

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
 )  
Amendment of Part 27 of the )  
Commission's Rules to Govern the ) WT Docket No. 07-293  
Operation of Wireless Communications )  
Services in the 2.3 GHz Band )

**COMMENTS OF THE WCS COALITION**

Paul J. Sinderbrand  
Mary N. O'Connor  
Jennifer L. Kostyu

Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, DC 20037-1128  
202.783.4141

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Its Attorneys

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## EXECUTIVE SUMMARY

Adoption of new performance requirements for the 2.3 GHz band Wireless Communications Service (“WCS”) as proposed in the Commission’s March 29, 2010 *Performance Public Notice* is premature at this time. Having suffered through more than a decade of regulatory uncertainty, the WCS Coalition fully supports the adoption of technical and service rules within the next two months that permit the WCS band to be put to its highest and best uses. However, the same urgency should not translate into a rush to judgment on new performance requirements, the reasonableness of which is highly dependent on the nature of the technical and service rules that WCS licensees will face.

The WCS community cannot make informed comments on future performance requirements for the WCS band without knowing the new technical and service rules under which those requirements must be satisfied. The technical rules for the band, of which several key issues are still unresolved, directly impact when and how licensees will be able to construct their networks. The timing of equipment availability, the complexity and cost of network design, and the impact of coordination delays cannot be accurately assessed until the final technical and service rules are known. Furthermore, the difficulty in addressing the proposals set forth in the *Performance Public Notice* is compounded by the fact that most WCS licensees face substantial uncertainty due to the pending status of a large number of WCS renewal applications and a pending application for review of the acceptance of one licensee’s substantial service showings. The pendency of these filings, many submitted three years ago, has left the affected licenses in limbo.

Imposing build out requirements that do not reflect the effects of the new technical and service rules amid the uncertainty surrounding the renewal and substantial service filings will only deter the very investment and innovation in broadband services that the Commission envisioned in its National Broadband Plan. Accordingly, concurrent with the adoption of the new WCS technical and service rules, the Commission should issue a *Further Notice of Proposed Rulemaking* (“*Further Notice*”) to consider new performance requirements, along with a timeline for resolving the pending renewal and substantial service matters. The *Further Notice* can and should be issued with a swift pleading cycle, with the intent of finalizing the performance requirements in the third quarter of 2010. This *de minimis* delay would ensure that the Commission has an opportunity to determine what build out benchmarks WCS licensees can reasonably meet under the new technical and service rules.

In addition, notwithstanding the uncertainty regarding the WCS technical and service rules and outstanding renewal and substantial service filings, several aspects of the proposals in the *Performance Public Notice* are clearly flawed. If the Commission hopes to achieve the goals of the National Broadband Plan and promote broadband availability in the WCS band, it must ensure that:

1. Any performance requirements imposed on WCS should provide at least four years before the interim benchmark is measured.
2. The rules should provide for substantial discounting of WCS population coverage requirements compared to those imposed on the 700 MHz C Block to reflect that 2.3 GHz

band licensees do not enjoy the favorable propagation characteristics of the 700 MHz band.

3. Just as the Commission excluded government lands from the 700 MHz band geographic coverage areas, performance requirements for WCS licensees must address in some fashion the delays associated with coordination and the possibility that some areas will prove impractical to serve.
4. The proposed “death penalty” for failing to meet a build out benchmark should be replaced by the same remedial provisions imposed on 700 MHz licensees, culminating with a “keep what you use” methodology.
5. The Commission should clarify its proposal to impose new payload requirements on point-to-point links applied towards performance requirements. In addition, it should specifically provide that point-to-point links constructed in good faith by WCS licensees prior to the adoption of final rules will be considered in assessing compliance with point-to-point link performance requirements, without regard to any payload requirements that were not applicable at the time of construction.

The *Further Notice* would provide the Commission with the opportunity to correct and hone these elements, as well as craft performance requirements that best fit the unique regulatory environment in which WCS licensees will be operating.

Lastly, the Commission should extend the current July 21, 2010 WCS substantial service showing deadline to avoid requiring WCS licensees to unnecessarily expend resources in deploying facilities that may neither comply with the future rules nor best provide the services that the public demands. Extending the deadline in this case comports with Commission precedent. It also would ensure sufficient time for licensees to take advantage of the additional operational flexibility afforded by the new technical rules, rather than forcing them to make uneconomic choices concerning deployment and service offerings.

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**COMMENTS OF THE WCS COALITION**

The WCS Coalition, by its attorneys, hereby submits its initial comments in response to the Commission’s *Public Notice* proposing to revise the performance requirements applicable to the 2.3 GHz band Wireless Communications Service (“WCS”).<sup>1</sup>

**I. INTRODUCTION**

As is discussed in detail below, the WCS Coalition respectfully submits that the Commission’s inquiry is premature and that it should more logically be conducted following the adoption of the technical and service rules for the WCS band. Given the continuing uncertainty as to the technical and service rules that ultimately will govern the WCS band, and the ongoing pendency of large numbers of renewal applications and one set of substantial service showings submitted by WCS licensees – in many cases three years ago – neither the WCS industry nor the Commission has, at this particular time, all of the data necessary to address future performance requirements for the band.

The WCS Coalition suggests that, concurrent with the adoption of WCS technical and service rules,<sup>2</sup> the Commission also establish a timeline in which it will resolve the pending renewal

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<sup>1</sup> FCC Public Notice, *Federal Communications Commission Requests Comment on Revision of Performance Requirements for 2.3 GHz Wireless Communications Service*, FCC 10-46, WT Docket No. 07-293 (rel. Mar. 29, 2010) (the “*Performance Public Notice*”).

<sup>2</sup> See FCC Public Notice, *Commission Staff Requests That Interested Parties Supplement the Record on Draft Interference Rules for Wireless Communications Service and Satellite Digital Audio Radio Service*, at 1, DA

and substantial service matters. To accomplish this, the Commission should issue a *Further Notice of Proposed Rulemaking* (“*Further Notice*”) proposing performance requirements that are crafted in light of the new technical and service rules and the proposed timeline. The *Further Notice* can and should call for a rapid pleading cycle, and the Commission should aim to resolve the issues raised in the *Further Notice* no later than the end of the third quarter of 2010. In addition, the Commission should, as it has done under similar circumstances, extend the current July 21, 2010 WCS substantial service showing deadline to avoid the need for WCS licensees to unnecessarily expend resources deploying facilities that may neither comply with the future rules nor best provide the services that the public demands.<sup>3</sup>

While the present uncertainties surrounding the WCS band preclude informed estimates as to when operators can fairly be expected to meet service benchmarks, even at this preliminary stage it is clear that certain elements of the performance requirements proposed in the *Performance Public Notice* would be unachievable and would disserve the Commission’s ultimate objective of promoting the 2.3 GHz band for mobile broadband use. Simply put, the proposed performance requirements are difficult to square with those recently adopted for the 700 MHz band and would afford insufficient time for mobile deployments even if the WCS band’s technical and service rules were as settled and straightforward as those that govern the 700 MHz band. Moreover, and in stunning contrast to the approach taken with the 700 MHz band, for which the Commission adopted a “keep what you use” policy, the *Performance Public Notice* would subject WCS licensees that fail to meet either the interim or the final performance benchmarks with an immediate, automatic death

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No. 10-592, WT Docket No. 07-293, et al. (rel. Apr. 2, 2010) (“*Technical Public Notice*”). The WCS Coalition will be providing specific recommendations for changes to the rules proposed in the *Technical Public Notice* later this week.

<sup>3</sup> While several WCS licensees have individual extension requests pending, a blanket extension would be consistent with Commission precedent from the 2.5 GHz band and assure that all WCS licensees are afforded similar treatment.

sentence – an approach that is sure to chill investment and innovation in the band and threatens consumer dislocation should operators be forced to cease popular broadband service operations. As the Commission crafts the *Further Notice*, it can and should revisit the rules proposed in the *Performance Public Notice* to assure that they are reasonable under the unique circumstances WCS licensees face, that they promote investment and innovation by not disadvantaging the 2.3 GHz band relative to other mobile broadband spectrum, and that they prevent the sort of consumer dislocation threatened by the current proposal.<sup>4</sup>

## **II. PERFORMANCE REQUIREMENTS ADOPTED IN A REGULATORY VACUUM COULD THWART THE COMMISSION'S OBJECTIVES FOR THE 2.3 GHZ WCS BAND.**

Removing obsolete legacy restrictions on the 2.3 GHz band is one of the first steps under the National Broadband Plan towards easing the Nation's shortage of spectrum available for mobile broadband.<sup>5</sup> The WCS Coalition fully supports the Commission's goal of adopting new technical and service rules for the band by the end of the second quarter of 2010<sup>6</sup> – this proceeding and its companion proceeding in IB Docket No. 95-91 have been pending before the Commission for far too long.

However, the urgency to adopt these new technical and service rules need not, and should not, translate into a rush to judgment on new performance requirements. Whether the Commission adopts new performance requirements in the second quarter of this year, or postpones a ruling on

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<sup>4</sup> The *Further Notice* has the additional benefit of providing the Commission with an opportunity to seek comment on ways to promote the rationalization by WCS licensees of their spectrum holdings in the WCS band in light of the new rules. In addition, the *Further Notice* will provide an opportunity for the Commission to address whether it has authority to impose new performance requirements on licenses that have already been renewed for an additional term and, if so, whether it is appropriate to impose new performance requirements under those circumstances.

<sup>5</sup> See FCC, *Connecting America: The National Broadband Plan*, at 85-86 (rel. Mar. 16, 2010).

<sup>6</sup> See Proposed 2010 Key Broadband Action Agenda Items, available at <http://www.broadband.gov/plan/chart-of-key-broadband-action-agenda-items.pdf> (link accessed through FCC News Release, *FCC Announces Broadband Action Agenda*, (rel. Apr. 8, 2010)).

the *Further Notice* until the third quarter, is unlikely to have any material bearing on whether or when the National Broadband Plan's vision for the 2.3 GHz band is realized. The WCS community shares the Commission's desire to see the 2.3 GHz band put to more productive use, but it is the lack of appropriate technical rules, not the lack of aggressive performance requirements, that has stood in the path of that shared goal.<sup>7</sup> A rushed decision imposing build out requirements that may be unachievable or economically unviable in light of the final technical and service rules ultimately will hinder efforts to reposition the WCS band by deterring the very investment and innovation the National Broadband Plan seeks to facilitate.

**A. A Rational Connection Must Exist Between Performance Requirements And The Ability Of Licensees To Meet Them.**

In developing performance requirements, the Commission must engage in a balancing act. The Commission's primary objective is to spur licensees to deploy facilities quickly and broadly. However, the Commission must temper its desire to see rapid widespread deployment with an appreciation that overly aggressive performance requirements unsupported by reasonable business plans will actually deter the very investment and innovation they are intended to promote.<sup>8</sup> The Commission has rightly noted: "We . . . do not want to set regulatory standards so high that it is more likely to impede build-out than encourage development of the service."<sup>9</sup>

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<sup>7</sup> The sense of urgency behind the *Performance Public Notice* is particularly ironic given that the WCS community has been pressing the Commission for almost thirteen years to adopt permanent rules governing satellite Digital Audio Radio Service ("SDARS") terrestrial repeaters and to eliminate the regulatory uncertainty that has impeded WCS deployments. Indeed, it has been 17 months since a draft order in this proceeding first circulated among the Commissioners for a vote.

<sup>8</sup> See, e.g., Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Notice of Proposed Rulemaking*, 21 FCC Rcd 9345, 9373 (2006).

<sup>9</sup> Allocations and Service Rules for the 71-76 GHz, 81-86 GHz, and 92-95 GHz Bands, *Memorandum Opinion and Order*, 20 FCC Rcd 4889, 4902 (2005) ("*Allocations Order*").

Determining appropriate performance requirements necessarily requires an assessment of how long it reasonably should take a licensee acting in good faith to reach a target level of service.<sup>10</sup> Common sense says that an automobile driver cannot be expected to estimate how long it will take to get from Point A to Point B unless he knows the route and what speed limits and other rules of the road will govern the trip. Yet, the *Performance Public Notice* asks the WCS community to undertake a similarly impossible task – to estimate how long it will take for WCS licensees to meet service benchmarks without knowing the route or the rules the licensees will have to follow.

For example, anticipated equipment availability always has been a key driver when imposing and enforcing performance requirements.<sup>11</sup> What Motorola, Inc. (“Motorola”) advised the Commission in 2006 remains true today: “The lack of technical rules governing the neighboring DARS band has led to technical uncertainty regarding the interference environment that WCS operations will ultimately face, making it difficult for WCS licensees to design their networks and for equipment vendors to design and build equipment.”<sup>12</sup> As the Wireless Telecommunications

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<sup>10</sup> See, e.g., Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, 22 FCC Rcd 15289, 15350 (2007) (“700 MHz Performance Order”).

<sup>11</sup> See, e.g., *id.* at 15350 n.385; *Allocations Order*, 20 FCC Rcd at 4901-02. See also, e.g., Applications filed by Licensees in the Local Multipoint Distribution Service (LMDS) Seeking Waivers of Section 101.1011 of the Commission’s Rules and Extensions of Time to Construct and Demonstrate Substantial Service, *Memorandum Opinion and Order*, 23 FCC Rcd 5894, 5905 (WTB 2008) (“LMDS MO&O”) (“[D]ifficulties in obtaining viable, affordable equipment . . . warrant granting a limited extension of time to permit these licensees to continue to build out their licenses.”); IDT Spectrum, LLC, *Order on Reconsideration and Memorandum Opinion and Order*, 23 FCC Rcd 12005, 12011-13 (WTB 2008) (same). See also Principles for Promoting the Efficient Use of Spectrum by Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178, 24182 (2000) (“[A] licensee may face problems in equipment availability that affects its ability to rapidly build out services as manufacturers look for a clear indication of communications businesses that will support equipment orders.”).

<sup>12</sup> Comments of Motorola Inc., WT Docket No. 06-102, at 2-3 (filed June 9, 2006). As Motorola further explained:

Two crucial parameters for evaluating interference into adjacent band services from DARS repeaters are out-of-band emission levels and EIRP levels. Establishing out-of-band emission limits for DARS repeaters is necessary to quantify the amount of interference WCS receivers will receive in-band (i.e., in the WCS spectrum) from the emissions of DARS repeater stations outside of the DARS frequency bands.

Bureau (“Bureau”) has recognized, the obsolete out-of-band emission (“OOBE”) limits adopted in 1997 to protect SDARS from mobile interference “have impeded the development of WCS equipment and have contributed to the unique circumstances of the band.”<sup>13</sup>

Were the Commission disposed to adopt the proposals originally advanced by the WCS Coalition to govern WCS mobile operations and SDARS terrestrial repeaters,<sup>14</sup> mobile broadband devices developed for the global marketplace could be modified to comply with the new rules in reasonably short order and likely could start becoming available for the United States market within a year or so of the adoption of final rules. However, that timeline will increase substantially if the Commission’s final rules require significant redesign of the 2.3 GHz devices that already are

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Establishing EIRP limits is necessary to provide greater certainty regarding the level and likelihood of overload interference that WCS systems will experience due to high-power DARS transmitters in the immediately adjacent band. Information on both of these parameters is critical to development of WCS equipment and system design. Publicly available information suggests a large range in possible repeater EIRP levels, from 2 kW to 40 kW. The impact on WCS of DARS transmitters operating in these extreme ranges is very different and the lack of defined limits on DARS repeater stations makes it impossible to understand the interference environment in which the WCS receivers will have to work. Absent such information it is not possible to design a system with guaranteed performance, making it very difficult, if not impossible, to launch commercial services.

Equipment design considerations impacted by these uncertainties relate to receiver design and performance parameters . . . . System design considerations impacted by these uncertainties relate to determining the geographic area around each DARS transmitter where overload or out-of-band interference would interfere with WCS reception.

*Id.* at 6-7. Motorola has not been alone in noting the challenge facing WCS network designers in the absence of permanent OOBE and power limits for SDARS terrestrial repeaters. *See, e.g.*, Comments of Intel Corporation, WT Docket No. 06-102, at 2 (filed June 9, 2006); Comments of Navini Networks, WT Docket No. 06-102, at 1 (filed June 9, 2006) (stating that “the continuing lack of permanent rules for terrestrial DARS repeaters impacts the WCS licensees’ ability to develop and implement mobile wireless broadband networks that provide the ubiquitous, fast, and reliable service that consumers demand”).

<sup>13</sup> Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134, 14139 (WTB 2006) (“*WCS Extension Order*”).

<sup>14</sup> *See* Letter from Paul J. Sinderbrand, Counsel to WCS Coalition, to Marlene H. Dortch, Secretary, FCC, IB Docket No. 95-91 (filed July 9, 2007); Letter from Paul J. Sinderbrand, Counsel to WCS Coalition, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-57, et al. (filed July 22, 2008).

available globally.<sup>15</sup> Moreover, many of the proposals advanced in this proceeding – whether through technical constraints or procedural hurdles like coordination requirements – would hinder the rapid deployment of facilities even after the technical rules are adopted.

As the *Technical Public Notice* acknowledges, interested parties have widely divergent views about the technical rules and those rules remain subject to significant debate.<sup>16</sup> The WCS community recognizes that the Commission does not intend to adopt the proposal by the WCS Coalition that launched this proceeding, and it can only speculate as to how the Commission will resolve the issues raised in the *Technical Public Notice*. Thus, the WCS community cannot at this time address intelligently what performance requirements will be achievable.

**B. The Issues Presented By The *Technical Public Notice* Must Be Resolved Before One Can Rationally Estimate A Reasonable Period For Licensees To Meet Service Benchmarks.**

Today, the WCS Coalition and the public have no clear guidance as to which of the many competing technical and other service rule proposals advanced in this proceeding and in IB Docket No. 95-91 ultimately will be adopted by the Commission.<sup>17</sup> But it is clear that how the Commission resolves these open issues will have a significant impact on the timing and extent of WCS deployment in the future. Indeed, it would be arbitrary and capricious for the Commission to

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<sup>15</sup> Indeed, if the Commission departs too far from the global equipment model, it is questionable whether the vendor community will invest the research and development funds necessary to modify existing or create new equipment for the niche WCS market in the United States.

<sup>16</sup> See *Technical Public Notice* at 1.

<sup>17</sup> This is particularly true now that the Commission has elected, over the WCS Coalition's objection, to delay the deadline for commenting on the *Technical Public Notice* until after comments in response to the *Performance Public Notice* are due. See Commission Staff Requests That Interested Parties Supplement the Record on Draft Interference Rules for Wireless Communications Service and Satellite Digital Audio Radio Service, *Order Extending Comment Period*, DA 10-622, WT Docket No. 07-293, et al. (rel. Apr. 13, 2010). Had the initial schedule been maintained, the WCS Coalition and others responding to the *Performance Public Notice* would have had a better idea of the issues that remain controversial. Now, however, the WCS Coalition must assume that most of the proposals advanced in the *Technical Public Notice* remain in play.

adopt performance requirements without first resolving the following issues raised by the technical proposals:

- The staff has proposed that WCS licensees engage in prior coordination with non-federal and federal Mobile Aeronautical Telemetry (“MAT”) operations prior to the deployment of base stations in the 2345-2360 MHz segment of the WCS band within 45 kilometers of MAT facilities. In response to the *Technical Public Notice*, the WCS Coalition intends to raise a variety of concerns regarding the proposal, including the lack of clarity as to what MAT facilities deserve coordination protection, what future WCS base stations should be subject to coordination, and how the coordination process will take place. *This issue is far from trivial – as discussed below, an analysis performed for the WCS Coalition suggests that approximately 25 percent of the United States population falls within the proposed coordination zones for federal and non-federal MAT facilities.* The WCS Coalition is particularly concerned about the standards that will apply to assure that MAT operations do not unreasonably preclude WCS deployments, given that throughout this proceeding the Aerospace and Flight Test Radio Coordinating Council (“AFTRCC”) has advocated levels of protection for MAT facilities that are far in excess of what is reasonably necessary. In short, the MAT coordination process proposed in the *Technical Public Notice*, if adopted, would substantially delay service to tens of millions of Americans, may result in the need to deploy substantially more WCS base stations in areas subject to coordination than would otherwise be the case, and could effectively preclude WCS from serving large portions of the country.<sup>18</sup> Acting now on establishing new WCS performance requirements, before the technical rules are in place, will preclude careful consideration of these factors once the details of the WCS/MAT coordination process are known.
- Although the *Technical Public Notice* proposes to permit WCS licensees to deploy facilities upon notification to SDARS, without any mandatory advance coordination process, Sirius XM Radio, Inc. (“Sirius XM”) has signaled that it may oppose the staff’s proposal and continue to urge that the Commission require coordination – a proposal that would add months, if not years, to any WCS deployment schedule.<sup>19</sup> Moreover, even under a notification system, the WCS Coalition fears that Sirius XM may be afforded the opportunity to unreasonably delay, if not preclude, WCS operations. The proposed performance requirements are best addressed after the Commission determines whether to adopt the staff’s proposal for a notification system and provides greater clarity as to the extent to which Sirius XM will be able to impede WCS deployments under whatever notification or coordination process is adopted.

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<sup>18</sup> See *700 MHz Performance Order*, 22 FCC Rcd at 15350 (concluding that “covering certain government land may be impractical, because these lands are subject to restrictions that prevent a licensee from providing service or make provision of service extremely difficult”).

<sup>19</sup> See Letter from Michael A. Lewis, Counsel for Sirius XM Radio, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 07-293, IB Docket No. 95-91, at 3 (filed Apr. 5, 2010) (“*Sirius April 5 Ex Parte*”).

- In its most recent substantive filing with the Commission, AFTRCC advocates that WCS facilities be limited in their power based on peak power, rather than average power.<sup>20</sup> Adoption of this proposal would increase the number of base stations WCS licensees must deploy to serve a given area, directly and adversely affecting the business case and impeding the ability of WCS licensees to serve large areas relatively rapidly. Any performance requirements ultimately adopted for WCS licensees must take into consideration technical rules that might hamper the rapid introduction of service over wide areas. The *Further Notice* will allow the Commission and interested parties to factor in the impact of maximum permissible WCS power levels, as well as other restrictions that may require a more extensive infrastructure, once the final technical rules are established.
- AFTRCC continues to demand that all WCS devices satisfy a 70+10 log(p) out-of-band emission (“OOBE”) limit at 2360 MHz and above.<sup>21</sup> While the WCS Coalition takes some comfort that the staff proposal reflected in the *Technical Rules Proposal* rejects this approach, uncertainty still exists as to the OOBE limits that will apply to this spectrum. Until final rules governing OOBE are adopted, it is impossible for the WCS community to determine the extent to which currently available equipment developed for the global market will need to be modified or to estimate the delays associated with such modifications. These issues go to the heart of when WCS licensees will be able to commence providing the sort of service envisioned by the National Broadband Plan, and are best addressed once the Commission has established its OOBE limits above 2360 MHz.
- The duty cycle limit that the *Technical Public Notice* proposes to impose on mobile WCS devices remains controversial.<sup>22</sup> While the staff’s specific suggested duty cycle requirement would permit viable broadband service offerings compliant with the IEEE 802.16e standard, other duty cycle proposals that have been suggested in this proceeding could either preclude the use of some WCS blocks or require the lengthy process of changing standard profiles adopted by the WiMAX Forum. Until the duty cycle debate is resolved, neither the WCS community nor the Commission can evaluate fully the implications of specific mandatory duty cycle rules on WCS deployment timelines. The Commission cannot square performance requirements with duty cycle restrictions until the technical rules are set.
- The staff proposal appears to preclude use of the 2305-2320 MHz band for point-to-point frequency division duplex (“FDD”).<sup>23</sup> If adopted, this proposal would require

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<sup>20</sup> See *Impact to Flight Test Safety of WCS Proposals*, at 7, 15, attached to Letter from William K. Keane, Counsel for Aerospace and Flight Test Radio Coordinating Council, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 07-293, IB Docket No. 95-91 (filed Mar. 31, 2010).

<sup>21</sup> See *id.* at 5, 15.

<sup>22</sup> See *Sirius April 5 Ex Parte* at 1-2.

<sup>23</sup> See *Technical Public Notice* at 9 (proposing that new Section 27.50(a)(1)(iii) provide that “[b]ase and fixed stations using frequency division duplex (FDD) technology are restricted to transmitting in the 2345-2360 MHz bands”).

substantial modifications to existing WCS FDD point-to-point facilities at significant cost.<sup>24</sup> As the Commission considers the performance requirements for WCS licensees, it must take into consideration the capital expense and delays associated with replacing existing FDD facilities should the proposed FDD limitations be adopted.

- The permissible uses for the WCS band C and D Blocks remain highly unsettled. The *Technical Public Notice* proposes to bar WCS licensees from using the inner half of the C and D Blocks for mobile time division duplex (“TDD”) broadband devices, and some have suggested that the C and D Blocks either be declared “off limits” for mobile operations entirely or subject to such onerous OOB limits that the C and D Blocks will be unusable. As a result, the utility of the C and D Blocks, and the type of services that will be possible there, hangs in the balance. Given the likely disparate treatment of the C and D Blocks, disparate performance requirements for the C and D Blocks also appear to be necessary. The *Further Notice* provides the Commission with an opportunity to consider, in light of the specific rules finally adopted to govern the C and D Blocks, what (if any) performance requirements are appropriate for these blocks.
- Although the *Technical Public Notice* proposes to limit SDARS terrestrial repeaters that are allowed under blanket licensing to operate with an average equivalent isotropically radiated power (“EIRP”) of 12 kilowatts, the *Technical Public Notice* also appears to permit higher-power repeaters to be licensed without consent from potentially affected WCS licensees. Such higher-power repeaters threaten to create “dead zones” that WCS will not be able to serve. In its comments on the *Technical Public Notice*, the WCS Coalition will urge the Commission to preclude site-by-site licensing absent consent of potentially affected WCS licensees. If, however, the SDARS terrestrial repeater licensing rules proposed in the *Technical Public Notice* are adopted, WCS performance requirements will necessarily have to exclude such “dead zones” in which service is not possible. Again, the treatment of the performance requirements for these “dead zones” is best addressed in response to the *Further Notice* after the Commission decides whether to preclude the high-power SDARS operations that will create such zones.

Seeking comment on performance rules before the Commission resolves the issues raised in the *Technical Public Notice* runs a substantial risk that the resulting performance rules will be arbitrary and capricious. By denying WCS licensees and others a reasonable opportunity to comment on the interplay between the new technical rules and the final performance requirements, the Commission does not advance its goal of assuring the prompt deployment of broadband services via WCS.

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<sup>24</sup> See Letter from Paul J. Sinderbrand, Counsel to Stratos Offshore Services Co., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 07-293, IB Docket No. 95-91 (filed Apr. 12, 2010).

**C. The Uncertainty For Resolving Pending WCS Renewal Applications And Substantial Service Showing Filings Compounds The Difficulty Of Estimating Service Deployments.**

Most WCS licensees also face significant uncertainty because the current status of large numbers of WCS licenses is in limbo. The Commission has before it a host of WCS renewal applications and one set of related substantial service showings, all of which were filed approximately three years ago yet still remain pending. Most of these renewal applications were submitted by WCS applicants that did not demonstrate substantial service concurrent with their renewal filings, but instead relied on the Commission's decision to extend the substantial service showing deadline beyond the renewal application date.<sup>25</sup> In some cases, these renewal applications are the subject of so-called "competing applications," while others are not.<sup>26</sup> One licensee's substantial service showings were challenged after being accepted by the Bureau, and an application

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<sup>25</sup> See *WCS Extension Order*, 21 FCC Rcd at 14141.

<sup>26</sup> This unusual regulatory uncertainty is the result of applications and subsequent filings made by Green Flag Wireless LLC ("Green Flag"), Snapline Communications, Inc. ("Snapline"), James McCotter ("McCotter") and CWC License Holding, Inc. ("CWC"). The Commission has been fully briefed on the merits of the position advanced by Green Flag, Snapline, McCotter and CWC and the arguments need not be reiterated here. See, e.g., Letter from Stephen Roberts, President, Snapline Communications, Inc., to Marlene H. Dortch, Secretary, FCC, Competitive Applications for WCS Licenses (filed July 27, 2007); Petition for Reconsideration by Snapline Communications, Inc., (File Nos. 0003001466 et al.) (filed Aug. 2, 2007); Letter from Jennifer Richter, Counsel to NextWave Wireless, Inc., to Marlene H. Dortch, Secretary, FCC, File Nos. 0003001466 et al. (filed Aug. 8, 2007); Letter from Donald Evans, Counsel to Green Flag, to Marlene H. Dortch, Secretary, FCC, File Nos. 0003001466 et al. (filed Sept. 18, 2007); Letter from Jennifer Richter, Counsel to NextWave Wireless, Inc., to Marlene H. Dortch, Secretary, FCC, File Nos. 0003001466 et al. (filed Sept. 24, 2007); Letter from Jennifer Richter, Counsel to NextWave Wireless, Inc., to Marlene H. Dortch, Secretary, FCC, File Nos. 0003001466 et al. (filed Oct. 9, 2007); Letter from Donald Evans, Counsel to Green Flag and McCotter, to Marlene H. Dortch, Secretary, FCC, File Nos. 0003001466 et al. (filed Oct. 12, 2007); Horizon Wi-Com, LLC Opposition to Application for Review, File Nos. 0003014435 et al. (Feb. 25, 2009) ("Horizon Wi-Com Opposition"); Letter from James J.R. Talbot, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, File Nos. 0003062647 et al. (filed Sept. 18, 2007); Letter from James J.R. Talbot, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, File Nos. 0003062647 et al. (filed Sept. 28, 2007). Suffice it to say, as the WCS Coalition has noted, that "the Bureau's failure to grant the pending WCS renewal applications has cast a pall over deployment efforts" because licensees are understandably reluctant to implement deployment until the issues raised by competing applicants are resolved. See Letter from Paul J. Sinderbrand, Counsel to WCS Coalition, to Marlene H. Dortch, Secretary, FCC, File Nos. 0003001448 et al., at 3 (filed Oct. 18, 2007).

for review of the Bureau's *Order* affirming their acceptance remains pending before the full Commission.<sup>27</sup>

Although the facts differ somewhat from case to case, in each one, the delay in resolving them has caused the licensee uncertainty as to whether the licenses will be renewed for an additional term through 2017. Until that cloud is lifted and operating rights through at least 2017 are confirmed, the affected WCS licensees are understandably hesitant to make further capital investment in WCS infrastructure.<sup>28</sup> The Commission cannot ignore that substantial build out cannot fairly be expected until the ongoing status of the affected licenses is confirmed. A WCS licensee not only needs to know the rules of the road to embark on the journey envisioned by the National Broadband Plan; it also needs to know that its driver's license remains valid. Accordingly, the Commission should establish a timeline for resolving these pending licensing proceedings and announce that timeline in conjunction with the release of the *Further Notice*. This will allow those commenting in response to the *Further Notice*, and ultimately the Commission, to factor any delay in resolving these licensing matters into the development of future performance benchmarks.

### **III. THE FURTHER NOTICE WILL PROVIDE AN APPROPRIATE VEHICLE TO ADDRESS FLAWS IN THE CURRENT COMMISSION PROPOSAL ON NEW WCS PERFORMANCE REQUIREMENTS.**

The continuing uncertainty regarding the issues raised by the *Technical Public Notice* makes it premature for the WCS community to address specifically the length of time it will reasonably

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<sup>27</sup> See Horizon Wi-Com, LLC, *Memorandum Opinion and Order*, 24 FCC Rcd 359 (WTB 2009); Green Flag and McCotter Application for Review, File Nos. 0003014435 et al. (Feb. 10, 2009); Horizon Wi-Com Opposition; Reply of Green Flag and McCotter to Horizon Wi-Com's Opposition, File Nos. 0003014435 et al. (Mar. 9, 2009).

<sup>28</sup> Some licensees that deferred their build out based on the Commission's decision to extend the deadline for demonstrating substantial service have begun to deploy facilities due to the impending expiration of the extension. While these licensees have chosen to risk their investments in meeting the current performance requirements, it is far from certain they would choose to risk the much greater amount of capital that would be required to meet heightened requirements without the Commission first resolving their licensing status.

take licensees to meet service benchmarks under the new rules. However, it is clear that five specific aspects of the *Performance Public Notice* are flawed. Issuance of the *Further Notice* will provide the Commission with an opportunity to correct these elements, craft a revised proposal that better fits the unique regulatory environment in which WCS licensees operate, avoid disadvantaging WCS relative to other bands that face far fewer regulatory challenges, and promote the objectives of the National Broadband Plan.<sup>29</sup> At a minimum, achievement of these goals requires:

1. Any performance requirements imposed on WCS should provide at least four years before the interim benchmark is measured.
2. The rules should provide for substantial discounting of WCS population coverage requirements compared to those imposed on the 700 MHz C Block to reflect that 2.3 GHz band licensees do not enjoy the favorable propagation characteristics of the 700 MHz band.
3. Just as the Commission excluded government lands from the 700 MHz band geographic coverage areas, performance requirements for WCS licensees must address in some fashion the delays associated with coordination and the possibility that some areas will prove impractical to serve.
4. The proposed “death penalty” for failing to meet a build out benchmark should be replaced by the same remedial provisions imposed on 700 MHz licensees, culminating with a “keep what you use” methodology.
5. Point-to-point links constructed in good faith by WCS licensees prior to the adoption of final rules should be considered in assessing compliance with point-to-point link performance requirements, without regard to any payload requirements that were not applicable at the time of construction.

Each of these elements is discussed below.

**A. Any Performance Requirements Imposed On WCS Should Provide At Least Four Years Before The Interim Benchmark Is Measured.**

At the outset, because the Commission has proposed the new WCS performance requirements in a brief public notice, rather than via a more traditional formal notice of proposed rulemaking, neither the WCS community nor the public has been provided with any transparency as to the thinking behind the proposals in the *Performance Public Notice*. As a result, the WCS

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<sup>29</sup> In addition, the *Further Notice* will provide the Commission with a vehicle for seeking comment on potential steps it can take to promote the rationalization of WCS spectrum holdings in light of the new technical and service rules.

Coalition and the public are left to speculate as to why the Commission, in establishing requirements for WCS, has apparently departed in several key respects from the recently adopted 700 MHz band performance requirements.

For example, the proposed first performance benchmark for WCS licensees, at just two and one-half years, is much shorter than the four years given 700 MHz band licensees.<sup>30</sup> As the Commission recognized when it adopted its four-year benchmark for 700 MHz band licensees:

We are concerned that the proposed three-year benchmark may not provide sufficient time for providers of advanced services to acquire and deploy 4G technologies. Such 4G network build-out will require the commercial availability of end-to-end integrated systems, including subscriber terminals, radio access network, core network, and transport network, in addition to flexible enhanced services and integrated back-office and customer support centers. To achieve a commercial availability benchmark, teams of service providers, vendors and integrators must complete several parallel processes, including completion of the standards, product development, field trials, interoperability testing and larger scale trials, followed by deployment. Such an implementation is challenging and it may not be possible for carriers to complete these tasks prior to the end of the three-year benchmark that was proposed in the *700 MHz Further Notice*.<sup>31</sup>

WCS licensees will face many, if not all, of the same impediments to deployment regardless of how the Commission addresses the issues raised by the *Technical Public Notice*. Yet the *Performance Public Notice* proposes to subject WCS licensees to a deadline even *shorter* than the one rejected for the 700 MHz C Block. If a rational basis for this disparate treatment exists, it is lost on the WCS community.<sup>32</sup> Once the issues raised by the *Technical Public Notice* are resolved, it will be

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<sup>30</sup> And, as discussed below, a 700 MHz band licensee that fails to achieve its interim benchmark is not penalized with automatic forfeiture of its entire license.

<sup>31</sup> *700 MHz Performance Order*, 22 FCC Rcd at 15350 n.385.

<sup>32</sup> The WCS Coalition appreciates that the 700 MHz C Block benchmarks must be met across each Economic Area ("EA"), while the Commission is proposing to subject WCS A and B Block licensees to EA-based benchmarks that are less onerous, but must be met more rapidly. However, it does not appear to the WCS Coalition that the impediments to deployment can be overcome within two and a half years, even if the test is applied over the wider WCS licensing areas.

possible to address with specificity when the initial performance evaluation should occur, but in no event should it occur more quickly than the four-year period imposed on 700 MHz band licensees.

**B. The Rules Should Provide For Substantial Discounting Of WCS Performance Requirements Compared To Those Imposed On The 700 MHz C Block To Reflect That 2.3 GHz Band Licensees Do Not Enjoy The Favorable Propagation Characteristics Of The 700 MHz Band.**

The Commission's rationale for adopting its 700 MHz performance requirements argues for either: (1) establishing longer construction periods for WCS, not the shorter ones proposed in the *Performance Public Notice*; or (2) maintaining the same construction periods adopted for WCS, and reducing the coverage requirements to be met within those periods. When it adopted the 700 MHz performance requirements, the Commission justified more stringent requirements than those historically applied in other bands by noting that "[t]he unique propagation characteristics of this spectrum means that fewer towers will be needed to serve a given license area, as compared to providing service at higher frequencies, and thus large license areas may be served at lower infrastructure costs."<sup>33</sup> This logic seems sound – licensees that can take advantage of favorable propagation characteristics to cover vast swaths of territory with minimal infrastructure perhaps should be required to meet any coverage requirement relatively rapidly. However, the propagation characteristics at 2.3 GHz are far less favorable than those at 700 MHz, so it will take far more transmitters for WCS licensees to meet the build out requirements than for 700 MHz licensees and, under the rationale articulated in the *700 MHz Performance Order*, a much longer period of time to achieve a comparable level of coverage.

Even under the most favorable regulatory circumstances, WCS licensees must deploy multiple times the number of base stations than 700 MHz licensees to provide equivalent population coverage, particularly in the more rural areas that the proposed performance requirements are

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<sup>33</sup> See *700 MHz Performance Order*, 22 FCC Rcd at 15348.

presumably targeting. Indeed, a WCS licensee will require approximately seven to twelve times as many base stations as a 700 MHz licensee to cover the same geographic area. As discussed in detail in Section II, however, the Commission has before it proposed restrictions on base station power limits, complex coordination processes and other technical and service rules that, if adopted, would further increase the number of WCS base stations required to provide coverage, not to mention delay base station availability and slow the deployment process.

In short, WCS licensees will require more time than 700 MHz C Block licensees to meet similar coverage requirements; or, if the Commission imposes similar timelines on WCS, a reduction in the coverage benchmarks. The WCS Coalition recognizes that the proposed WCS rules do provide some discounting by requiring A and B Block licensees to achieve less population coverage in each EA than a 700 MHz licensee is required to do. But whatever relative benefit that discount provides the WCS licensee is more than outweighed by the fact that the WCS licensee also must meet a higher population coverage requirement for its entire service area, and must meet both of these benchmarks far more rapidly than a 700 MHz band licensee, notwithstanding the greater infrastructure build out required. The *Further Notice* will provide the Commission an opportunity to assure that the WCS population coverage requirements do not disadvantage WCS relative to 700 MHz service.

**C. The *Further Notice* Will Provide An Avenue For Addressing The Impact That Coordination Zones Will Have On The Rapid Deployment Of WCS Service.**

As noted in Section II, WCS service to the public may be substantially delayed, if not altogether precluded, should the Commission adopt the staff proposal requiring coordination of WCS base stations in the 2345-2360 MHz segment with MAT operations. While the WCS Coalition is hopeful that the Commission will moderate the approach advanced in the *Technical*

*Public Notice*, for present purposes the possibility of delay, or outright preclusion of WCS service in areas near MAT facilities, cannot be discounted.

This issue is far from trivial. The National Telecommunications and Information Administration (“NTIA”) and AFTRCC have provided the WCS Coalition with a listing of approximately 150 non-federal and federal MAT facilities that would require protection under the Commission’s proposal. Although NTIA has not been authorized to provide the WCS Coalition with the specific coordinates of the non-federal facilities, a preliminary analysis suggests that over 76 million Americans (*i.e.*, almost 25 percent of the U.S. population) are likely to reside within the coordination zones established to protect federal and non-federal MAT. When, if ever, the WCS service will be available to these 76 million Americans will largely depend on the outcome of the issues raised in the *Technical Public Notice*. Overly burdensome coordination requirements to protect MAT facilities will inevitably hamper, if not preclude, the offering of service by WCS licensees to a large portion of the population.

When the Commission adopted its performance requirements for 700 MHz band licensees, it considered an analogous situation – difficulties faced by potential licensees in covering government lands. The Commission specifically resolved that problem by excluding those government lands from the 700 MHz band geographic coverage requirements, finding that “covering certain government land may be impractical, because these lands are subject to restrictions that prevent a licensee from providing service or make provision of service extremely difficult.”<sup>34</sup>

Yet, for reasons unknown, the rules proposed in the *Performance Public Notice* do not provide any relief for WCS licensees that may be facing coordination requirements that delay, if not preclude, service to substantial portions of the population of their service areas. The *Further Notice*

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<sup>34</sup> See *700 MHz Performance Order*, 22 FCC Rcd at 15350.

will permit the Commission to take any coordination requirements that are imposed on WCS licensees into consideration in adopting its rules and either provide licensees additional time to meet performance benchmarks, exclude areas subject to coordination from any performance obligations, or adopt a combination of the two concepts.

**D. No Basis Exists For Subjecting WCS Licenses To More Onerous Penalties Than 700 MHz Licensees When Interim Or Final Performance Benchmarks Are Not Achieved.**

Under the rules proposed by the *Performance Public Notice*, a WCS licensee that fails to meet either its interim or its final performance requirement loses its license and must discontinue whatever service it is providing to the public at the time.<sup>35</sup> This stands in stunning contrast to the rules recently adopted for the 700 MHz band. Although the rules for the 700 MHz band vary somewhat from block to block, ultimately the failure to meet the interim benchmarks does not result in an automatic loss of any operating authority, and failure to meet the final benchmark only results in the loss of operating authority for those areas not then being served.<sup>36</sup>

Since the *Performance Public Notice* provides no transparency into the rationale behind the proposed rules, commenters have been deprived of the opportunity to critique the reasoning that seems to be leading the Commission to impose the death penalty at both the interim and final WCS performance review. This omission is particularly stark because the rationale behind the 700 MHz band approach appears wholly applicable to the WCS situation:

[O]ur ‘keep-what-you-use’ rules provide additional methods for making smaller license areas available, thus promoting access to spectrum and the provision of service, especially in rural areas. This rule ensures that others are given an opportunity to acquire spectrum that is not adequately built out and provide services to those who reside in those areas. In this way, our rules are pro-competitive and help ensure service to communities that might otherwise not receive service. In sum, we conclude that our approach should effectively promote service, including in rural

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<sup>35</sup> See *Performance Public Notice* at 2.

<sup>36</sup> See *700 MHz Performance Order*, 22 FCC Rcd at 15348-49; 47 C.F.R. § 27.14.

areas, while establishing a clear regulatory framework for licensees as they develop their business plans.<sup>37</sup>

The imposition of the proposed death penalty approach to WCS performance is even more troubling because it jeopardizes the ability of the public to continue receiving broadband services at the time performance is evaluated. To take an extreme example, under the *Performance Public Notice* a WCS licensee serving 74.499999 percent of the population of its authorized service area in five years would automatically lose its license and be forced to immediately cease its service offerings. It is difficult to imagine how such a rule advances the public interest. The *Further Notice* will provide the Commission an opportunity to either correct this imbalance or explain how the public interest is served by subjecting WCS licensees to a death penalty while allowing 700 MHz band licensees that fail their final performance evaluation to retain the spectrum they are using.

**E. The *Further Notice* Should Clarify The Proposal To Impose Payload Requirements And, At A Minimum, Propose That Licensees Be Credited With Existing Point-To-Point Links That Do Not Meet Any New Payload Requirements.**

The *Performance Public Notice* proposes that for a point-to-point link to be considered for purposes of meeting the new performance benchmarks, that link must meet the payload standards set forth in Section 101.141 of the Commission's rules – requirements that are not presently applicable to point-to-point links in the WCS band. At this juncture, it is impossible for the WCS community to evaluate how the final rules adopted in response to the *Technical Public Notice* will impact the ability of WCS licensees to meet these payload standards, or for that matter, whether those standards will be unduly prescriptive of business models for WCS in the future. But what the WCS community does know is that, if the Commission adopts this requirement, it should include

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<sup>37</sup> 700 MHz *Performance Order*, 22 FCC Rcd at 15349.

provisions permitting links deployed prior to the issuance of the *Further Notice* that do not meet Section 101.141 standards to be applied against future point-to-point link performance benchmarks.

At the outset, the *Further Notice* will provide the Commission an opportunity to clarify precisely what requirements it would impose on WCS licensees. The text of the *Performance Public Notice* references only Section 101.141 generally, without identifying the particular subsection the Commission would look to during WCS performance reviews. If the Commission's intent is that to be considered towards the performance benchmark a WCS point-to-point link must comply with the requirements of Section 101.141(a)(1) – which requires that the bits per second be equal to or greater than the bandwidth specified by the emission designator in Hertz – the WCS community is less concerned.<sup>38</sup> However, what greatly troubles the WCS Coalition is that footnote 3 of the *Performance Public Notice* suggests that only links compliant with the substantially more stringent requirements of Section 101.141(a)(3) would be entitled to consideration when evaluating WCS licensee performance.<sup>39</sup>

The difference between the two rules is significant. Section 101.141(a)(3) requires a minimum payload capacity of 18.5 Mbps for a 5 MHz channel, while 5 Mbps is required under Section 101.141(a)(1) for a channel of similar bandwidth. The reference in the *Performance Public Notice* to Section 101.141(a)(3) is odd since, unlike the more general language of Section 101.141(a)(1), Section 101.141(a)(3) is only applicable by its very terms to the 4 GHz, 6 GHz, 10 GHz and 11 GHz band point-to-point microwave bands, all of which are shared among multiple licensees using site-based licensing. Section 101.141(a)(3) was adopted by the Commission to minimize frequency congestion in those shared bands by promoting the deployment of very high

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<sup>38</sup> See 47 C.F.R. § 101.141(a)(1).

<sup>39</sup> See *Performance Public Notice* at 2 n.3 (“We note that under section 101.141 of the Commission's rules, for example, a link with a 5 MHz bandwidth would be required to provide 18.5 megabits/second in capacity. 47 C.F.R. § 101.141.”).

capacity links. The Commission's rationale for this aggressive requirement is absent in the case of WCS, where flexible use spectrum that has been licensed on a geographic basis is involved. Commission performance requirements that artificially push a business model that promotes fewer, but higher capacity links, may not result in the most efficient and effective use of the 2.3 GHz band.

Several WCS licensees already have deployed, or are deploying, point-to-point facilities in the band for backhaul and other purposes and are actively utilizing those links for a variety of services. In at least some cases, it appears that the technologies selected to implement those links, although fully compliant with all current applicable Commission rules, cannot provide the throughput necessary to meet the payload standards suggested in the *Performance Public Notice*. The *Performance Public Notice* does not explain why the Commission now believes payload standards are necessary to count point-to-point links towards WCS performance compliance. Indeed, if adopted, the Commission's proposal will force WCS licensees to abandon that portion of the market that has a need for point-to-point links that can be economically satisfied at 2.3 GHz utilizing existing technology, but which does not need the high-capacity links required under Section 101.141.

For example, some licensees are deploying WCS for fixed point-to-point links that provide reasonably priced backhaul for Wi-Fi hotspots. These links do not necessarily meet the payload standards of Section 101.141(a)(3) – 18.5 Mbps over a 5 MHz channel is not necessary for Wi-Fi hotspot backhaul, most of the deployed equipment is incapable of providing that capacity, and, most importantly, providing that level of capacity in a single link may effectively limit the number of hotspots for which backhaul can be provided in a given area. Indeed, since it appears to be a given that mobile use will not be possible for at least part of the C and D Blocks, point-to-point usage of those channels likely will be prevalent. The Commission should not adopt payload requirements

that foreclose business models that can play a role in making ubiquitous broadband services available.

Should the Commission adopt payload standards for WCS point-to-point links to be considered during a performance evaluation, it would be arbitrary and capricious not to grandfather links that were deployed before any new payload benchmark becomes effective. Not grandfathering these links would contradict longstanding Commission precedent. The Commission has routinely grandfathered existing operational requirements to minimize the impact of rule changes and the chance of service interruption or discontinuation.<sup>40</sup> Although grandfathering decisions may create some disparity between grandfathered and non-grandfathered operations, the Commission has long recognized that equitable considerations – such as unfairly penalizing parties who in good faith acted in accordance with Commission rules, affording parties an opportunity to retain the value of their investments made in reliance on Commission rules, and decisions that would be too disruptive to existing service – often weigh in favor of grandfathering existing operations.<sup>41</sup>

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<sup>40</sup> See, e.g., Amendment of the Commission's Rules Concerning Airport Terminal Use Frequencies in the 450-470 MHz Band of the Private Land Mobile Radio Services, *Report and Order*, 20 FCC Rcd 1966, 1980-81 (2005) (allowing licensees authorized on Airport Terminal Use frequencies to operate at their existing power levels which are in excess of new power limitations); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for Narrowband Private Land Mobile Radio Channels in the 150.05-150.8 MHz, 162-174 MHz, and 406.1-420 MHz Bands that are Allocated for Federal Government Use, *Report and Order*, 20 FCC Rcd 5793, 5809-10 (2005) (grandfathering existing non-Federal licenses using the frequencies 150.7825 MHz and 150.7975 MHz in spite of the Commission's decision to no longer issue non-Federal licenses on those frequencies); Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Order*, 19 FCC Rcd 22284, 22286-87 (2004) (concluding that although existing digital video operations in the lower and upper segments of the 2150-2162 and 2500-2690 MHz bands may not be compatible with newly adopted technical rules, existing deployments could continue to operate at their existing levels to prevent interruption of service).

<sup>41</sup> See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd 13620, 13808-09 (2003).

In this case, despite the myriad of technical and legal challenges in the WCS band, licensees have in good faith taken steps to implement build out plans to fulfill the existing substantial service requirements by a deadline that is now a mere three months away. Failure to grandfather links constructed prior to the release of the *Further Notice* would negate those good faith efforts that fully comply with the Commission's current rules. It also would strand invested capital at a time when funding is in relatively short supply. Moreover, customers who have come to depend on these facilities to support broadband service may have their expectations of continued service upset.

**IV. THE COMMISSION SHOULD EXTEND THE UPCOMING JULY 21, 2010 BUILD OUT DEADLINE.**

Finally, no later than when it adopts final technical and service rules for the WCS band and issues the *Further Notice*, the Commission should extend the current July 21, 2010 WCS substantial service showing deadline to avoid the need for WCS licensees to expend resources in deploying facilities that may not comply with the future rules or best provide the services being demanded by the public. While several WCS licensees have individual extension requests pending, a blanket extension will assure that all WCS licensees are afforded similar treatment, and in the process simplify the Commission's search for the best performance standards to apply going forward.

The blanket relief requested by the WCS Coalition is consistent with the extension granted in 2003 as the 2.5 GHz Multipoint Distribution Service and Instructional Television Fixed Service were undergoing major regulatory changes to facilitate the introduction of mobile broadband services. The Commission then was proposing to substantially modify the performance requirements applicable to 2.5 GHz band licensees as part of its regulatory rewrite, much as the *Performance Public Notice* proposes to modify the WCS performance requirements in conjunction with modification of the technical and service rules. "In light of the breadth of the proposals . . .

and our re-evaluation of performance standards for the 2500-2690 MHz band,” the Commission in that case granted a blanket extension of an upcoming performance deadline.<sup>42</sup> As it explained:

While we are normally reluctant to suspend a build-out requirement, a suspension of this construction deadline will allow the Commission to evaluate the performance requirements and service rules for this band. This approach is consistent with prior Commission actions suspending a deadline while relevant policy is subject to the pending rulemaking proceedings. Accordingly, we will suspend the BTA construction deadline pending the release of a *Report and Order* in this proceeding.<sup>43</sup>

As the Commission is aware, WCS band licensees have faced a variety of similar technical and operational challenges since the spectrum was first auctioned in 1997. In that time, WCS licensees have worked in good faith with the Commission to find the best resolution for those issues. Although disappointed that these issues were not resolved in 2008 when the vote on a circulated draft order languished, the WCS Coalition is encouraged by the Commission’s intent to adopt new technical rules in the near future that will provide licensees with the flexibility to use the spectrum in the most efficient ways possible. Yet, as these issues remain unresolved and as the Commission is considering significant changes to the build out requirements, strict enforcement of the existing requirements is inequitable, unduly burdensome, and contrary to the public interest. In contrast, extending the deadline would ensure sufficient time for licensees to take advantage of that

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<sup>42</sup> Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722, 6805 (2003) (“*Broadband Access NPRM*”); Requests by Interactive Video And Data Service Auction Winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998) (“*Jan/Feb Order*”); Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181, 3184 (WTB 1997) (“*March Order*”); Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 7220, 7222 (CCB 1988).

<sup>43</sup> *Broadband Access NPRM*, 18 FCC Rcd at 6805, *citing* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool Modification of FCC Rule Section 90.627(b) Governing Multiple Sites for Specialized Mobile Radio Service Systems in Rural Markets, *Order*, 8 FCC Rcd 3974 (1993).

additional flexibility instead of forcing them to make uneconomic choices about deployment and service offerings.

Extending the construction deadline during the pendency of the rulemaking concerning the new WCS band requirements is consistent with Commission precedent not only in the 2.5 GHz band context, but also with rulings in this and other proceedings. When the Commission previously extended by three years the July 21, 2007 deadline for licensees in light of the uncertainty regarding the technical rules governing the WCS band, the Commission agreed with WCS band licensees that, due to circumstances beyond the licensees' control, equipment for the band was scarce and that "limited deployment attempts using available equipment have been marred by technical problems or proved to be economically infeasible."<sup>44</sup> Unfortunately, many of these challenges remain, as this proceeding has dragged on through no fault of the WCS community, continuing to "hinder[] WCS equipment development, network design, and facility deployment."<sup>45</sup> There is longstanding precedent, including the *WCS Extension Order*, in which the Commission has extended build out deadlines so that spectrum can be put to a higher use for the benefit of consumers, and that precedent should be followed here.<sup>46</sup>

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<sup>44</sup> *WCS Extension Order*, 21 FCC Rcd. at 14139.

<sup>45</sup> *Id.* at 14137; *see also LMDS MO&O*, 23 FCC Rcd at 5905-06 (extending the construction deadline for LMDS licensees due to factors outside the licensees' control).

<sup>46</sup> *See WCS Extension Order*, 21 FCC Rcd at 14140-41; Request of Warren C. Havens for Waiver or Extension of The Five-Year Construction Requirement For 220 MHz Service Phase II Economic Area and Regional Licensees, *Memorandum Opinion and Order*, 19 FCC Rcd 12994, 13001 (WTB 2004) ("[T]he public interest would be ill-served by compelling 220 MHz Phase II licensees to devote their resources to the construction of stopgap, legacy analog systems to meet the construction deadline" when licensees are on the verge of "deploy[ing] new digital technologies."); FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, 16 FCC Rcd 11072, 11077 (WTB 2001); *March Order*, 12 FCC Rcd at 3183-84; *Jan/Feb Order*, 13 FCC Rcd at 758; Extension of the Five-Year Build-out Period for BTA Authorization Holders in the Multipoint Distribution Service, *Memorandum Opinion and Order*, 16 FCC Rcd 12593, 12596 (MMB 2001); *Broadband Access NPRM*, 18 FCC Rcd at 6805.

**V. CONCLUSION.**

The Commission should not rush to adopt the ill-conceived performance requirements for the WCS band. Rather, the Commission should first finalize the technical and service rules for the band, resolve the long pending renewal applications and substantial service showings, and adopt the *Further Notice* so that interested parties can comment on – and the Commission can ultimately determine – appropriate and reasonable performance benchmarks for the WCS band. Additionally, the Commission should extend the upcoming July 21, 2010 construction deadline to ensure that licensees need not invest scarce capital and other resources in deployments that may not be consistent with – let alone optimized for – the forthcoming technical and performance requirements.

Respectfully submitted,

THE WCS COALITION

By: /s/ Paul J. Sinderbrand  
Paul J. Sinderbrand  
Mary N. O'Connor  
Jennifer L. Kostyu

Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, DC 20037-1128  
202.783.4141

Its Attorneys

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