

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054**

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In the Matter of)	
)	
Fostering Innovation and Investment in the)	GN Docket No. 09-157
Wireless Communications Market)	
)	
A National Broadband Plan For Our Future)	GN Docket No. 09-51
_____)	

To: The Commission

COMMENTS OF GREEN FLAG WIRELESS, LLC

These comments of Green Flag Wireless, LLC ("Green Flag") address three of the most pressing problems affecting the deployment of broadband in this country: the need to put available spectrum to use in the near term, the need to spur innovation, and the need to increase diversity of ownership. All of these needs can be met immediately without any rule changes and by a simple application of the Commission's existing rules. As will be set forth below, this approach will have immediate beneficial effects on the availability of broadband nationwide.

The Commission's rules have historically required all of its radio licensees to provide substantial service over the licensed spectrum during the course of the license term. The term "substantial service" has consistently been defined as "that level of service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal." See, *e.g.*, Section 27.14(a). This definition obviously implies that not only must *some* service be provided over the course of the license term, but it must be better than mediocre service. A licensee who fails to provide any service is not entitled to renewal expectancy, nor should it be since it has presumptively failed to put the spectrum of which it was

the steward to effective use. The consequence of not being entitled to renewal expectancy is that the licensee is subject to comparative evaluation with other applicants who timely file applications for the same license during the renewal period. This process has worked well over the last 75 years since it imposes a very real incentive on licensees: they must either use their spectrum or risk losing it to someone else.

In the common carrier services, comparative renewals have rarely been an issue. In part this is because common carrier frequencies tended to be subject to intense demand and there was rarely a question of a licensee failing to put its spectrum to use. In addition, the common carrier rules typically provide that carriers had to meet substantial service benchmarks at, or often well before, the renewal deadline. See, for example, Section 24.203 of the rules which requires PCS licensees to provide service to certain proportions of their service area populations within 5 and 10 years of the initial grant, and Section 27.14(g) and (h) which require 700 MHz licensees to meet service thresholds within four years. These service requirements are intended to prevent warehousing of spectrum by requiring licensees to actually provide service before the end of their license terms or suffer forfeiture as a consequence. The Commission has not hesitated to invoke the forfeiture penalty if the substantial service benchmarks were not met. Northstar Technology, LLC, DA 04-526, rel. Feb. 25, 2004. These "use or lose" obligations have made comparative renewal challenges rare since a licensee which does not provide substantial service during its license terms will simply lose its license – there is nothing for a challenger to challenge at renewal time.

Two developments have changed this paradigm. First, in several services, the Commission has granted blanket waivers or extensions of the requirement that licenses must be

forfeited if substantial service is not provided during the initial term. This is true, for example, in the Wireless Communications Service, where licensees were granted three year extensions to meet the service thresholds established by the rules,¹ and in the Local Multipoint Distribution Service, where licensees were granted an additional four years to meet their obligations.

Application Filed by Licensees in the LMDS, 23 FCC Rcd 5894 (2008). This has left those licensees in the posture of having provided no service at all during their terms (and thus having no renewal expectancy upon renewal) while not forfeiting their licenses. Second, in the PCS services, some licensees have built out their systems to the minimum degree necessary to avoid forfeiture, but have then failed to actually provide service to the public. (The PCS rules do not require either actual service to the public over constructed facilities or continuation of service once it has been provided, even if only ephemerally.) Both of these circumstances contribute to warehousing of spectrum since licensees can simply sit on the spectrum for speculative purposes without developing it or offering service to the public. These circumstances also make such licenses subject to renewal challenge.

Section 27.14(a) and 24.16 of the rules expressly contemplate the filing of competing applications challenging the grant of a renewal where the incumbent has not provided substantial service during its license term. The rules establish a procedure to be followed in these cases whereby the incumbent and the challenger are evaluated on a level playing field without the renewal expectancy which the incumbent failed to earn. The availability of this process has the

¹ *Consolidated Request of the WCS Coalition for a Limited Waiver of Construction Deadline for 132 WCS License*, 21 FCC Rcd 14134 (2006).

decidedly salutary effect of keeping incumbents on their toes: in order to keep their licenses in the face of a potential renewal challenge, they need to put them to substantial use. In numerous instances in recent years, renewal challenges have been filed invoking the provisions of these rules, but the Commission has refused to implement the process. In some cases, renewal challenges have been pending with the Bureau now for more than two years without any action by the Commission. Letting spectrum lie fallow for more than a decade serves no one's needs.

By simply moving forward on an expedited basis to undertake the comparative evaluation which the rules already on the books actually require, the Commission would serve three critical policy objectives. First, it would ensure that spectrum which has been lying fallow will be put to use. This would add a large chunk of capacity to the nation's increasingly tight broadband inventory. Second, implementation of the existing rules would have the effect of diversifying ownership of the broadband spectrum. Increasingly, the nation's spectrum for both voice and broadband has become concentrated in the hands of a few corporations. This has had the effect of not only reducing competition in many markets but also in reducing innovation. The present mobile communications market, while dominated by the big four, also has a surprisingly resilient small market and "undermarket." In small markets ignored by the majors, smaller local and regional carriers have continued to offer customer-based service at reasonable prices. These carriers – so long as mandatory roaming and handset availability permit – will continue to serve the rural markets that the majors cannot be bothered with. Similarly, even in major markets, there are segments of the population – those who cannot afford typical service offerings of the majors – who are being served by smaller independent carriers with prepaid or other innovative offerings. The presence of these carriers not only makes service available to that market sector,

but also puts at least some pressure on the majors to do something to serve that sector as well. Everyone benefits.

Third, diversity of broadband ownership will stimulate innovation. The majors – relics of the old Bell era – tend to be hidebound and hierarchical. They innovate clumsily, if at all, because there is so much investment both financial and psychological, in the old way of doing things. By contrast, new entrants into the broadband field can dare to innovate, to bring fresh ideas to the marketplace and let them be tested. This is especially true in the renewal context since a renewal challenger would not be weighted down with the burden of heavy auction-related acquisition costs: it could afford to try new approaches.

The renewal situation gives the Commission an unusual opportunity to allocate spectrum to licensees who propose innovative uses rather than those who simply can bid the highest amount in an auction. Normally the Commission's hands are tied in issuing spectrum by the mandates of Section 309 of the Act to issue new licenses by auction. While Congress assumed that that process would get spectrum into the hands of those who would put it to its highest use, in fact the auction process has largely cut out smaller and more innovative operators who cannot match the auction coffers of the majors. The result is that behemoth incumbents sometimes sit on spectrum for a decade without using it (thus coincidentally enhancing the value of their other spectrum holdings which are safe from broadband competition), while other smaller companies eager for spectrum cannot get access to it.

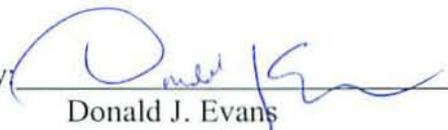
The present circumstances permit the Commission to make a policy judgment in favor of innovation, new entry and diversity without the constraint of only giving licenses to the highest (and therefore biggest and richest) bidders. The Commission should therefore seize this

opportunity to do something new and different in broadband licensing – the result cannot possibly be worse than the current situation which has resulted in no use or service whatsoever.

The Commission holds now in its hands the tools to expand broadband access and increase diversity and innovation by just following its own rules and procedures. It should do so.

Respectfully submitted,

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