

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

In the Matter of)	
)	
Facilitating the Provision of Spectrum-Based Service 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 and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services and to Facilities Capital Formation)	WT Docket No. 03-202
_____)	

SPRINT COMMENTS

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Summary

Sprint makes the following points in these comments:

1. There is no basis in policy that would justify a change in performance requirements during license renewal periods. The FCC has relied on market forces in determining CMRS coverage and network buildout. This policy has been immensely successful. The FCC has acknowledged that there exists effective competition in rural areas today and that additional licensees will enter rural areas as soon as market conditions justify additional entry. As the FCC has also recognized, access to spectrum is not a major issue for firms wanting to provide service in rural areas. Thus, the FCC's reliance on market forces has been appropriate.

Adoption of the re-licensing alternatives mentioned in the *FNPRM* would harm consumers. Adoption of buildout requirements during renewal periods would result in uneconomic investment because any new requirement would have practical effect only where construction would not otherwise be economic. In this regard, the FCC has recently reaffirmed that it will not require licensees to deploy services where construction would be economically unsustainable, because such construction would lead to high prices for customers.

A "keep what you use" alternative would similarly harm consumers. Non-rural licensees currently moderate the prices charged by rural carriers, because of their ability to enter rural areas if rural licensees engage in unreasonable conduct. This pricing and competitive effect would be lost if the FCC disenfranchises non-rural carriers of their spectrum in rural areas.

2. Major legal issues and potential consequences would result if the FCC attempts to change the rules governing existing licensees. Although the Communications Act permits the FCC to modify licenses, it must affirmatively find that the public interest will be served by the modification. Sprint submits that modifying PCS license renewal rules cannot be justified. In fact, changing the material terms of exclusive use licenses obtained at auction would harm significantly investor confidence in future auctions, undermine carrier actions in reliance of license grants and harm the public interest.

In addition, changing the renewal rules for licenses obtained at auction could expose the federal government to substantial damages liability. The PCS license auction, for example, established a contract between the federal government and the licensee, and an essential part of the bargain was that PCS licenses would be renewable upon a demonstration of substantial service, without additional buildout requirements. Changing the renewal rules after the fact would constitute a material breach of contract.

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SPRINT COMMENTS

Sprint Corporation submits these comments in response to the Further Notice of Proposed Rulemaking (“*Rural Spectrum FNPRM*” or “*FNPRM*”).¹

I. THERE IS NO BASIS IN POLICY THAT WOULD JUSTIFY A CHANGE IN PERFORMANCE REQUIREMENTS DURING LICENSE RENEWAL PERIODS

The Commission has never adopted performance requirements during license renewal periods.² Instead, it has permitted geographic-area licensees to expand coverage as market conditions warrant. In its *FNPRM*, the Commission asks whether it should now change course and

¹ See *Facilitating the Provision of Spectrum-Based Services to Rural Areas*, WT Docket Nos. 02-381, 01-14 and 03-202, *Further Notice of Proposed Rulemaking*, FCC 04-166, 19 FCC Rcd 19078 (Sept. 27, 2004), summarized in 69 Fed. Reg. 75174 (Dec. 15, 2004)(“*Rural Spectrum FNPRM*” or “*FNPRM*”).

² See *id.* at ¶ 145 (“[O]ur current performance requirements apply only during the initial term. As noted, once a licensee renews its license, no additional performance requirements are imposed in subsequent terms other than the standard necessary in order to achieve a renewal expectancy.”).

abandon its reliance on market forces by imposing performance requirements during license renewal periods.

Sprint submits there are four facts that are material to the question that the Commission has posed, and none of these facts are disputed:

1. There exists effective competition in most rural areas today;
2. Additional licensees have powerful economic incentives to enter rural markets when market conditions warrant;
3. Additional construction requirements during renewal periods – after buildout and renewal obligations are met – either will have no effect (because the construction would have occurred without the rule) or will result in uneconomic investment, and the Commission ruled as recently as September that it will not require carriers to engage in uneconomic investment; and
4. A “keep what you use” regime would not result in additional providers in rural areas but would rather result in less competition among existing service providers because of the loss of the beneficial effects of potential competition, to the detriment of consumers.

Sprint respectfully submits that the public interest would not be promoted by adoption of either performance requirements during renewal periods or conversion of all licenses into a “keep what you use” model.

A. THERE IS NO EVIDENCE OF ANY PROBLEM THAT WOULD JUSTIFY GOVERNMENT REGULATION TO OVERRIDE MARKET FORCES

Over the past decade, the Commission has followed a market-oriented approach to spectrum policy that has “allowed economic forces to determine build-out of wireless facilities and the provision of wireless services.”³ The Commission adopted this policy because it allows firms to operate “at a competitive and efficient scale of operation” that, in turn, benefits consumers: “The providers are then able to pass along to consumers the cost savings from efficient op-

³ *Rural Spectrum NPRM*, 18 FCC Rcd 20802, 20819 ¶ 34 (2003).

erations.”⁴ This market-based entry policy, the Commission has observed, has been “a huge success.”⁵ Among other things, 97 percent of all Americans (276 million people) have a choice of at least three different wireless service providers.⁶

There are fewer wireless carriers in rural areas compared to metropolitan areas – on average, 3.7 providers vs. 5.9 providers respectively.⁷ This is not surprising; an area with a population density of 100 persons or less per square mile cannot be expected to support the same number of service providers as a metropolitan area with a density exceeding 1,000 persons per square mile. As the Commission has itself acknowledged:

Because the economics of providing service can be significantly different in rural areas as compared to urban areas, our market-based policy acknowledges that market characteristics, especially demographics, will affect the optimal provision of service in rural areas.⁸

Two points bear emphasis concerning the current market-based entry policy. First, additional wireless carriers will enter rural markets “where it is economic to do so,” as the Commission has noted.⁹ Thus, the Commission can have a high degree of confidence that additional entry in rural areas will occur as soon as market conditions justify such entry.

Second, the Commission has recognized that “despite the differing structure of rural markets, effective CMRS competition does exist in rural areas.”¹⁰ Indeed, all available data suggest

⁴ *Id.* at 20807 ¶ 6.

⁵ *Id.* at 20805 ¶ 3.

⁶ *See Ninth Annual CMRS Competition Report*, 19 FCC Rcd 20597 at ¶ 49 (2004).

⁷ *See id.* at ¶ 109.

⁸ *Rural Spectrum Order* at n.111.

⁹ *Id.* at ¶ 131.

¹⁰ *See Ninth Annual CMRS Competition Report*, 19 FCC Rcd 20597 at ¶ 27. *See also id.* at ¶¶ 107-11.

that the average price of wireless service in rural areas is “very similar to the average price in urban areas.”¹¹

The Commission commenced the instant *FNPRM* to examine whether there are “additional measures” that it can take to “promote access to spectrum in rural areas.”¹² This inquiry follows the Commission’s own recognition that its “current policies and regulations are working to promote access to ‘unused’ spectrum” in rural areas.”¹³

In its *Rural Spectrum Order*, the Commission declined to adopt new regulations – re-licensing rules for future spectrum allocations, more rigorous buildout requirements in rural areas – precisely to ensure that licensees possess the flexibility they need to respond to market conditions and demands in rural areas.¹⁴ Yet, in the very same document, the Commission asks whether it should abandon its reliance of market forces – which admittedly has been a “huge success” – in favor of government intervention into market entry decisions.

However, the *FNPRM* does not present evidence that access to CMRS spectrum in rural areas is a problem, much less a problem of such sufficient magnitude that would justify a wholesale change in the Commission’s successful market-oriented policies. The Commission has previously acknowledged that “access to spectrum does not appear to be a substantial barrier to entry in RSAs.”¹⁵ Indeed, there are a variety of ways that a firm interested in providing service in a given rural area can obtain the spectrum it needs:

¹¹ *Eighth Annual CMRS Competition Report*, 18 FCC Rcd 14783, 14837 ¶ 118 (2003).

¹² *Rural Spectrum FNPRM* at ¶ 3.

¹³ *Id.* at ¶ 151. *See also id.* at ¶¶ 3 and 131.

¹⁴ *See, e.g., Rural Spectrum Order* at ¶¶ 37, 75, 78.

¹⁵ *2002 Biennial Review – Spectrum Cap Order*, 16 FCC Rcd 22668, 22691 ¶ 43 (2001).

1. Acquire spectrum at auction. For example, a number of PCS licenses covering rural areas will become available later this month in Auction 58. The Commission has indicated that another 90 MHz of spectrum (AWS) will likely be auctioned in June 2006.¹⁶ The Commission has not scheduled auction dates for yet another 60 MHz of 700 MHz spectrum. In short, there appear to be opportunities for firms interested in rural areas to obtain spectrum directly from the Commission.
2. Acquire spectrum from an existing licensee via the partitioning/disaggregation process. Over 200 MHz of licensed Commercial Mobile Radio Services (“CMRS”) spectrum is currently available in the market. Much spectrum in rural areas is underutilized (because of the demographics and economics discussed above) and congestion is not an issue in rural areas. Thus, a firm interested in providing services in a rural area can alternatively seek to obtain a partitioned/disaggregated license from an existing licensee. While OPASTCO and Blooston assert that potential new entrants are “repeatedly rebuffed” in pursuing these alternatives because existing licensees are “not willing or able” to consider these requests, these parties provided no facts in support of such sweeping assertions. These assertions are, moreover, inconsistent with available facts.¹⁷ As the Commission has observed, partitioning has occurred “across all regions of the country,” including “many counties that fall within the various definitions of ‘rural’”:

¹⁶ See FCC News, *FCC to Commence Spectrum Auction That Will Provide American Consumers New Wireless Broadband Services* (Dec. 29, 2004).

¹⁷ See, e.g., *Rural Spectrum FNPRM* at ¶ 148.

[O]ver 60 percent of all counties in the broadband PCS service have been partitioned at least once. . . . For example, of the partitioned broadband PCS counties, 72 percent are counties with a population density of 100 persons per square mile or less. In addition, 77 percent of the partitioned broadband PCS counties are contained within RSAs.¹⁸

3. Acquire spectrum from an existing licensee via the FCC's still new leasing rules.

Although the spectrum leasing rules have been in effect for less than one year, the Commission processed over 60 lease filings during the first six months alone, including leases involving rural areas.¹⁹ Based on this record evidence, the Commission is correct in concluding that “market-based incentives are encouraging parties to engage in spectrum leasing arrangements.”²⁰

Given the numerous ways that would-be-rural-entrants have obtained, and can obtain spectrum, coupled with the absence of facts indicating that access to spectrum in rural areas is a problem, there is no reason for the Commission to change its current policy of relying on market forces – especially where that policy has already been a “huge success.”

B. THE RE-LICENSING ALTERNATIVES MENTIONED IN THE *FNPRM* WOULD HARM CONSUMERS

The Commission seeks comment on two different regulatory regimes that might be imposed during license renewal periods: (1) the imposition of performance requirements, or (2) the conversion of geographic-area/“complete forfeiture” licenses into “use it/lose it” licenses. Sprint demonstrates below that consumers would be harmed by adoption of either alternative.

1. New performance requirements during re-licensing terms. The Commission seeks comment on the wisdom of adopting a “more rigorous substantial service construction require-

¹⁸ *Rural Spectrum NPRM*, 18 FCC Rcd at 20835-36 ¶ 66.

¹⁹ *See Rural Spectrum FNPRM* at ¶ 149.

²⁰ *Id.*

ment” for licensees during renewal terms.²¹ At the outset, Sprint questions whether it is realistic to think that it is even possible to develop definitions to distinguish “substantial service” from “more rigorous substantial service,” so as to put licensees on notice of the standard they must satisfy to retain their license.²²

In addition, any new “more rigorous” performance requirement that the Commission might adopt necessarily would result in uneconomic investment, which would harm consumers. Licensees have a natural (and powerful) economic incentive to provide services in any area where, in the Commission’s words, “it is economic to do so.”²³ Thus, as the Commission has recognized, any construction requirement that it might impose during renewal terms necessarily will cause “uneconomic investment or construction” – because, as a practical matter, the buildout rule (however defined) will have practical effect only in circumstances where construction is not otherwise economic.²⁴

A Commission requirement that a licensee build facilities in an area where it is not economic to do so would not be in the public interest. This is because customers would be penalized in the form of higher prices if carriers are forced by government regulation to make uneconomic investments as a condition of retaining their licenses. As one rural trade association has acknowledged, “[p]ushing competition into an area that cannot support multiple providers causes all providers and their subscribers to suffer” and “may prove disastrous for a rural community”:

²¹ See *Rural Spectrum FNPRM* at ¶ 158.

²² Substantial service is generally defined as service which is “sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.” *Id.* at n.225. The FCC also needs to consider how it would enforce any new “more rigorous substantial service” standard. Should the FCC consider disfranchising a licensee that has invested over \$10 billion in its network with service to over 20 million customers because the licensee has, in the FCC’s judgment, provided “substantial service” but not “more rigorous substantial service”?

²³ *Rural Spectrum FNPRM* at ¶ 131.

If [government] policies are designed to introduce four or five providers of a competing service into an area that can support no more than one or two, there is the substantial risk that all will fail. As the companies struggle for their survival, the customer loses as none of the companies can afford to upgrade service or equipment.²⁵

Requiring any one carrier to build in an area where it is not economic to do so would be imprudent. But, requiring every CMRS licensee – and there may be more than ten licensees once the AWS and 700 MHz licenses are auctioned – to build in rural areas that may be capable of supporting only one or two providers would be economically irresponsible and without public interest benefits. As noted above, an area with a population density of 100 persons or less per square mile cannot be expected to support the same number of service providers as a metropolitan area with a density exceeding 1,000 persons per square mile. And, as the Commission has recognized, “if there were more than an efficient number of providers in a market, absent other support such as subsidies, in the long run some of these providers would go out of business, causing a loss of service and other inconvenience to consumers.”²⁶

If the Commission believes it is necessary for consumers to have more than two or three wireless carriers in the same area, it must provide an economic incentive; it cannot overrule the laws of the market and basic economics. For example, if the Commission determines that public policy requires that rural areas be served by more than 3.7 carriers (on average), then the appropriate response would be to increase the desirability of providing service in rural areas (*e.g.*, provide increased universal service subsidies), not to impose a command-and-control construction requirement. But given the Commission’s findings that there already exists effective competi-

²⁴ See *id.* at ¶ 154.

²⁵ National Telecommunications Cooperative Association (“NTCA”) NPRM Comments at 4 (Dec. 29, 2003).

²⁶ *Rural Spectrum NPRM*, 18 FCC Rcd at 20807 ¶ 6.

tion in rural areas and that additional entry will occur “where it is economic to do so,”²⁷ it is not apparent that there is a need for the Commission to adopt additional economic incentives to entice licensees to serve sparsely populated areas.

The Commission held in its *Rural Spectrum Order* that it does “not propose to require licensees to deploy services where their market studies or other analyses indicate that service would be economically unsustainable.”²⁸ There is no reason for the Commission to reconsider this ruling, and the Commission should reject arguments urging adopting of new construction requirements during renewal terms.

2. Applying a “use it/lose it” requirement during re-licensing terms. Eleven years ago, the Commission abandoned the cellular “keep what you use” licensing model in favor of geographic-area licenses subject to a “complete forfeiture” approach, whereby a license would be cancelled if specified construction requirements are not satisfied.²⁹ In its *Rural Spectrum FNPRM*, the Commission asks whether PCS and other “complete forfeiture” licenses should now be converted into the cellular “keep what you use” model during the renewal period.³⁰ Sprint submits that adoption of this alternative would also harm the public interest.

As noted above, residents of rural areas currently pay wireless prices that are similar to those paid by their urban/suburban counterparts, even though there are fewer providers in rural areas. A major reason for this desirable result is the impact of *potential competition*, a doctrine that recognizes that “a firm poised to enter the relevant market may prompt competitive re-

²⁷ See *Ninth Annual CMRS Competition Report*, 19 FCC Rcd 20597 at ¶¶ 27, 207-11 (2004); *Rural Spectrum Order* at ¶ 131.

²⁸ *Rural Spectrum Order* at ¶ 77.

²⁹ See *Rural Spectrum FNPRM* at ¶ 141.

³⁰ See *Rural Spectrum FNPRM* at ¶ 154.

sponses from existing firms.”³¹ The Commission has observed that potential competition “can be as important as actual competition in promoting desirable outcomes,”³² because potential competition can “constrain market power as effectively as actual competition.”³³

It is axiomatic that an existing “non-rural” carrier can enter an adjacent rural market more quickly and economically than can a new entrant. Although infrastructure deployment is never an easy task, it is far more efficient for a carrier already serving territory adjacent to a rural area to extend coverage through the construction of additional cell sites and the lease of “backhaul facilities” to connect the new cell sites to its existing network. By contrast, a new entrant wanting to serve the same rural area would require the same cell site facilities – *plus* it would require other components of a wireless network (*e.g.*, MSCs, HRLs, SS7 networks), operations support systems, billing systems, employees and training, a business plan, an advertising budget, *etc.* Thus, it is existing non-rural carriers, *not* potential new entrants, which place competitive pressure on existing licensees in rural areas.

The rural carrier “keep what you use” proposal, however, would eliminate the potential competition effects that non-rural carriers currently perform. Rural carriers would have little to fear from non-rural providers if, because of government regulation, they lose a portion of their spectrum due to a failure to build out in rural areas within the time specified by the government requirement.

In fact, loss of potential competition would impact customers in both rural and non-rural areas. Residents of rural areas would be negatively impacted because rural carriers would no longer need to moderate their pricing and conduct because of the threat of entry by non-rural car-

³¹ *Cable TV Rate Order*, 11 FCC Rcd 1179, 1182 n.38 (1995).

³² *2000 Biennial Review – Spectrum Cap Order*, 16 FCC Rcd 22668, 22680 ¶ 28 (2001).

riers. But residents of metropolitan areas would also be negatively impacted by the loss of potential competition. Specifically, rural carriers could easily increase their roaming prices if they are confident that a non-rural carrier can no longer enter its market in response to unreasonably high roaming rates. It is understandable that certain rural carriers would like the government to disable likely competitors, but these carriers have yet to identify how the public interest would benefit from the reduction of competition.

II. THERE ARE SIGNIFICANT LEGAL ISSUES AND CONSEQUENCES IF THE COMMISSION ATTEMPTS TO CHANGE THE RULES GOVERNING EXISTING LICENSEES

It is one thing for the Commission to adopt a new approach for license renewal periods with respect to spectrum that has not yet been auctioned, because firms acquiring the spectrum would be on notice as to which rules would apply during renewal periods, and can make bidding and license investment decisions with reference to the rules in place. It is another thing for the Commission to change the renewal rules for licenses that have already been assigned – that is, change the rules after licensees have developed business plans and made investments based on the prior rules. And it is yet another thing altogether for the Commission to change the renewal rules contained in an auction contract and expropriate rights obtained after the government has received valuable consideration for issuing the licenses. The Commission is correct in observing that it should proceed “carefully” in changing the requirements applicable to existing licensees because, as Sprint demonstrates below, the Commission could expose the federal government to substantial damages liability.

³³ *Cable Act Reform Provisions NPRM*, 16 FCC Rcd 17312, 17345 ¶ 69 (2001).

A. SPRINT DID NOT MAKE THE ARGUMENT THAT THE COMMISSION REJECTED

In its *Rural Spectrum Order*, the Commission held that it possesses the right to modify the terms and conditions of FCC licenses:

We emphasize that, contrary to Sprint's assertions, the Commission retains the right to modify the terms and conditions of FCC licenses. . . . Thus, no auction bidder could have assumed that it was buying a license containing terms that the Commission could not modify.³⁴

We note for the record that Sprint never argued that the Commission lacked the authority to modify licenses, including those obtained at auction. Indeed, Sprint explicitly recognized that the "Communications Act empowers the Commission to modify the term of licenses under certain circumstances."³⁵ Rather, Sprint has argued that license modification cannot be justified under the license modification statute and that in any event, modification of licenses obtained at auction could expose the government to potential claims for damages.

The legal issue in this docket is not whether the Commission possesses the legal authority to convert PCS and other geographic-area licenses into the "keep what you use" model. The issues are rather twofold: (1) can the Commission meet its statutory burden of demonstrating that license modification will promote the public interest and (2) even if it can meet this burden, will such a change nonetheless expose the federal government to damages liability?

B. CHANGING THE REQUIREMENTS APPLICABLE TO RENEWAL PERIODS WOULD NOT PROMOTE THE PUBLIC INTEREST

As noted above, the Communications Act empowers the Commission to modify the term of licenses, including the terms governing service during renewal periods.³⁶ To exercise this statutory authority, however, the Commission must first determine that the modification "*will*

³⁴ *Rural Spectrum FNPRM* at ¶ 84.

³⁵ Sprint Reply Comments at 15 (Jan. 26, 2004).

promote the public interest, convenience, and necessity.”³⁷ In addition, Congress has made clear that the burden of demonstrating that a license modification “will promote” the public interest “shall be upon the Commission.”³⁸

Sprint submits that a modification of the PCS license renewal rules cannot be justified under this statutory standard. Indeed, the proposals being considered would undermine rather than promote the public interest. A government order forcing private firms to make uneconomic investments, where the public benefits from such investments would be marginal at best because effective competition already exists, cannot credibly be considered as consistent with the public interest. In this regard, the Commission has already determined in its *Rural Spectrum Order* that additional regulations will not promote the public interest:

[W]e believe that licensees can provide a meaningful and socially beneficial service without providing ubiquitous service and that providing licensees with sufficient flexibility to respond to market fluctuations will promote the public interest.³⁹

There is an additional reason why the retroactive modification of PCS license renewal rules would be incompatible with the public interest. The auction process for radio licenses has been successful because investors have had confidence in understanding with precision what they are buying. Investor confidence in future auctions would be harmed if the Commission announces, years after an auction has occurred, that the material terms of the license contract will be fundamentally altered. The Commission has thus recognized that one of its foremost objec-

³⁶ See 47 U.S.C. § 316.

³⁷ *Id.* at § 316(a)(1)(emphasis added).

³⁸ See *id.* at § 316(b).

³⁹ *Rural Spectrum Order* at ¶ 78.

tives is to “preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission’s auction rules.”⁴⁰

Maintaining the integrity of our rules and auction processes is an essential goal. . . . We are not looking to maximize revenues, but to maintain the integrity for all of our future auctions and to ensure that all participants are treated fairly and impartially. These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.⁴¹

A Commission order changing the material terms of licenses obtained at auction would harm significantly investor confidence in future auctions and thereby undermine the public interest. Indeed, a Commission order changing the material terms of licenses obtained at auction could undermine innovation in the wireless industry, because investors would be wary of making additional investments and funding new wireless applications if there is no certainty that the investment will be recouped – because the government might later change the rules of the game.

C. CHANGING THE TERMS GOVERNING RENEWAL PERIODS FOR AUCTIONED LICENSES COULD EXPOSE THE FEDERAL GOVERNMENT TO SIGNIFICANT DAMAGES LIABILITY

The Commission and courts have repeatedly recognized that an auction of PCS licenses establishes a contract between the federal government and the licensee, under which both parties owe duties to each other.⁴² PCS carriers paid the U.S. Treasury sizable consideration for their licenses – in Sprint’s case, over \$3 billion – and they invested additional billions in relocating incumbent licensees in the PCS band, in constructing networks to meet the buildout requirements of their licenses, and in upgrading their networks to use spectrum more efficiently and to provide valuable new services and features to the public. The auction winners paid such amounts for li-

⁴⁰ *PCS Installment Payment Reconsideration Order*, 13 FCC Rcd 8345, 8348 ¶ 7 (1998).

⁴¹ *Second PCS Payment Plan Order*, 12 FCC Rcd 16435, 16437 ¶ 3 (1997).

⁴² *See* Sprint Reply Comments at 17-18 n.63 (Jan. 26, 2004).

censes that were defined by FCC rules and orders in existence *prior to the auction*, subject to standardized terms and conditions that were not subject to negotiation or variation.⁴³ An essential part of the bargain between the parties was that PCS licensees would be for a ten-year term renewable thereafter upon a demonstration of substantial service, *without* any additional buildout requirements:

PCS licensees are afforded exclusive rights and a renewal expectancy for the entire authorized area once performance requirements are met, regardless of whether service is provided over the entire authorized area. . . . [O]nce a licensee renews its license, no additional performance requirements are imposed in subsequent terms.⁴⁴

The Commission established this regime specifically to provide a “stable environment that is conducive to investment” in order to “foster the rapid development of PCS.”⁴⁵ In other words, the Commission acknowledged that the renewal expectancy and the absence of additional buildout requirements during renewal terms were essential elements of the contract enveloping the licenses, because these were key factors on which bidders rely in valuing the license and investing in a PCS network based on such licenses. As noted above, the Commission’s market-based policy has been enormously successful, including in rural areas.

A subsequent Commission decision that PCS carriers will lose some or all of their licensed spectrum in particular areas during the renewal period if they do not satisfy new, additional buildout requirements or do not serve certain areas would constitute a breach of the license contract. Auction winners invested substantial sums in licenses that were renewable without any additional buildout requirement. “Under these circumstances, if the companies did not at least buy a promise that the Government would not deviate significantly from those procedures and

⁴³ See *id.* at n.64.

⁴⁴ *Rural Spectrum Order* at ¶¶ 34 and 145.

standards, then what did they buy?”⁴⁶ Without the near-certainty of renewal with no additional requirements, unquestionably bidders would have bid less and the winners would have invested funds in facility deployment and services differently.

Sprint obtained at auction the right to provide its services throughout every corner of the United States and under the license terms that the Commission itself established. Under the rules that the Commission adopted, Sprint may determine where it provides services – so long as it satisfies construction requirements during the initial term. A Commission decision converting geographic PCS licenses into “keep what you use” licenses would mean that:

- Sprint no longer has the right or ability to serve every corner of the country as business conditions warrant, a right it obtained at auction;
- Sprint can no longer enjoy revenues or other strategic benefits from licenses it chooses to partition/disaggregate or from spectrum it leases; and
- Sprint would be required to expend additional sums to retain spectrum in certain areas – that is, expend additional sums to preserve a right it obtained at auction.

Sprint incorporates herein by reference the legal analysis it previously submitted on this subject.⁴⁷ An extensive legal analysis is not required to realize that the Commission cannot reasonably anticipate being able to alter material terms of auction contracts, after receiving billions of dollars in auction revenues, without exposing the federal government to sizable damages liability.

⁴⁵ *Second PCS Order*, 8 FCC Rcd 7700, 7753 (1993).

⁴⁶ *Mobil Oil Exploration. v. U.S.*, 530 U.S. 604, 620-21 (2000).

⁴⁷ *See Sprint Reply Comments at 17-21 (Jan. 26, 2004).*

III. CONCLUSION

For the foregoing reasons, Sprint respectfully requests that the Commission take action consistent with the views expressed above.

Respectfully submitted,

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