

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

In the Matter of	)	
	)	
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	)	WT Docket No. 10-112
	)	
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 THE WCS COALITION**

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## **Executive Summary**

The WCS Coalition supports the Commission's proposal to eliminate those provisions of Section 27.14 of the Commission's Rules that contemplate the filing of competing applications when a Part 27 licensee applies for renewal. The comparative renewal provisions are historical vestiges that no longer advance the public interest, are inefficient, costly and subject licensees to an unnecessary form of double jeopardy. The better approach is to accept renewal applications, subject those applications to petitions to deny, evaluate the renewal application, and then utilize competitive bidding to award the spectrum should the Commission not grant the renewal application.

The Commission's proposal to require unspecified additional showings at renewal to obtain a renewal expectancy creates great uncertainty that will discourage investment in new facilities and services. The WCS Coalition proposes a simple and straightforward solution – licensees should be entitled to a renewal expectancy if they have met their substantial service or performance requirements and otherwise operated in material compliance with the Commission's rules during their license term. Adoption of this approach will achieve the Commission's objectives here – it will provide licensees with the regulatory certainty they need to invest in new facilities and introduce new service offerings.

The WCS Coalition does not take issue with the proposal to define the permanent discontinuance of operations as the cessation of all operations for a period of 180 days. However, the Commission should clarify that the new discontinuance rule will not apply to a 2.3 GHz band WCS license until the WCS licensee submits its initial performance showing in accordance with recently-adopted Section 27.14(p) of the Commission's Rules. It would be fundamentally unfair to subject those WCS licensees that have filed substantial service notifications prior to the adoption of Section 27.14(p) to the new discontinuation rule. Those notifications are being treated as legal nullities, and the filers do not receive any regulatory benefit from their actions.

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The WCS Coalition,<sup>1</sup> by its attorneys and pursuant to Section 1.415 of the Commission’s Rules, hereby submits its comments in response to the *Notice of Proposed Rulemaking* (“NPRM”) commencing this proceeding.<sup>2</sup>

**I. The Commission Should Amend Its Rules To Preclude The Filing Of Competing Applications When A Part 27 Licensee Seeks Renewal.**

The WCS Coalition supports the Commission’s proposal to eliminate those provisions of Section 27.14 of the Commission’s Rules that contemplate the filing of competing applications when a Part 27 licensee applies for renewal and the holding of comparative proceedings to select from among mutually exclusive applicants. The better

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<sup>1</sup> The WCS Coalition represents the interests of 2.3 GHz band Wireless Communications Service (“WCS”) licensees before the Commission. For purposes of this proceeding, its members include AT&T Inc., Horizon Wi-Com LLC, NextWave Wireless Inc and CELLUTEC.

<sup>2</sup> 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, *Notice of Proposed Rulemaking and Order*, 25 FCC Rcd 6996 (2010) [“NPRM”].

approach is to accept renewal applications, subject those applications to petitions to deny, evaluate the renewal application, and then utilize competitive bidding to award the spectrum should the Commission not grant the renewal application.<sup>3</sup>

The Commission has recognized that the comparative renewal provisions of Part 27 of the Commission's Rules are a historical vestige that no longer advance the public interest.<sup>4</sup> Although vague and incomplete,<sup>5</sup> these provisions subject a renewal applicant to a form of double jeopardy – its renewal application is subject to petitions to deny and, even if the licensee is found to have complied in all respects with the Commission's rules and policies, it can be forced into an adversarial comparative hearing if a competing application is filed.

This process can impose significant costs and other burdens on the resources of both the licensee and the Commission staff that is tasked with making comparative evaluations.<sup>6</sup>

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<sup>3</sup> See *id.* at 7012-14. The *NPRM* suggests that, rather than utilize competitive bidding, the Commission might employ some unspecified "other mechanism that the Commission concludes would serve the public interest" to license spectrum that is returned to the Commission upon denial of a renewal application. See *id.* at 7014. Given the Commission's repeated recognition that "spectrum auctions most likely will result in the licensing of spectrum to a party that most highly values the spectrum," (*id.* at 7013), one is hard pressed to identify circumstances where the Commission might elect to pursue another course. While the WCS Coalition does not suggest the Commission foreclose further consideration of other assignment mechanisms in future rulemaking proceedings, for now the Commission should make clear that it will utilize competitive bidding to re-auction returned licenses. Making such a pronouncement now will allow the Commission to immediately auction returned spectrum, without the need for further proceedings to determine the most appropriate vehicle for reassignment.

<sup>4</sup> 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, 8093 (2007) ["700 MHz Report and Order"].

<sup>5</sup> See *NPRM*, 25 FCC Rcd at 7000; *700 MHz Report and Order* 22 FCC Rcd at 8092. Indeed, a comparison between the comprehensive rules governing the comparative renewal process for the Cellular Radiotelephone Service (47 C.F.R. §§ 22.935-22.940) and the skeletal provisions set forth in Part 27 have led to questions of whether the Commission even intended for competing applications to be filed for Part 27 services. See, e.g. Comments of NextWave Wireless Inc., WT Docket No. 08-182, at 2-3 (filed Oct. 6, 2008).

<sup>6</sup> *700 MHz Report and Order*, 22 FCC Rcd at 8093. See also *id.* 8206-07(elimination of comparative renewals for 700 MHz licensees would provide additional certainty for licensees, "reliev[ing] all licensees, including small businesses that hold or will hold licenses in the 700 MHz Band[,] the

It substantially delays spectrum assignments<sup>7</sup> and places a cloud over the spectrum that is subject to the competitive challenge.<sup>8</sup> And that, in turn, discourages network build-out and the introduction of new service offerings to the marketplace.<sup>9</sup> Historically, it also has encouraged the submission of “strike” applications – competing renewal applications that are filed in the hopes of securing a payoff from the licensee.<sup>10</sup>

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burden of possibly facing a comparative hearing.”).

<sup>7</sup> 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 take much more time.” Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920, 15933-34 (1998) [“1998 Auction Implementation Order”]. The Commission also noted that the D.C. Circuit has “recognized that repetitious appeals may prolong proceedings for years even after the Commission’s decision.” *Id.*, citing *Orion Communications Limited v. FCC*, 131 F.3d 176, 180 (D.C. Cir. 1997). See also Amendment of Part 1 of the Commission’s Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 89 F.C.C.2d 257, 258 (1982) [“1982 Lottery Order”]. The *NPRM* acknowledged that “the comparative renewal process can result in protracted litigation that may be unduly burdensome for an incumbent licensee and strain available Commission resources.” See *NPRM*, 25 FCC Rcd at 7012. The Commission has noted that “when Congress sought to eliminate the comparative renewal process for broadcast stations, it recognized that the change would ‘lead to a more efficient method’ of renewal and ‘should result in a significant cost saving to the Commission.’” See *id.* at ¶ 40 n.115, citing H.R. Rep. No. 104-204(I), at 123 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 91 (ultimately resulting in amendment of Section 309 of the Communications Act by adding new subsection (k), as part of the Telecommunications Act of 1996 (1996 Act)). See 47 U.S.C. § 309(k).

<sup>8</sup> See *1998 Auction Implementation Order*, 13 FCC Rcd at 16006. The problems wrought by competing renewal applications are illustrated by the situation recently faced by WCS licensees where otherwise routine transactions, including pro forma transactions, were stuck at the Commission for years as the Commission has grappled with how to handle competing renewal applications for this spectrum. See, e.g., Unrestricted Subsidiary Funding Company, Assignment Application, FCC File No. 0003437671 (filed May 14, 2008); Letter from Donald J. Evans, Counsel for Green Flag Wireless Communications, LLC, CWC Wireless Holding, Inc. and James F. McCotter to Marlene H. Dortch, Secretary, FCC, FCC File No. 0003437671 (dated June 18, 2008) (opposing pro forma assignment of 19 WCS licenses by Sprint Nextel Acquisition Corp.).

<sup>9</sup> As a result, the public ultimately suffers as “[a] renewal applicant may have to devote considerable resources to defend its authorization against competing applications, resources that might otherwise be used to improve service to the public.” *NPRM*, 25 FCC Rcd at 7012.

<sup>10</sup> See *id.* at 7013.

It is precisely because of the protracted, inefficient nature of the comparative hearing process (frequently featuring pitched battles over “minutiae of questionable public interest significance”)<sup>11</sup> that both Congress and the Commission strived to eliminate such hearings, first by replacing them with lotteries,<sup>12</sup> and then with the present system of competitive bidding to award licenses.<sup>13</sup> Indeed, the Commission twenty-eight years ago acknowledged that an alternative to comparative hearings was needed “to help speed service to the public, reduce processing expenses to both applicants and the Commission and provide a fair and efficient means of allocating spectrum resources.”<sup>14</sup>

Today, the use of comparative hearings at renewal cannot be squared with the use of competitive bidding to award initial licenses in the Part 27 services. As the *NPRM* recognizes, it defies logic to utilize competitive bidding to assign initial licenses in a service, but to employ comparative proceedings when a license is returned to the Commission for reassignment.<sup>15</sup> Simply put, comparative process lacks the myriad benefits of competitive bidding, a process that is “open to a variety of applicants” and “ensures that spectrum

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<sup>11</sup> *1998 Auction Implementation Order*, 13 FCC Rcd at 16005.

<sup>12</sup> See Amendment of the Commission’s Rules To Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C.2d 175 (1984); Amendment of Part 1 of the Commission’s Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Notice of Proposed Rule Making*, 88 F.C.C.2d 476, 477 (1981) (“the public is ill-served by a selection process that takes years and costs thousands or even millions of dollars in legal and administrative costs.”).

<sup>13</sup> See Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 312 (1993); Balanced Budget Act of 1997, § 3002(a)(1), *codified as* 47 U.S.C. § 309(j); *1998 Auction Implementation Order*. In the broadcast context, too, Congress recognized the problems inherent in comparative proceedings by replacing them as a renewal mechanism in 1996 with a process that is substantially similar to what the *NPRM* is proposing here. See 47 C.F.R. §309(k).

<sup>14</sup> *1982 Lottery Order*, 89 F.C.C.2d at 258.

<sup>15</sup> See *NPRM*, 25 FCC Rcd at 7013.

licenses are assigned to those who place the highest value on the resource and will be suited to put the licenses to their most efficient use.”<sup>16</sup> Indeed, it is for these reasons that the Commission already has eliminated competing applications for 700 MHz licensees and has proposed to do the same for licensees in the 2155-2175 MHz band.<sup>17</sup> Elimination of competing renewal applications for the other Part 27 radio services is long overdue.

## **II. The Commission Must Provide Licensees With Greater Certainty As To The Requirements For License Renewal.**

It is troubling that the *NPRM* suggests that even where a 2.3 GHz band WCS licensee meets the Commission’s newly-adopted performance requirements and otherwise comports with the Commission’s rules, it would not necessarily be entitled renewal of its license as a matter of right.<sup>18</sup> This approach will *not* achieve the Commission’s stated goal of “providing licensees certainty regarding their license renewal requirements.”<sup>19</sup> Nor will it “encourage licensees to invest in new facilities and services, and facilitate their business and network planning.”<sup>20</sup> In fact, it will achieve the opposite – adoption of the proposal set forth in the *NPRM* will create substantial uncertainty for all Wireless Radio Service licensees as to what they must do to assure license renewal, discouraging investment in new facilities and services.

With respect to 2.3 GHz band licensees, the Commission’s newly-adopted Section 27.14(p) performance requirements were specifically designed to “afford WCS licensees

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<sup>16</sup> *700 MHz Report and Order*, 22 FCC Rcd at 8150.

<sup>17</sup> *See id.* at 8093; *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band, Notice of Proposed Rulemaking*, 22 FCC Rcd 17035, 17082 (2007).

<sup>18</sup> *NPRM*, 25 FCC Rcd at 7005-08.

<sup>19</sup> *Id.* at 6999.

<sup>20</sup> *Id.*

bright-line certainty regarding their performance obligations . . . .”<sup>21</sup> In the *NPRM*, however, the Commission opines that under its proposal, “a substantial service showing for renewal requires more detailed information regarding a licensee’s services and related matters for its entire license period than one made for performance purposes.”<sup>22</sup> In other words, a WCS licensee who meets its performance benchmarks (and thereby achieves “meaningful deployment of new broadband services”) and otherwise comports with the Commission’s rules receives no renewal expectancy and must demonstrate in its “renewal showing” that it has done something more. Yet, the *NPRM* gives licensees little clue as what more is required – while the Commission provides a generalized laundry list of issues it might explore at renewal,<sup>23</sup> that list raises more questions than it answers.

For example, does the Commission’s proposal to explore “whether service has been provided to rural areas,”<sup>24</sup> effectively adopt a new performance requirement for Wireless Radio Services and, if so, how much service to rural areas is required to satisfy it? Does the Commission’s suggestion that renewal showings include “a description of its investments in its system” suggest that a licensee that meets all of its performance requirements might be stripped of its license for doing so without spending “enough” money? If so, how much of

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<sup>21</sup> Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, *Report and Order and Second Report and Order*, FCC 10-82, ¶ 198 (rel. May 20, 2010) [“*WCS/SDARS Report and Order*”].

<sup>22</sup> *NPRM*, 25 FCC Rcd at 7005.

<sup>23</sup> *See id.* at 7006 (tentatively concluding that the Commission should examine “[1] the level and quality of service, [2] whether service was ever interrupted or discontinued, [3] whether service has been provided to rural areas, and [4] any other factors associated with a licensee’s level of service to the public.”).

<sup>24</sup> *Id.*

an expenditure is “enough”?<sup>25</sup> If renewal applicants must provide “[a] list, including addresses, of all cell transmitter stations constructed,” does the Commission intend to evaluate whether the licensee has “enough” base stations and whether they are at the “correct” locations”?<sup>26</sup>

In adopting its substantial service safe harbors, the Commission and the judiciary have consistently recognized that providing licensees with certainty as to their obligations is essential to promote investment and provide fundamental fairness to regulated entities.<sup>27</sup> Yet, adoption of the proposal advanced in the *NPRM* would eliminate the very certainty that current substantial service safe harbors and specific performance requirements provide.

To avoid that result, the WCS Coalition proposes a simple and straightforward solution – licensees should be entitled to a renewal expectancy if they have met their substantial service or performance requirements and otherwise operated in material

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<sup>25</sup> *Id.* at 7007-08.

<sup>26</sup> *Id.* at 7007.

<sup>27</sup> *See, e.g.* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606, 5720 (2006) (“We believe that establishing a substantial service standard with safe harbors will ‘. . . promote investment in and rapid deployment of new technologies and services.’”) *quoting* 47 U.S.C. Section 309(j)(4)(B); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”), *Report and Order*, 12 FCC Rcd 10785, 10843-44 (1997) [*“WCS Report and Order”*]. In the broadcast context, the D.C. Circuit has warned that :

The court recognizes that the public itself will suffer if incumbent licensees cannot reasonably expect renewal when they have rendered superior service. Given the incentive, an incumbent will naturally strive to achieve a level of performance which gives him a clear edge on challengers at renewal time. But if the Commission fails to articulate the standard by which to judge superior performance, and if it is thus impossible for an incumbent to be reasonably confident of renewal when he renders superior performance, then an incumbent will be under an unfortunate temptation to lapse into mediocrity . . . The Commission in rule making proceedings should strive to clarify in both quantitative and qualitative terms what constitutes superior service.

*Citizens Commc’ns Ctr. v. FCC*, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971).

compliance with the Commission's rules during their license term. Adoption of this approach will achieve the Commission's objectives here – it will provide licensees with the regulatory certainty they need to invest in new facilities and introduce new service offerings.

### **III. The New Rules Regarding Discontinuance Of Service Should Only Apply To A 2.3 GHz Band License After Submission Of Its Initial Performance Demonstration Pursuant to Newly-Adopted Section 27.14(p).**

Finally, the *NPRM* also proposes “to adopt a uniform regulatory framework governing the permanent discontinuance of operations for Wireless Radio Services under Parts 22, 24, 27, 80, 90, 95 and 101 of the Commission's rules.”<sup>28</sup> More specifically, the *NPRM* proposes that once a licensee has submitted its initial “construction showing or notification” with respect to a license,<sup>29</sup> that license will be automatically forfeited upon a subsequent permanent discontinuance of service.<sup>30</sup> For those services (like WCS) where prior Commission approval is not required before discontinuing service, the *NPRM* proposes that a licensee would be deemed to have permanently discontinued service if it does not operate or, in the case of a Commercial Mobile Radio Service (“CMRS”) carrier, does not provide service to at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier, within the license area for a period of 180 consecutive days.<sup>31</sup>

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<sup>28</sup> *NPRM*, 25 FCC Rcd at 7017.

<sup>29</sup> *Id.* at 7019. Although the *NPRM* does not explain precisely what is meant by the term “initial construction showing or notification”, the WCS Coalition presumes that it refers to the first construction, substantial service, performance or similar showing that a licensee is required to make under the rules applicable to its particular radio service. As discussed below, the proposed new discontinuance rule – Section 1.953 – should be modified to provide licensees greater clarity as to when the rule becomes effective as to a given license.

<sup>30</sup> *See id.* at 7018-19.

<sup>31</sup> *See id.* at 7018. The 2.3 GHz WCS is not considered to be a CMRS, and thus the Commission's proposed definition of discontinuance by a CMRS carrier – failing to “provide service to at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier” – would not apply to 2.3 GHz WCS operations. While the WCS Coalition takes no position on the merits of the

The WCS Coalition has no quarrel with the proposal to define a permanent discontinuance for 2.3 GHz band WCS licenses as the cessation of all operations for 180 consecutive days. Subject to the one caveat discussed below, it strongly supports with the Commission’s tentative conclusion that “the “proposed permanent discontinuance rule should apply commencing on the date a licensee makes its initial construction showing or notification.”<sup>32</sup> By not subjecting licensees to discontinuance rules until their initial substantial service or performance showing is submitted, the Commission will advance its objective of “afford[ing] Wireless Radio Services licensees operational flexibility to use their spectrum efficiently . . . .”<sup>33</sup> Licensees will have the freedom to trial innovative technologies and service offerings, without fear that once a trial has started, the discontinuance rule will artificially force it to continue even should the trial prove unsuccessful.

However, once a licensee has submitted its initial construction notice, substantial service demonstration, performance showing or similar filing, it should not be permitted to completely discontinue service for an extended period of time absent a waiver from the Commission. To effectuate this approach and codify the proposal set forth in the text of the *NPRM*, the Commission should modify the language of proposed Section 1.953(a) of the

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Commission’s proposed definition of discontinuance by a CMRS carrier, the definition applicable to 2.3 GHz WCS licensees should recognize that WCS spectrum can productively be used for a variety of applications that do not necessarily involve the provision of service directly to end users. For example, it is currently productively used to provide highly economical backhaul from WiFi hot spots, a business model in which the end user may have no relationship with the WCS service provider.

<sup>32</sup> *Id.* at 7019 (“Under this approach, if a CMRS provider makes a five-year construction showing, it would have to serve at least one subscriber that is not affiliated with, controlled by, or related to it in any ensuing 180-day period or else it would be deemed to have permanently discontinued service and its license would automatically terminate without specific Commission action.”).

<sup>33</sup> *Id.* at 7017.

Commission's Rules set forth in Appendix A of the *NPRM* to read as follows (additional language highlighted):

(a) *Termination of Authorization.* A licensee's authorization will automatically terminate, without specific Commission action, if it permanently discontinues service at any time subsequent to the licensee's submission of the initial construction notification, substantial service demonstration, performance showing or other similar filing required under the rule part applicable to the authorization.

That said, the Commission should clarify that the new discontinuance rule will not apply to a 2.3 GHz band WCS license until the licensee submits its initial performance showing in accordance with recently-adopted Section 27.14(p) of the Commission's Rules.<sup>34</sup> In its recent *Report and Order* in WT Docket No. 07-293, the Commission eliminated the former requirement that WCS licensees demonstrate "substantial service," superseding it with a new requirement that imposes specific performance requirements to be met 42 months and 72 months following the effective date of the new rules.<sup>35</sup> Most WCS licensees never submitted substantial service showings under the former rule, and thus it is clear that those licenses will not immediately be subject to the proposed discontinuance rule, should it be

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<sup>34</sup> See *WCS/SDARS Report and Order* at App. B. Section 27.14(p) currently requires that the initial performance showing be filed no later than March 1, 2014, which will be 42 months following the effective date of the rule. The WCS Coalition believes that the Commission's new 2.3 GHz band WCS performance requirements are extraordinarily aggressive, and has no choice but to seek reconsideration of those new performance requirements.

<sup>35</sup> *Id.* at ¶ 218 ("The new performance requirements supersede the substantial service performance requirement for all WCS licensees, including any licensee that previously filed a substantial service demonstration.") (citation omitted). Under the Commission's initial rules governing the 2.3 GHz band, licensees were required to demonstrate substantial service in conjunction with their initial renewal applications, which were due on July 21, 2007. See *WCS Report and Order*, 12 FCC Rcd at 10843-44. However, in December 2006, the Wireless Telecommunications Bureau granted requests filed by the WCS Coalition and others for an extension of the substantial service demonstration deadline until July 21, 2010. See Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006). The Bureau found an extension was warranted because WCS licensees "face factors beyond their control that have limited their options in providing service," (*id.* at 14139), including "relatively restrictive OOB limits [that] impeded the development of WCS equipment . . ." *Id.*

adopted.<sup>36</sup> However, a handful of WCS licensees had filed substantial service showings under the former rule, and it is with respect to those licenses that clarification is sought.

The Commission made clear in the *WCS/SDARS Report and Order* that those substantial service showings that had been filed were, for all practical purposes, legal nullities. Indeed, the Commission ruled that “because the new performance requirements supersede the substantial service requirement for all WCS licensees, it is unnecessary for the Wireless Telecommunications Bureau to process any pending substantial service demonstrations, and any such demonstrations and pleadings filed in opposition are hereby dismissed as moot.”<sup>37</sup> In addition, those 2.3 GHz band WCS licensees that had satisfied the substantial service requirement received no regulatory benefit, and are subject to the same performance requirements as those that did not.<sup>38</sup>

Under these circumstances, the Commission should clarify that, whether or not a 2.3 GHz band licensee submitted a showing under the now-superseded substantial service requirement, a license will not be subject to the proposed new 180-day discontinuance of service rule until it submits its demonstration of compliance with the 42-month performance requirement set forth in newly-adopted Section 27.14(p). Adoption of this clarification

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<sup>36</sup> Substantial service demonstrations were filed for only 20 of 155 WCS licenses prior to July 21, 2007 (*see WCS/SDARS Report and Order* at ¶ 218 n.519), and the WCS Coalition does not believe that any material number were submitted prior to the release of the *WCS/SDARS Report and Order*. The Wireless Telecommunications Bureau has made clear that because the former substantial service requirement has been superseded by specific performance requirements, 2.3 GHz band WCS substantial service showings will no longer be accepted for filing. Wireless Telecommunications Bureau Advises 2.3 GHz Wireless Communications Service Licensees That It Will Not Accept Substantial Service Performance Showings, *Public Notice*, DA 10-1193 (rel. June 29, 2010).

<sup>37</sup> *WCS/SDARS Report and Order* at ¶ 221, corrected by Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, *Erratum* at ¶ 8 (rel. June 8, 2010).

<sup>38</sup> *See WCS/SDARS Report and Order* at ¶¶ 219-220.

would be fully consistent with the Commission's stated objective in this proceeding of "afford[ing] Wireless Radio Services licensees operational flexibility to use their spectrum efficiently . . . ." <sup>39</sup> Having just substantially revised the 2.3 GHz band WCS technical rules to facilitate deployment of mobile facilities with the *WCS/SDARS Report and Order*, the Commission should not be imposing artificial impediments to the band's transition to mobile services. Those 2.3 GHz band WCS licensees that deployed fixed facilities to comport with the former WCS regulatory regime should not be under any compulsion to maintain those facilities if they conclude that other business models possible under the new rules are superior.

The requested clarification will also advance the Commission's goal of "affording similarly-situated licensees and like services comparable regulatory treatment."<sup>40</sup> It will subject all WCS licenses to the same requirement (*i.e.*, all will be subject to the discontinuance requirement once they submit evidence of having complied with the 42-month performance requirement of newly-adopted Section 27.14(p)), without regard to whether they submitted a substantial service demonstration prior to the Commission's decision to replace the substantial service test and to ban the filing of substantial service demonstrations. Indeed, it would be fundamentally unfair to subject to the discontinuance rule those WCS licensees that did file substantial service showings prior to the adoption of the new performance requirements when the Commission has made clear that those who made such filings receive no regulatory benefit from their actions <sup>41</sup>

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<sup>39</sup> *NPRM*, 25 FCC Rcd at 7017.

<sup>40</sup> *Id.*

<sup>41</sup> See *WCS/SDARS Report and Order* at ¶¶ 219-220.

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WHEREFORE, for the foregoing reasons, the Commission should both amend its rules to preclude the filing of competing applications when a Part 27 licensee seeks renewal and, should it adopt its proposed rule to govern permanent discontinuance of service, clarify that the new rule will only apply to a 2.3 GHz band WCS license after submission of its initial performance demonstration pursuant to newly-adopted Section 27.14(p).

Respectfully submitted,

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