

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
2008 Biennial Review of Telecommunications) WT Docket No. 08-182
Within the Purview of the Wireless)
Telecommunications Bureau)

To: The Commission

**REPLY COMMENTS OF GREEN FLAG WIRELESS
COMMUNICATIONS, LLC, CWC LICENSE HOLDING, INC. AND
JAMES MCCOTTER**

Green Flag Wireless Communications, Inc., CWC License Holding, Inc. and James McCotter ("Joint Commenters") hereby submit these comments in reply to the proposal offered by Nextwave Wireless, Inc. ("Nextwave") in this proceeding. Nextwave suggests that the Commission should do away with comparative renewal proceedings for certain Part 27 services pursuant to its mandate under Section 11 of the Act to determine whether regulations remain necessary "as the result of meaningful economic competition between providers of such service." This suggestion is completely inapposite and is in fact simply an attempt to "end run" the current

mutually exclusive posture of Joint Commenters' WCS applications and those of Nextwave and other WCS licensees.

Joint Commenters have timely filed applications which are mutually exclusive with the renewal applications of many of the WCS incumbents. Part 27 of the rules specifically contemplates and permits the filing of competing applications with renewals and it establishes certain procedures that apply to such proceedings. 47 CFR 27.14(b) - (d). Because the rules vest the incumbent licensee with a dispositive preference in any renewal proceeding, there is little incentive for a challenger to file a competing application if the incumbent has provided that minimal level of service defined as "sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal." 27.14(b). This is a very low bar indeed. Moreover, the rules preclude challengers from receiving more than their expenses in return for the dismissal of their applications. 47 CFR 1.935 This rule protects incumbents from abusive or nuisance filings and ensures that only serious applicants will apply for such licenses since there is no possibility of greenmail. There can be no "strike" applications because only applicants genuinely interested in constructing stations and using the spectrum, like Joint Commenters, would apply. Finally, the Commission assumes that licensees who have bought their licenses at auction have a strong economic incentive to put their licenses to remunerative use in the public interest. So there is little likelihood that licenses will lie fallow for an entire license term.

This historically proven regulatory framework severely limits the circumstances in which a renewal challenge might be filed. Such a challenge would have little chance of success unless the licensee had done nothing or virtually nothing with its license during the course of its license term. And, of course, it is in precisely that case that a challenge to the incumbent should not only be entertained but should be encouraged. If the incumbent cannot find a way to use the

spectrum, a new licensee with new ideas should be permitted to have a go. Letting spectrum lie utterly fallow for ten years cannot possibly be in the public interest, nor can it meet the well established and Court-tested standard justifying renewal of a license. Having done nothing whatsoever with its WCS licenses for ten years, Nextwave finds itself in this exact posture, and for that reason it is attempting to change the rules in mid-stream in order to escape the consequences of its own derelictions. This Machiavellian ploy must be rejected on multiple grounds.

I. Section 11 of the Act Does Not Apply to the Rules in Question

Section 11 of the Act is intended as a tool to periodically review certain burdensome regulations and eliminate those which are no longer necessary. However, the purview of Section 11 is expressly limited. It does not cover *all* Commission regulations by any means. The Section applies by its terms only to regulations "that apply to the operations or activities of any provider of telecommunications service." The statute targets regulations that encumber the actual working business of telecommunications providers: their "operations" and "activities." The statute is plainly not directed at mere administrative procedures that apply to the processing of applications. It is indisputable that the Commission's renewal procedures in no way apply to the operations of telecom providers. The use of a Section 11 proceeding to eliminate a purely procedural administrative rule would therefore be inappropriate and unlawful. Indeed, since Section 11 proceedings are not intended to address matters such as the renewal procedures raised by Nextwave, it is likely that many interested parties are not even aware that the matter is being raised in this context. The Commission should therefore simply reject this attempt to short-

circuit the normal notice and comment proceedings which would apply to a fundamental and substantive change in the Commission's licensing process.

II. The Threshold Criterion of Section 11 Is Not Present Here

In addition to being limited to operations and activities of telecom providers, Section 11 may only be invoked where there is a finding that the rule is no longer necessary "as the result of meaningful economic competition between providers of such service." While Nextwave strains to assert that there is vigorous competition generally in the wireless communications field, Section 11 requires a more specific competitive environment: the "meaningful economic competition" must be between providers of "*such services*." (Emph. added) In other words, there must be competition among the providers of *WCS service* in order for Section 11 to be invoked. The problem is that in the *WCS service* there is not only no "meaningful" competition - - there is no competition at all! In no market that Joint Commenters are aware of were there more than zero or one *WCS service* providers as of the end of the ten year terms. In the vast majority of markets there was no service at all, much less any competition. Where there was service, it was bogus or minimal at best. And in no case were there as much as two service providers despite the fact that four licenses for each market in this service were outstanding. This is exactly why new blood needs to be introduced into the competitive mix. On this state of the record the Commission could not possibly find that there is meaningful economic competition either within the *WCS service* itself or between *WCS service* providers and any other service providers. Service is simply non-existent. That being the case, even if Section 11 otherwise applied, the necessary finding of "meaningful competition" is absent.

III. The Commission May Not Lawfully Change Its Licensing Procedures in Mid-Stream

Nextwave is clearly seeking to shield itself from competing applications by getting the Commission to change the filing process in its favor. The current Part 27 rules have been in effect for more than a decade. Prior to that, the Commission's rules always permitted renewal challenges in the common carrier services, always predicated on the reasonable basis that an incumbent would receive a dispositive renewal preference if it had provided substantial service during its license term. There is therefore nothing surprising or unusual about the renewal framework established by the Commission in Part 27. Joint Commenters duly filed their applications under the rules applicable in 2007. The situation is therefore almost identical to that presented in *McElroy Electronics Corporation v. FCC*, 990 F. 2d 1351 (DC Cir. 1993). There, it will be recalled, the Commission's rules regarding applications for unserved areas permitted applications to be filed as of a date certain. Such applications were filed, generating howls of protest from the incumbent cellular carriers who had failed to fully build out their systems. When the Commission tried to change the procedures after the fact so as to preclude the filing of competing applications, it was slapped down sharply by the Court. Having established filing procedures in its rules and orders, the Commission could not willy-nilly change those procedures to the benefit of incumbents and to the detriment of new entrants. Just as the Commission could not lawfully -- or fairly -- change the rules in the middle of the game in the case of unserved areas, it may not change the rules on renewals so as to defeat the opportunity of timely filed challengers to vie for these licenses. If it feels that the current procedures are not in the public

interest, the Commission should conduct a full rulemaking proceeding and then, if appropriate, change the rules for future renewal terms.

IV. Putting Renewal Applications Up for Auction Would Violate the Statute

Nextwave apparently suggests that renewal applicants who fail to meet substantial serviced deadlines should have their licenses cancelled and the licenses put up for re-auction as "initial" licenses. This is of course what the Commission normally does when a license is cancelled for failure to meet build-out requirements, for example. That option might have been available if the Commission had simply cancelled Nextwave's (and the other incumbents' licenses) when they admitted that they had provided no service during their license terms. However, once the Commission did not cancel their licenses, a regulatory void opened. Renewal were filed in the absence of substantial service and then mutually exclusive applications were filed against them. Section 309(j) of the Act only authorizes the Commission to use auctions for "initial" licenses; it does not authorize the Commission to hold auctions to grant renewal applications. Indeed, if the Commission attempted such a maneuver, we may be sure that Nextwave would cry the loudest that its expectancy and investment were being undermined.¹ In the circumstances now applicable to the WCS applications, use of auctions is neither lawful nor appropriate. Lotteries, of course, are no longer permissible due to the application of Section 309(i)(5). The comparative procedures established by 27.14 are therefore the best alternative and the ones duly provided for by the rules to cover just this eventuality. They should be applied.

¹ The Act does not expressly prohibit the use of competitive bidding for auctions, but the clear implication is that Congress did not intend auctions to be used in the renewal context.

V. Comparative Hearings Are Useful in the Rare Circumstances Presented Here

Comparative hearings are rare indeed. As noted above, it is almost unheard of for a licensee to go a full ten years of its license term without having provided even that mediocre level of service which might just minimally warrant renewal. When that occurs, however, as it has occurred here, the public interest militates strongly in favor of not allowing ten more years of the same waste of a valuable public resource. Rather, the Commission owes it to itself and the public to entertain the application of someone ready, willing and able to actually put the spectrum at issue to its highest use. That is why the provisions of Part 27 dealing with renewal challenges are not the administrative oversight which Nextwave seems to consider them; rather, they are a potent stick for encouraging incumbents to put their spectrum to use. While Nextwave states that the current substantial service and forfeiture provisions are ample to do the job - the plain fact is that they are not. Scores of WCS licensees did not use their spectrum. Hundreds of LMDS licenses did not use their spectrum. 39 GHz licensees have not used their spectrum. Joint Commenters strongly suspect that it was only the threat of a competing application that drove those few WCS and LMDS licensees who *did* construct and operate systems during their license terms to do so. The possibility of losing one's license is a powerful motivator, and the Commission should not lightly cast that tool aside.

VI. Conclusion

For the reasons set forth above, the use of Section 11 to eliminate administrative procedures is not only unlawful but would be grossly unfair to those applicants who have duly relied on the existing rules in filing their applications and making their service plans. To change

the rules on competing applications in the middle of the application process would violate the clear principle laid down by the Court in *McElroy*. Since neither auctions nor lotteries are authorized by Section 309 of the Act, the Commission should proceed to put into effect the time-tested and perfectly serviceable rules which it wisely placed in Part 27.

Respectfully submitted,

Green Flag Wireless Communications, LLC

CWC License Holding, Inc.

James McCotter

By _____/s/_____

Donald J. Evans

Their Attorney

I, Donald Evans, hereby certify that on this 27th day of October, 2008, a copy of the foregoing Reply Comments of Green Flag Wireless Communications, Inc., CWC License Holdng, Inc. and James McCotter was served via electronic mail on Jennifer McCarthy and Jennifer Richter.

_____/s/_____

Donald J. Evans