we find that Monet acted diligently in completing construction despite the unforeseeable circumstances surrounding the system construction. Based upon Monet’s experience with these particular markets, Monet indicates that the timeframe allotted for installing backhaul facilities was reasonable.²⁸ In light of these circumstances, we believe that Monet has been diligent in constructing its markets and that, but for circumstances beyond its control, Monet would have satisfied the construction requirements in a timely manner. Indeed, the fact that Monet amended its extension request to indicate timely provision of service for the Worthington BTA suggests that Monet allotted sufficient time to construct its network and would have satisfied its requirements in the two subject markets but for the unforeseen delays in establishing its backhaul connections. Further, despite these difficulties, Monet actually satisfied the construction requirements for the Willmar-Marshall and Bemidji BTAs within sixteen days of its deadline.²⁹

7. Furthermore, grant of a very brief extension in this case serves the public interest by allowing Monet to implement its proposed plan to bring service to rural and otherwise underserved areas. The two BTAs in question are rural markets.³⁰ We have found that rural markets are, as expected, more likely to be underserved by virtue of their sparse population than more urban areas.³¹ Monet’s proposed service to these rural and underserved markets is consistent with statutory and Commission policy

²³ *Id.* at 6.

²⁴ *See id.* at 7.

²⁵ *Id.*

²⁶ *Id.* at 3.

²⁷ *Id.* at 3, 7.

²⁸ *Id.* at 4.

²⁹ *See* August Amendment to Extension Request at 1.

³⁰ As Monet points out, the Willmar-Marshall and Bemidji BTAs have population densities that place them in the lower 25th and lower 10th percentile of all markets, respectively. *See* Extension Request at 6.

³¹ *See, e.g.,* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, FCC 01-192, Appendix C, Table 5 (rel. Jul. 17, 2001) (demonstrating that, of the lower quartile of counties in terms of population, only 18.0% have 3 or more mobile telephone providers compared to 93.2% of the highest quartile of counties).

directives to ensure service to rural areas using licenses that are awarded through competitive bidding,³² Commission statements encouraging PCS service to rural areas,³³ and recent action by the Wireless Telecommunications Bureau's Commercial Wireless Division on similar requests for extension of time involving rural and sparsely-populated areas.³⁴ Moreover, as we have noted in similar requests,³⁵ even to the extent that some commercial wireless carriers are providing service to parts of the BTAs, Monet's construction will benefit consumers in terms of the choices available to them and is likely to promote vigorous competition in the marketplace. Accordingly, for the foregoing reasons, we find a short extension of time is warranted and therefore grant Monet's request.

IV. ORDERING CLAUSE

8. 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 of the Commission's rules, 47 C.F.R. §§ 0.331, 1.925, 1.946, that the Request for Waiver and Extension of the Broadband PCS Construction Requirements filed by Minnesota PCS Limited Partnership on April 26, 2002, as amended on May 8, 2002 and August 13, 2002, IS HEREBY GRANTED to extend the five-year construction deadline for the Willmar-Marshall and Bemidji BTAs for a period of sixteen days, from April 28, 2002 to May 14, 2002.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
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³² See 47 U.S.C. § 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...").

³³ See, e.g., *PCS MO&O* at 5018 ("ensure that PCS service is made available to as many communities as possible and that spectrum is used efficiently").

³⁴ See, e.g., Minnesota PCS Limited Partnership, Request for Waiver and Extension of the Broadband PCS Construction Requirements, Order, DA 02-211 (rel. Aug. 29, 2002) ("*Minnesota PCS*"); Leap Wireless International, Inc., Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573, 19577 (2001).

³⁵ See, e.g., *Minnesota PCS* at para. 7; Trustee in Bankruptcy for Magnacom Wireless, LLC and Telecom Wrap Up Group, LLC, Petition for Waiver and Extension of Broadband PCS Construction Requirements, Order, 17 FCC Rcd 9535, 9538 (rel. May 24, 2002).