

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In re Revisions of Performance)
Requirements for 2.3 GHz)
Wireless Communications Service)

WT Docket 07-293

To: The Commission

**Joint Comments
of
Green Flag Wireless, LLC, CWC License Holding, Inc. and James McCotter**

Green Flag Wireless, LLC, CWC License Holding, Inc. and James McCotter ("Joint Commenters") hereby offer these comments on the Commission's proposal to adopt significantly more stringent build-out standards for the Wireless Communications Service ("WCS") than it has previously adopted for any other service it regulates. Joint Commenters are applicants for new WCS stations and they will therefore be directly affected by the new standards if they are adopted.

Initially, Joint Commenters note that the proposed standards emerged somewhat out of the blue. The Public Notice (FCC 10- 46) did not appear in a Notice of Proposed Rulemaking. No context was provided for the proposed changes other than the unrelated proceedings in this Docket concerning the technical coexistence of WCS operations and operations in the adjacent SDARS band. No purpose or background for the proposal was articulated. The Commission presented no hint as to what, if anything is wrong with the current performance standards or why the proposed standards are potentially an improvement. The terseness of the March 29 Public

Notice, normally a virtue, is actually counterproductive in this case: we cannot discern what problem the new rules are intended to solve, and therefore cannot evaluate whether they are likely to accomplish that purpose. Perhaps if the Commission had let the public in on its thinking, the public could have offered constructive suggestions beyond the proposals offered by the Commission.

Second, we must observe that the current performance requirements which have been in place for the last thirteen years have proven difficult enough for the incumbent licensees to meet. Virtually the entire industry failed over the first ten years of licenseeship to meet the safe harbor requirements established in 2007. *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd. 10785, 10844 (1997). They therefore requested and were granted an extension of time to meet those standards. In the intervening three years, many of the WCS incumbents have still done nothing to meet the original performance requirements but have instead sought a further extension of time to perform. If the original standards are already too tough for most people to measure up to, how much harder will it be to meet the new standards? To be sure, the incumbents have suggested that the continuing uncertainty regarding the interplay of this spectrum with the SDARS spectrum has hampered their ability to perform, but that uncertainty is likely to persist for at least several years while the new technical rules are appealed and reconsidered. The fate of this service seems to always be under a cloud of uncertainty from one quarter or another. That continuing cloud will impede, as a practical matter, progress toward the new benchmarks. There is no point in setting stringent new standards if they are infeasible of achievement.

Third, in considering the new standards, the Commission should also take into account the present posture of the licenses and applications for those licenses. At present most of the incumbent licensees' renewal applications are mutually exclusive with competing applications of Joint Commenters or other applicants. Under the procedures prescribed by the rules, the Commission must conduct a comparative renewal proceeding. The result will be either that the incumbents retain their licenses or the competing applications are granted. For the incumbents' renewal applications to be granted, the Commission will have to find that they provided substantial service during the 1997 to 2007 license term. There will therefore of necessity already have been significant performance and operation under the existing safe harbor standards. In addition, the comparison involved in the license renewal process will no doubt require both the incumbents and the challengers to lay out their plans as to how their proposed service concepts for the 2007 - 2017 license term will best serve the public interest. This will likely incent both groups to propose performance and service plans that will go well beyond mere square miles of coverage or links per millions of population. In short, because of the unique and unprecedented posture in which the WCS service now stands, it may be the rare service for which performance thresholds are unneeded; the comparative renewal process and the pre-existing substantial service standards have already provided the best incentives for licensees (whether incumbents or challengers) to build out quickly and provide service productively.

The unique comparative renewal situation also puts the challengers and the incumbents in dramatically different postures. The incumbents have now had almost thirteen years to build out their systems. If the incumbents retain their licenses, it might make sense in their case to impose relatively rigorous performance benchmarks on them given their history of laggardly compliance

and excuse after excuse for delay. On the other hand, the challengers will be arriving on the scene with a clean slate. It seems patently unfair to effectively penalize the newly entering licensees for the derelictions of the incumbents.

In this context, we question whether the benchmarks proposed in the Public Notice are feasible. There is no other service licensed by the Commission where such relatively vast areas were required to be built out on such an abbreviated timeframe. Even in the 700 MHz rulemaking (where this issue was exhaustively vetted in a full NPRM rather than being dealt with summarily in an ancillary Public Notice), the Commission imposed only a requirement that 35% of the population be covered in four years, with 70 % being covered in ten years. Moreover, the penalty for failure to achieve full build-out is proportionate to the offense: the build-out period is first reduced by two years if the initial threshold is not met, and then the licensee is stripped of the unserved areas. *See* 27.14(g). These coverage metrics were deemed extremely stringent when adopted in 2007. Yet the metrics proposed for WCS are more than twice as aggressive. While Joint Commenters support the encouragement of prompt build-outs rather than warehousing, they believe that artificial build-out schedules are generally to be discouraged because construction and service should flow naturally from market demand – not be driven by government fiat. Build-out schedules which have butted up against the realities of the market have historically without exception resulted in pleas for extensions which could not reasonably be denied. Build-out schedules should prevent warehousing but not mandate construction that is wasteful, useless or silly just to comply with a schedule.

Joint Commenters are not even sure that sufficient equipment to cover the entire country under the proposed benchmarks could be manufactured and installed in the 30 months allotted.

Literally thousands of transmitters would be necessary, a volume that would likely overwhelm the capacity of the relatively small number of manufacturers who make this equipment. What the Commission is proposing is roughly equivalent to mandating that the build out of cellular facilities across the United States that took approximately twenty years to accomplish should be done in five. This is unrealistic.

In the same vein, the Commission should ensure that whatever equipment is available is available to all WCS licensees equally. The Commission has recently been presented with several instances of sweetheart arrangements between the major carriers and equipment manufacturers whereby equipment sales and /or availability have been contractually limited to the largest carriers whose favor the manufacturers must curry. In a scenario where build-outs must be completed in short order, it would obviously be contrary to the public interest to have one class of licensees be sent to the back of the line while the other class secures most of the available equipment. As with the other services where this has arisen as an issue, the Commission should forbid licensees from entering into contracts or arrangements that have the effect of delaying or reducing the non-discriminatory availability of equipment to all licensees. By the same token, in order to be type-accepted, equipment for this service should be operable over the entire WCS band. Such measures are especially needed where, as here, some of the licensees are industry giants (AT&T, Comcast, Sprint, etc.) while the new licensees are orders of magnitude smaller in size.

The proposed schedule is also anti-competitive. AWS licensees, who may be considered to be broadband competitors of WCS licensees, have no build-out benchmarks whatsoever apart from the general substantial service requirement at renewal time. The Commission's general policy is to treat competitive service providers consistently. It would give AWS licensees a huge

competitive advantage to be able to build out their networks on their own schedule free from artificial FCC-imposed requirements, while new WCS licensees would bear the burden of the strictest performance standards ever imposed. And no reason has been advanced for favoring new WCS licensees over new AWS licensees in this regard.

If a performance benchmark must be set, something along the lines adopted for the 700 MHz band would be reasonable: 35% of population by the end of year four, 70 % by the end of year ten, with the licensee forfeiting not its entire license but only the portion that has not been built out if it fails to meet these levels. The threat of losing one's entire license if strict performance metrics are not met actually works *against* the Commission's purposes because it scares off both debt and equity investment in the build-out of the facilities. Few firms in the investment community are willing to risk tens or hundreds of millions of dollars to build out a network, knowing that if some percentage of the population is not covered by a date in the near future, the entire investment will be forfeited. Instead of stimulating broadband build-out, the Commission will actually have stifled it. The Commission grudgingly came to this realization in the 700 MHz context, and the same principle applies here.

Also applicable is the exclusion from the coverage analysis of government-owned land. Such land – typically parks, national forests, reserves, or wilderness areas – are not generally open to development. In fact, they usually discourage development. So an FCC requirement that such areas be served would run contrary to their missions and would serve no purpose since there are usually few potential users in such areas. Again, the Commission recognized the wisdom of this exclusion in the 700 MHz proceeding after hearing extensively from the affected industries. The same policy should be followed here.

The Public Notice also proposes throughput minimums for point to point links. The Public Notice does not propose a specific minimum that would be applied, but whatever the number is, it is bound to be wrong. If a particular customer, service or application is legitimately requiring capacity of, say, 5 Mbps over a 5 MHz channel, what purpose would be served by administratively declaring that the channel is underused? Once a wireless pipeline is constructed, the licensee has every incentive to maximize the use of the bandwidth so as to soak up and serve all available demand. If the demand is there, the pipe will be more full; if the demand is not there, the pipe will be less full, but in either case an artificial minimum will add nothing to the equation. Minimum payload requirements simply distort the market and possibly even penalize licensees who have built out in good faith with no conceivable advantage to the public. This novel concept should be rejected.

Finally, the performance timetable should include some recognition of the effects of stimulus funding in particular markets. The federal government is making over \$6 billion available over the next two years to firms which have applied for stimulus funding under the American Reinvestment and Recovery Act. In those communities where this massive governmental investment in broadband has occurred or is occurring, the need for WCS spectrum to be rolled out is less pressing than might otherwise be the case. At the same time, new entrants who do not enjoy the benefit of stimulus funding will face a much tougher competitive environment because they will have to construct and operate with privately raised funds which will necessarily entail much higher capital costs. In view of this handicap which new licensees will suffer in those communities, the Commission should defer the normal build-out timetable by an additional three years in those areas only.

CONCLUSION

New build-out standards are not required for this service; all that is immediately required is strict enforcement of the existing ones. Any new standards that are adopted should not apply to new licensees but rather to the incumbents who have failed to put their spectrum to use. To the extent that new standards are adopted, they should be reasonable and capable of implementation in the real world. The proposed standards do not meet those requirements. Standards similar to those adopted for the 700 MHz service would be more appropriate.

Respectfully submitted,

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