

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Wireless Internet Service Providers Association	)	WT Docket No. 18-353
And Utilities Technology Council Request for	)	
Waiver of Citizens Broadband Radio Service	)	
Transition Deadline	)	

**COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (NCTA) submits these comments expressing serious reservations regarding the request of the Wireless Internet Service Providers Association (WISPA) and Utilities Technology Council (UTC) (collectively the Petitioners) for waiver of Sections 90.1307(c) and (d) and Sections 90.1338(a) and (b) of the Commission’s rules (Petition).<sup>1</sup> The Commission should deny the Petition *without prejudice* as premature, insufficiently supported to justify a blanket waiver, and contrary to the public interest at this time. If the equipment availability and other concerns raised by Petitioners have not been resolved in sufficient time for compliance with the 2020 grandfathering deadline as it approaches, individual licensees could request relief on a case-by-case basis at a later date, as the Commission contemplated.

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<sup>1</sup> Wireless Internet Service Providers Association and Utilities Technology Council, Petition for Waiver of Sections 90.1307(c) and (d) and Sections 90.1338(a) and (b) of the Commission’s Rules, WT Docket No. 18-353 (filed Oct. 4, 2018) (Petition); *Wireless Telecommunications Bureau Seeks Comment on Wireless Internet Service Providers Association and Utilities Technology Council Request for Waiver of Citizens Broadband Radio Service Transition Deadline*, Public Notice, WT Docket No. 18-353 (rel. Nov. 27, 2018).

## I. THE PETITIONERS' REQUEST IS PREMATURE

Petitioners seek a waiver and extension of the grandfathering provisions related to the Commission's Citizens Band Radio Service (CBRS), which grant certain covered fixed wireless licensees protected status under the Part 90 rules until a five-year transition period to new Part 96 rules ends on April 17, 2020.<sup>2</sup> Given that it is still nearly a year and a half before the transition period ends, the Petitioners' claims that a waiver of the deadline until January 8, 2023 is necessary for all licensees to complete their transition is premature. It remains to be seen whether the equipment availability and other challenges described in the Petition will be resolved before the spring of 2020.

In fact, development of the CBRS band is progressing, and the Commission's recent adoption of revised rules for the band should further expedite that progress.<sup>3</sup> The Commission already has certified the first set of CBRS devices and a CBRS module that can be used by end-user device manufacturers to receive Commission certification for their devices.<sup>4</sup> Additionally,

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<sup>2</sup> It is not clear from the Petition whether the Petitioners also intend to request relief for existing licenses set to expire after April 17, 2020, but before January 8, 2023 (i.e., those licenses initially granted between April 17, 2010 and January 8, 2013). To the extent that the Petitioners intend for their waiver request to apply to those licensees also, enabling them to extend their license terms by up to three additional years, until January 8, 2023, NCTA also opposes that request for the reasons described in these comments. *See infra* note 10.

<sup>3</sup> *See Promoting Investment in the 3550-3700 MHz Band*, Report and Order, FCC 18-149, GN Docket No. 17-258, ¶ 2 (rel. Oct. 24, 2018) ("We anticipate that the targeted changes described herein will spur additional investment and broader deployment in the band, promote robust and efficient spectrum use, and help ensure the rapid deployment of advanced wireless technologies—including 5G—in the United States.").

<sup>4</sup> Press Release, CBRS Alliance, Sierra Wireless Announces Industry's First FCC Certified Embedded Module for Citizens Broadband Radio Service (CBRS) Networks, Nov. 6, 2018, <https://www.cb rsalliance.org/news/sierra-wireless-announces-industrys-first-fcc-certified-embedded-module-for-citizens-broadband-radio-service-cbrs-networks/>; Press Release, CBRS Alliance, CBRS Alliance and Wireless Innovation Forum Celebrate First Generation of Certified Devices, Oct. 9, 2018, <https://www.cb rsalliance.org/news/cbrs-alliance-and-wireless-innovation-forum-celebrate-first-generation-of-certified-devices/>.

the Commission recently reported to Congress that “WTB/OET have taken multiple actions to facilitate the testing and development of SASs and ESCs,” including “conditionally approv[ing] the first wave of SAS Administrators on December 21, 2016 and . . . the first wave of ESC operators on February 21, 2018.”<sup>5</sup> CBRS testing also is well underway, and a variety of entities have “actively made significant investments to take the first steps towards providing commercial services in the band.”<sup>6</sup> Given such demonstrated progress and the significant amount of time left before the transition period ends, their Petition is premature.

## **II. THE PETITION FAILS TO OFFER DETAIL SUFFICIENT TO JUSTIFY THE REQUESTED WAIVER**

The generally applicable, speculative claims proffered by the Petitioners fail to demonstrate with particularity that the circumstances at issue warrant a blanket waiver. Petitioners seeking waiver of the Commission’s rules “face[] a high hurdle even at the starting gate.”<sup>7</sup> The applicable waiver standard set forth in Section 1.925(b)(3) requires the Petitioners to demonstrate that “(i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public

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<sup>5</sup> *Report to Congress Pursuant to Section 1008 of the Spectrum Pipeline Act of 2015, As Amended by the Ray Baum’s Act of 2018; Use of Spectrum Bands Above 24 GHz for Mobile Radio Services; 3.5 GHz SAS and ESC Applications; Expanding Flexible Use in Mid-Band Spectrum; Between 3.7 and 24 GHz; Promoting Investment in the 3550-3700 MHz Band*, Report, DA 18-1128, GN Docket Nos. 14-177, 15-319, 17-183, 17-258, ¶¶ 8, 11 (rel. Nov. 2, 2018) (3.5 Report).

<sup>6</sup> 3.5 Report ¶¶ 17-18.

<sup>7</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

interest, or the applicant has no reasonable alternative.”<sup>8</sup> To meet this standard, the Petitioners “must plead with particularity the facts and circumstances which warrant such action.”<sup>9</sup>

The Petitioners ask the Commission to grant a blanket waiver to extend the grandfathering provisions pertaining to *all* licensees in the 3650-3700 MHz band whose licenses were initially set to expire between April 17, 2015 and April 17, 2020 or that were issued after January 8, 2013.<sup>10</sup> In support of their request, the Petitioners assert generally applicable claims about the difficulties that licensees may face in meeting the April 17, 2020 end date for the Commission’s five-year transition period. As discussed above, with significantly more than a year left in the transition period, these claimed difficulties remain uncertain.<sup>11</sup> Further, it is far from certain that maintaining the 2020 deadline for the general class of licensees would frustrate or fail to serve the purpose of the grandfathering rules or would be inequitable or unduly burdensome for all covered licensees. Additionally, the Petitioners offer no concrete evidence to substantiate their claims that covered licensees will be hard-pressed or unable to meet the 2020 deadline.

Moreover, Petitioners’ generalized claims do not necessarily reflect the particular facts and circumstances applicable to each licensee that would be covered by the requested waiver. In its *2015 CBRIS Order* adopting the grandfathering rules, the Commission specifically noted “[t]o the extent that we may have overlooked any technical obstacles . . . Part 90 incumbents may

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<sup>8</sup> 47 C.F.R. § 1.925(b)(3).

<sup>9</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

<sup>10</sup> Petition at 1. The Petitioners seek a waiver of Section 90.1307(c) and (d) to extend the licensing grandfathering deadline “beyond April 17, 2020 . . . through January 8, 2023.” *See id.* Section 90.1307(c) applies the April 17, 2020 deadline to licenses that “expire[] between April 17, 2015 and April 17, 2020” and Section 90.1307(d) applies the same deadline to “[l]icensees that were issued after January 8, 2013.” 47 C.F.R. §§ 90.1307(c)-(d).

<sup>11</sup> *See supra* Section I.

avail themselves of our waiver process *on a case-by-case basis*.”<sup>12</sup> Without more information about licensees’ individual circumstances, it would be inappropriate to rule out the possibility that at least some, if not many, of these licensees will be able to meet the 2020 transition deadline. In fact, as noted below, the Commission has declined to grant a blanket waiver of its rules in the past when doing so would cover parties that do not need the waiver.<sup>13</sup> The Petitioners have not offered enough information about the specific circumstances of individual licensees to demonstrate that a blanket waiver of the grandfathering provisions is appropriate.

Furthermore, Commission precedent (including the two cases cited in the Petition<sup>14</sup>) does not support granting the Petitioners’ waiver request.<sup>15</sup> For example, in the *E911 Order* cited in the Petition, the Commission explained its general approach to waiver requests of the E911

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<sup>12</sup> *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, ¶ 399 (2015) (*2015 CBRS Order*) (emphasis added).

<sup>13</sup> See *infra* Section III.

<sup>14</sup> See Petition at 8-9 (citing *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies*, Order, 25 FCC Rcd. 8861, ¶ 11 (2010) (granting the requested waiver in part with respect to equipment-related relief, but denying the deadline extension for licensing additional operations to avoid encumbering the relevant spectrum longer than necessary) and *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd. 17442 (2000) (*E911 Order*)).

<sup>15</sup> See, e.g., *Petition of General Communications, Inc. for Waiver of Certain Channelization and Other Restrictions on Common Carrier Fixed Point-to-Point Operations Between 6425 and 7125 MHz*, Memorandum Opinion and Order, 31 FCC Rcd. 11792, ¶ 24 (2016) (declining to extend a waiver of its upper 6 GHz rules for GCI to all other carriers and noting that, while “other similarly situated carriers may need waivers to achieve their broadband deployment goals . . . we must consider them under the specific factual circumstances presented”); *Commercial Mobile Alert System*, Order, 27 FCC Rcd. 9096, ¶ 11 (2012) (denying blanket waiver requests by the Rural Cellular Association and the Rural Telecommunications Group of the Commission’s deadline for providing commercial mobile alert capability on the grounds that the “petitions fail to provided sufficient facts by which we can determine whether any particular carrier acted in a timely and diligent manner in order to meet the April 7, 2012 deadline”).

Phase II requirements, asserting that while “there could be instances where technology-related issues or exceptional circumstances may mean that deployment of Phase II may not be possible by October 1, 2001 . . . these cases could be dealt with through *individual* waivers as these implementation issues are more precisely identified.”<sup>16</sup> The Commission then denied a request for waiver by United States Cellular Corporation (USCC) that would have extended Phase II deadlines for all rural wireless carriers on the grounds that the request was “insufficiently substantiated” and “overly broad,” noting that the fact that the waiver would extend deadlines for all rural carriers “could . . . substantially delay Phase II deployment even in cases where this is unnecessary.”<sup>17</sup>

Additionally, the Petitioners seek to expand the class of devices protected under the grandfathering provisions to include “*all* devices registered in ULS under Part 90, not just those that were covered by the grandfathering registration process.”<sup>18</sup> This request amounts to an attempt to relitigate an issue that the Commission already considered and settled in its *2015 CBRS Order*. In that *Order* the Commission specifically rejected extending its grandfathering provisions to devices that were not in use as of April 17, 2016 to avoid “categorically granting incumbents exclusive rights to a full 50 MHz of spectrum they may not be using (and may not be authorized to use).”<sup>19</sup> The Petitioners offer inadequate and unpersuasive justification for this request, claiming that extending grandfathering protection to these devices is warranted because “they were installed with reliance that CBRS would be operational.”<sup>20</sup> This request should be

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<sup>16</sup> *E911 Order* ¶ 43 (emphasis added).

<sup>17</sup> *Id.* ¶¶ 70, 73.

<sup>18</sup> Petition at 4 n.15 (emphasis added).

<sup>19</sup> *2015 CBRS Order* ¶ 402.

<sup>20</sup> Petition at 7.

denied not only as an attempt to create a back door to obtain protections the Commission previously withheld, but because it would “serve to delay the ultimate integration of 3650-3700 MHz into the [CBRS]” by extending protected status to thousands of additional devices.<sup>21</sup>

### **III. GRANTING A BLANKET WAIVER OF THE GRANDFATHERING RULES WOULD DELAY GAA DEPLOYMENT AND BE CONTRARY TO THE PUBLIC INTEREST**

The Petitioners also have not demonstrated that granting their waiver request is in the public interest at this time. The Commission determined that including the 3650-3700 band in the CBRS framework “will serve the public interest by promoting spectrum availability, efficiency, and usability for all 3.5 GHz Band users, including prior 3650-3700 MHz licensees.”<sup>22</sup> It specifically structured its grandfathering rules, including the five-year transition period, to balance the needs of incumbents while ultimately freeing up the band for contiguous use with the rest of the CBRS band.<sup>23</sup> The Commission explained that the five-year transition period is appropriate because “incumbents licensed after January 8, 2013 Federal Register publication date of the [CBRS] *NPRM* . . . were on notice of [the Commission’s] supplemental proposal to integrate the . . . band into the [CBRS framework]” and “according them more than a five-year priority over GAA users of the band would unnecessarily curtail the spectral efficiencies contemplated by our rules.”<sup>24</sup>

Extending the transition period beyond five years with a blanket waiver for all Part 90 licensees would not only upset the balance the Commission struck in 2015, but could disrupt the plans of new users that have structured their investments with the intention of using the

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<sup>21</sup> 2015 CBRS Order ¶ 412.

<sup>22</sup> *Id.* ¶ 393.

<sup>23</sup> *Id.* ¶¶ 394-399.

<sup>24</sup> *Id.* ¶ 400.

3650-3700 MHz band to offer services on a GAA basis. Potential service providers assumed that grandfathered incumbent licensees would no longer be accorded priority status beginning on April 17, 2020, and ending on a rolling basis until the final grandfathered licenses expire on January 8, 2023. With GAA deployments expected in early 2019, shortly after the SAS/ESC receive final approval, granting the Petition could have “a meaningful negative impact on the future development of the [CBRS]” by “restrict[ing] future [CBRS] deployments or negatively affect[ing] spectrum availability in the band” – outcomes the Commission has sought to avoid in considering at least one past request for waiver of its licensing rules in this band.<sup>25</sup> For instance, one NCTA member company’s analysis reveals that existing grandfathered licensees today encumber between 25 and 85 percent of the POPs in fifteen key markets in its footprint, significantly and negatively affecting its ability to deploy new CBRS services.

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<sup>25</sup> See *TEACH, Inc. Waiver Request and Application for New Nationwide 3650-3700 MHz Service License*, Order, 31 FCC Rcd. 1180, ¶ 15 (2016) (granting a waiver of the rule banning new nationwide 3650-3700 licenses after April 17, 2015, but noting specifically that because the new licensee’s equipment would not be accorded grandfathered status, granting the waiver would not have a “meaningful negative impact” on CBRS deployment).



## **CONCLUSION**

For the reasons discussed above, the Commission should deny without prejudice the Petition for a blanket waiver as premature, lacking in sufficient detail as to the individual circumstances faced by licensees, and contrary to the public interest at this time. To the extent that concerns identified by Petitioners are not resolved in a timely fashion before the April 2020 deadline, it may be appropriate for those individual licensees to request relief based on their specific circumstances.

Respectfully submitted,

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