

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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)	

REPLY COMMENTS OF COMCAST CORPORATION

In the *Performance Public Notice*,¹ the Commission sought comment on proposals that would dramatically expand the performance requirements WCS operators must meet to retain their licenses. As a WCS licensee that, in good faith, will have complied with the Commission's existing build-out requirements by the July 21, 2010 deadline, Comcast Corporation ("Comcast")² shares the Commission's interest in ensuring that WCS spectrum is put to productive use. In these Reply Comments, Comcast demonstrates that the new requirements should not apply to licensees that meet the current benchmarks, and that doing so would jeopardize the integrity of the auction process by which this spectrum was awarded. Moreover, the proposed requirements risk frustrating progress toward the National Broadband Plan's goals for wireless broadband because they will discourage, rather than encourage, efficient investment.

¹ Federal Communications Commission Requests Comment on Revision of Performance Requirements for 2.3 GHz Wireless Communications Service, *Public Notice*, WT Docket No. 07-293 (rel. Mar. 29, 2010) ("*Performance Public Notice*").

² Comcast's WCS operating subsidiaries are: Comcast WCS ME02, Inc., Comcast WCS ME04, Inc., Comcast WCS ME05, Inc., Comcast WCS ME16, Inc., Comcast WCS ME19, Inc., Comcast WCS ME22, Inc., Comcast WCS ME26, Inc., and Comcast WCS ME28, Inc.

Thus, the Commission should apply the proposed new requirements only to those that fail to demonstrate substantial service by July 21, 2010.

I. THE FCC SHOULD NOT APPLY NEW PERFORMANCE REQUIREMENTS TO WCS LICENSEES THAT SATISFY THE CURRENT BENCHMARKS.

The WCS band has a turbulent history, marked by more than thirteen years of technical and regulatory uncertainty. Comcast supports the Commission's efforts to resolve those problems and provide WCS licensees with additional operational flexibility for future broadband deployments. At the same time, WCS licensees that satisfy the current build-out requirements in good faith reliance on the Commission's current performance requirements should not be subjected to an entirely new set of build-out obligations. To do so would frustrate the Commission's longstanding goal of "promot[ing] efficient use of the spectrum, encourage the provision of service to rural, remote and insular areas and prevent the warehousing of spectrum."³ Subjecting these licensees to new build-out requirements also would risk jeopardizing the integrity of the Commission's auction process.

The many ongoing technical and legal obstacles involved in the WCS band have prevented many licensees from building out their licenses, which the Commission readily acknowledged when it extended the July 21, 2007 build-out deadline by three years for more than 130 WCS licenses.⁴ Nevertheless, a limited number of WCS licensees, including Comcast, did timely satisfy the substantial service requirement for some or all of their licenses by the

³ Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), *Report and Order*, 12 FCC Rcd 10785, 10843 (1997).

⁴ See Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134, 14139 (WTB 2006) ("[W]e find that WCS licensees have demonstrated that they face factors beyond their control that have limited their options in providing service.").

initial July 21, 2007 deadline.⁵ Several licensees that received the three-year extension, including Comcast with respect to three of its markets, are currently deploying facilities to meet the upcoming July 21, 2010 construction deadline.⁶

The Commission's *Performance Public Notice* proposing new performance requirements for the WCS band is silent as to whether the proposed new requirements will apply to those licenses that will have already been built out by the current July 21, 2010 deadline.⁷ The Commission should be clear that those new requirements will not apply to WCS licensees that demonstrate substantial service by this deadline. These licensees have devoted valuable time and resources to ensure their timely compliance with the Commission's existing requirements,⁸ relying in good faith on the Commission's codified rules and official decisions when developing and implementing their build-out plans.⁹

As one commenting party correctly noted, the Commission risks endangering the integrity of its auction process by applying new performance requirements to WCS licensees that

⁵ Comcast's 2007 build-out notifications demonstrating that it provides substantial service were "accepted" by the Commission. Comcast WCS ME16, Inc., File No. 0003107373 (July, 12, 2007); Comcast WCS ME16, Inc., File No. 0003107370 (July, 12, 2007); Comcast WCS ME19, Inc., File No. 0003107440 (July, 12, 2007); Comcast WCS ME19, Inc., File No. 0003107385 (July, 12, 2007); Comcast WCS ME19, Inc., File No. 0003107379 (July, 12, 2007); Comcast WCS ME22, Inc., File No. 0003107459 (July, 12, 2007); Comcast WCS ME28, Inc., File No. 0003107476 (July, 12, 2007); Comcast WCS ME26, Inc., File No. 0003107468 (July, 12, 2007). *See also* Comments of Horizon Wi-Com, LLC, Request for Comment on Revision of Performance Requirements for 2.3 GHz Wireless Communications Service, WT Docket No. 07-293, at 2 (Apr. 21, 2010) ("Horizon Wi-Com Comments").

⁶ *See* Comments of Broadband South LLC, Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, WT Docket No. 07-293, at 3 (Apr. 21, 2010) ("Broadband South Comments").

⁷ *See generally* *Performance Public Notice*.

⁸ *See* Horizon Wi-Com Comments at 3; Broadband South Comments at 3.

⁹ *See* Broadband South Comments at 6.

satisfy the current substantial service standard by July 21, 2010.¹⁰ Licensees, including Comcast, have made significant financial and business investments to purchase and develop auctioned spectrum.¹¹ Those investments were based in large part on existing build-out requirements, which are fundamental factors in assessing the valuation of a license and in creating viable business plans to meet those requirements. Although the Commission may have the power to change a licensee's performance obligations under proper circumstances and through proper procedures, it should only do so in limited circumstances. This is not a case where such change is warranted.

Applying new WCS performance requirements (in whatever form they ultimately take) will require Comcast and other WCS licensees that already have deployed their systems, or are in the process of doing so, to revisit and potentially revise or even abandon the specific business plans they have created and implemented.¹² Some licensees may find that their prior investments are stranded because existing business plans cannot be scaled to meet aggressive new benchmarks that were not in place, and not considered, when current plans were developed and investments made.

The implications of the decision the Commission makes here will extend far beyond the WCS band. Applying new performance requirements after spectrum is auctioned will erode investor confidence in the auction process by injecting uncertainty regarding the rules under

¹⁰ See Horizon Wi-Com Comments at 4.

¹¹ Auction No. 14, held in 1997, resulted in total gross bids of almost \$14.9 million for 126 WCS licenses.

¹² See, e.g., Comments of The WCS Coalition, Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, WT Docket No. 07-293, at 21 (Apr. 21, 2010) ("WCS Coalition Comments") (noting that the fixed point-to-point links that some licensees are deployed for backhaul for Wi-Fi hotspots do not meet the proposed payload standards suggested in the *Performance Public Notice*).

which the bidders, if successful, must operate. If the expectations created during the auction process are so easily altered, companies will not have the certainty they need to make the significant investments necessary to deploy new wireless services. Analyst Christopher King of Stifel Nicolaus underscored this principle in discussing the 700 MHz auction at an FCC broadband plan hearing on capital formation: “Capital market investors like to know the rules at the beginning of their investments and want long-term regulatory certainty. Changing government policy after the 700 MHz auction would amount to ‘bait-and-switch’ regulation at the FCC.”¹³

II. MODIFYING THE PERFORMANCE REQUIREMENTS AS PROPOSED WOULD FRUSTRATE PROGRESS TOWARD MAKING MORE SPECTRUM AVAILABLE FOR WIRELESS BROADBAND.

The National Broadband Plan presents a compelling vision of America’s broadband future – a vision in which consumers are empowered and social and economic goals are furthered through the wide availability of high-speed networks, applications, content and devices.¹⁴ Although some have questioned how well the United States has fared relative to other nations with respect to broadband deployment and adoption, there can be no question that Americans’ appetite for these innovative capabilities will continue to expand dramatically.

Consumers demand the flexibility of using communications and information technologies wherever they are, which in turn drives demand for wireless spectrum and the networks that rely on it. Although much of this demand for spectrum will be driven by skyrocketing use of smart phones, laptops and other mobile Internet-connected devices, the National Broadband Plan

¹³ Tracy Ford, *Light Regulatory Touch Best Way to Stimulate Investment in Broadband: Panelists Tell FCC in Hearing*, RCR Wireless, Oct. 1, 2009, available at <http://www.rcrwireless.com/ARTICLE/20091001/FROTPAGE/910019995/light-regulatory-touch-best-way-to-stimulate-investment-in-broadband>.

¹⁴ See FCC, *Connecting America: The National Broadband Plan*, at 9-11 (Mar. 16, 2010), available at <http://www.broadband.gov/plan/> (“National Broadband Plan”).

correctly anticipates dramatically increasing demand for other wireless services, such as wireless backhaul and unlicensed services.¹⁵ The National Broadband Plan further explains that the adverse consequences of failing to meet burgeoning spectrum demand will be equally dramatic, including increased costs and prices, diminished service quality, stifled innovation and an inability by the U.S. to compete in world markets.¹⁶ With the right rules, the 2.3 GHz band can play an important role in satisfying overall spectrum demand.¹⁷

For wireless broadband to thrive, spectrum must not only be available, it must be subject to a regulatory environment that promotes investment.¹⁸ Unfortunately, the new performance requirements proposed in the *Performance Public Notice* fall far short of creating a viable situation for the WCS band. As the WCS Coalition noted in its initial comments, establishment of performance requirements is premature at this juncture, since the Commission has not yet even decided the technical and other service rules that will apply to WCS.¹⁹ The proposed performance requirements thus have no logical connection to whatever demands the forthcoming rules for WCS will impose on licensees.²⁰ This approach is at once arbitrary and counterproductive.²¹ As one commenter explains: “[A]rtificial 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

¹⁵ *Id.* at 77.

¹⁶ *Id.*

¹⁷ *Id.* at 85 (proposing to make additional spectrum available and revise technical rules to enable robust use of 2.3 GHz band).

¹⁸ *Id.* at 85 (noting tools at Commission’s disposal for making spectrum usable for broadband).

¹⁹ WCS Coalition Comments at 1.

²⁰ *Id.* at 5.

²¹ *Id.* at 7-10 (noting several unresolved technical issues that would significantly affect the timing and extent of WCS deployment).

of the market have historically without exception resulted in pleas for extensions which could not reasonably be denied.”²²

Some of the proposals advanced in the *Performance Public Notice* seem completely divorced from the reality of building and operating a wireless network. For example, the Commission has proposed to set the first performance evaluation deadline at just 30 months – the earliest wireless services performance deadline ever. This deadline simply does not afford sufficient time for licensees to provision WCS service efficiently, as the record in this proceeding demonstrates.²³ Adoption of an overly-aggressive performance requirement that cannot be supported by rational business plans will not spur investment, but rather will chill the very investment in WCS services the Commission presumably hopes to encourage by modifying the performance requirements.

This chill on investment is exacerbated by the severe consequences WCS licensees face if they fail to meet even the initial 30-month proposed benchmark. By terminating a WCS license “automatically” and “without further Commission action” if the licensee fails to meet the applicable benchmark in the service area,²⁴ the Commission heightens the investment risk licensees already face, further undermining the goal of encouraging wireless broadband services

²² Joint Comments of Green Flag Wireless, LLC, CWC License Holding, Inc. and James McCotter, Revisions of Performance Requirements for 2.3 GHz Wireless Communications Service, WT Docket 07-293, at 4 (Apr. 21, 2010) (“Green Flag Wireless Comments”).

²³ Reply Comments of the WCS Coalition, Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, WT Docket No. 07-293, at 4-5 (Apr. 29, 2010) (“WCS Coalition Reply Comments”); Green Flag Wireless Comments at 4-5; Comments of Stratos Offshore Services Company, Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, WT Docket No. 07-293, at 6 (Apr. 21, 2010) (“Stratos Offshore Services Comments”).

²⁴ *Performance Public Notice* at 3. Presumably, the requirements of due process provided for in the Communications Act will not be discarded in these new “automatic” termination procedures.

using WCS spectrum. As one commenter puts it: “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.”²⁵

The proposed performance requirements seem especially inappropriate given the Commission’s recent treatment of 700 MHz spectrum.²⁶ This disparate treatment is all the more striking given that the propagation characteristics of 700 MHz spectrum suggest those licensees could reach more of their license areas more quickly than operators using 2.3 GHz WCS spectrum.²⁷ The proposed “death penalty” for WCS licensees that fail to meet performance benchmarks is inexplicably more severe than the penalty for 700 MHz licenses, which are forfeited only to the extent build-out requirements are not met.²⁸

It is difficult to comprehend fully the Commission’s intent in proposing the new WCS performance requirements. The *Performance Public Notice* offers no explanation for the proposed rules either generally or, as discussed above, with reference to forthcoming technical and service rules the Commission plans to adopt. To the extent the Commission believes that WCS spectrum should be placed in “better hands” because some licensees have not made the most productive use of WCS spectrum, it should not be setting unrealistic performance benchmarks designed to induce failure, but rather should be exploring application to WCS of the

²⁵ Green Flag Wireless Comments at 6; *see also* Stratos Offshore Services Comments at 7; WCS Coalition Comments at 4.

²⁶ WCS Coalition Reply Comments at 5-6, 9-11; WCS Coalition Comments at 15-16.

²⁷ Horizon Wi-Com Comments at 5.

²⁸ *Id.* (citing 47 C.F.R. §27.14(h)(1)); Green Flag Wireless Comments at 6.

market-based mechanisms described in the National Broadband Plan.²⁹ An almost assured “death penalty” for many current licensees, based on unreasonable performance standards, will lead to further delay and controversy which will have the affect of prolonging the deployment of service in this band. Market-based options would be a more advisable path.

III. CONCLUSION

WCS spectrum can play an important role in fulfilling the vision described in the National Broadband Plan. Comcast shares the Commission’s commitment to enhancing use of WCS spectrum, as our compliance with the existing performance requirements underscores. As the record demonstrates, however, the proposed performance requirements are inappropriate and will undermine – not enhance – efforts to make the most of this valuable spectrum. Accordingly, Comcast respectfully requests that the Commission decline to adopt the requirements in the *Performance Public Notice*.

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²⁹ National Broadband Plan at 75-76.