

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

Amendment of Parts 1, 22, 24, 27, 74, 80	)	
90, 95 and 101 to Establish Uniform License	)	
Renewal, Discontinuance of Operation and	)	WT Docket No. 10-112
Geographic Partitioning and Spectrum	)	
Disaggregation Rules and Policies for Certain	)	
Wireless Radio Services	)	

**To: The Commission**

**COMMENTS OF THE BLOOSTON LICENSEES**

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP (“Blooston”), on behalf of its wireless clients (the “Blooston Licensees”)<sup>1</sup>, respectfully submits, pursuant to Section 1.415 of the Commission’s Rules, the following comments in response to the Commission’s Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding concerning the proposed establishment of additional construction and/or service requirements for wireless licensees at each ensuing license renewal. In brief, the Blooston Licensees submit that additional buildout and take back requirements may be appropriate for larger licenses, but licenses held by rural carriers, encompassing primarily rural areas, require a different approach. Low population density, low priority in the equipment distribution chain, significantly higher construction and backhaul costs, and other factors dictate a more reasonable approach. Unique considerations for private users dictate a more flexible approach as well.

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<sup>1</sup> The Blooston Licensees participated in multiple stages of the above-captioned proceeding, and are a diverse group of rural telephone and telecommunications service providers, paging carriers, and private internal spectrum users, with many being small businesses.

For additional build out obligations, the Commission should not retroactively implement any additional construction and/or service requirements beyond that which was adopted in the underlying Second Report and Order. This is especially true for rural service providers and private user licensees. Doing so would impose undue financial burdens on these entities that were not previously contemplated as they developed their business plans prior to acquiring their licenses. Otherwise, the Commission may actually jeopardize their ability to provide service. For any licensees to which additional construction obligations ultimately apply, such requirements should be phased in at the end of the next full license term.

If additional buildout obligations are not met, the mandatory negotiation proposal described in the FNPRM would be a better approach for rural service providers and private users. If the Commission nonetheless decides to reclaim unserved areas, rural service providers should be able to exclude “ultra-rural” areas from any take-back process. Similar considerations apply to private internal use operations using auctioned spectrum. Further, any measures to reclaim spectrum should not result in the outright cancellation of licenses if a bona fide service is being provided to the public or if the licenses is being used to meet private internal communications needs. To the extent that unserved areas are reclaimed, such process should leave the incumbent an adequate buffer so that they do not have to curtail service in order to protect new licensees.

## **I. Background**

The Commission has just completed a comprehensive effort to streamline and harmonize its license renewal and discontinuance rules in order to ensure that similarly

situated licensees are treated in the same fashion. These newly adopted rules will place significant burdens on licensees in order to ensure the continued viability of their licenses. And for carriers, the Commission has made clear that the mere offering of service to the public alone will not be sufficient to maintain a commercial wireless license. Rather in that case, the carrier must actually provide service to at least one paying unaffiliated subscriber (or roamer) in order to avoid triggering the permanent discontinuance of operation clock. For other licensees, the FCC has clearly enunciated the requirements which must be met to preserve the license – namely standards for both construction and permanent discontinuance of operation. The Blooston Licensees believe that these steps will go a long way to ensure that licensees are unable to warehouse spectrum or otherwise allow spectrum to lay fallow. Thus, commercial wireless licensees and private internal users now have clear, measurable standards in order to ensure that spectrum will be put to use in a timely manner and not to lay fallow. As discussed below, for certain licensees, the Commission must take measured actions with regard to further construction requirements that will not undercut their business case or force construction to areas that do not have a population that would support such expense.

## **II. Any New Construction Requirements Should Apply Only to Newly Licensed Frequency Bands**

The Commission has proposed a variety of new construction requirements, which it believes will facilitate the deployment of services to Rural America. At its crux, the proposals would impose additional construction requirements on commercial licensees beyond those construction requirements applicable in the initial license term. In this

regard, the FCC has asked, if the initial benchmark was 67%, should the construction requirement at the next license renewal be increased by 10% to 77% and then by another 5 or 10% at the next following license renewal to 82 or 87%? FNPRM at para. 105.

The Commission has offered three proposals for how these rules changes should be applied: (a) on a prospective basis only to new licenses issued in the future; (b) an “opt-in” framework to facilitate additional buildout or (c) prospectively to all existing and future licensees of flexible geographic licenses. The Blooston Licensees believe that the Commission’s proposals in this proceeding should only be applied to future licensees in frequency bands that are allocated by the Commission following the effective date of these rules. Alternatively, the Blooston Licensees would support these rules applying to applicants and licensees for spectrum auctions which are proposed subsequent to the adoption of any rules in this proceeding.

Application of additional construction requirements to existing licensees would be fundamentally unfair and unduly burdensome. In making decisions to participate in the auctions (and spend millions of dollars in auction bids and construction costs in many cases), applicants developed detailed business plans in order to determine the feasibility of obtaining a license and providing service to the public. To impose additional service requirements well after critical financial decisions have been made would only serve to upend sound financial planning, and force investment where it might not be financially feasible to do so. This is especially the case in rural America where small rural carriers must carefully plan their systems in order to ensure that they can garner enough revenues to support their system’s substantial costs. Rural service implementation generally

entails the construction of more base stations per subscriber count than urban or suburban areas; more expensive backhaul; and greater expenses in overcoming terrain considerations. Given the lack of population over which to spread expenses, and reduced (or negative) population growth for purposes of generating greater future revenues, the business case for a rural wireless system generally has very little room for unexpected substantial expenses. This concern is further exacerbated because smaller carriers are being forced to upgrade systems every few years (and long before what would otherwise be the end of the useful life of the equipment), in order to keep up with the new service offerings provided by the larger carriers. Costly additional construction requirements may force smaller rural carriers out of the business.

The service areas won at auction by rural telephone companies and their affiliates are almost always composed primarily of rural areas, and as these companies seek to build coverage to their telephone service areas they by definition bring service to rural areas. Therefore, they generally do not need a punitive incentive to build out to rural areas.<sup>2</sup>

The same may not be true of large and urban license areas generally won by much bigger wireless carriers. To the extent that the Commission wishes to encourage service to rural areas by such licensees, it can adopt a requirement that the larger carriers must serve rural areas commensurate to the general buildout obligation at each build out bench mark. If the bench mark is, for instance, one-third of the total population, then the

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<sup>2</sup> To the extent that the Commission wishes to encourage additional coverage by rural licensees, the voluntary incentive approach discussed at para. 102 of the FNPRM could be a valuable tool, especially if it results in additional funding or other incentives that would allow rural carriers to implement service to some of the much more challenging portions of their service areas, with ultra-low population density and difficult terrain.

licensee should as part of that obligation provide coverage to at least one-third of the rural area in the license boundaries. Irrespective of whether the bench mark is geographic based or POPs based, the rural bench mark should be POPS based, since there will be instances where it may never make sense to serve certain rural areas that are virtually unpopulated.

Companies that obtain their licenses for private internal use should not be subjected to additional construction requirements for the sake of expanding coverage to places that may be unnecessary to their operations. Such private users have spent a significant amount of resources to obtain spectrum to be tailored to their specific needs, which may be completely unlike those of a commercial wireless service provider.

**III. If Adopted, Additional Construction Requirements Should Be Implemented as of the End of the Next Full License Term.**

To the extent that the Commission decides to adopt additional construction obligations for any class of licensees, it should delay the implementation of such requirements until the end of the respective next full license term. By doing this, the Commission will provide a more reasonable opportunity for carriers to modify business plans in order to meet the Commission's new thresholds. Nonetheless, the Blooston Licensees are concerned that there will be circumstances (described above) where regardless of the amount of time and planning, sound business judgment will dictate that it is not feasible to install additional transmitters for the sake of installing transmitters to meet an artificial build out requirement. The exemptions discussed above should govern such circumstances.

#### **IV. Any Penalties Should Not be Onerous or Require Curtailment of Service**

The Commission needs to balance its interest in ensuring that service is available to the public against the need to ensure that licensees are not hindered in their ability to provide service by well-meaning but onerous regulations. As a result, if a licensee does not meet additional build out obligations imposed after the initial license term, the Commission should allow the licensee to keep the areas that are being served. The public interest would be served by allowing the licensee to keep what it is serving, rather than enforcing a license cancellation that would result in a waste of resources, disrupt what may be a valuable service to the public, and potentially strand the reclaimed spectrum for several years before it can be re-auctioned. The Commission can take official notice that several licenses turned in by licenses or otherwise cancelled remain unsold after several years, due to the severe demands on the Commission's limited auction resources.

When reclaiming any unserved area, the Commission must provide the incumbent with a sufficient protection buffer in order to ensure that there is no harmful interference from any other co-channel licensee. In other words, the incumbent licensee should not have to curtail the service it is providing at its boundaries in order to meet the traditional power reduction requirement along the border between two market area licensees. Instead, any winner of the auction for reclaimed spectrum should have to fully protect the incumbent's existing operations.

The Commission should also refrain from reclaiming areas that are sufficiently surrounded by the incumbent's existing service that they do not offer a realistic service opportunity for a new licensee, but could be disruptive of the existing service if put into

the hands of another entity. Reclaiming spectrum in such circumstances could facilitate competitive mischief, and may deprive existing subscribers of necessary extensions of coverage.

If additional construction requirements are applied to small and rural carriers<sup>3</sup>, the appropriate remedy for any failure to meet such construction requirements would be to require affected licensees to negotiate with third parties to either partition/disaggregate/lease unused spectrum, i.e., the “use or offer” penalty discussed at para. 115 of the FNPRM. This will allow such smaller licensees the ability to be compensated for their upfront costs in obtaining the spectrum at auction, while facilitating the rapid delivery of advanced communications services to the public. As discussed above, for the most part rural carriers are winning smaller licenses at auction, which incorporate primarily rural areas. Many such licenses include areas where the population dips well below 10 persons per square mile (i.e., one-tenth the definition of “rural” in the Act); and in a number of areas, terrain and climate can make provision of service to such customers more expensive than the rest of the system. It may take several years for the business case to develop to extend service to such areas.

Likewise, for private users with specific internal communications needs, the Commission should not punish such licensees for failure to build to commercial operator specifications. If anything, such licensees should be placed under the “use or offer” criterion, so that they have an opportunity to recover their investment in the spectrum

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<sup>3</sup> Small and rural carriers would include those carriers that qualify for either the small business or rural service provider bid credits as of the time of the license renewal in question, or qualify as a “rural telephone company” under the Communications Act.



they purchased, after they have had time to size up the extent of their own coverage needs.

## **V. Conclusion**

It is clear that the Commission has a legitimate concern to ensure that service is provided to the public. That said, the public interest demands that the Commission balance that concern against the need to be fair and equitable to all stakeholders, so that they have an incentive to implement service in more challenging rural areas. Spectrum auction licensees are routinely investing millions of dollars into spectrum acquisition and implementation. Therefore, the Commission must be careful not to force licensees to continue expanding service when there is no business case to do so. To be forced into a money-losing trajectory will only force a loss of service that is contrary to the public interest.

Respectfully submitted,

**BLOOSTON LICENSEES**

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