

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,) WT Docket No. 10-112
95, and 101 To Establish Uniform License)
Renewal, Discontinuance of Operation, and)
Geographic Partitioning and Spectrum)
Disaggregation Rules and Policies for Certain)
Wireless Radio Services)
)
Imposition of a Freeze on the Filing of)
Competing Renewal Applications for Certain)
Wireless Radio Services and the Processing of)
Already-Filed Competing Renewal)
Applications)
_____)

COMMENTS OF AT&T INC.

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COMMENTS OF AT&T INC.

AT&T Inc., on behalf of itself and its affiliates (“AT&T”), respectfully responds to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.¹ In the NPRM, the Commission, with the goal of simplifying the regulatory process for licensees,² proposes to create “consistent requirements for renewal of licenses and consistent consequences for discontinuance of service”

¹ *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services; Imposition of a Freeze on the Filing of Competing Renewal Applications for Certain Wireless Radio Services and the Processing of Already-Filed Competing Renewal Applications*, Notice of Proposed Rulemaking and Order, WT Docket No. 10-112, FCC 10-86 (May 25, 2010) (“NPRM”).

² *Id.* at ¶ 1.

and to “clarify construction obligations for spectrum licenses that have been divided, by geographic partitioning or disaggregation of the spectrum.”³ As discussed below, AT&T supports the Commission’s preference for a simple regulatory process, but believes that some of the changes proposed in the NPRM are unnecessary, overly burdensome, and complex. Instead, AT&T recommends retaining the existing framework for processing most renewal applications, and modifying the procedures—in a clearly defined and unambiguous manner—only for renewals that are contested.

I. INTRODUCTION AND SUMMARY

The current process for renewal of uncontested licenses and the existing partitioning and disaggregation rules are clear and equitable, and the predictability of those rules has promoted rational investment in wireless services. Unfortunately, without justification, the processes and procedures proposed in the NPRM threaten to exponentially increase the burden placed on renewal showings for uncontested licenses, potentially modify the substantive standards by which past performance is judged, and fundamentally alter performance requirements for parties that have entered into private partitioning and disaggregation contracts in reliance on existing rules.⁴ Instead, the Commission should limit the proposed reforms to contested renewals, with only minimal modifications to the existing procedures.

Indeed, if adopted as proposed in the NPRM, the new renewal rules would be not only contrary to the Commission’s stated goal of simplifying the regulatory process for licensees, but

³ *Id.* (“The Commission currently has a patchwork of rules governing renewal and discontinuance obligations for wireless services.”).

⁴ If the Commission concludes that a licensee’s showing “is insufficient, its renewal application will be denied, and its licensed spectrum will return automatically to the Commission for reassignment.” NPRM at Appendix A, *Proposed Rules*, at 47 C.F.R. § 1.949(h) (“Proposed Rules”).

also contrary to sound public policy. The increased data collection process imposes burdensome requirements on licensees, as well as administrative costs on the FCC's limited resources, but has no offsetting benefit for consumers or licensees. Further, the vague requirements proposed in the NPRM—and, in particular, the nebulous “substantial service” standard— have no place in license renewal proceedings due to the draconian nature of the penalty implicated for failure to meet those requirements—license forfeiture. Historically, “substantial service” was never a stand-alone performance requirement. Instead, it has been a safety valve for market-based licensees who cannot satisfy the numerical, objective safe harbors contained in service-specific construction performance rules.⁵ Put another way, “substantial service” has provided licensees

⁵ See, e.g., 47 C.F.R. § 24.103(d) (PCS rules); *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, ¶ 113 (1997) (establishing “four permanent links per one million people” and “coverage to 20 percent of the population” as safe harbors for substantial service); *Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0GHz Bands*, Report and Order and Second Notice of Proposed Rule Making, 12 FCC Rcd 18600, ¶ 46 (1997) (concluding that “[a]lthough a finding of substantial service [for a 39 GHz licensee] will depend upon the particular type of service offered by the licensee, one example of a substantial service showing for a traditional point-to-point licensee might consist of four links per million population within a service area”); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 12545, ¶ 270 (1997) (concluding that “for an LMDS licensee that chooses to offer point-to-multipoint services, a demonstration of coverage to 20 percent of the population of its licensed service area at the 10-year mark would constitute substantial service. In the alternative, an LMDS licensee that chooses to offer fixed, point-to-point services, the construction of four permanent links per one million people in its licensed service area at the 10-year renewal mark would constitute substantial service.”); *Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order, 13 FCC Rcd 19853, ¶ 34 (1998) (establishing “coverage to one-third of the maritime VPC's major waterway(s)” as a five year safe harbor for substantial service, and “coverage to two-thirds of the major waterway(s)” as a ten year safe harbor, and further noting “[t]hese ‘safe-harbor’ examples are intended to provide licensees a degree of certainty regarding how to comply with the substantial service requirement”); *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Report and Order and Memorandum Opinion Footnote continues on next page . . .

some flexibility in how they meet the build-out requirements in their markets. Renewal

and Order, 15 FCC Rcd 1497, ¶ 70 (1999) (establishing “(a) a demonstration of coverage to twenty percent of the population or land area of the licensed service area; or (b) a demonstration of specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers; or (c) a demonstration of service to niche markets or a focus on serving populations outside of areas currently serviced by other licensees” as safe harbors for substantial service); *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, Memorandum Opinion and Order, 14 FCC Rcd 17556, ¶ 17 (1999) (noting “[t]o the extent that licensees seek a ‘safe harbor’ for compliance with our construction requirements, they have the alternative of relying on the specific population coverage criteria”); *Amendment of the Commission's Rules Regarding Multiple Address Systems*, Report and Order, 15 FCC Rcd 11956, ¶ 96 (2000) (establishing “(i) whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and (ii) whether the licensee’s operations service niche markets or focus on serving populations outside of areas served by other licensees” as safe harbors for substantial service and noting “[t]hese safe-harbor examples are intended to provide MAS licensees a degree of certainty as to how to comply with the substantial service requirement by the end of the ten-year initial license term”); *The 4.9 GHz Band Transferred From Federal Government Use*, Notice of Proposed Rulemaking, 65 FR 14230, ¶¶ 58-60 (2000) (noting “[w]e propose that licensees in the 4.9 GHz band be governed by the same construction standards, including the same safe harbor provisions [as LMDS licensees],” and noting “[o]ur safe harbor proposals are intended to provide licensees an opportunity to achieve certainty as to compliance with the substantial service requirement during or by the end of the initial license term”); *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, Second Report and Order, 15 FCC Rcd 5299, ¶ 78 (2000) (establishing “leasing the predominant amount of its licensed spectrum in at least 50 percent of the geographic area covered by its license” and “providing coverage to 50 percent of the population” as safe harbors for substantial service, and noting “[t]hese ‘safe harbor’ examples are intended to provide Guard Band Managers a degree of certainty regarding how to comply with the substantial service requirement”); *Amendment of Parts 2 and 25 of the Commission's rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, ¶ 177 (2002) (explaining that for an “MVDDS licensee that chooses to offer point-to-multipoint service, a demonstration of substantial service would consist of actual delivery of service to customers via four separate transmitting locations per million population”); *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*, Third Memorandum Opinion and Order, 21 FCC Rcd 5606, ¶ 288 (2006) (adopting the following “safe harbors” for BRS: “constructing six permanent links per one million people for licensees providing fixed point-to-point services; providing coverage of at least 30 percent of the population of the licensed area for licensees providing mobile services or fixed point-to-multipoint services; providing specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; or providing service to niche markets or areas outside the areas served by other licensees”).

standards should possess that same flexibility. Licensees have a right to know the specific showings that will justify renewal before they commit billions of dollars at auction and in network and service deployment. The “substantial service” standard—without objective, numerical safe harbors—strips licensees of this right.

Moreover, imposing new requirements that increase the construction burdens that licensees must meet in order to obtain renewal would be legally infirm. Such requirements violate the Administrative Procedure Act (“APA”)⁶ because they upset the reasonable expectations and serious reliance interests of licensees, which spent billions of dollars in private risk capital to obtain spectrum licenses and deploy next-generation networks—all with the understanding that their licenses would be renewed under the substantive standards and processes in place when the license was obtained. Moreover, new onerous renewal requirements would effect a regulatory taking in violation of the Fifth Amendment Takings Clause. Further, without empirical safe harbors, employing a “substantial service” requirement for license renewal would be unconstitutionally vague under the Due Process Clause. Finally, if the Commission plans to apply new rules to currently pending license renewals that cover conduct that predates the rules—as the Commission’s related Order suggests by directing the Wireless Telecommunications Bureau to conditionally grant such applications subject to the conclusion of this rulemaking—such a result would plainly violate the APA’s prohibition on retroactive rulemaking and the fundamental due process requirement of fair notice.

If the FCC nevertheless seeks to modify the renewal requirements for market area licenses, it should adopt the following requirements, which are common to market area services.

First, the Commission should maintain the streamlined renewal process for renewals that are

⁶ 5 U.S.C. § 551(4).

routinely granted unless challenged. *Second*, the Commission should create a universal process for filing petitions to deny or to challenge renewals. The filing of a petition would trigger an obligation on the part of the renewal proponent to set forth a more comprehensive case for renewal. *Third*, the Commission should universally use the “substantial service” and “substantial compliance with the rules” standards as the threshold for a dispositive renewal preference even in the face of a challenge, but the service-specific safe harbors must be retained as an objective means to demonstrate compliance with the renewal standards. *Fourth*, the Commission should adopt its tentative conclusion to limit incentives for strike filings by prohibiting competing renewal filings and returning non-renewed licenses to the FCC inventory for subsequent auction.

Consistent with the NPRM’s focus on streamlining license requirements, the NPRM also seeks comment on performance requirements for partitioned and disaggregated licenses and on permanent discontinuation requirements. As detailed below, the Commission should retain the existing performance requirements for partitioned and disaggregated licenses. And, any new permanent discontinuation requirements should be applied in an even-handed manner across wireless services.

II. ANY INCREASE IN THE BURDEN TO JUSTIFY RENEWAL WOULD BE INEQUITABLE AND UNSOUND AS A MATTER OF PUBLIC POLICY.

Any renewal rules the Commission adopts should be clear and equitable and promote rational investment in wireless services. The proposed rules do not satisfy these policy goals. The Commission proposes to exponentially increase the burden of demonstrating that renewal thresholds have been met, substantially increasing the complexity of the grant process for uncontested licenses. Specifically, the NPRM proposes that licensees provide, for each market

area license, over 12 new factual showings involving substantial amounts of data.⁷ But the Commission does not explain how these new showings simplify matters for licensees or result in any consumer benefit. Equally troubling is the Commission’s failure to adequately define the specific information required for each of these factual showings and to explain how it will apply the information from these factual showings when evaluating renewal applications. The Commission simply notes that if a licensee’s showing “is insufficient, its renewal application will be denied, and its licensed spectrum will return automatically to the Commission for reassignment.”⁸ As a result, the proposed renewal procedures could require substantial additional build-out, with no instructions on the form or extent of build-out that must occur to guarantee renewal.

The proposed rules represent fundamentally unsound public policy. *First*, the increased data collection process will severely burden licensees and consume FCC resources with no offsetting benefit for consumers. *Second*, the vague requirements proposed by the Commission have no place in license renewal proceedings due to the draconian nature of the penalty implicated for failure to meet those requirements—license forfeiture. Licensees should know the specific performance requirements to justify renewal for any particular license, and they should have access to this information as they make decisions to acquire spectrum. By stripping carriers of this knowledge, the NPRM proposals will necessarily chill investment in networks, or substantially increase the cost of capital due to the increase in perceived risk. *Finally*, uncontested renewals should be granted unconditionally during the pendency of this rulemaking. While AT&T understands why the Commission wants to grant contested renewals on a

⁷ Proposed Rules at 47 C.F.R. § 1.949(c).

⁸ *Id.* at 47 C.F.R. § 1.949(h).

conditional basis, licenses where renewals have not been challenged—either through a petition to deny or a competing filing—should not be subject to a vague future condition.

A. The Proposed Renewal Requirements Are Substantially More Onerous Than Existing Requirements without Any Countervailing Benefit.

The current renewal process for almost all applications is straightforward and does not weigh down the FCC or renewal applicants with unnecessary administrative burdens. Licensees file—and the FCC processes—an enormous number of uncontested applications each year.⁹ So long as a licensee is in good standing and there are no competing applications or petitions to deny, the Commission has streamlined renewal grants, which imposes little cost on the FCC or licensees. The NPRM, however, threatens to upset this efficiency, with no offsetting benefits for consumers. The proposed rules would require licensees to collect and report an unprecedented amount of complex data for each market area license, including uncontested licenses where no party has complained about the level of service provided.¹⁰

1. The Existing Renewal Application Process Does Not Require Major Reform.

The NPRM asserts that the proposed rule changes are needed to make renewal “clearer and consistent across services,”¹¹ to “simplify the regulatory process for licensees,”¹² and to

⁹ AT&T Mobility, for example, has filed renewal applications for 256 Cellular licenses, 742 PCS licenses, and 951 Microwave licenses over the last five years. Additionally, AT&T Inc. has filed 929 renewal applications since that time.

¹⁰ Proposed Rules at 47 C.F.R. § 1.949(c). The Commission’s timing could not be worse, considering recent Commission estimates that 430,000 renewal showings will be filed over the next ten years. *See* NPRM at ¶ 7 (“[L]icensing records reflect that, over the next ten years, we can expect more than 30,000 renewal showings to be filed by geographic-area licensees and more than 400,000 by site-based licensees.”).

¹¹ NPRM at ¶ 1.

¹² *Id.*

implement “expeditious renewal procedures.”¹³ But “expeditious renewal procedures” that are “consistent across services” already exist. The overwhelming majority of renewal applications are for uncontested applications, which is an extremely effective and simple process.¹⁴ For wireless services, Section 1.949 establishes a 90-day filing period for renewal applications and instructs applicants to use the same form as applications for initial authorization in the same service, *i.e.*, FCC Form 601 or 605.¹⁵ And, while Section 1.949 also instructs applicants to follow any additional service-specific rules, the existing service-specific rules typically address only contested renewal applications and do not impose additional burdens on most licensees.¹⁶

Indeed, the concerns expressed in the NPRM that specific services have ambiguous and overly complex renewal procedures warranting overhaul appear overstated:

- **Part 22 Cellular Radiotelephone Service.** The NPRM overstates the complexity of the renewal process for the large majority of cellular licenses.¹⁷ Specifically, the NPRM implies that all cellular renewal applicants are subjected to a two-step comparative hearing process.¹⁸ In reality, the two-step process is implicated only when a renewal is

¹³ *Id.* at ¶ 7.

¹⁴ In the cellular context, the Commission has remarked that renewing existing licenses “accomplishe[s] the public interest objectives” of “encouraging investment in facilities” and “ensuring continuity of service.” *Amendment of Part 22 of the Commission’s Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 7 FCC Rcd 719, ¶ 3 (1992).

¹⁵ 47 C.F.R. § 1.949.

¹⁶ The exception to this statement is the 700 MHz rules in Part 27, which address both uncontested and contested applications.

¹⁷ NPRM at ¶ 9 (“The Part 22 Cellular Radiotelephone Service rules establish a detailed, two-step comparative hearing process for addressing a timely-filed renewal application and all timely-filed mutually exclusive applications. The rules require an administrative law judge to conduct a threshold hearing to determine whether a cellular renewal applicant is entitled to a renewal expectancy.”).

¹⁸ AT&T also points out that “substantial service,” in the context of cellular renewals, is the threshold for obtaining a renewal expectancy, not the threshold for obtaining renewal.

challenged. For the overwhelming majority of cellular licenses (*i.e.*, licenses that are not challenged), the process is vastly simpler and less administratively complex. As noted above, Section 1.949 of the Commission’s rules requires the filing of a simple form.¹⁹

- **Part 24 PCS.** The NPRM implies that PCS licensees are confused by the PCS renewal process, which has not been the experience of AT&T.²⁰ The PCS renewal process for uncontested licenses—like the cellular renewal process—is effective and requires only the filing of a simple form.²¹ In fact, the Commission’s Universal Licensing System shows that 2,839 applications for “Renewal Only” or “Renewal/Modification” filed for broadband PCS (CW) licenses have been granted.²² What is unclear, perhaps, are the specific renewal procedures if a renewal is contested.

At bottom, the NPRM conflates the requirements for uncontested renewals and contested renewals. While the procedures used in contested renewal proceedings may be ambiguous and require clarity, the streamlined filing requirements for uncontested renewals are well-understood by licensees, have proven to be efficient, are time tested, and come directly from Section 1.949.

2. The Proposed Renewal Application Rules Will Severely Burden Licensees and Drain FCC Resources with No Offsetting Benefit for Consumers.

Contrary to the Commission’s stated goals, the renewal standards proposed in the NPRM do not make renewal “clearer,”²³ “simpler,”²⁴ or “expeditious.”²⁵ Rather, the NPRM proposes to

¹⁹ 47 C.F.R. § 1.949.

²⁰ NPRM at ¶ 10 (“In contrast to the detailed Part 22 Cellular renewal rules, our Part 24 Broadband Personal Communications Service rules contain virtually no guidance regarding comparative renewal applications, do not specify how or when competing applications are to be filed against a renewal application, do not establish two-step hearings, and do not enumerate procedures for evaluating renewal applications or what is required in a renewal expectancy exhibit.”).

²¹ 47 C.F.R. § 1.949.

²² AT&T has been unable to find any contested PCS renewals. The only ungranted renewal applications that are shown in ULS for PCS were associated with licensees in bankruptcy proceedings or where extensions of construction deadlines were pending.

²³ NPRM at ¶ 1.

take an effective and straightforward renewal process and burden licensees with substantial and onerous new disclosures of dubious value. The proposed rules require all licensees to detail, for each market area license, including uncontested licenses:

- The level and quality of service provided by the applicant (*e.g.*, the population served, the area served, the number of subscribers, the services offered);
- The date service commenced and the duration of any interruptions;
- The extent to which service is provided to rural areas;
- The extent to which service is provided to tribal lands;
- Any other factors associated with the level of service to the public; and
- A copy of each FCC order that finds that the applicant violated the Communications Act or an FCC rule (regardless of whether the order relates to the license being renewed).²⁶

In addition to the showings listed in the proposed rules, the NPRM also suggests additional showings, including:

- An explanation of the licensee's record of expansion, including a timetable for the construction of new sites;
- A description of its investments in its system;
- A list, including addresses, of all cell transmitter stations constructed;
- Identification of types of facilities constructed and their operational status;
- Whether the licensee is offering a specialized service that does not require a high level of coverage to benefit customers; and
- Whether the licensee serves niche markets or focuses on serving populations outside of areas served by other licensees.²⁷

²⁴ *Id.*

²⁵ *Id.* at ¶ 7.

²⁶ Proposed Rules at 47 C.F.R. § 1.949(e).

As detailed below, these specific showings are unnecessary, overly vague, and will require significant additional time and resources for the applicant to produce, all while generating little value for regulators or the public.²⁸ As an initial, overarching matter, the proposed rules appear to incorrectly presume that licensees' networks can be neatly separated into components based on discrete FCC licenses. To illustrate, in AT&T's case, in the future it may have 700 MHz, 800 MHz cellular, 1900 MHz PCS, and 1.7/2.1 GHz AWS licenses that geographically overlap and, as far as AT&T's network is concerned, where various licenses may be fully integrated into a single consumer product.²⁹ In such circumstances, attributing capital investment, operating expenses, customers, cell sites, or other service-related metrics to any specific license is impossible. Even beyond that fundamental problem, there are a host of other factors that render the proposed information gathering highly onerous and impractical and the information generated of little value:

- **Investment in Wireless System.** The Commission proposes to require wireless providers to describe their system investments on a license-by-license basis. Where build-out in a licensed area started a long time ago, this information may be impossible to gather. Further, as wireless technologies have evolved, providers have made countless modifications to their wireless networks. It is impossible for providers to generate data evidencing these modifications. Even if the data exists, licensees will need to expend significant resources to put the investment information into any rational context. Going forward, this requirement would impose overly burdensome recordkeeping obligations on licensees, with no offsetting public benefit.

²⁷ NPRM at ¶ 27.

²⁸ If the Commission is simply interested in collecting this information for general data gathering purposes and high-level analysis—as opposed to a careful review of each renewal application, then the Commission should adopt these data reporting obligations in another proceeding, and not under the guise of reforming the renewal process.

²⁹ In addition, common antenna structures and transmission facilities are likely shared.

- **List of Cell Sites.** Requiring renewal applicants to list their cell sites—both current and future—is directly contrary to the intent of flexible, market area licensing. This filing would require licensees to gather and maintain a massive collection of information that may change on a daily basis. To the extent that the NPRM seeks future cell site information, that data may expose highly confidential expansion plans, allowing other licensees to anticipate changes in service and limiting competition among licensees.
- **Subscribers.** The number of subscribers in a licensed area has minimal bearing on whether a carrier provided substantial service during the license term. Further, it is manifestly unclear how this information would be used in the renewal process, as individuals do not subscribe to 800 MHz cellular service or 1900 MHz PCS service, but rather offerings that may span those bands and more. In fact, to the extent that a carrier has an extensive network, but few subscribers, it may well be the case that the carrier is providing service in a very rural environment, which arguably may serve the public interest. Subscriber data also would require the disclosure of confidential information, forcing carriers and the Commission to undertake unnecessary administrative hurdles to maintain that confidentiality and possibly setting up administrative challenges to seek the data.
- **Service Offered.** The NPRM suggests that carriers provide information on the services offered, but fails to specify what information must be disclosed for this requirement. This requirement appears to suggest that a license might be renewed, or not renewed, on the basis of the type of service offered by the licensee. However, it has traditionally been the Commission’s policy to allow regulatory flexibility and the market to stimulate and discipline the types of offerings to the public. To the extent that a particular licensee believes that a specific offering is commercially viable, the Commission should allow consumer demand and competition to determine the market outcome, not a renewal proceeding.
- **Dates of Service Initiation and Interruptions.** Once again, the utility of service initiation and interruption data is questionable. To the extent that the FCC is concerned with service interruption, Commission rules already require network outage reporting. It makes little sense to duplicate this regulatory requirement in the renewal process, especially since outages may have no relationship to network design or licensee fault, and the implication of including this information in the renewal process is that some level of interruption could rise to the level of nonrenewal. The service inception date appears even less relevant; to the extent that service initiation has been already reported under service specific rules (*e.g.*, cellular modifications), the data already exists at the FCC. To the extent that Commission rules have not required licensees to report the date of service initiation, licensees may have no record of this date—especially where licenses were acquired in the secondary markets. It is also unclear why service initiation at an earlier or later date should affect renewal, given the vagaries of terrain, weather, incumbent operations, and a host of other factors associated with the build-out of specific licenses.
- **Copies of FCC Orders.** The NPRM proposes that renewal applicants provide copies of all FCC orders related to rule violations. As an initial matter, the premise of the

requirement—that orders should be resubmitted to the agency that issued them—seems wasteful of licensee and FCC resources. At most, a simple citation to any such orders should suffice. The proposed rule—47 C.F.R. § 1.949(e)—is particularly burdensome because the showing is required of all affiliates of a licensee, even if the issue in an affiliate’s order bears no relationship to the license being renewed.³⁰ In a company like AT&T—with thousands of licenses and numerous regulated businesses—this showing is simply unreasonable. Moreover, the proposed certification alternative at 47 C.F.R. § 1.949(f) is equally oppressive because it requires company-wide due diligence for the renewal of a single license. While a history of noncompliance or compliance is relevant to renewal, the Commission also should clarify that this compliance obligation does not apply to notices of apparent violation. Such documents often are based on unsubstantiated claims that are proven false upon disclosure of the facts.

Even if licensees are not required to make a showing for each factor, they will likely feel compelled to do so in light of the uncertainty as to the weight the Commission will give to each factor, the uncertainty as to how the factors will be applied, and the overbearing penalty if a licensee fails to accurately predict the answers to these questions. These proposed evidentiary showings would not improve the current renewal process. If anything, they would inject unneeded confusion and uncertainty into renewal proceedings. As such, they should be rejected.

B. The Public Interest Does Not Support Increasing Renewal Burdens After Licensees Commit Billions of Dollars Acquiring Spectrum and Deploying Networks.

The Commission aims to implement renewal procedures that “serve the public interest by providing licensees certainty regarding their license renewal requirements” and that “facilitate their business and network planning.”³¹ As detailed below, the NPRM proposals go far beyond the goal of process reform into the unwarranted imposition of new substantive requirements. *First*, the renewal requirements proposed in the NPRM inequitably upset licensees’ reasonable reliance on existing rules to base planned network investments. *Second*, any licensee obligations

³⁰ Proposed Rules at 47 C.F.R. § 1.949(e).

³¹ NPRM at ¶ 7.

to construct facilities or provide service to the public should be adopted as performance requirements prior to licensing, not as renewal requirements after licenses are awarded. *Third*, given that non-renewal would result in license forfeiture, renewal requirements must be clear and intelligible and safe harbors must be established well in advance of when licenses are to be renewed. Uncertainty, whether through ambiguity or through changing requirements mid-term, increases the risk in investing in licenses, and therefore is contrary to the FCC's stated goal of enhanced 4G build-out.

1. The Onerous Renewal Requirements Proposed in the NPRM Would Inequitably Upset Licensees' Reasonable Reliance on Existing Renewal Standards to Base Planned Network Investments.

The proposed renewal procedures radically interfere with substantial investment-backed expectations. Licensees have developed their business models and expanded their networks believing that the Commission would retain its longstanding approach to renewal of licenses. Here, the new renewal standards proposed in the NPRM would defeat the reliance interests that wireless providers developed during the investment-friendly renewal regime over the last two decades—a regime that has fostered multi-billion-dollar investments in wireless voice and broadband networks and services and has increased the scope and availability of such services to subscribers.

On a going forward basis, the new renewal proposals would drive non-economic and irrational network build-out and discourage investment in 4G networks. Whereas market forces and customer needs historically have dictated network deployment, the proposed regulations will force wireless providers to build their networks in inefficient ways and to secure significant new capital contributions simply to ensure compliance with the proposed renewal requirements. Faced with the prospect of license loss, licensees would have no choice but to refocus their

network planning horizon in this fashion. Not only is this diversion an inefficient use of capital resources, it also introduces unnecessary risk to licensees and investors due to the vagueness of this proposed regulatory regime. As previously stated, any ambiguity in the requirements that ensure the continued use of a mobile provider's most critical—and costly—assets will increase perceived risks by lenders and investors. At best, this may affect the cost of capital for licensees and, at worst, could limit the financial resources necessary to construct the nation's 4G networks.

2. The Commission Should Establish Build-Out Obligations Prior to License Auctions, Not as Renewal Requirements Imposed in the Middle of a License Term.

Any licensee obligations to construct facilities or provide service to the public should be adopted as performance requirements prior to spectrum auctions, not as renewal requirements after licenses are awarded. The Commission has conducted spectrum auctions—and providers have bid and invested billions of dollars—based on an explicit understanding of the build-out requirements they would need to satisfy in order to retain their licenses. Even for licenses awarded prior to spectrum auctions, the overwhelming majority of such licenses were awarded to entities that have since sold them or been the subject of acquisitions where the value of the licenses was privately negotiated in reliance on existing build-out and renewal requirements. If licensees knew that build-out requirements would increase and could change post-acquisition, in all likelihood they would have bid less—or potentially not participated at all—in FCC auctions and secondary market transactions. Changing the rules of the game now would disrupt these expectations and potentially devalue those investments. And, going forward, spectrum auctions would garner less participation and the overall business case for wireless investment would decrease. Similarly, potential secondary market transactions that would serve the public interest

might not come to fruition because investors and potential acquirers would be leary of paying for what are essentially conditional licenses.

These outcomes do not benefit anyone: the Commission, wireless providers, or consumers. Accordingly, any licensee meeting a performance requirement duly adopted by the FCC and coincident with a renewal deadline should be deemed to meet any performance-based renewal criteria. Put another way, if the FCC has established an end-of-term construction benchmark and that benchmark is met, renewal should not impose additional construction obligations. To adopt regulations that require particular licensees to meet a specified goal, and then move that goal mid-term, is fundamentally inequitable and irrational as a matter of public policy.

3. Renewal Requirements Must Be Clear and Intelligible and Safe Harbors Must Be Established Well Before Licenses Are Scheduled for Renewal.

The vague renewal requirements proposed by the Commission have no place in license renewal proceedings due to the oppressive nature of the penalty for failure to meet those requirements—license forfeiture. Licensees should know exactly the performance that is required to justify renewal. Such clarity serves the public interest, as it encourages effective build-out and continuity of service. Licensees are able to engage in longer term planning and have the ability to derive a return on their investment for longer than the initial license term. By stripping carriers of this knowledge, the Commission will stymie build-out and efficient network investment.

The NPRM's proposed reliance on a vague "substantial service" standard as a stand-alone requirement for license renewal is particularly problematic. As noted previously, historically the "substantial service" standard for wireless carriers has been a safety valve for

market-based licensees that cannot satisfy the numerical, objective safe harbors contained in service-specific performance rules. It has not traditionally been a stand-alone requirement. Nor should it be in the renewal context. Licensees have a right to know the specific showings that will justify renewal before they commit billions of dollars at auction, in the secondary market, and in network and service deployment.

As detailed above, the Commission identifies 12 factors that licensees can use to justify license renewal, many of which have no bearing on renewal qualifications. Further, the NPRM fails to define the meaning of many of the factors or the specific information that licensees should file for each factor. For example, the Commission has not described what it envisions when it asks licensees to describe service “during the entire license period.” The rules provide no clarity as to whether there is any difference between “level” and “quality” of service. Nor does the NPRM provide any objective, numerical guideposts governing licensee build-out, let alone any safe harbors. Failure to spell out renewal requirements and safe harbors—and indeed, the elimination of the *de facto* safe harbors—creates vagueness that serves no regulatory purposes and creates unnecessary confusion. These failures also hinder network deployment given the risk-averse nature of investors and lenders.

III. ANY INCREASE IN THE CONSTRUCTION BURDEN TO JUSTIFY RENEWAL WOULD BE LEGALLY INFIRM.

A. The Proposed Renewal Standards May Constitute Impermissible Retroactive Rulemaking and Violate Fundamental Due Process Principles.

In so far as the Commission intends to apply any renewal rules adopted in this proceeding to currently pending renewal applications, as its related Order suggests,³² such action would

³² See NPRM at ¶ 113 (directing the Wireless Telecommunications Bureau “to grant currently pending applications for renewal, as well as applications for renewal filed during this rulemaking, on a conditional basis, *subject to the outcome of this proceeding*”) (emphasis added).

constitute impermissible retroactive rulemaking and violate fundamental principles of Due Process.³³ Specifically, the APA limits “rules” to agency prescriptions of “future effect”³⁴ and prohibits retroactive rules.³⁵ An agency rule may be unlawfully retroactive in two respects: it may be “primarily retroactive” or “secondarily retroactive.”³⁶ A rule is primarily retroactive if it “impair[s] rights a party possessed when he acted, increase[s] a party’s liability for past conduct, or impose[s] new duties with respect to transactions already completed.”³⁷ Such rules are “categorical[ly] limit[ed],” *i.e.*, per se unlawful.³⁸ Secondary retroactivity addresses agency rules that have “exclusively future effect but affect[] the desirability of past transactions”³⁹ by

³³ AT&T has joined CTIA and other wireless providers and associations in a Petition for Reconsideration of this Commission Order. *See* Petition for Reconsideration of CTIA-The Wireless Association, et. al, WT Docket No. 10-112 (filed August 6, 2010).

³⁴ 5 U.S.C. § 551(4). *See also* *NCTA v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009) (highlighting the “APA’s requirement that legislative rules . . . be given future effect only” (internal quotation omitted)).

³⁵ *See, e.g., DIRECTV v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997) (holding that “primarily retroactive” rules are per se unlawful under the APA); *Chadmoore Commc’ns, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997) (“[A] legislative rule may only be applied prospectively.”); *see also Bowen v. Georgetown Univ. Hosp.*, 448 U.S. 204, 216 (1988) (Scalia, J., concurring) (stating that the APA “does not permit retroactive application” of agency rules).

³⁶ *See, e.g., DIRECTV*, 110 F.3d at 825-26; *see also, e.g., Bergerco Canada v. U.S. Treasury Dep’t*, 129 F.3d 189, 192 (D.C. Cir. 1997) (“[T]here are two retroactivity limits in the APA: The first is a categorical limit, requiring express congressional authority and applying only in the domain of agency rules. The second limit is more elastic, governing all agency decisionmaking and involving the sort of balancing of competing values, both legal and economic, that often features in ‘arbitrary or capricious’ analysis and that has historically governed retroactivity considerations in the agency context.”).

³⁷ *DIRECTV*, 110 F.3d at 825-26 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

³⁸ *Bergerco Canada*, 129 F.3d at 192.

³⁹ *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001) (internal quotation marks omitted); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 (D.C. Cir.1986)
Footnote continues on next page . . .

“affect[ing] a regulated entity’s investment made in reliance on the regulatory status quo before the rule’s promulgation.”⁴⁰ “Retroactivity of this sort makes worthless substantial past investment incurred in reliance upon the prior rule.”⁴¹ In addition, “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”⁴²

The proposed rules, if applied to pending renewal applications, would be primarily retroactive.⁴³ While a renewal application is pending, the Commission reviews the licensee’s performance during the license term to determine whether renewal is warranted based on existing renewal standards. To apply new renewal standards to a pending renewal application would mean that a licensee’s past conduct would be adjudged under a standard that was not in place during the applicable license term. Accordingly, the application of whatever new rules result from the NPRM to currently pending renewal applications would “impose new duties with respect to transactions already completed,”⁴⁴ making them primarily retroactive and thus plainly

(“[R]etroactive modification or rescission of [a] regulation can cause great mischief. Of course, an agency must balance this mischief against the salutary effects, if any, of retroactivity.”).

⁴⁰ *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006); *see also NCTA*, 567 F.3d at 670 (“Our case law does require that agencies balance the harmful ‘secondary retroactivity’ of upsetting prior expectations or existing investments against the benefits of applying their rules to those preexisting interests.”).

⁴¹ *Bergerco*, 129 F.3d at 192-93 (quotation marks omitted).

⁴² *See, e.g., Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

⁴³ The Commission’s decision to conditionally grant renewal applications—“subject to such rules as [the Commission] may ultimately adopt in this proceeding,” NPRM at ¶ 113—indicates that the agency intends to apply new renewal rules to past conduct, or at least creates that possibility.

⁴⁴ *DIRECTV*, 110 F.3d at 826.

unlawful. In addition, there can be no debate about whether licensees with pending renewal applications received “fair notice” of the new rules,⁴⁵ because they would have had literally *no* notice. Applying yet-to-be-adopted rules to past conduct under pending renewal applications would be blatantly retroactive and a denial of due process.⁴⁶

In addition to their effect on pending renewal applications, the proposed renewal rules are also secondarily retroactive in violation of the APA because they effectively alter the bounds of providers’ licenses. Licensees purchased their wireless licenses with the reasonable expectation that they would receive what they paid for — *i.e.*, spectrum licenses that could be renewed under the Commission’s existing regulatory structure.⁴⁷ Based upon those reasonable expectations, reinforced by decades of relatively conflict-free adherence to that structure by licensees and the Commission, those licensees, including AT&T, invested billions of dollars to build-out their

⁴⁵ *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (holding that “due process requires that parties receive fair notice before being deprived of property,” and applying that requirement to a denial of a renewal application for a Commission license).

⁴⁶ The Commission could resolve this serious legal issue by making clear in this rulemaking that any new rules are limited to purely prospective effect and reversing its directive in the Order that the Bureau only conditionally grant pending license renewals. Setting aside for a moment this legal issue, the conditional grants make no sense with regard to *uncontested* renewal applications. Conditional licensing for uncontested applications is not only unnecessary, it threatens network deployment. A “conditional” stigma on a license is a factor that licensees must explain to investors, lenders, and business partners. And, any disclosure of “conditional” status would seem to implicate the possibility that the FCC could attempt to impose an *ex ante* requirements that the licensee had not met as of the deadline, implicating a retroactive license renewal—effectively a revocation of the license. As the Commission is well aware, the rulemaking process frequently takes years. For licensees and private investors—who finance build-out—this prolonged uncertainty shrinks the business case for network and service deployment. This uncertainty also threatens potential partnerships and strategic acquisitions that would benefit the public interest, as well as secondary market transactions that are critical for the optimal and efficient distribution of the nation’s finite spectrum resources.

⁴⁷ *See, e.g., NCTA*, 567 F.3d at 671 (“And by significantly altering the bargained-for benefits of now-unenforceable exclusivity agreements, the Commission has undoubtedly created the kinds of secondary retroactive effects that require agency attention and balancing.”).

wireless networks. With no analysis and minimal justification, much of which fails to pass scrutiny, the Commission now proposes to change that renewal structure to require substantially more burdensome reporting requirements and potentially more onerous build-out standards, while leaving licensees in doubt as to how this new structure will ultimately affect their licenses. Thus, the proposed renewal rules affect the desirability of past transactions, in that wireless licenses are rendered less valuable because of the increased hurdles for renewal and the uncertainty about how high licensees must jump to clear those hurdles. This squarely fits within the definition of retroactive rulemaking.

B. The Proposed Renewal Requirements Would Trigger Heightened Review Under the APA Because They Would Disrupt Serious Reliance Interests In Existing Renewal Requirements.

The Commission's proposed renewal requirements represent a dramatic reversal of policy that must satisfy particularly high hurdles under the APA to survive judicial review. "If the Commission changes course, it 'must supply a reasoned analysis' establishing that prior policies and standards are being deliberately changed,"⁴⁸ because "a rational person acts consistently, and therefore changes course only if something has changed."⁴⁹ "Indeed, where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as

⁴⁸ *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 57; see also *Wis. 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."); *Telecomms. Research and Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.")).

⁴⁹ *Schurz Commc'ns, Inc. v. FCC*, 982 F.2d 1043, 1053 (7th Cir. 1992).

arbitrary and capricious.”⁵⁰ In *FCC v. Fox Television Stations, Inc.*,⁵¹ the Supreme Court emphasized that the Commission must “display awareness that it *is* changing position” and that it may not “depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”⁵²

The *Fox* Court also identified two circumstances in which the Commission must satisfy an even higher burden of explanation than usual for a change of course. *Fox* requires an agency to “provide a more detailed justification [for a change in policy] than what would suffice for a new policy created on a blank slate” when the “new policy rests upon factual findings that contradict those which underlay its prior policy” and “when its prior policy has engendered serious reliance interests that must be taken into account.”⁵³ The Court explained that “[i]t would be arbitrary or capricious to ignore such matters” because “a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁵⁴

Here, the proposed renewal requirements, with insufficient explanation for their adoption, would disrupt “serious reliance interests that must be taken into account.”⁵⁵ The Commission’s current renewal process has been in effect for decades and as the wireless industry has exploded

⁵⁰ *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995); *Verizon Tel. Cos.*, 570 F.3d at 304 (“[I]t is arbitrary and capricious for the FCC to apply such new approaches without providing a satisfactory explanation when it has not followed such approaches in the past.”).

⁵¹ 129 S. Ct. 1800 (2009).

⁵² *Id.* at 1811.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

and spectrum value has increased, has been an important stimulant of wireless investment. During this time, wireless providers have invested hundreds of billions of dollars in private risk capital to deploy next-generation networks to communities across our nation in reliance on the fact that the Commission would renew their licenses under the current renewal standards. And wireless providers have spent billions at auction and in the secondary markets for spectrum based on the expectation that their licenses could be renewed in the future under existing renewal standards. The proposed renewal rules upset these reliance interests by creating uncertainty that will discourage investment in licenses at auction and inequitably upset licensees' reasonable reliance on existing rules. Accordingly, the reliance engendered by existing renewal rules heighten the burden faced by the Commission under *Fox* to explain its decision to reverse course.

As it exists, the record does not demonstrate the need for a new renewal standard for uncontested renewal applications. In the NPRM, the Commission generally explained that “uniform renewal policies and procedures will promote the efficient use of spectrum resources, and will serve the public interest by providing licensees certainty regarding their license renewal requirements.”⁵⁶ The Commission also found that the proposed renewal standards “would encourage licensees to invest in new facilities and services, and facilitate their business and network planning.”⁵⁷ And, the Commission set a goal to “simplify the regulatory process for licensees.”⁵⁸ For the reasons explained above, the proposed renewal standards complicate and inject substantial additional uncertainty into the renewal process. This uncertainty, the additional reporting requirements, and the potentially more burdensome build-out requirements, all of

⁵⁶ NPRM at ¶ 7.

⁵⁷ *Id.*

⁵⁸ *Id.* at ¶ 1.

which may lead to questions about whether renewal will be granted, would have the effect of discouraging investments in new facilities and services and create artificial barriers to efficient network planning and spectrum use.

C. The Proposed Renewal Requirements Would Violate the Takings Clause.

The proposed renewal requirements also raise serious Takings Clause concerns.⁵⁹ A regulatory “taking” occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified.⁶⁰ All of the factors for a regulatory taking are met here. Wireless licensees have vested property rights in the physical infrastructure of their wireless networks and in the ability to use those networks in reliance on the Commission’s existing renewal requirements. As discussed, the wireless industry currently operates under a renewal process that is effective and straightforward wherein renewal grants are streamlined at little cost to the FCC and licensees. Based on this efficient and reliable process, wireless licensees have invested hundreds of billions of dollars of private capital in expanding their networks and deploying technology and new services. Changing the renewal requirements as now proposed would interfere with these substantial investment-backed expectations, seriously devalue those investments, and reduce the

⁵⁹ See *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (holding that the Commission lacks authority to impose regulatory obligations that would result in a taking in “an identifiable class of cases”); see also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1510 (D.C. Cir. 1984) (en banc) (“When there is no authorization by an act of Congress or the Constitution for the Executive to take private property, an effective taking by the Executive is unlawful because it usurps Congress’s constitutionally granted powers of lawmaking and appropriation.”), *overturned on other grounds*, 471 U.S. 1113 (1985).

⁶⁰ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). The Supreme Court’s regulatory takings inquiry focuses on the character of the government action, the economic impact of the government action, and reasonable investment-backed expectations. *Penn Cent. Transp.*, 438 U.S. at 124.

ability of licensees to derive a return on their investment for longer than the initial license term.⁶¹ Accordingly, the Commission’s proposed renewal requirements would be unconstitutional under the Takings Clause and therefore unauthorized by law.

D. Employing A “Substantial Service” Requirement For License Renewal Would Be Unconstitutionally Vague Under The Due Process Clause.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”⁶² Vague laws offend important constitutional values in two ways: First, by “fail[ing] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden,”⁶³ a vague law “may trap the innocent by not providing fair warning.”⁶⁴ Second, a vague law “permits and encourages an arbitrary and discriminatory enforcement.”⁶⁵ Accordingly, the Fifth Amendment Due Process Clause,⁶⁶ “insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.”⁶⁷

⁶¹ See *District Intown Properties Ltd. P’ship v. District of Columbia*, 198 F.3d 874, 878 (D.C. Cir. 1999) (stating that “[a] regulation’s economic effect upon [a] claimant may be measured in several different ways,” including the ability to earn a reasonable rate of return).

⁶² *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

⁶³ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

⁶⁴ *Grayned*, 408 U.S. at 108.

⁶⁵ *Papachristou*, 405 U.S. at 170; *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). See also *Keeffe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985) (“A [law] is vague either if it does not give fair warning of the proscribed conduct or if it is an unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion.”).

⁶⁶ U.S. Const. amend V, cl. 4.

⁶⁷ *Grayned*, 408 U.S. at 108; see also *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (explaining that a rule “which either forbids or requires the doing of an act in terms
Footnote continues on next page . . .

This fundamental due process requirement applies to agency regulations.⁶⁸ “In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability.”⁶⁹ Accordingly, regulations must be “sufficient to put the petitioner on notice as to the proscribed conduct.”⁷⁰ That is, to survive a vagueness challenge, a regulation must be “sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require.”⁷¹ A reviewing court must decide whether, “by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.”⁷²

To employ a “substantial service” standard as a basis for license renewal would be unconstitutionally vague. As the Commission explained in the NPRM, “substantial service . . . is defined as service that is sound, favorable, and substantially above a level of mediocre service

so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.”).

⁶⁸ See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

⁶⁹ *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995); see also *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000).

⁷⁰ *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1306 (D.C. Cir. 1978).

⁷¹ *Freeman United Coal Min. Co. v. Federal Mine Safety and Health Review*, 108 F.3d 358, 362 (D.C. Cir. 1997).

⁷² *General Elec.*, 53 F.3d at 1329 (internal quotation marks omitted).

that just might minimally warrant renewal.”⁷³ Because this definition of “substantial service” is tied to whether a licensee qualifies for renewal, employing this standard as a basis for license renewal would render it completely circular and, thus, devoid of any meaning.⁷⁴ As a renewal requirement, then, the “substantial service” standard would be unconstitutionally vague; licensees would be “[un]able to identify, with ascertainable certainty,”⁷⁵ the standard and thus would be left to guess at its meaning.⁷⁶ The Commission further obscures the standard by providing no explanation as to the meaning of some of the factors that would demonstrate substantial service, and thus qualify a licensee for renewal, or how it would apply those factors. That this “substantial service” standard would be unconstitutionally vague as applied to license renewals is especially so because the consequences of noncompliance are “severe”—license loss, and the accompanying loss of billions upon billions of dollars invested in build-out and deploying next generation wireless networks.⁷⁷

⁷³ NPRM at ¶ 21 (quoting *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064, ¶ 75 (2007) (emphasis added) (subsequent history omitted) (“700 MHz First Report and Order”)).

⁷⁴ That licensees are required to meet certain construction benchmarks as requirements of their licenses cannot cure the vagueness defect in the “substantial service” standard—as the Commission has emphasized in the NPRM that “a licensee that meets the applicable performance requirements might nevertheless fail to meet the substantial service standard at renewal.” *Id.* (emphasis added).

⁷⁵ *General Elec.*, 53 F.3d at 1329.

⁷⁶ The “substantial service” standard could be saved if it were clarified with meaningful criteria that give licensees fair notice of the applicable requirements and cabin the Commission’s discretion so as to prevent arbitrary enforcement. See *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982) (noting that regulating entities “may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process”).

⁷⁷ See *Trinity Broad. of Fla., Inc.*, 211 F.3d at 628 (“[T]he Commission imposed a severe penalty—denial of Trinity’s application to renew its commercial television station license.”). See also *Village of Hoffman Estates*, 455 U.S. at 499 (explaining that more severe consequences *Footnote continues on next page . . .*

IV. AT&T AGREES WITH THE FCC THAT BANNING COMPETING RENEWAL APPLICATIONS AND AUCTIONING NON-RENEWED SPECTRUM WOULD DISCOURAGE STRIKE FILINGS AND IS THEREFORE IN THE PUBLIC INTEREST.

AT&T has strongly supported, and continues to support, the Commission's decision to "prohibit the filing of competing (*i.e.*, mutually exclusive) applications against renewal applications for the Wireless Radio Services identified above, whether licensed by site or geographic area" as well as its decision to auction non-renewed spectrum.⁷⁸ This approach is consistent with Congressional directives and Commission precedent, which, as detailed below, support market-driven licensing, not comparative hearings. Particularly important, the Commission's proposed approach deters "strike" applications, which parties file to harass renewal applicants and to try to exact payoffs.

Both Congress and the Commission have long recognized that comparative licensing proceedings, in which licenses are awarded based on subjective determinations concerning the qualifications of competing licensees, burden Commission resources and delay the provision of services to the public. In approving Section 309(j) of the Act authorizing competitive bidding procedures for licensed spectrum, the House Committee "found that the current [comparative] licensing procedures delay the delivery of services to the public and the result is stifling the growth of emerging technologies."⁷⁹ The Commission has estimated that "a routine comparative proceeding can take from three to five years or more to complete" and that "complex cases may

translates to less tolerance of vagueness). Because the consequences of noncompliance bear on the vagueness analysis, a "substantial service" standard may be appropriate as an *interim* build-out requirement, where a licensee does not face the risk of license loss.

⁷⁸ NPRM at ¶ 40 (citing *700 MHz First Report and Order*, ¶¶ 76-77).

⁷⁹ H.R. Rep. No. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 573.

take much more time.”⁸⁰ The Commission also has noted that the D.C. Circuit “recognize[s] that repetitious appeals may prolong proceedings for years even after the Commission’s decision.”⁸¹ For these reasons, the Commission eliminated the filing of competing renewal applications for 700 MHz commercial service licenses and revised Section 27.14 to require these licenses to be re-auctioned by the Commission if they are not renewed.⁸² The Commission also has proposed to apply the same approach to another Part 27 service, AWS-3.⁸³

AT&T agrees that comparative hearings are not needed to encourage improved licensee performance, since the auction process, competitive market forces, interim substantial service build-out requirements not tied to renewal, and the petition to deny process already provide those incentives. As the Commission determined in eliminating comparative renewal procedures for 700 MHz commercial service licenses, “[t]he existing petition to deny process, coupled with the ability of a petitioner to participate in any subsequent auction to re-license spectrum that is returned to the Commission for lack of renewal, creates sufficient incentives to challenge inferior service or poor qualifications of licensees at renewal.”⁸⁴

⁸⁰ *Implementation of Section 309(j) of the Telecommunications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, ¶ 36 (1998).

⁸¹ *Id.* (citing *Amendment of the Commission’s Rules to Allow the Selection from Among Competing Applicants for New AM, FM, and Television Stations by Random Selection*, Notice of Proposed Rulemaking, 4 FCC Rcd 2256, ¶¶ 7-13 (1989)).

⁸² *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064, ¶ 76 (2007) (“We are mindful of the potential costs and the burdens they impose on both the Commission and licensees.”).

⁸³ *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, Notice of Proposed Rulemaking, 22 FCC Rcd 17035, ¶ 108 (2007).

⁸⁴ *700 MHz First Report and Order* at ¶ 76.

Importantly, the Commission’s proposed approach will “prevent parties from interposing ‘strike’ applications against a renewal applicant for possible anticompetitive purposes, to harass an applicant, or to exact a payoff.”⁸⁵ As explained in the NPRM, the Commission “has found that even weak applicants who may have a very slim chance of prevailing can file no-risk, no-cost [competing renewal] applications because they are virtually assured of recovering at least attorney’s fees and costs for dismissing their applications.”⁸⁶ The comparative renewal process, however, was not designed to foster this abuse, which “needlessly drain[s] Commission resources and disserve[s] the public interest.”⁸⁷ The approach proposed in the NPRM eliminates the possibility of strike filings, and should be adopted.

V. THE FCC SHOULD NOT ALTER THE EXISTING PERFORMANCE REQUIREMENTS FOR PARTITIONED AND/OR DISAGGREGATED LICENSES.

AT&T opposes the tentative conclusion in the NPRM to “requir[e] each party to a partitioning, disaggregation, or combination of both . . . to individually meet the applicable

⁸⁵ NPRM at ¶ 42.

⁸⁶ *Id.*

⁸⁷ *Id.* The Commission acknowledges that “[a]lthough section 1.935 of our rules provides that any potential settlement payment that a renewal applicant may make to a competing applicant to withdraw its filing is limited to the filing party’s reasonable and prudent expenses (*see* 47 C.F.R. § 1.935), we remain concerned that the potential for abuse of the Commission’s processes nevertheless exists. Abuses of the comparative renewal process can be difficult to prove.” *Id.* (citing *Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 FCC Rcd 5179, ¶ 26 (1989) (stating there is “[n]o satisfactory direct method of divining intent . . . that is capable of separating wholly sincere applicants from those whose objective is simply to prey upon the inadequacies of the regulatory process for private gain.”)).

service performance requirements (both construction and operation) for its license.”⁸⁸ As detailed below, imposing a construction obligation on both parties to a partitioning or disaggregation would upset longstanding private contractual relationships and would discourage publicly beneficial arrangements in the future.

Reversing policies to alter the construction requirements applicable to disaggregated and partitioned licenses would upset legitimate economic reliance by third parties. The original partitioning and disaggregation rules permitted licensees to allocate construction responsibility between themselves and have been incorporated into innumerable contracts between private entities. The Commission’s proposal to alter the requirements after-the-fact will, in many cases, change the value of the bargains struck by partitioners and partitionees and disaggregators and disaggregatees. In other cases, changes in the construction requirements could render some deals completely uneconomic. Some areas may have been partitioned to third parties with the idea that they could implement niche services free of any obligation to undertake widespread construction in less populated areas. *Ex post facto* implementation of construction requirements for such licenses eviscerates that model.

Adopting independent construction requirements for each party to a geographic partitioning or spectrum disaggregation also stifles the goals of the National Broadband Plan for the United States to have the most extensive wireless networks of any nation and to expand broadband service to all Americans, including those in rural areas.⁸⁹ While it may seem that imposing construction obligations on more licensees would accelerate build-out, in fact it would

⁸⁸ NPRM at ¶ 92.

⁸⁹ Federal Communications Commission, National Broadband Plan, Goals 2 and 3, pp. 25-26 (March 2010).

have the opposite effect, as it would discourage carriers from using partitioning and disaggregation to provide spectrum, which often facilitates expansion of service in rural areas. The disaggregation and partitioning rules allow wireless providers to affiliate themselves with parties interested in pursuing rural build-outs. In many cases, the feasibility of those arrangements is premised on the partitioner or disaggregator having already met the build-out requirements, thus freeing the partitionee or disaggregatee to construct where economically feasible. These policies have been successful in extending service to certain areas more quickly than otherwise would have occurred. Imposing build-out requirements on each party to a partition or disaggregation transaction limits these possibilities and discourages this type of beneficial partnering.

Further, the proposed rules would discourage partitioning and disaggregation after a certain portion of the license term has passed, thereby limiting the efficient use of spectrum. Partitioning and disaggregation does not always occur at the very beginning of a license term—if a partition or disaggregation occurs in the middle or toward the end a license term, the partitionee or disaggregatee can accept the construction obligation if feasible or, if not feasible, negotiate to have the partitioner or disaggregator initiate build-out. These contractual options would disappear under the proposed rules.

Whether or not the FCC imposes construction requirements on disaggregated and partitioned spectrum, it should take this opportunity to permit licensees to re-aggregate and de-partition spectrum. In order to promote rapid build-out, AT&T and other carriers partnered with small businesses and rural telephone companies to construct partitioned and disaggregated markets. Over time, in secondary market transactions, the original licenses have regained control of those partitioned or disaggregated licenses. For example, in MTAs 004 and 011, AT&T has

11 separate PCS B Block and 11 separate PCS A Block licenses, respectively. Allowing reaggregation and de-partitioning would reduce by nearly 25 percent the number of PCS licenses tracked by AT&T, and commensurately the number of filings AT&T must make to administer those licenses. Obviously, this also reduces the processing burden on the FCC. Because partitioning and disaggregation were entirely voluntary, there appears to be no public policy that would be adversely affected by permitting licensees to reverse that process.

VI. THE PERMANENT DISCONTINUATION REQUIREMENTS SHOULD BE APPLIED IN AN EVEN-HANDED MANNER AND EXTRANEOUS DISCONTINUATION REQUIREMENTS SHOULD BE ELIMINATED.

As part of its proposed overhaul of the renewal and certain construction requirements, the NPRM also seeks comment on the need for modifications to the service discontinuance rules for certain services. These requirements typically impose a deadline—on pain of license forfeiture—for reinitiating service after a voluntary or involuntary service discontinuation. As discussed below, AT&T believes the public interest dictates that the Commission apply any new or modified permanent discontinuation requirements in an even-handed manner across wireless services. In such regards, AT&T further submits that this proceeding also provides an appropriate venue for the Commission to eliminate outdated permanent discontinuance rules, including Section 101.305.

AT&T agrees with the Commission that discontinuation of service rules should be applied even-handedly. In the NPRM, the Commission explains that “adoption of a uniform discontinuance of service rule for Part 22, 24, 27, 80, 90, 95 and 101 Wireless Radio Services will serve the public interest by ensuring that similarly situated licensees are afforded comparable regulatory treatment.”⁹⁰ Against that backdrop, the NPRM proposal to exempt

⁹⁰ NPRM at ¶ 53.

BRS/EBS licensees from any discontinuation of service rules is difficult to comprehend. While the NPRM suggests that such a difference is warranted based upon the transition occurring in the BRS/EBS service, the transitions have been certified complete in the overwhelming majority of all markets in the U.S. Moreover, even if the transition justified such an action, the proposed exemption has no end date. Nor is the exemption narrowly tailored; there is no reason, for example, why the requirements should not apply to BRS/EBS in markets where the transition is complete. Like other licensees, BRS/EBS licensees have the option to seek a waiver in the event that the application of the rule in an individualized circumstance would be inequitable.⁹¹

The FCC also should take this opportunity to delete Section 101.305 of its rules. Section 101.305 requires that common carrier licensees under Part 101 of the rules notify the Commission of involuntary discontinuations of service in excess of 48 hours⁹² and provides that common carriers may only “voluntarily discontinue, reduce or impair public communication service to a community or part of a community without obtaining prior authorization from the Commission pursuant to the procedures set forth in part 63 of this chapter.”⁹³ Neither of these provisions seems to have any rational regulatory purpose, and both appear to be relics of a bygone era in terms of common carrier regulatory oversight and protecting end users from losing access to communications. But Section 101 services are, as a whole, fixed wireless operations

⁹¹ 47 C.F.R. § 1.925.

⁹² 47 C.F.R. § 101.305(a) (“If the public communication service provided by a station in the Common Carrier Radio Services, the Local Multipoint Distribution Service or 24 GHz Service is involuntarily discontinued, reduced or impaired for a period exceeding 48 hours, the station licensee must promptly notify the Commission. In every such case, the licensee must furnish full particulars as to the reasons for such discontinuance, reduction or impairment of service, including a statement as to when normal service is expected to be resumed. When normal service is resumed, prompt notification thereof must be given Commission.”).

⁹³ 47 C.F.R. § 101.305(b).

used as part of a licensee's network, not critical services provided directly to end users. As such, Section 101.305's concern for protecting "communit[ies]" is misplaced.⁹⁴ Both provisions also appear to conflict with Section 101.65, which provides a more rationale approach to discontinuance.⁹⁵ Accordingly, Section 101.305 should be deleted.

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Id.

⁹⁵ Under Section 101.65, a "license will be automatically forfeited in whole or in part without further notice to the licensee upon the voluntary removal or alteration of the facilities, so as to render the station not operational for a period of 30 days or more." Additionally, Section 101.65 provides that "if a station licensed under this part discontinues operation on a permanent basis, the licensee must cancel the license. For purposes of this section, any station which has not operated for one year or more is considered to have been permanently discontinued." 47 C.F.R. § 101.65.

VII. CONCLUSION

As detailed above, administrative law and sound public policy dictate that the Commission retain the effective, streamlined renewal process currently used for uncontested applications; eliminate competing mutually exclusive renewal applications; retain the existing performance requirements for partitioned and disaggregated licenses; and apply permanent discontinuation requirements in an even-handed manner while eliminating extraneous discontinuation requirements. In this manner, the FCC will most directly achieve the goals of Congress and the Commission to stimulate network investment and ensure the rapid deployment of 4G services to the public.

Respectfully submitted,

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