

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In re: Request for Comment on Revision of )  
Performance Requirements for 2.3 GHz Wireless )  
Communications Service )  
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WT Docket No. 07-293

**COMMENTS OF HORIZON WI-COM, LLC**

Horizon Wi-Com LLC (“Horizon”), by counsel, hereby submits its comments in response to the Commission’s Public Notice of March 29, 2010<sup>1</sup> regarding the captioned matter.<sup>2</sup>

Horizon applauds the Commission’s desire to develop enhanced performance standards, and looks forward to participating in this process. Yet, as set forth below, the predicate for such a change in any licensee obligations (i.e., enhanced technical rules for the WCS) has not yet arrived. Most certainly, there is no basis for changing requirements for a licensee like Horizon that has already met the established and formal existing performance requirements and has had such performance formally accepted by the Commission.

**I. INTRODUCTION AND BACKGROUND**

WCS licenses were initially granted almost thirteen years ago. See, *In the Matter of Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service*, 12 FCC Rcd 10785 (1997) (the “WCS Service Order”), setting forth rules for the WCS. See also *Public Notice*, 13 FCC Rcd 4782 (1997), announcing grant of the WCS licenses. From

<sup>1</sup> Public Notice entitled Requests Comments on Revision of Performance Requirements for 2.3 GHz Wireless Communications Service, FCC 10-46 (the “Public Notice”). The Public Notice was published in the Federal Register on April 6, 2010. 75 Fed Reg. 17349-01, April 6, 2010. Accordingly, comments are due as of this date and these comments are timely filed.

<sup>2</sup> Horizon is a member in good standing of the WCS Coalition (the “Coalition”). Horizon understands that the Coalition is also submitting comments this date in this proceeding, and Horizon concurs generally with the Coalition’s comments. By these comments, Horizon focuses upon Horizon-specific and related issues.

the very inception of WCS licensing, there have been material unresolved questions concerning FCC rules to be adopted regarding coordination and co-existence between WCS licensees and SDAR licensees in adjacent bands. This the Commission has recognized repeatedly. See e.g., WCS Service Order. Indeed, this was one large factor in the Commission's determination to grant virtually all WCS licensees a three year extension of time to meet existing performance requirements (the "Extension"). Order, WT Docket 06-102, 21 FCC Rcd 14140 (WTB, 2006).

Virtually all WCS licensees elected not to construct prior to the expiration date of the original license grant (July 21, 2007), and in a manner initially required by the Commission. Horizon was an exception. It timely built all of its licenses. It did so prior to the expiration of its initial license term. It consulted with Commission staff regarding its build out prior to constructing. After its build out, Horizon filed the proper notifications of construction with the Commission. And Horizon's notifications were formally "accepted" by the Commission.<sup>3</sup> Then the acceptances were confirmed upon appeal.<sup>4</sup>

While Horizon was building, most other WCS licensees were relying upon the Extension. In renewal filings for many WCS licensees other than Horizon, no discussion of construction completion was, or could have been, made. Many, perhaps most, of those renewals were challenged on the basis that the applicant was not entitled to an "expectancy of renewal" because it did nothing during the initial term of its license. The primary challenging parties also challenged Horizon's renewal filing, even though Horizon had timely built, and had its build notifications formally accepted.

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<sup>3</sup>FCC ULS system entries for all Horizon WCS stations, reflecting the Commission determination that construction referenced in the Horizon notifications complies with the FCC's build out rules. The Commission "accepted" each Horizon notification. (There is no technical "grant", as there is no application before the Commission.). Thus, Horizon received the most positive response available from the Commission on any construction notification.

<sup>4</sup> Memorandum, Report & Order, in Re Applications of Horizon Wi-Com, LLC 24 FCC Rcd 359 (Mob. Div., 2009)

## II. DISCUSSION

### A. The Public Notice Does Not Give Proper Consideration to A WCS Licensee Like Horizon Who Has Already Constructed

Even if the Commission and its Public Notice were to have set forth a basis for changing performance standards on a forward-looking basis for those licensees who have not constructed, it does not follow that any basis exists for imposing heightened performance standards upon licensees who have built, such as Horizon. After all, upon reliance on its license terms and express rules, Horizon did what most other WCS licensees have not done: Horizon built earlier than necessary; it built more than necessary; it expended considerable funds and other resources for build out; and it requested and received formal FCC approval for its build-out. See n.3, supra.

Historically, the Commission has properly, and repeatedly, recognized that all licensees in a given service need not be treated equally with respect to performance requirements and other matters, and that timing of license activity can be a reasonable basis for distinguishing treatment of licensees in the same service. For example, in the 700 MHz band, all Lower Band Block C licensees need only provide “substantial service” by the end of their license term. 47 C.F.R. § 27.14. Other Lower Band 700 MHz licensees, who were licensed later, need to adhere to population or geographic area-based quantitative standards. *Id.* The key to the Commission’s properly disparate treatment here is that one group was licensed before new standards were promulgated and the other group was licensed later. Significantly, at least some in the early group had constructed facilities prior to the new rules being contemplated. In the Personal Communications Service (“PCS”), performance requirements also vary from band to band. See also Section 101.81 of the rules, where primary and secondary status of fixed microwave licensees is determined by whether licensees took certain actions before a given date. See also, WT Docket No. 05-211, where the Commission revised unjust enrichment schedules for some licensees but not for those licensees who had acted (there applied) prior to revision of the rules. Second Report and Order and Further Notice of Proposed Rulemaking 27 FCC 4753 (2006).

The Commission should take this same approach here and apply enhanced performance

requirements, if to anyone, only to those who had not built out prior to the enhanced standards being proposed.<sup>5</sup> Where licensees have built, and had their build notifications accepted by the Commission, the Commission should not now alter radically existing license terms.

The Commission's distinguishing between those WCS licensees who have built and those who have not built would further the public interest in a several ways. First, it is necessary to protect fundamental due process rights of those who have built. Second, it is necessary to protect the integrity of the Commission's auction and general licensing processes. Without it, considerable uncertainty and unpredictability would thwart investment in wireless services and trust in the Commission. That would in turn limit services available to the public generally and work contrary to the public interest. Lastly, it would send the wrong message to the general licensee community: Rather than encouraging early build out, it would reward inaction by licensees.

## B. The Public Notice Provides No Bases to Change Existing Rules

At the heart of the Commission's consideration of changing construction requirements is a "if we help you here, you can help us there" theory. (See Section II A. above.) Apparently, the "help" the Commission believes it has conveyed in this instance is enhanced technical rules that somehow increase the value of the WCS spectrum currently licensed. The problems with that theory, at least as applied here, are numerous. First, as the issue of technical rules is the subject of a separate proceeding, questions exist as to whether a tradeoff in one proceeding can appropriately be made in another one.<sup>6</sup> Second, at issue in this docket, and in both IB Docket No. No. 95-91 and General Docket No. 90-357, is not a change in existing rules, but rather a long-overdue promulgation of rules to coordinate WCS and SDARS operations. Moreover, the tentatively proposed rules, as Commission staff have informally communicated to WCS licensees, do not resolve important issues existing under the existing status quo. Rather, they present material technical problems for WCS licensees that appear to prevent the provision over WCS spectrum of the very service that the Commission professes to want to be available to the

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<sup>5</sup> That would properly reflect that licensees who have built out expended considerable resources in reliance upon existing formal rules of the Commission.

<sup>6</sup> Given this, out of an abundance of caution, Horizon is submitting a copy of these comments in Docket No. IB Docket No. 95-91 and General Docket No. 90-357.

public.<sup>7</sup> Lastly, no new technical rules have yet been adopted. Rather, the Commission has merely invited comment on draft interference rules involving WCS and SDARS.<sup>8</sup> No one knows what rules will be promulgated, and enhanced performance standards should not be promulgated in a vacuum.

Under these circumstances, it is woefully premature to contemplate material changes in performance standards based on rules that are not yet known or effective.

C. The Public Notice Does Not in Any Way Explain Why the Standards Set Forth in the Public Notice Could Be Appropriate

One of the most striking aspects of the Public Notice is the total absence of support for the standards proposed. The potentially “altered” technical rules are not even articulated. (Nor could they be articulated since, none are yet existent.) So if the Commission were correct in its presumption that changing those rules could justify changes in performance requirements, one would still not know what, if any, performance requirements should be changed without knowing what the technical rules will be.

Even if the technical rules were known, and they were to justify a wholesale change in performance standards, there would still be no basis for agreeing with, or disagreeing with, the particular standards set forth in the Public Notice. This is because the Public Notice merely sets forth proposed numerical standards without providing any rationale as to why they are at the proper level. In addition, there is absolutely no discussion of their appropriateness specifically for WCS. For example, enhanced coverage requirements contemplated for WCS is far greater than for 700 MHz, and propagation at 700 MHz is far better than at 2.3 GHz. *Compare* 47 C.F.R. § 27.14 with the standards proposed in the Public Notice. Yet, no explanation for this disparity has been provided. Also, the proposed sanction here for non-compliance – complete loss of license – is far greater than the “use or lose” sanctions recently adopted for 700 MHz licensees. See, e.g. 47 C.F.R. § 27.14(h)(1). Again, no explanation for the disparate treatment has been provided.

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<sup>7</sup> For example, the inclusion of any duty cycle rules precludes FDD and necessarily is technology specific and limiting in nature. Lastly, currently contemplated rules present out-of-band limitations and coordination zone issues.

<sup>8</sup> See, Public Notice, DA 10-592, rel. April 2, 2010. Comments have not yet been submitted in this proceeding.

Without answers to these questions, it is not possible for parties to comment reasonably on the substance of those standards. This is particularly the case when the Commission is changing rules or policy, and has a higher burden to meet to justify such changes. As reviewing courts have repeatedly pronounced, “When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasonable explanation for departure from prior norms.”<sup>9</sup> In this regard, reviewing courts have also observed that “sharp changes of agency course constitute ‘danger signals’ to which a reviewing court must be alert.”<sup>10</sup> Yet, no rationale for the change proposed has yet been articulated.

D. It Would be Particularly Unfair to Impose Upon Licensees New Build Out Obligations at a Time When Renewal Clouds Remain Over Many WCS Licenses, and a Construction Cloud Remains Over Horizon

The vast majority of WCS licenses are under a cloud regarding renewal of the licenses. This cloud has lingered for nearly three years. The cloud consists of “competing applications” requesting the very same spectrum already awarded to WCS licensees.<sup>11</sup> Further, Horizon is involved in a dispute where a third party has challenged the Commission staff determination, and subsequent confirmation, of the sufficiency of their build showings.<sup>12</sup>

Given the lingering nature of these clouds, it would be absolutely inappropriate for the Commission to add to the burdens of these licensees, by increasing performance obligations, when there is so little certainty regarding these matters. From the perspective of basic economics – and justice – licensees need answers to these issues before they can assess reasonably the appropriateness of further investment in the licenses. The clock for further build out cannot fairly start until these matters are resolved.

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<sup>9</sup> *Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986); *State Farm*, 463 U.S. at 57; *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1810-12 (2009); *see also Verizon Tel. Cos. V. FCC*, 570 F.3d 294, 300 (D.C. Cir. 2009) (“If the FCC changes course, it ‘must supply a reasoned analysis’ establishing the prior policies and standards are being deliberately changed.” (citation omitted)); *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001) (“[A]n agency acts arbitrarily and capriciously when it abruptly departs from a position it previously held without satisfactorily explaining its reason for doing so.”); *Mazza v. Dep’t of Health & Human Servs.*, 903 F.2d 953, 959 (3d Cir. 1990).

<sup>10</sup> *Natural Resources Defense Council v. EPA*, 683 F.2d 752, 760 (3<sup>rd</sup> Cir. 1982).

<sup>11</sup> The Commission has recently decreed, in the 700 MHz band, not to permit the type of challenge here at issue. But the Commission has not yet clarified applicability of that policy to WCS.

<sup>12</sup> Counsel for that party is being served with a copy of this pleading, out of an abundance of caution.

### III. CONCLUSION

Horizon is one of very few WCS licensees who has already built out its licenses to meet all existing performance requirements. The Commission has formally acknowledged that, then confirmed the sufficiency of the Horizon build. Given this, it would violate both due process and fundamental fairness, and undermine the integrity, predictability and certainty of the Commission's rules were the Commission to change the fundamental rules of the service at this time.

Horizon welcomes the opportunity to work with the Commission to properly enhance existing performance requirements. Yet, as Horizon has demonstrated herein, it is not the proper time for such enhancement. The predicate for such a substantial change in license obligations, i.e. significant changes in technical rules, is far from done. No one knows what rules will eventually be promulgated, or when. Moreover, those rules that are contemplated include severe limitations for WCS licensees.

The continuing pendency of challenges to licensee renewals of many WCS licensees and the build-out submission of Horizon provide an additional reason the Commission should not move forward on changing performance standards at this time.

For all of the foregoing reasons, Horizon urges the Commission not to move forward with revised performance standards at this time.

Respectfully submitted,  
Horizon Wi-Com, L.L.C.

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