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EXECUTIVE SUMMARY

By this submission, Toba requests that the Commission extend its Interim Construction Benchmark for stations WQIZ 635 and WQIZ 636 for a period of two years, but in no event less than two years after the Commission renders a final (effective) ruling on interoperability in WT Docket No. 12-69.

Due solely to issues that could not have been foreseen, and that are totally outside of Toba's control, it would be impractical and contrary to the public interest for Toba to construct in accordance with its existing Interim Construction Benchmark, Toba's request complies with both provisions of the Commission's general waiver rules, for a multitude of reasons.

The continuing lack of interoperability, and the associated lack of equipment availability, has absolutely undermined any reasonable business case for a "greenfield" buildout. For "greenfield" providers, such as Toba, this issue presents a dire problem.

Grant of the relief here requested is particularly appropriate given the Commission's actions in numerous other proceedings where first extensions, such as this one, were requested.

Notably, prior to submitting any request for extension, Toba has undertaken the "meaningful efforts" that the Commission specified would be considered when the Commission determines whether to apply its "discretion" in applying sanctions for non-compliance with Interim Construction Benchmark. This provides yet another reason for grant of the relief requested herein.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Toba Inlet PCS, LLC Request for Limited Extension) Call Signs WQIZ 635 and WQIZ 636
of Initial Construction Benchmarks)
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**REQUEST FOR EXTENSION OF
INITIAL CONSTRUCTION BENCHMARKS**

I. INTRODUCTION

Toba Inlet PCS (“Toba”), pursuant to Section 1.925(b)(3) and 1.46(e)(1) of the Commission’s Rules, 47 C.F.R. §§ 1.925(b)(3) and 1.46(e)(1), hereby requests an extension of the Interim Construction Benchmark set forth in Section 27.14(g) of the Commission’s rules¹, with respect to those B Block licenses held by Toba and set forth as Exhibit A to this request (the “Licenses”). Specifically, due solely to circumstances beyond its control, Toba requests an extension of the Interim Construction Benchmark with respect to its Licenses for a period of two years but, in no event, less than two years after the Commission issues a final (effective) ruling on Interoperability in WT Docket No. 12-69. In support thereof, and as presented below, this request is being made only

¹ Pursuant to Section 27.14(g), a Lower 700 MHz licensee must build out and offer service over at least 35 percent of the geographic area included in its licensed area by (in Toba’s case) June 13, 2013 (the “Interim Construction Benchmark”)

given that (a) Toba has taken “meaningful efforts”² to construct, and (b) grant of such extensions would better serve the public interest and be consistent with applicable codified provisions and case law governing extensions of time to construct.

II. THE COMMISSION’S STANDARDS FOR WAIVERS AND EXTENSIONS OF TIME TO CONSTRUCT

A. The Waiver Standard

A waiver of the Commission’s rules applicable to wireless services is appropriate whenever a party demonstrates either (1) that the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and that grant of a waiver would be in the public interest, or (2) in view of unique or unusual factual circumstances in the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative. 47 C.F.R. § 1.925(b)(3).

The Commission has authority to waive its rules whenever there is "good cause" to do so. 47 C.F.R. §§ 1.3; 1.925. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969) ("WAIT Radio"). As further explained in WAIT Radio, the Commission is charged with administration of its responsibilities consistent with an over-arching "public interest" standard. That an agency may discharge its responsibilities by promulgating rules of general applicability which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. In fact, the Commission's right to waive its rules is not unlike an obligation in

² See, e.g. the Commission’s Public Notice of December 6, 2011, (DA-1981) (the “Public Notice”) the Commission articulated this meaningful efforts standard as justifying extensions of the Interim Construction Benchmark.

that it is a sine quo non to its ability to promulgate otherwise rigid rules. It is the necessary "safety valve" that makes the system work. See, WAIT Radio, at 1157, 1159.

B. Rules Governing Build-Out Obligations When There Are Circumstances Beyond a Licensee's Control

Section 1.946(e) of the rules provides additional guidance, directed specifically to requests for extension of time to construct. It provides in pertinent part that:

1. An extension may be granted if the licensee shows that failure to meet the construction or coverage deadline is due to "causes beyond its control", and
2. The filing of a construction request, if based upon circumstances beyond the licensee's control, causes the construction period to be automatically extended pending disposition of the extension request.

The Commission confirmed in its *Second R&O* that, at that time, the Commission did not foresee granting extensions of the time to construct facilities except for unforeseen circumstances beyond a licensee's control (i.e., "unavoidable circumstances"). *Service rules for the 698-746, 747-762 and 777-792 MHz Band, Second R&O* 22 FCC Rcd 15289, 15348 (2007) ("*Second R&O*"). As demonstrated below, the circumstances giving rise to this request clearly were unforeseen at the time the rules were adopted and at the conclusion of Auction No. 73 and are well beyond the control of Toba.

III. ARGUMENT

There is an overarching basis for this extension request: Lack of interoperability, and resulting equipment and roaming issues. In each case, it is unforeseen circumstances that are completely out of Toba's control that lead to this filing. The first involves the lack of interoperability in the 700 MHz Band. The second focuses on problems unique to licenses associated with high power operation on the adjacent E Blocks. There are also several secondary reasons why an extension is warranted. Each is discussed below, under a separate caption.

A. The Lack of Interoperability in the 700 MHz Band Constitutes a Unique and Unusual Circumstance Unforeseen Prior to Auction No. 73 that is Beyond Toba's

Control ; and Rigid Application of the Rule would be Inequitable and Contrary to the Public Interest.

The Commission established its Interim Construction Benchmark for a reason: “to better promote access to spectrum and the provision of service.” *Second R&O*, at 15348. It was envisioned that the favorable propagation characteristics of the 700 MHz band made the licenses particularly effective in providing innovative services not only in high population markets, but in rural areas as well. *Id.* That is to say, the Commission most certainly did not establish construction requirements without reason, and any consideration of an extension request must consider the actual nexus between the Commission goal in establishing the construction requirement and the reasons for the requested extension. As shown herein, the lack of interoperability across the Lower 700 MHz band, and resulting virtual absence of any workable business model for smaller licensees, has removed that nexus. Simply put: It does not matter what the propagation characteristics of a particular band are if there are no reasonably priced devices and no legitimate potential to roam.

In the last several months alone, the Commission received several dozen comments and reply comments in WT-Docket No. 12-69, the “Interoperability” proceeding. Virtually without exception, commenting parties explained there to be a very critical public interest need for interoperability. Without interoperability smaller carriers and potential new entrants (like Toba) cannot compete effectively, or even provide any meaningful service on the Lower 700 MHz licenses.³ In Toba’s case this means that it cannot (1) offer compelling or competitive services to any of its potential customers until a meaningful array of cutting-edge devices become available to it at reasonable prices⁴; (2) offer roaming to its customers; and (3) serve others’ customers who travel into a Toba market, or obtain

³ See, e.g., Reply Comments of King Street Wireless submitted on July 16 in WT Docket No. 12-69, at 7, listing a myriad of reasons why, without interoperability, it is simply impossible for small carriers to offer meaningful service, including roaming; offering desired equipment at reasonable prices; accepting customers from another carrier; or offering true 4G services.

⁴ For example, no iphone is available for Band Class 12 application.

revenue therefrom. The difficulty with obtaining equipment from multiple vendors appears to be worsening rather than getting better. The latest complication on this front is a report released last week from the House Permanent Select Committee on Intelligence, which recommended that U.S. companies avoid purchasing equipment from two Chinese vendors.⁵ If existing carriers that hold licenses find it economically difficult to justify construction on their licenses at this time, Toba, as a potential new entrant, most certainly cannot. Toba's situation is not like that of other carriers with customer bases to protect which might deploy on one or more licenses just to attempt to prevent customer erosion – Toba has no customers. Therefore, the fact that a limited number of carriers that have existing customer bases and that have built systems can in no way legitimately undermine this request. Indeed, the far more relevant fact is that very few 700 MHz licensees have built.

These are universal problems faced by virtually all holders. Yet, they are particularly acute to Toba which would be a new entrant into its markets with “greenfield” deployments. So, the lack of interoperability and its resulting impact on roaming and device availability effectively erodes any meaningful benefit that otherwise would be derived from Toba's compliance with the Interim Construction Benchmark. This itself warrants an extension of time for Toba to comply with the Interim Construction Benchmark.

Given the lack of interoperability, reasoned application of the Commission's established standards for grant of waivers and extensions of time to construct warrants a grant of the relief requested herein. The situation is “unique and unusual” because, as the Commission itself recognized in its Notice in WT Docket No. 12-69, the Lower 700 MHz Band is the only mobile band where interoperability has not already been mandated.⁶ The fragmentation of the Lower 700 MHz band was unforeseen by Toba, the Commission or, upon information and belief, any of the other

⁵ See FierceWireless, rel. October 10, at pp. 3-4.

⁶ *Notice of Proposed Rulemaking* in WT Docket No. 12-69, 27 FCC Rcd 3521 (2012).

licensees, prior to Auction No. 73. Given the dire competitive ramifications stemming from lack of interoperability, the underlying purpose of the construction obligation would not be served by its rigid application in this instance. (In fact, the lack of interoperability has frustrated those purposes.)

Lastly, it is beyond question that the lack of interoperability, which was originated by AT&T after Auction No. 73 and which has been driven almost exclusively by the nation's two largest carriers, is something that is absolutely outside of Toba's control. Toba has done all that any small carrier could reasonably be expected to do to prevent or to remedy the interoperability issue. Yet the issue remains unresolved. Regardless of the decision of the Commission in the interoperability proceeding, Toba needs an extension of the Interim Construction Benchmark in order to be able to offer competitive roaming and in order for the device ecosystem for Band Class 12 devices to develop, mature and become more affordable. Therefore, Toba requests an extension for all Toba licenses for two years but, in no event, less than two years after a final (effective) ruling on Interoperability.

B. Grant of the Relief Here Requested Would Be Consistent with FCC Action in Other Proceedings.

As set forth below, over the last several years, the Commission has properly granted a considerable number of requests for construction extensions in situations that are similar, but less compelling, than this one. Review of those discussions, below, demonstrates that the same relief should here be granted.

(i) *Interference Protection.* The Commission has recognized that where interference protection obligations impair the offering of new services, an extension of the performance benchmark is appropriate. For example, in the case of the Wireless Communications Service ("WCS"), the Bureau was "persuaded . . . that relatively restrictive [out-of-band emission (OOBE)] limits may have impeded the development of WCS equipment and may have contributed to the

unique circumstances of the band.”⁷ The Bureau therefore granted extended construction periods. Here, the interference protection obligations associated with Channel 51 are at least as compelling as those present in the WCS proceeding.

(ii) *Lack of Availability of Equipment.* In 2004, the Commission extended the construction requirements in the 220 MHz Phase II service because equipment for use in that spectrum was “scarce presently or face[d] technical and economic challenges.”⁸ More recently, the Commission granted an extension of the substantial service deadline for most Local Multipoint Distribution Service (“LMDS”) licensees.⁹ Those licensees faced factors beyond their control, including difficulties in obtaining viable, affordable equipment, that warrant granting a limited extension of time to permit these licensees to continue to build out their licenses.”¹⁰ In granting Multichannel Video and Data Distribution Service (“MVDDS”) licensees an extension of their substantial service deadline, the Bureau reiterated that an extension is justified when viable and affordable equipment is not available, as lack of availability is a circumstance outside the control of licensees.¹¹ Those same considerations are here present and the same relief should be granted.

⁷ *WCS Extension Order*, 21 FCC Rcd at 14139.

⁸ Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13001 (WTB 2004) (“*Havens*”).

⁹ Toba is cognizant that on October 10, 2012, the Wireless Telecommunications Bureau denied an extension request of T-Mobile License, LLC. But here, and not there, is the “systematic problem with equipment availability” that the Bureau has found to justify an extension. Moreover, unlike T-Mobile, this is Toba’s first request for an extension of time to build.

¹⁰ Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission's Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd at 5905 (“*LMDS Extension Order*”).

¹¹ See Requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service, *Order*, 25 FCC Rcd 10097, 10102 (WTB 2010). See also, e.g., *WCS Extension Order*, 21 FCC Rcd at 14140 (“We believe that this situation is similar to previous instances where the Bureau extended applicable construction deadlines as a result of a lack of equipment.”); *FCI 900, Inc.*, 16 FCC Rcd at 11077 (extending the five-year construction deadline for certain 900 MHz SMR licensees because commercially-viable equipment was not available to enable licensees to meet the deadline); Requests of Progeny LMS, LLC and PCS Partners, L.P. for Waiver of Multilateration Location and

(iii) *Existence of Pending rulemakings.* In 1997, the Commission granted a blanket extension of the construction deadline for Interactive Video and Data Service (“IVDS”) authorizations, finding that an extension was warranted because the Commission intended to commence a rulemaking to consider significant revisions to the IVDS rules.¹² The Commission reaffirmed this reasoning one year later, finding that “[r]equiring IVDS licensees to comply with rules which are under Commission review would not further the public interest in this instance.”¹³ In 2001, the Commission extended the MDS construction deadline during a period of substantial regulatory uncertainty associated with recent service rule changes that provided MDS licensees new authority to offer innovative data, voice, and broadband services, instead of anticipated video programming services.¹⁴ Indeed, the Commission has often extended performance requirements where, as here, relevant policy issues were subject to pending Commission proceedings.¹⁵ Moreover, the Commission has consistently recognized that the public interest is not served by requiring the construction of “stop-gap” facilities merely to meet construction requirements. This is particularly

Monitoring Service Construction Rules, *Order*, 23 FCC Rcd 17250, 17258 (WTB 2008) (“*Progeny Order*”) (“[T]he demonstrated lack of available M-LMS equipment, is a factor warranting a further extension of time for all M-LMS licensees”).

¹² See Requests by Interactive Video and Data Service Auction Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181-2 (WTB 1997). The Commission concluded it would be fundamentally “unreasonable and contrary to the public interest to require IVDS licensees to meet the [existing] build-out requirement.” *Id.*

¹³ Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756, 758 (WTB 1998).

¹⁴ See Extension of the Five-Year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service, *Memorandum Opinion and Order*, 16 FCC Rcd 12593, 12596 (MMB 2001).

¹⁵ See, e.g., DTV Build-out, Requests for Extension of the Digital Television Construction Deadline, Commercial Television Stations With May 1, 2002 Deadline, *Order*, 19 FCC Rcd 10790 (2004); ASC Communications, Inc., Licensee of Multipoint Distribution Service Station WMH541, San Diego, California – Request for Declaratory Ruling, *Memorandum Opinion and Order*, 19 FCC Rcd 24100, 24103 (2004); Application for Extension of Time to Construct, Application for Assignment of Conditional License, Requests for Extension of the Digital Television Construction Deadline, *Order*, 18 FCC Rcd 22705, 22706-07 (2003); 1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes, *Report and Order*, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 17525, 17536 (1999); Southern Company, Request for Waiver of Section 90.629 of the Commission's Rules, 14 FCC Rcd 1851, 1857 (1998).

the case given that any network deployed now may have to be modified once the Channel 51 issues have been resolved and commercially viable equipment becomes available.¹⁶ Just this week, the Commission once again applied this common sense solution. In WT Docket No. 07-293, the Commission extended its construction period, this time for the WCS. It did so because of the long pendency (until this week) of a proceeding addressing interference and other matters in need of resolution before the spectrum could be utilized productively. These facts closely parallel those in the interoperability proceeding, and so too should the end result.

C. Given the Changed Circumstances, Absent Grant of the Relief Here Requested, a Build Makes No Sense And, Absent a Waiver or Extension, Not Building Also Presents Considerable Risks.

The Initial Construction Requirement now forces Toba and other holders to either (a) risk sanctions for not building or (b) expend scarce capital resources to deploy systems that make no economic sense, fail to advance the Commission's broadband goals, and fail to reach and to offer competitive service to significant portions of the population within the license areas. Thus, as another 700 MHz licensee has explained, the Initial Construction Benchmark only creates a "powerful regulatory incentive to engage in economically irrational behavior."¹⁷ Absent prompt grant of the relief here requested, Toba will face the dilemma of either risking its license rights by deferring construction or spending scarce capital on inferior systems which may be marginally competitive and make little economic sense.

To be clear, while certain of the consequences for failing to meet the intermediate 35 percent performance benchmark are not clear, others are known to be severe. The FCC can subject Toba to loss of its licenses, to loss of authority to operate in the part of its license service areas not served as

¹⁶ Vulcan Ex Parte, at 20.

¹⁷ Comments of USC noted in footnote 366 of the 2nd R & O released August 10, 2007 – Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, W T Docket No. 06-150, Released August 10, 2007

of November 30, 2013 and/or enforcement action, including the imposition of forfeitures.¹⁸ Post-Auction No. 73 developments discussed above have already put licensees at least three years behind other 700 MHz licensees, particularly the nation’s two largest carriers, and a two year license reduction and expedited timeframe to meet the 70% requirement would exacerbate the situation, stifle competition and result in an extraordinarily inefficient use of valuable spectrum.

D. Toba Has Undertaken “Meaningful Efforts” to Put Its Spectrum to Use.

The Commission has long-recognized that certain bases for requesting extensions of time to construct are far more compelling than others. In this vein, late last year the Commission issued its Public Notice¹⁹ providing some clarity on this issue. In particular, with respect to possible sanctions other than shortening license term and the time in which a second level of construction must be completed, the Commission explained that it would use its discretion to impose extra sanctions only where those licensees who did not meet their Interim Construction Benchmarks

“have also failed to undertake meaningful efforts to put this spectrum to use, such as engaging in system planning, exploring site leases, pursuing network engineering planning, or engaging in efforts to procure equipment. Accordingly, licensees undertaking no meaningful efforts to build out their networks may lose authority to operate in part of the remaining unserved areas of the license, at the Commission’s discretion.”²⁰

The Public Notice provides, unequivocally, that the Commission “may” use its discretion and reduce the area where a licensee may operate only if the licensee is “undertaking no meaningful efforts”, as the Commission defined that term in its Public Notice.²¹ Here, in stark contrast, Toba has

¹⁸ See 47 C.F.R. § 27.14(g)(1).

¹⁹ Public Notice, “700 MHz Construction and Reporting Requirements, DA 11-1981, __ FCC Rcd __, rel. December 6, 2011. (“Public Notice”)

²⁰ Public Notice, at 3-4.

²¹ Public Notice, at 2.

undertaken meaningful efforts in each and every one of the meaningful efforts categories defined by the Commission. It has retained an engineering firm to engage in system planning, initial site exploration and lease planning. Additionally, Toba representatives have attended a number of conferences and had numerous vendor meetings in an effort to procure equipment.

For all of the above reasons, the discretionary authority that the Commission may utilize in limited instances is not here applicable.

IV. CONCLUSION

As demonstrated by the above, due to circumstances beyond its control, Toba requests an extension of time to comply with the Commission's Interim Construction Benchmarks for Toba's licenses. Toba seeks an extension until the later of (a) two years after its current build date or (b) two years after issuance of an interoperability decision in WT Docket No. 72-69. It does so only after having taken all "meaningful efforts," as the Commission requested.

The current lack of interoperability, high power E Block interference and Channel 51, issues each fully warrant the two-year extension being requested. Grant of such request is consistent with codified rules and policy, and with applicable case precedent.

Respectfully submitted,

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EXHIBIT A

Licenses

WQIZ 635
WQIZ 636