

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

In the Matter of
Qwest Wireless, LLC
Request for a Waiver and Extension of the
Broadband PCS Construction Requirements
File No. 0000939234

ORDER

Adopted: March 5, 2003

Released: March 6, 2003

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

I. INTRODUCTION

1. In this Order, we address the request by Qwest Wireless, LLC ("Qwest") for waiver and extension of time to meet the construction requirements for station WPOH997, a 10 MHz E block broadband Personal Communications Services ("PCS") license for a partitioned area of the Albuquerque, New Mexico Basic Trading Area, BTA008 ("Albuquerque BTA"). Station WPOH997 consists of three counties in the Albuquerque BTA: Catron, Socorro, and Torrance ("Albuquerque Partition"). Specifically, Qwest seeks an extension of time of just over nine months (from June 26, 2002 until March 31, 2003) in order to satisfy its construction requirement under section 24.203(b). For the reasons stated below, we grant Qwest's Extension Request to the extent described below.

II. BACKGROUND

2. 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 licensed area or make a showing of substantial service within five years of initial license grant. Based on the original grant date, the five-year deadline for the subject license was June 26, 2002. On June 25, 2002, Qwest filed a request for an extension of time to satisfy its construction requirements, seeking an additional period of just over nine months to complete construction for the partitioned area covered by station WPOH997.

3. The Albuquerque Partition was initially part of the E Block license for the Albuquerque BTA, issued under call sign KNLH655 and held by U S WEST Communications, Inc., Qwest's predecessor-in-interest. The Albuquerque BTA was then partitioned to Tularosa Basin Telephone Company, Inc. ("Tularosa") under call sign WPOH997. In its application, Tularosa elected to meet the

1 See File No. 0000939234, Exhibit 1 entitled "Request for Extension of Time to Complete Construction," filed by Qwest on June 25, 2002 ("Extension Request").

2 47 C.F.R. § 24.203(b).

3 See Extension Request.

4 See File No. 50396-CW-AL-97, filed by U S West Wireless, L.L.C. and Tularosa on September 10, 1997 and amended on October 28, 1997 and February 10, 1998; see also "Wireless Telecommunications Bureau

five-year construction benchmark with respect to the Albuquerque Partition, leaving Qwest to meet the requirements with respect to the remainder of its licensed area in the Albuquerque BTA. Tularosa, however, did not construct any PCS facilities in the Albuquerque Partition, and instead assigned the license for the Albuquerque Partition back to Qwest.⁵ Even though Qwest now holds the authorizations for both the Albuquerque Partition and for the majority of the counties of the surrounding Albuquerque BTA,⁶ there remain separate build-out benchmarks for each of the two licenses.

III. DISCUSSION

4. Qwest acknowledges that it did not timely satisfy the construction requirement set forth in section 24.203(b) of the Commission's rules for station WPOH997. 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.⁷ Accordingly, without grant of extension of time or a waiver of the PCS construction rule, the license for station WPOH997 automatically terminated as of the June 26, 2002 construction deadline. An extension of 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.⁸ Furthermore, in recognizing that compliance with the broadband PCS construction requirements may be difficult at times, 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.⁹ 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.¹⁰ As discussed below, we find that the

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Commercial Wireless Service Information," *Public Notice*, Report No. LB-98-13 (December 12, 1997) (indicating grant of partial assignment to Tularosa).

⁵ See File No. 0000259838, filed by Qwest Wireless, LLC and Tularosa on December 14, 2000; see also "Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications -- Action," *Public Notice*, Report No. 811 (March 21, 2001) (indicating consent of assignment to Qwest); "Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications -- Action," *Public Notice*, Report No. 992 (October 10, 2001) (indicating consummation of assignment to Qwest).

⁶ Qwest retains the license for KNLH655, a disaggregated and partitioned license that includes spectrum covering seven of twelve counties within the Albuquerque BTA. If the area covered by WPOH997 is included, Qwest holds licensed spectrum covering ten of twelve counties within the Albuquerque BTA.

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

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 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).

¹⁰ 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).

circumstances set forth in Qwest's Extension Request warrant grant of a waiver and extension of time for satisfaction of the five- year construction requirement.

5. Qwest contends that good cause exists to grant its Extension Request,¹¹ and that "unique or unusual factual circumstances would render application of the rules inequitable, unduly burdensome or contrary to the public interest."¹² In support of its Extension Request, Qwest explains that it has made diligent efforts to construct within its markets generally and within the Albuquerque BTA and Albuquerque Partition specifically.¹³ With respect to construction within the Albuquerque market, Qwest notes that it "has constructed sufficient PCS facilities to provide adequate service to 540,335 persons in the Albuquerque BTA (78.5% of the total BTA population, 80.6% of the population in the service areas associated with KNLH655 and [WPOH997] combined, and 83.9% of the population in the service area associated with KNLH655 alone)."¹⁴ With respect to construction within the Albuquerque Partition specifically, Qwest explains that the assignment of station WPOH997 from Tularosa back to Qwest occurred on July 19, 2001, and "since reacquiring the Station less than a year ago . . . it has acted reasonably and diligently under the circumstances."¹⁵ Qwest explains that it has "devised a market development plan" for the Albuquerque Partition and "is in the process of identifying additional, suitable site locations and is confident that it can complete the process of obtaining all necessary land use and building permits within the extended construction period requested herein."¹⁶ Qwest also notes that it "has sufficient equipment and resources on hand to quickly complete deployment of its system" in the Albuquerque Partition.¹⁷ Qwest argues that grant of the waiver will support the public interest, "facilitat[ing] the introduction of a new, all-digital wireless competitor to a rural market with a population smaller than 99.8% of the FCC's BTAs."¹⁸ Qwest also submits that failure to grant the Extension Request will "directly contradict FCC and Congressional objectives" and will result in the Albuquerque Partition continuing to be underserved.¹⁹

6. We find that a waiver and extension of time of the five-year coverage requirements for station WPOH997 is warranted. Based upon the totality of the record before us, we believe that Qwest has presented unique factual circumstances and that strict application of the construction requirement would be contrary to the public interest. We also agree with Qwest that, in light of these circumstances, there is good cause to grant the Extension Request and that doing so will serve the public interest. First, we note that the license at issue is unique because it represents a partitioned area that Qwest originally held as part of its license for KNLH655 and then later re-acquired. Second, the population of the Albuquerque Partition represents approximately four percent of the total population of the Albuquerque BTA.²⁰ We note that, but for the fact that the partitionee voluntarily agreed to satisfy the construction

¹¹ Extension Request at 3-8.

¹² *Id.* at 4-8.

¹³ *Id.* at 4-5.

¹⁴ *Id.*

¹⁵ *Id.* at 2, 5.

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 7.

²⁰ *Id.* at 2, n.3. Qwest calculates all population data referenced in its Extension Request using 1990 U.S. Census Bureau population data. *Id.* We note that, using 2000 U.S. Census Bureau population data, the population of the Albuquerque Partition represents approximately 4.6 percent of the total population of the Albuquerque BTA. See <<http://www.fcc.gov/oet/info/maps/areas/data/2000/FCCCNTY2K.txt>>.

requirement for the Albuquerque Partition, the partitioner could have elected to satisfy the five-year construction requirement for the entire geographic area and could have done so without any construction in the areas covered by the Albuquerque Partition.²¹ Third, Qwest already has completed a substantial amount of construction within the Albuquerque BTA, as evidenced by the fact that Qwest far exceeded the five-year coverage requirements for station KNLH655. Based upon the information provided in Qwest's construction notification for station KNLH655, Qwest was able to provide coverage to more than *triple* the requisite percentage of its licensed population as of its five-year buildout deadline.²² Although E block licensees are only required to provide adequate coverage to 25% of the population of their licensed areas within five years, Qwest's construction notification for station KNLH655 stated that it was "serving with signal strength sufficient to provide 'adequate service' to 83.93% of the population in its licensed area."²³ Because Qwest has far exceeded its build out requirements for station KNLH655, it has provided additional benefits to the public and has demonstrated a commitment to providing service within the Albuquerque BTA. We believe that, in light of Qwest's recent acquisition of station WPOH997 and its level of construction in the Albuquerque BTA generally, Qwest warrants greater flexibility with regard to building out the Albuquerque Partition.

7. We also believe that the public interest will be served by granting the requested relief and by providing Qwest with additional time to satisfy its construction requirement in the Albuquerque Partition. Grant of the Extension Request is likely to result in the reasonably rapid provision of PCS service to the population of the Albuquerque Partition, which is a rural area.²⁴ We have found that rural areas are, as expected, more likely to be underserved by virtue of their sparse population than more urban areas.²⁵ By granting this waiver, we ensure that at least twenty-five percent of the currently underserved population represented by the Albuquerque Partition will have access to PCS service from Qwest by March 31, 2003.²⁶ In other BTAs, rural areas such as the counties represented by the Albuquerque Partition might go entirely unserved; for example, if Qwest had not partitioned its license for the Albuquerque BTA, Qwest could have satisfied the five-year construction requirement for the entire BTA without any service at all within the Albuquerque Partition. As we noted above, at the time KNLH655 was originally partitioned, the partitioner could have elected to satisfy the buildout requirement for the

²¹ See 47 C.F.R. § 24.714(e) (parties to a partitioning agreement must satisfy at least one of the following coverage requirements: (1) the partitionee must satisfy the applicable coverage requirement for the partitioned licensed area or (2) the original licensee must satisfy the applicable coverage requirements for the entire geographic area).

²² See File No. 0000954042, Exhibit 1 at 5, filed by Qwest on July 8, 2002.

²³ *Id.*

²⁴ Qwest points out that the average population density of the Albuquerque Partition is 1.6 persons per square mile. See Extension Request at 2.

²⁵ 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).

²⁶ Qwest compares its situation to that set forth in *GTE Wireless of the Pacific, Inc.*, in which the Division granted the licensee an extension of time to complete construction in a re-acquired market that it had previously partitioned. See Extension Request at 5-9 (citing *GTE Wireless of the Pacific, Inc.*, *Memorandum Opinion and Order*, 15 FCC Rcd 11779) (Comm. Wir. Div., WTB 2000) ("*GTE Wireless*"). Qwest states that, in *GTE Wireless*, it was determined that "an extension of time [was] warranted where it [was] likely to result in the reasonably rapid provision of PCS service." *Id.* at 7. We agree with Qwest that the circumstances presented in this case are similar to those presented in *GTE Wireless* and that, as with *GTE Wireless*, grant of the requested relief will facilitate the reasonably rapid provision of PCS service to the re-acquired, partitioned area.

entire geographic area -- a requirement that could have been satisfied absent any construction within the Albuquerque Partition. Furthermore, Qwest's proposed service to this rural and underserved area, and its commitment to providing PCS service as evidenced by its construction of the surrounding Albuquerque BTA, as discussed above, is consistent with statutory and Commission policy directives to ensure service to rural areas using licenses that are awarded through competitive bidding,²⁷ Commission statements encouraging PCS service to rural areas,²⁸ 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.²⁹ Moreover, as we have noted in similar requests,³⁰ even to the extent that some commercial wireless carriers are providing service to parts of the BTAs, Qwest'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 grant Qwest's Extension Request and extend Qwest's five-year construction deadline from June 26, 2002 to March 31, 2003.

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 Qwest Wireless, LLC on June 25, 2002, IS HEREBY GRANTED to extend the five-year construction deadline for station WPOH997 from June 26, 2002 until March 31, 2003.

FEDERAL COMMUNICATIONS COMMISSION

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

²⁷ 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...").

²⁸ 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").

²⁹ See, e.g., *Minnesota PCS Limited Partnership, Request for Waiver and Extension of the Broadband PCS Construction Requirements, Order*, 17 FCC Rcd 16371 (Comm. Wir. Div., WTB 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 (Comm. Wir. Div., WTB 2001).

³⁰ See, e.g., *Minnesota PCS* at 16374; *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).