

**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

REPLY TO COMMENT OF WCS COALITION

Green Flag Wireless, LLC, CWC License Holding, Inc. and James McCotter ("Joint Commenters") hereby submit this reply to the Comments of the WCS Coalition. Joint Commenters agreed with many of the comments offered by the Coalition, but we take firm exception to the suggestion that the current build-out deadline for WCS incumbents be extended yet again.

A. The Extension Request is Misplaced

A number of WCS Incumbents have filed requests that the Commission grant a further extension of time for them to build out their systems. Joint Commenters have duly opposed those requests. In this proceeding the Commission sought no comment or input on that issue; it asked only for comment on what build-out standards should apply going forward. The WCS Coalition has simply seized this opportunity to lobby yet again for another extension of the day of reckoning. Since the Commission did not ask for comment on the extension of the existing deadline and has given no one any reason to think that such an action is being considered in this Docket, it would be inappropriate and probably unlawful for the Commission to grant such relief here.

Moreover, the WCS Coalition purports to ask for a blanket extension which would apply to all Incumbents in this band. But significantly, AT&T – by far the largest holder of 2.3 GHz spectrum – has not sought an extension and has in fact been filing build-out notifications indicating that it has constructed and is operating over a hundred point to point links in cities across the United States. Another Incumbent, Horizon Wi-Com, LLC, has also filed notifications of construction in many markets, as has Comcast. There is obviously no industry-wide condition that calls for a blanket, industry-wide relief. The Coalition simply appears to be using this narrow proceeding as a backdoor opportunity to rescue a small number of WCS licensees from the consequences of their failure to construct and operate systems. That attempt should be rejected. Rather, the Commission should consider the merits of the pending extension requests in the context of the filings by each Incumbent and grant or deny them on their own merits.

B. No Extension is Justified

Sirius XM Radio, Inc. has already filed comments in this proceeding opposing any extension of time to construct. Those comments echoed many of the points raised by Joint Commenters in their original objection to the various requests for extension of time which have been filed by Incumbents. Specifically, Joint Commenters noted the following:

The Incumbents seeking an extension have now had more than 12 years to make constructive use of the spectrum they have been assigned, and to date none of them have taken the smallest step toward construction, operation, or the provision of actual service to the public. This extraordinary period of blatant warehousing exceeds any other time period ever afforded by the Commission in any service in its history. The very essence of stewardship of a radio license is that *the license must be used for something*. Every single service regulated by the Commission

mandates in one way or another that radio spectrum must either be put to use or forfeited. Keeping spectrum locked up in a safe is the very definition of wasting the spectrum, and it goes without saying that the public is getting no benefit whatsoever from the continued holding of these licenses by Incumbents. Twelve years is an eternity in the world of communications, and Incumbents not only have done nothing but now ask for an indefinite period of time to continue to do nothing in the future. This is contrary to everything the Commission stands for.

What's worse, the Commission expressly put the Incumbents on notice when they were granted their last extension that this would not be an open-ended extension:

"We expect WCS licensees to take advantage of this relief and aggressively develop equipment and service options for the 2.3 GHz band. The Extension of the construction deadline until July 21, 2010, is intended to give WCS licensees additional flexibility to develop and deploy services based on opportunities available to them *in the near future*." (Emph. added)

Consolidated Request of the WCS Coalition for a Limited Waiver of Construction Deadline for 132 WCS Licenses, 21 FCC Rcd 14134 (2006). ("*WCS Extension Order*") Instead of taking advantage of the earlier relief afforded, the Incumbents did absolutely nothing. Certainly there was no "aggressive" development of service or equipment options in the immediate aftermath of the extension grant. They simply settled back and now offer the exact same arguments they offered before for their inaction.

While any construction activity undertaken after the June-July, 2007 expiration of these licensees' licenses is legally irrelevant to their entitlement to a renewal expectancy for the last term, continued warehousing of this valuable broadband spectrum is not in the public interest. The Commission may grant an extension of time to construct only when a licensee can demonstrate that it has made significant progress toward construction and that the need for an extension has been caused by reasons beyond its control. See 47 CFR § 1.946(e). Here there is

no reason whatsoever why the Incumbents could not have constructed their stations using currently available, FCC-certified equipment. They have simply chosen to delay deployment in the hope that different equipment will be available in the future and that the Commission may revise the OBEE rules.

The Incumbents offer three basic justifications for their complete lack of action: the lack of available equipment, the continuing uncertainty about the interaction between SDARS operations and WCS operations, and the uncertainty created by the pendency of their renewal applications. These justifications may be deconstructed in turn. On the lack of equipment, as has been noted above, several Incumbents have filed construction build out demonstrations using available equipment. Horizon Wi-Com in particular relied on off-the-shelf equipment from Navini Networks which was fully type-accepted by the Commission for use in the 2.3 GHz band.¹ The fact that equipment for mobile applications may not yet be available is hardly a basis for not constructing since there will always be *some* aspect of broadband service on the horizon (whether it be LTE or other applications of technology) that will not be immediately available. If that were an excuse for not constructing, nobody would ever have to construct anything.

Incumbents rely primarily on the fact that the interplay between SDARS licenses and WCS licenses has not yet been definitively resolved by the Commission. They therefore request an extension until after the Commission resolves the SDARS/WCS interference issues. But this is precisely the relief that the Commission *refused to grant* them in 2006:

Although we agree that a three-year construction deadline is warranted in this case, we reject the WCS Coalition's argument that the timing of relief should be based on the resolution of the pending SDARS repeater rulemaking. We believe that the lack of certainty regarding the construction deadline could act as a

¹ Horizon's build-out demonstration was defective in other respects, a matter which is now under consideration by the full Commission, but at least it showed that WCS equipment is readily available.

disincentive for WCS licensees to expeditiously develop technological solutions for the band and construct systems. This would undermine one of the purposes for the construction requirement – to prevent spectrum warehousing.

WCS Extension Order, supra, at para. 14. Exactly as the Commission feared, the Incumbents have used the lack of certainty about the SDARS proceeding to delay *any* progress toward construction, thus undermining the purpose of the construction requirement. Incumbents simply ignored the Commission's repeated enjoinders that they were expected – indeed, required – to proceed with construction of their systems *despite* the pendency of the SDARS proceeding. Now having let two more years elapse without action, they have come back again asking for the same relief on the same basis that was previously denied.

Finally, Incumbents note the pendency of the challenges to their renewals which have been filed as a basis for not proceeding with construction. This seems to turn the situation on its head. It was the fact that Incumbents had provided no substantial service whatsoever during their initial license terms that made them vulnerable to a renewal challenge. Now they are attempting to take their dereliction and use it as an excuse for *continued* dereliction. It may be some years before the Commission resolves the issue of which applicant should receive the WCS licenses for which mutually exclusive applications have been filed. The Commission has never accepted the pendency of a renewal challenge as a basis for an incumbent licensee to abdicate all responsibility to provide service while the renewal is being resolved. It should not do so here.

C. Conclusion

The Commission should not adopt the harsh, unrealistic, and unprecedented build-out requirements proposed in the Public Notice for the reasons set forth by Joint Commenters and all others commenting on the issue. It should also not disturb the build out requirements that

currently apply to Incumbents either as to extent of service or the time when such service must have been provided.

Respectfully submitted,

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