

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

In the Matter of )  
 )  
NORTHSTAR TECHNOLOGY, LLC )  
 )  
Request for a Waiver and Extension of the )  
Broadband PCS Construction Requirements )

**ORDER ON RECONSIDERATION**

**Adopted: February 24, 2004**

**Released: February 25, 2004**

By the Associate Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. On January 24, 2003, the Commercial Wireless Division of the Wireless Telecommunications Bureau released an Order which denied the request of Northstar Technology, LLC (“Northstar”) for a waiver and an extension of time to meet the construction requirements for one of its broadband Personal Communications Services (“PCS”) licenses and found that the subject license had previously terminated automatically on April 28, 2002.<sup>1</sup> On February 24, 2003, Northstar filed a Petition for Reconsideration (“Petition”) of this decision.<sup>2</sup> For the reasons stated below, we deny the Petition.

**II. BACKGROUND**

2. Northstar was the licensee of station KNLG232, the 10 MHz F Block broadband PCS license in the Corbin, Kentucky Basic Trading Area, BTA098 (“Corbin BTA”), which it acquired in the post-auction secondary market on March 15, 2002.<sup>3</sup> 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 otherwise make a showing of substantial service within five years of initial license grant.<sup>4</sup> Based on the original grant date, the five-year deadline for the license was April 28, 2002. On May 8, 2002, Northstar sought an extension of its buildout period, asking for an additional 4 months (*i.e.*, until August 28, 2002) to complete construction of the Corbin BTA.<sup>5</sup> Northstar subsequently filed

<sup>1</sup> See In the Matter of Northstar Technology, LLC Request for a Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 18 FCC Rcd 800 (Comm. Wir. Div. 2003) (“January 24<sup>th</sup> Order”).

<sup>2</sup> Petition for Reconsideration filed by Northstar Technology, LLC (February 24, 2003) (“Northstar Petition”).

<sup>3</sup> The Commission consented to the assignment of the licenses from Third Kentucky Cellular Corporation on December 21, 2001, and the parties consummated the assignment of the licenses on March 15, 2002. See File Nos. 0000606759 (assignment application) and 0000836534 (notice of consummation).

<sup>4</sup> 47 C.F.R. § 24.203(b).

four supplements to its initial request, providing further information on its construction progress.<sup>6</sup> On September 9, 2002, Northstar filed a notification of construction for the Corbin BTA, indicating that it was “serving with a signal level sufficient to provide ‘adequate service’ to 35.8 percent of the population in its licensed service area.”<sup>7</sup>

3. In the January 24<sup>th</sup> Order, the Commercial Wireless Division (“Division”)<sup>8</sup> found that Northstar failed to satisfy the criteria for grant of a waiver and/or an extension of time to satisfy its construction requirement. Northstar had argued that a waiver of the construction deadline was warranted because application of the construction requirement would not serve the underlying purpose of the rule and that grant of a waiver would serve the public interest. Northstar argued that although it had not acquired the license until mid-March 2002, it nevertheless had secured leases for numerous sites to provide coverage well above the 25 percent requirement and that it had experienced a setback when its equipment vendor refused to sign a contract involving Rural Utilities Service financing,<sup>9</sup> thereby necessitating that Northstar find another equipment vendor just months prior to its construction deadline.<sup>10</sup> While the Division recognized that Northstar had taken these steps toward constructing its F Block PCS system prior to its construction deadline, it stated that these actions alone are insufficient to warrant an extension of time to satisfy the construction requirement.<sup>11</sup> The Division noted that in *Northstar Technology, LLC*, it had granted a request for extensions of time filed by Northstar for its Middlesboro, Kentucky and Somerset, Kentucky BTA licenses, and that many of the facts underlying *Northstar Technology, LLC* were the same as those presented with respect to its Corbin BTA. However,

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<sup>5</sup> See Letter to Scott Mackoul, Esq., Federal Communications Commission, Wireless Telecommunications Bureau, from Thomas Gutierrez and Todd Slamowitz, counsel for Northstar, dated May 8, 2002 and supplemented May 17, 2002 (“May Supplement”), June 6, 2002 (“June Supplement”), September 13, 2002 (“September Supplement”) and December 18, 2002 (“December Supplement”) (collectively, “Extension Request”).

<sup>6</sup> See May Supplement; June Supplement; September Supplement; and December Supplement.

<sup>7</sup> See File No. 0001021125, filed September 6, 2002.

<sup>8</sup> The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and certain duties of the Commercial Wireless Division have been assumed by the Mobility Division. The Mobility Division is responsible for policy, regulation, and licensing of radio services expected to be used to provide mobile wireless services, with the exception of public safety and critical infrastructure services. See Reorganization of the Wireless Telecommunications Bureau, *Order*, FCC 03-291, ¶ 2 (rel. Nov. 25, 2003); “Wireless Telecommunications Bureau Announces Primary Responsibility and Appointments for Reorganized Bureau,” *News Release* (rel. Jan. 15, 2004).

<sup>9</sup> The U.S. Department of Agriculture’s Rural Utilities Service provides low interest loans to qualified wireless providers.

<sup>10</sup> See FCC Form 601 filed by Northstar on March 26, 2002, “Exhibit 1 Limited Waiver and Extension of Time to Construct” at 5 (“Middlesboro/Somerset Extension Request”). The Commission previously granted Northstar’s request to extend the construction requirement for KNLH637, the F Block license for the Middlesboro-Harlan, Kentucky BTA and KNLH638, the F Block license for the Somerset, Kentucky BTA (“Middlesboro/Somerset Extension Request”). See *Northstar Technology, LLC*, Request for Waiver and Extension of the Broadband PCS Construction Requirements, *Order*, 17 FCC Rcd 10908, 10911 (Comm. Wir. Div 2002) (“*Northstar Technology, LLC*”). In a May 8, 2002 supplement to its Middlesboro/Somerset Extension Request, Northstar included a request to also extend the construction period of its F Block license for the Corbin BTA, which is the subject of this proceeding. In order to fully consider Northstar’s extension request, the Division incorporated into the record for this proceeding the facts and arguments set forth in Northstar’s Middlesboro/Somerset Extension Request. See December Supplement (confirmation that facts in the Corbin BTA proceeding are similar to those set forth in the Middlesboro/Somerset Extension Request).

<sup>11</sup> See January 24<sup>th</sup> Order at 802 ¶ 5.

the Division noted that the critical aspect of *Northstar Technology, LLC* -- specifically, increased service and the promotion of vigorous competition in rural areas as a result of the grant of a waiver -- is absent from this case.<sup>12</sup>

### III. DISCUSSION

4. In its petition for reconsideration, Northstar argues that the January 24<sup>th</sup> Order is unfair and improper in several respects. Northstar argues that the Division discriminated against Northstar by denying relief that was provided to other licensees who also sought to serve rural areas and experienced circumstances that were beyond their control.<sup>13</sup> Also, Northstar argues that the Division required Northstar to construct its F Block license in a different area than its Corbin BTA C Block license,<sup>14</sup> thereby improperly relying upon a standard of which no notice was provided,<sup>15</sup> improperly penalizing Northstar for having multiple licenses in the same market area,<sup>16</sup> and ignoring the fact that Northstar would be providing different services over its F Block channel.<sup>17</sup> Further, Northstar argues that the Commission demonstrated that applying the build-out rule in this instance serves no purpose,<sup>18</sup> and that automatic termination of the license is, in effect, a revocation that cannot occur without notice and opportunity for hearing.<sup>19</sup>

5. 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.<sup>20</sup> Northstar has acknowledged that it did not timely satisfy the construction benchmarks set forth in section 24.203(b) of the Commission's rules for 10 MHz PCS licenses. Accordingly, without grant of extension of time or a waiver of the PCS construction rule, the subject license for the Corbin BTA automatically terminated as of the April 28, 2002 construction deadline. 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, that application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.<sup>21</sup> 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.<sup>22</sup> Furthermore, in recognizing that compliance with the

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

<sup>13</sup> Northstar Petition at 4-5.

<sup>14</sup> Northstar is the C Block licensee of the Corbin BTA.

<sup>15</sup> Northstar Petition at 5.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 10-13.

<sup>20</sup> 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203.

<sup>21</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>22</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).

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.<sup>23</sup>

6. As noted, in deciding whether to waive a rule, the public interest is taken into consideration.<sup>24</sup> In the context of build-out proceedings, the requisite public interest may be found in the increase in service or competition to rural, underserved areas.<sup>25</sup> This is due to the fact that rural markets are more likely to be underserved, as compared to more urban areas, by virtue of their sparse population.<sup>26</sup> Our efforts to facilitate service to rural areas are mandated by statutory and Commission policy directives to ensure service to rural areas using licenses that are awarded through competitive bidding,<sup>27</sup> and are evidenced by Commission statements encouraging PCS service to rural areas<sup>28</sup> and action by the Division on similar requests for extension of time involving rural and sparsely-populated areas.<sup>29</sup>

7. As an initial matter, we note that section 1.946(e) of the Commission's rules provides that a request for extension must be filed prior to the expiration of the applicable construction period.<sup>30</sup> In the case of its Corbin BTA license, Northstar failed to request a waiver or an extension of time prior to the expiration of its construction period even though it had timely filed for extensions of its construction deadlines with respect to its Middlesboro and Somerset BTA licenses.<sup>31</sup> Moreover, although Northstar

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<sup>23</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>24</sup> See 47 C.F.R. § 1.925.

<sup>25</sup> See In the Matter of Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, Increasing Flexibility to Promote Access to and the Efficient Use of Spectrum and Widespread Deployment of Wireless Services, and To Facilitate Capital Formation, WT Docket No. 03-202, *Notice of Proposed Rulemaking*, 18 FCC Rcd 20802, 20818 ¶ 31 (rel. Oct. 6, 2003).

<sup>26</sup> 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).

<sup>27</sup> See 47 U.S.C. § 309(j)(4)(B).

<sup>28</sup> 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").

<sup>29</sup> See, e.g., 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. 2001).

<sup>30</sup> 47 C.F.R. § 1.946(e). See e.g. Request For Extension of Time to Construct an Industrial/Business Radio Service Trunked Station, Call Sign WPNZ 964, File No. 0000356906, *Memorandum Opinion and Order*, 18 FCC 22055 (Comm. Wir. Div 2003) (affirming that, because a license will automatically terminate for failure to construct by the expiration of the construction period, the dismissal of late-filed extensions may be upheld); Instapage Network, Ltd., Notification of Construction and Request for Waiver of Narrowband PCS Station KNKV222, File No. 0000175254, *Order on Reconsideration*, 17 FCC Rcd 19083 (WTB 2002) (requiring compliance with Commission's rules regarding requests for extension) (*Instapage*).

<sup>31</sup> Indeed, in its timely-filed March 26, 2002 request for waiver regarding its Middlesboro and Somerset markets, Northstar made no mention that it would also need an extension for its Corbin BTA-F Block license, even though it specifically identified the Corbin-F Block license in the March 26, 2002 request. It was not until May 8,

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eventually requested a waiver of section 1.946, it did not explain why it had failed to timely request an extension of its deadline. The Commission has emphasized that requiring licensees to file extension requests on a timely basis serves important policy objectives and has upheld the dismissal of untimely requests for extension.<sup>32</sup> Accordingly, the Division could have dismissed the extension request as moot because Northstar's license terminated automatically prior to the filing of the extension request and Northstar failed to provide a basis as to why section 1.946(e) should be waived.<sup>33</sup>

8. This notwithstanding, even had Northstar filed a timely request for extension, we find little basis in the record for reconsidering the decision to deny Northstar's request to extend its construction period or waive its construction obligations. As noted, in the January 24<sup>th</sup> Order, the Division concluded that Northstar had not met its burden of showing that a public interest existed that warranted the waiver of the Commission's construction requirements. The Division found that granting a waiver would not advance any public policy goals because the service Northstar sought to provide on its F Block license would not expand service coverage or promote increased competition to the Corbin BTA.<sup>34</sup> Instead, the Division concluded that Northstar sought to satisfy its construction requirements for its F Block license by duplicating the same service and coverage that Northstar was providing with its existing C Block facilities.<sup>35</sup> The Division found that Northstar essentially sought additional time to provide the same service to the same customers using the same cell sites.<sup>36</sup>

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2002, in a letter updating the Commission as to the buildout of its Middlesboro and Somerset markets, that Northstar first indicated that it was requesting an extension of time to construct its Corbin F Block market. *See* note 8.

<sup>32</sup> In the Matter of Nathan Sherman Enterprises, Inc., Lubbock SMR, Inc., S&C Investments, Inc., Triangle Communications, Inc., Mobilecom One, L.L.C., Hawaiian Wireless, Inc., HBS Communications, Inc., SRI, Inc. and Spectrum Resources of the Northeast, Inc., Applications for Review of the Cancellation of 800 MHz Specialized Mobile Radio Licenses, *Order*, 16 FCC Rcd 11150 (2001) ("As a general matter, allowing the filing of untimely extension requests... would undermine orderly and efficient spectrum management, lead to administrative uncertainty and delay, and hinder [the Commission's] ability to relicense scarce spectrum resources to other licensees who are ready and able to construct"); *see also* In the Matter of Interstate Power and Light Co., Requests for Extension of Time to Construct Private Land Mobile Radio Stations WPBI312, WPBI313, WPBI314, WPBI315, WPBI316, WPBI317, and WPBI318, and Waiver of Sections 1.946 and 90.629 of the Commission's Rules, FCC File No. 0001104499, 0001104500 0001104501, 0001104502, 0001104503, 0001104504, 0001104505, *Order*, 18 FCC Rcd 11051 (Pub. Safety Div. 2003).

<sup>33</sup> *See e.g. Instapage* at 19090-19091 ¶¶ 14-15.

<sup>34</sup> *See* January 24<sup>th</sup> Order at 802 ¶ 5.

<sup>35</sup> *See* January 24<sup>th</sup> Order at 802 ¶ 5; *see also* December Supplement.

<sup>36</sup> *See id.* We find no factual basis for the argument regarding the provision of different services by Northstar on the F Block channel. In its Petition, Northstar states that due to the "residential and highway service needs" of the Corbin BTA, this market area requires more spectrum to adequately serve it. Yet Northstar does not provide further explanation or showing with respect to capacity constraints that it might be experiencing. In arguing why it should not be required to "expend funds to meet artificial deadlines," Northstar itself stated in its underlying extension request that because "Northstar's is (sic) already operating in the C Block in the Corbin market, there is no Public Interest to be accomplished by virtue of Northstar also operating on the F Block" and that "already offers service to the very persons who would be potential candidates for service were it to offer service over F Block channels." *See* June Supplement at 1. Further, the Northstar Petition states that the F Block channel is "critical to permitting Northstar's efficient offering of data service, and to capture roaming from carriers using technologies different from that utilized by Northstar on its C Block license," and if it could not operate on the F Block channel, some subscribers would not be able to "roam efficiently" in the Corbin BTA. *See* Northstar Petition 8-9. However, Northstar's offerings appear to be potential offerings only; beyond this statement, Northstar provides no showing, either in its petition, its underlying extension request and supplements, or in its September 2002 construction

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9. Given Northstar's failure to show that it will provide new services or competition in the subject market area, we find little merit in its argument that the January 24<sup>th</sup> Order is discriminatory because it denies Northstar the relief which was provided to other licensees in similar situations, *i.e.* licensees serving rural areas or experiencing unique circumstances.<sup>37</sup> Northstar specifically mentions four instances, in which the Commission granted licensees' requests for extension, including its own Middlesboro/Somerset Extension Request.<sup>38</sup> In each of the four cited cases, however, the Division found that each of the petitioners had demonstrated that grant of the subject extension request will benefit the public interest by allowing for the introduction of new services to rural areas and will likely promote vigorous competition in the subject areas.<sup>39</sup> Northstar, however, has not demonstrated that similar public interest benefits exists with respect to its F Block Corbin BTA license; it merely asserts that a waiver is necessary to provide service to rural areas.<sup>40</sup> Northstar has failed to make a sufficient showing that the waiver is necessary in order to increase or maintain adequate service coverage and competition to underserved areas.<sup>41</sup> Instead, Northstar has only demonstrated that it has deployed its F Block channels in areas of the market that it is already serving with its C Block license.

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notification that Northstar is now providing services on its F Block channel which are different than those offered over its C Block channels, whether in the form of serving roamers using a "different" technology or with respect to data service offerings.

<sup>37</sup> Northstar Petition at 4-5.

<sup>38</sup> *Id.* See *Northstar Technology, LLC*; Leap Wireless International, Inc. Request for Waiver and Extension of Broadband PCS Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 19573 (Comm. Wir. Div. 2001) ("Leap Order"); Telecorp PCS, LLC Request for Waiver of Section 24.203(a) of the Commission's Rules for Broadband PCS Licenses WPOI215 in Louisville-Lexington-Evansville MTA and WPOI217 in the St. Louis MTA, *Order*, 16 FCC Rcd 18917 (Comm. Wir. Div. 2001) ("Telecorp Order"); American Wireless, LLC Request for Extension/Waiver of PCS Build-Out Requirement, *Memorandum Opinion and Order*, 15 FCC Rcd 11025 (Comm. Wir. Div. 2000) ("American Wireless Order").

<sup>39</sup> See *Northstar Technology, LLC* at 10910 ¶ 4; Leap Order at 19575-19577 ¶¶ 7-12, 19579 ¶¶ 16-18; Telecorp Order at 18922 ¶ 11; American Wireless Order at 11027 ¶ 7.

<sup>40</sup> Simply alleging that an area is rural is insufficient to warrant a waiver. A petition must make a showing how the public interest will be served. For example, we recently reconsidered a Division decision denying a request for extension of time. See *PinPoint Wireless, Inc.*, Request for a Waiver and Extension of the Broadband PCS Construction Requirements, *Order on Reconsideration*, DA 04-380 (rel. Feb. 13, 2004) (*PinPoint*). In *PinPoint*, the petitioner on reconsideration clarified its extension request by providing a detailed showing of a combination of factors sufficient to support a limited extension of time to complete construction. *PinPoint* demonstrated that it is providing service to certain rural areas having limited coverage by other wireless carriers. *Pinpoint* also showed that the markets at issue are part of three economically interdependent BTAs in which consumers have a need for seamless wireless service from a single provider, and in which wireless service to a certain area would be discontinued if *PinPoint* was no longer authorized to serve the markets at issue. We determined that, in light of the rural and regional focus of the three-BTA region, *PinPoint*, as a locally-based carrier, was in a unique position to be responsive to the particularized needs of the area's consumers. See *Pinpoint* at ¶ 6. Further, we found that reconsideration would be in the public interest by promoting public safety in *PinPoint*'s coverage of rural lakes, thereby facilitating the deployment of enhanced 911 services in these areas. We determined that the public interest factors presented by *PinPoint* warranted a limited waiver of the Commission's construction requirements. In contrast to the *PinPoint* situation, Northstar stated that a waiver will permit Northstar to enhance its already existing wireless system in rural parts of Kentucky, but otherwise provided very little detail specific to the Corbin BTA in support of its request for extension --- a contrast to the detailed showing Northstar provided with respect to its Middlesboro and Somerset markets. See generally *Middlesboro/Somerset Extension Request*.

<sup>41</sup> The Division noted that even without its F Block license, Northstar itself already provides service to the Corbin BTA via its C Block license, and that the four counties that comprise the Corbin BTA each receive coverage

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10. Similarly, we find little merit behind Northstar's assertion that the Division should have granted a waiver because circumstances beyond its control prevented Northstar from timely complying with the Commission's buildout requirements.<sup>42</sup> Northstar argues that the Division ignored the fact that its initial equipment vendor withdrew from a network equipment supply agreement because Northstar acquired its financing through the Rural Utilities Service. Northstar asserts that the Division's failure to consider this circumstance was discriminatory because this same showing was sufficient to support a waiver with respect to Northstar's Middlesboro and Somerset markets, and was more convincing than those presented in other cases in which a waiver was granted.<sup>43</sup> We find, however, that Northstar's equipment problem was insufficient by itself to warrant waiver or extension of its construction obligations. Northstar is incorrect that in *Northstar Technology, LLC*, the Division found that Northstar's equipment vendor issue constituted a circumstance beyond Northstar's control. Instead, the Division viewed Northstar's diligence in seeking to build out its Middlesboro and Somerset BTAs, despite its equipment problem, as demonstrating Northstar's commitment to constructing its markets.<sup>44</sup> In that situation, the Division found that it was the totality of the record, including the expansion of service and promotion of vigorous competition in unserved rural areas as well as its commitment to serving its markets, that warranted an extension of Northstar's construction period in the Middlesboro and Somerset markets.<sup>45</sup> The Division did not find that the equipment issue itself was a circumstance out of Northstar's control that prevented Northstar from complying with its buildout obligation.

11. Further, Northstar's arguments that the January 24<sup>th</sup> Order improperly relies upon a standard of which no notice was provided,<sup>46</sup> and improperly penalizes Northstar for having multiple licenses in the same market area<sup>47</sup> are similarly misplaced. The January 24<sup>th</sup> Order did not set out a new standard with respect to Northstar's public interest showing nor did it provide that a licensee must make a special showing to hold multiple spectrum blocks within a single market. Instead, the underlying issue in the January 24<sup>th</sup> Order was that Northstar failed to show that a public interest existed that was sufficient to warrant a waiver of section 24.203 given Northstar's failure to comply with its obligation to timely construct its facilities in the Corbin market. As noted, we have found that there is a public interest in promoting wireless service to rural areas because such areas are more likely to be underserved. However, in the instant case, Northstar sought to extend its construction period merely to provide the same service to its existing coverage footprint in an area that has a number of wireless providers. The Division correctly determined that a waiver would not increase service nor promote competition in the Corbin BTA nor did Northstar offer any other public interest rationale to support its request for waiver.

12. We also disagree with Northstar's argument that application of the construction requirement would serve no purpose. The Commission's construction requirements are intended to

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from at least two cellular carriers, and that multiple PCS carriers also provide service to that market. January 24<sup>th</sup> Order at 803 ¶ 6.

<sup>42</sup> See Northstar Petition at 5.

<sup>43</sup> Northstar Petition at 5.

<sup>44</sup> *Northstar Technology, LLC*, at 10910 ¶ 5.

<sup>45</sup> *Id.* at 10909 ¶ 4. Further, although Northstar argues that showings made by other licensees that were granted extensions were less deserving of relief than Northstar's, it fails to provide support for this statement.

<sup>46</sup> Northstar Petition at 5. Specifically, Northstar argues that the Commission did not provide notice that Northstar would be required to serve a different part of its service area to show public interest.

<sup>47</sup> *Id.* at 7.

ensure that spectrum is used effectively and made available to as many communities as possible.<sup>48</sup> Our construction requirements were promulgated pursuant to the Communications Act's mandate that the Commission set performance requirements, such as appropriate deadlines and penalties for performance failures to ensure the speedy delivery of service to the public, and to prevent stockpiling or warehousing of spectrum by licensees.<sup>49</sup> We continue to believe that the Commission's construction requirements serve these public policy purposes and we decline to reevaluate, in this proceeding, the rationale supporting the Commission's decision to adopt rules governing buildout requirements.

13. Finally, Northstar challenges our authority to impose on the license of station KNLG232 the condition set forth in section 24.203(b) of our rules.<sup>50</sup> Northstar states that automatic termination of the subject license would disserve the public interest because the underlying rule at issue is inconsistent with the Communications Act and is unenforceable.<sup>51</sup> Northstar contends that the Commission could not establish a buildout requirement as a license condition, the failure of which results in automatic cancellation of the license.<sup>52</sup> Northstar asserts that our rules which state that a license terminates automatically for failure to meet construction deadlines<sup>53</sup> are contrary to the clear intent of Congress in implementing sections 309(j)(6) and 312 of the Communications Act.<sup>54</sup> Northstar argues that the Commission cannot revoke its license for failure to meet its construction deadline without being afforded a revocation hearing under Section 312 of the Communications Act, as amended.<sup>55</sup>

14. We reject these arguments. The Commission's authority to impose license conditions is firmly grounded in statutory law. Section 301 of the Communications Act, as amended, provides "[i]t is the purpose of this Act ... to provide for the use of such channels, but not ownership thereof ... under licenses granted by [the Commission], and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license."<sup>56</sup> Further, as the Commission recently reiterated in its order in *Glendale Electronics, Inc.*,<sup>57</sup> a license that cancels for failure to satisfy a license condition is not

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<sup>48</sup> See *PCS MO&O* at 5018.

<sup>49</sup> See 47 U.S.C. § 309(j)(4)(B).

<sup>50</sup> *Id.* at 13. 47 C.F.R. § 24.203(b). Section 24.203(b) provides that "[f]ailure by any licensee to meet [the build-out] requirements will result in forfeiture of the license and the licensee will be ineligible to regain it."

<sup>51</sup> *Id.* at 9.

<sup>52</sup> *Id.*

<sup>53</sup> See 47 C.F.R. §§ 1.946(c), 1.955(a)(2), 24.203.

<sup>54</sup> 47 C.F.R. §§ 309(j)(6), 312. See Northstar Petition at 9-13.

<sup>55</sup> *Id.* at 11 (citing 47 U.S.C. § 312). Section 312(c) provides that "[b]efore revoking a license or permit pursuant to [the seven conditions under which the Commission may revoke the license or permit listed in] subsection (a), ... the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation ... should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon the licensee, permittee, or person to appear before the Commission at a time and place stated in the order." *Id.* § 312(c).

<sup>56</sup> 47 U.S.C. § 301; see *id.* § 303(r) (authorizing the Commission to "[m]ake such rules and regulations and prescribe restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

<sup>57</sup> In the Matter of Glendale Electronics, Inc., Regarding the License of SMR Station WNGQ365, Santiago Peak and Mount Lukens, California, *Memorandum Opinion and Order*, FCC 04-18 (rel. Feb. 9, 2004).



revoked and does not trigger a hearing requirement.<sup>58</sup> Northstar's argument that the Commission must hold a hearing to determine whether failure to meet its build-out requirement should result in license cancellation is erroneous. A Commission "licensee takes its license subject to the conditions imposed on its use. These conditions may be contained in both the Commission's regulations and in the license. A licensee may not accept the benefits of the license while rejecting the corresponding obligations."<sup>59</sup> The Commission decided in a rulemaking proceeding after notice and comment that it would adopt a license condition that provides for automatic termination upon failure to meet buildout requirements. In making this decision, the Commission concluded that adherence to construction requirements is a necessary corollary to promoting the efficient use of spectrum.

#### IV. ORDERING CLAUSE

13. 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 Petition for Reconsideration filed by Northstar Technology, LLC, on February 24, 2003 IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Linda C. Chang  
Associate Chief, Mobility Division  
Wireless Telecommunications Bureau

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<sup>58</sup> See *Peninsula Communications, Inc. v. FCC*, No. 01-1273, slip op. at 2 (D.C. Cir. Jan. 30, 2003) (finding that rescission of the conditional grant of licenses for failure to satisfy the condition is not a revocation without a hearing as required under Section 312(c) of the Communications Act, 47 U.S.C. § 312(c)).

<sup>59</sup> *P&R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984), citing *Capital Telephone Co. v. FCC*, 498 F.2d 734, 740 (D.C. Cir. 1974)). The Court in *Temmer* found that a license is modified, for purposes of Section 316 of the Communications Act, as amended, when an unconditional right conferred by the license is substantially affected. *Temmer*, 743 F.2d at 927-28. Because loading requirements were a conditional right that appellants failed to meet, the Court determined that revocation of 15 of 20 channels from appellants' licenses for failing to meet SMR loading requirements did not constitute a license modification and, as a result, appellants were not entitled to a hearing under Section 316. *Id.* at 927.