

**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 T-MOBILE USA, INC.**

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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
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**COMMENTS OF T-MOBILE USA, INC.**

T-Mobile USA, Inc. (“T-Mobile”) submits these comments in response to the Commission’s Notice of Proposed Rulemaking that would implement more consistent licensing requirements for certain wireless services.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

T-Mobile supports the Commission’s efforts to apply more uniform rules and regulations across Wireless Radio Services. Properly harmonizing existing license renewal requirements on a prospective basis serves the public interest by promoting investment in and effective use of spectrum. The Commission’s proposed “renewal showing,” however, is ambiguous and fails to adequately define an objective standard for license renewals, which could have the unintended

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<sup>1</sup> See *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) (the “*Licensing NPRM*”).

consequence of creating more, not less, uncertainty for licensees. In fact, the proposal suggests a lengthy and unwieldy renewal process that will discourage investment and encourage litigation, to the detriment of competition and consumers. Further, the renewal showing proposes to collect information that is competitively sensitive and confidential and which is unnecessary to the Commission's determination of whether a license warrants renewal. The proposed regulatory compliance demonstration also is unnecessarily duplicative. Requiring a licensee to file with its renewal application copies of *all* orders and letter rulings concerning statutory and rule violations of *all* affiliates since the company's inception (or certify that none exist) is punitive and burdensome. Moreover, petitions to deny that may be pending against a licensee or an affiliate are irrelevant to whether a license should be renewed. Rather, the renewal showing should be based upon reasonable, clear and objective standards that provide licensees with certainty regarding the renewal process, and that the Commission can review and act upon promptly.

The proposed renewal obligation also is far more onerous than the current requirements applicable to any Commercial Mobile Radio Service ("CMRS") licensee. Applying this higher standard to actions taken by licensees prior to the effectiveness of the new rules would be patently unfair and would constitute retroactive rulemaking. Accordingly, licensees should not be held accountable to a standard for which they had no prior notice.

## **II. A THREE-PART APPROACH FOR HARMONIZING WIRELESS RADIO SERVICES RENEWAL PROCEDURES SERVES THE PUBLIC INTEREST**

T-Mobile supports the Commission's efforts to fairly harmonize the license renewal procedures across commercial wireless services on a prospective basis.<sup>2</sup> As the *Licensing NPRM* describes, renewal requirements vary widely across different types of licenses. As a result,

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<sup>2</sup> While the *Licensing NPRM* is intended to harmonize renewal procedures across all Wireless Radio Services, T-Mobile's comments are intended to focus on the renewal requirements for geographic area, CMRS licensees.

licenses that may be used for similar services – such as cellular, personal communications service (“PCS”), special mobilized radio (“SMR”) and advanced wireless service (“AWS”) licenses – are subject to different renewal requirements. Adopting appropriate standard requirements can put all licensees on equal footing and provide them with additional certainty regarding the renewal process.

The three-part approach proposed by the *Licensing NPRM* – (1) licensees filing a specific “renewal showing,” (2) a prohibition on competing renewal applications, and (3) the return of applicable spectrum to the Commission for reassignment if a renewal application is denied – would create consistency and equal treatment among licensees.<sup>3</sup> In addition, requiring license renewal applicants to demonstrate that they are offering service to the public provides additional incentives for licensees to invest in new facilities and services and to rapidly build out their licensed areas while discouraging the “warehousing” of spectrum.<sup>4</sup> The Commission’s proposed approach also would eliminate the uncertainty and administrative burden associated with competing applications. The majority of T-Mobile’s license holdings consist of PCS and AWS authorizations. Neither the PCS nor AWS service rules, however, fully address how competing applications should be resolved, creating ambiguity in the application of those rules. And, allowing the filing of competing applications encourages other parties to file speculative “strike” applications in the hope of acquiring spectrum if the current licensee’s renewal is unsuccessful. Competing applications (regardless of their merit) delay processing of renewal applications and, if granted, place licenses in the hands of parties that – unlike other licensees that participated in auctions – made no investment in the spectrum.

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<sup>3</sup> See *Licensing NPRM*, 25 FCC Rcd at 7002.

<sup>4</sup> Transmission capacity is crucial to meeting the ever growing consumer demand for wireless broadband service and next generation technologies. See Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 84-85 (Mar. 16, 2010).

Instead, returning a license to the Commission in the event that a renewal application is denied will ensure the license is reassigned equitably through the auction process when there are mutually exclusive applications. T-Mobile agrees with the Commission that “[t]he existing petition to deny process, coupled with the ability of a petitioner potentially 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.”<sup>5</sup>

### **III. THE PROPOSED “RENEWAL SHOWING” RAISES MORE QUESTIONS THAN IT RESOLVES AND CREATES UNCERTAINTY FOR WIRELESS LICENSEES**

The Commission’s harmonization of the license renewal process cannot be effective unless the proposed “renewal showing” is unambiguous, reasonable, and not overly burdensome. The Commission’s proposed renewal showing, however, increases the complexity and uncertainty of the renewal process. Today, licensees rarely need to make a specific renewal showing. For example, out of the thousands of cellular and PCS renewal applications filed to date, only three have been challenged in those services.<sup>6</sup>

Now, the *Licensing NPRM* proposes to require all licensees to make a renewal showing that is more extensive, cumbersome and confusing than what previously would have been required only after the (very unlikely) filing of a competing application.<sup>7</sup> Specifically, the renewal showing factors suggested in the *Licensing NPRM* are ambiguous, fail to establish a

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<sup>5</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).

<sup>6</sup> See *Licensing NPRM*, 25 FCC Rcd at 7034-35. Virtually all of the renewal challenges to date have been in the 2.3 GHz Wireless Communications Service where 175 competing applications have been filed against 148 renewal applications. *Id.* at 7033-34, 7035-38.

<sup>7</sup> Given the flexibility (for both licensees and the Commission) of the PCS renewal process, T-Mobile believes that the Part 24 PCS rules could be a template for any effort to harmonize the renewal process for Wireless Radio Services.

specific and objective standard by which renewal applications can be judged fairly, and will compel the disclosure of highly sensitive commercial and competitive data that is unnecessary to determine whether a licensee's use of the spectrum is sufficient to warrant renewal.

Accordingly, the elements of the proposed renewal showing should be modified to reflect reasonable and objective standards by which renewal applications can be considered.

**A. An Ambiguous Renewal Standard Will Discourage Investment**

Certainty in the Commission's regulations is imperative if further investment in facilities and services is to be encouraged.<sup>8</sup> As the U.S. Court of Appeals for the District of Columbia Circuit explained:

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 standards 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.<sup>9</sup>

The Commission's proposed renewal criteria contain too many ambiguities to make licensees reasonably confident that they will be able to successfully renew their licenses. As a result, the

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<sup>8</sup> *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 Rulemaking, 3 FCC Rcd 5179, 5193 (1988) ("*Broadcast Renewal NOP*") ("[I]t is very difficult for an incumbent licensee to know, with any degree of certainty, the standards by which it will be judged and, consequently, how its performance will fare in a comparative evaluation. This in turn disserves the public interest because such uncertainty by licensees may discourage broadcasters from making investments in areas such as improved programming.").

<sup>9</sup> *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.35 (D.C. Cir. 1971) (citation omitted).

new renewal showing will not “facilitate their business and network planning” and licensees will have less incentive to “invest in new facilities and services” as the Commission intended.<sup>10</sup>

For example, in evaluating the level and quality of a licensed service, the *Licensing NPRM* proposes to consider: (1) the population served, (2) the area served, (3) the number of subscribers, and (4) the services offered, within the licensed area. Population and area served are objective and quantifiable features directly related to the level and quality of service provided by a licensee. It is unclear, however, how subscriber data and the licensee’s service offerings will factor into the Commission’s evaluation of whether a licensee is providing a particular – and currently undefined – level and quality of service. For example, would a licensee with 100 subscribers in the licensed area be providing a sufficient level of service? Similarly, are there particular services, or a number of those services, that a licensee must offer to demonstrate a level and quality of service to warrant renewal?

In proposing to consider “whether service was ever interrupted or discontinued,” the *Licensing NPRM* also offers no standard for how the Commission will apply this information to its renewal analysis. For example, will an arbitrary number of outages, or total duration of interruptions, trigger a threshold that results in a denied renewal application? The proposal fails to consider that service interruptions and outages can occur for any number of reasons, including but not limited to maintenance and upgrades, technical issues outside a licensee’s control (*e.g.*, an outage caused by a third party supplier of backhaul facilities), vandalism, severe weather, natural disasters and other emergencies. Issues concerning the interruption or discontinuance of service during the license term are best addressed in the context of the Commission’s permanent

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<sup>10</sup> *Licensing NPRM*, 25 FCC Rcd at 6999.

discontinuance rule set forth in Section 1.953 of the Commission's rules, not in the renewal context.<sup>11</sup>

“Whether service has been provided to rural areas” is a similarly vague factor. For example, whether or how the Commission will define “rural” areas, or whether a specific level or type of service to a rural area would warrant renewal is left unanswered. The Commission's emphasis on providing service to less populated rural and tribal areas also does not square with its apparent concern that subscriber level is an important factor in its renewal analysis.

The Commission's proposed “non-exclusive” list of additional factors that it could consider in evaluating renewal applications raises similar concerns about the lack of measurable standards in reviewing license renewals.<sup>12</sup> Moreover, an arbitrary list of factors to which licensees may be held accountable, raises serious notice issues. For example, requiring licensees to explain their record of expansion, including a timetable for future growth, and to provide a description of their network investments could be interpreted as requiring a certain level of investment, but it is utterly unclear how this information will be evaluated. If a renewal application is granted, could there be consequences for a licensee who ultimately chooses to implement a different business plan than the one set forth in its application? Similarly, the Commission suggests that licensees must disclose the locations of each cell transmitter and identify the types and the operational status of their constructed facilities. This information, in addition to being highly confidential (as discussed below), is irrelevant and duplicative if a

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<sup>11</sup> T-Mobile supports the Commission's proposal to adopt a uniform framework regarding the permanent discontinuance of wireless operations as it would ensure that similarly situated licensees are afforded the same regulatory treatment. *See Licensing NPRM*, 25 FCC Rcd at 7018-19. Regardless of the specific time period that would constitute a permanent discontinuance of service, however, licensees should be able to obtain a waiver of the permanent discontinuance rule for good cause.

<sup>12</sup> *See id.* at 7007-08.

licensee describes in its renewal showing the scope of its coverage based upon population and geographic area.

## **B. A Renewal Showing Should Be Based upon Objective Standards**

The proposed renewal showing improperly allows the Commission to base its renewal decisions on a subjective review of the success of licensees' business plans and judgments – for example, by passing on their service offerings, the number, placement and type of equipment, and investment decisions, among other things – rather than basing its decisions on objective, standardized measurements.<sup>13</sup> As the Commission previously held, qualitative evaluations are:

necessarily subjective as different triers of fact may disagree as to whether a given record of performance can be classified as minimal, meritorious, or superior. In addition, triers of fact, regulatees, and the public are never quite sure as to the specific standards that will be applied in any given case. Consequently, we believe that it is appropriate to re-examine the standards utilized for determining when a renewal expectancy is warranted with a view toward clarifying what is expected of licensees and removing unnecessary subjectivity from the review process.<sup>14</sup>

Failure to define objective standards for renewal applications creates an environment ripe for legal challenge, of not only this rulemaking, but also of each and every renewal application that

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<sup>13</sup> See, e.g., *Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of 1.2111(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17*, Order, 17 FCC Rcd 7084, 7089 (WTB 2002) (concluding that the Commission should not substitute subjective business judgments regarding issues of profit or loss as the measure to determine unjust enrichment in place of objective standards); *Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands*, Order, 20 FCC Rcd 19696, 19714 (2005) (noting that the Commission relies upon “a variety of other mechanisms for assigning licenses that do not require a detailed evaluation of applicants' business judgments”).

<sup>14</sup> *Broadcast Renewal NOI*, 3 FCC Rcd at 5180; see also *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2892, 2901 (1993) (concluding that federal customer service standards for cable systems should not rely on subjective rather than objective levels of customer satisfaction, which “would be very difficult to measure and would result in fluctuating standards”).

is denied by the Commission based upon a subjective analysis.<sup>15</sup>

**C. The Proposed Renewal Showing Promotes a Lengthy Renewal Process**

The existing renewal process for uncontested renewal applications extends two or more months, but license renewal applicants can expect that their licenses will ultimately be renewed if they timely met their performance benchmarks. The proposed renewal showing, by contrast, will require significant staff time and administrative resources to review and act upon the volumes of information that would be required, further delaying license renewals. Because licensees will no longer have any certainty that their renewal applications will be granted given the ambiguity of the renewal showing, they could find themselves in a prolonged regulatory limbo while their renewal applications are pending. This regulatory uncertainty provides no incentive for licensees to further invest in the licenses and could delay the delivery of new technologies and services to consumers.<sup>16</sup>

**D. The Proposed Renewal Showing Seeks Highly Confidential Information that Is Unnecessary To Determine Whether a License Warrants Renewal**

The *Licensing NPRM* proposes to collect highly sensitive commercial and competitive data as part of a licensee's renewal showing. For example, a licensee would be required to submit with its renewal application: (1) the number of subscribers the licensee has in the licensed area; (2) an explanation of the licensee's record of expansion, including a timetable for future growth; (3) a description of the licensee's investments in its systems; (4) the locations of each cell transmitter; (5) identification of the types, and the operational status, of the licensee's

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<sup>15</sup> See *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Second Order on Reconsideration of the Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 25020, 25032 (2000) ("Administering such a subjective test [regarding the ability of a party to make license payments] would be difficult and would invite challenge on the basis of being arbitrary.").

<sup>16</sup> A protracted renewal process also could adversely affect the secondary market by keeping the legal status of a license in limbo for an extended period.

constructed facilities; and (6) a list of all interruptions and discontinuances in the licensed area. Each of these categories contains confidential and competitively sensitive information that is not typically made public by operators.<sup>17</sup> In addition, the disclosure of information regarding facilities and operations raises national security concerns. The Commission has long recognized the highly sensitive nature of this information through its standard practice of issuing in merger transactions protective orders and detailed confidentiality procedures to safeguard information about subscriber and market share and network operations.<sup>18</sup> Service outage information, as a matter of course, also is kept confidential and is not subject to Freedom of Information Act requests.<sup>19</sup>

None of this confidential and sensitive information is necessary for the Commission to make an informed determination regarding whether a licensee is using its spectrum and warrants renewal. Under the Commission's renewal proposal, licensees already would submit information about geographic and population coverage, negating the need to file additional coverage data. In fact, the requested confidential information bears little relationship to whether a licensee is using its spectrum sufficiently to warrant renewal.<sup>20</sup> Furthermore, providing the confidential information with the renewal application would be administratively burdensome and generate unnecessary paperwork. Service interruption and discontinuance information is already

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<sup>17</sup> The one exception is transmitter locations for site-based licenses, which are already available through the Commission's universal licensing system and need not be disclosed again in a renewal application.

<sup>18</sup> See, e.g., *Applications of Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless*, Protective Order, 24 FCC Rcd 13862 (WTB 2009); *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, Protective Order, 23 FCC Rcd 11154 (WTB 2008).

<sup>19</sup> See 47 C.F.R. § 4.2.

<sup>20</sup> The requested confidential information would be relevant only if the Commission intended to use that information to review and pass judgment on a licensee's individual business plans. As discussed above, however, basing the Commission's renewal analysis on subjective beliefs would not serve the public interest.

accessible by the Commission in operators' outage reports that are filed pursuant to Part 4 of the Commission's rules.<sup>21</sup>

To the extent the Commission ultimately concludes that licensees must submit any confidential information with their renewal applications, the Commission should ensure that the submission is not made publicly available. In addition, the Commission should adopt the presumption that any information declared to be competitive or otherwise sensitive business information is automatically deemed confidential without requiring licensees to submit a specific confidentiality request with each filing.<sup>22</sup>

#### **IV. THE PROPOSED REGULATORY COMPLIANCE DEMONSTRATION IS UNDULY PUNITIVE AND BURDENSOME**

Requiring a licensee to file with its renewal applications copies of all orders and letter rulings finding a violation or apparent violation of the Communications Act or any Commission rule or policy, as well as a list of any pending petitions to deny filed against the licensee, is unduly burdensome and punitive.<sup>23</sup> The Commission's own enforcement records should include copies of relevant orders or letter rulings regarding statutory or rule violations. Accordingly, requiring licensees to provide the same information is duplicative and begs the question why matters that have been presumably settled or resolved are resurfaced for some sort of further embarrassment or punishment via the renewal process. Moreover, any allegations set forth in pending petitions to deny are irrelevant to the renewal process as they are merely unproven

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<sup>21</sup> See 47 C.F.R. §§ 4.1 *et seq.*

<sup>22</sup> The Commission adopted such a presumption in similar cases where the Commission's rules require service providers to submit confidential information. See, e.g., 47 C.F.R. § 0.459(a)(3) (stating that the Commission "may use abbreviated means for indicating that the submitter of a record seeks confidential treatment, such as a checkbox enabling the submitter to indicate that the record is confidential"); *Id.* § 4.2 (providing that outage reports are presumed confidential).

<sup>23</sup> Under the proposed rule, a licensee alternatively must certify that there are no orders, rulings or pending petitions to deny that must be disclosed.

assertions. The breadth of the proposed compliance demonstration also is unusually onerous. The demonstration encompasses not only the licensee itself, but any entity that owns or controls the licensee, any entity that is owned or controlled by the licensee, any entity that is under common control with the licensee, and any other affiliate of the licensee.<sup>24</sup> For larger companies and/or those that provide other non-wireless services, this could include a significant number of operating affiliates and lines of business. Further, the demonstration includes *all* orders, rulings and petitions to deny relating to the licensee or an affiliate, regardless of whether they concern the license for which the renewal is sought, again implicating a tremendous number of licenses and potentially non-wireless operations. As currently drafted, the proposed rule also places no time limit on the demonstration even though the Commission itself is subject to statutory time limitations on enforcement cases.<sup>25</sup> Thus, licensees must disclose orders and rulings dating back beyond the license term effectively to the company's inception – in some cases, this could be decades.

As a practical matter, the identification and disclosure of *all* orders, letters, and pending petitions to deny for *all* affiliates across *all* lines of business over potentially decades of time would require an unheralded level of due diligence. It is unlikely that any licensee will be able to provide the assurances the Commission seeks, particularly regarding compliance concerning licenses and operations that were acquired from another entity. Thus, the Commission cannot reasonably expect licensees to certify that they have made all of the requisite disclosures.<sup>26</sup> It

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<sup>24</sup> See *Licensing NPRM*, 25 FCC Rcd at 7011-12.

<sup>25</sup> 47 U.S.C. § 503(b)(6).

<sup>26</sup> The Federal Communications Bar Association has long warned against making any general representations or opinions that a licensee is operating in compliance with the law. See Federal Communications Bar Association, *Report of the Subcommittee on Legal Opinions of the Transactional Practice Committee*, at 27 (Jan. 26, 1996), available at <http://www.law.indiana.edu/fclj/pubs/v48/no3/fcc.html> (noting that “[t]he breadth of [the] Communications Act regulation is such that it is

also is questionable whether an action that occurred in the distant past is even relevant to the qualifications of the licensee at the time of renewal.<sup>27</sup> Holding a licensee to such an unwarranted standard is even more unreasonable given the grave consequence – loss of a license – if it is unable to guarantee the accuracy and completeness of its disclosure.<sup>28</sup>

**V. ANY NEW RENEWAL SHOWING SHOULD NOT APPLY TO ACTIONS TAKEN BY LICENSEES PRIOR TO THE NEW RULES' EFFECTIVE DATE**

As explained above, the renewal showing proposed in the *Licensing NPRM* is far more onerous and ambiguous than the renewal requirements now imposed on licensees. The Commission would apply the new renewal showing to the entire license term, even though licensees had no notice of the higher standard to which they would eventually be held and were deprived of the opportunity during their license term to meet this higher threshold.<sup>29</sup>

Accordingly, to the extent the Commission adopts the proposed renewal showing (or a variation thereof), it should not apply new standards to licensees prior to the new rules' effective date.

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inappropriate to give a general opinion to the effect that a licensee is operating in compliance with [the] law” and that providing such an opinion “requires an uncabined amount of diligence”).

<sup>27</sup> Any matter involving alleged violations of the Communications Act should be resolved as a stand alone issue or with respect to the specific license(s) at issue. Yet, the FCC’s proposed regulatory compliance requirement possibly could encourage extended litigation during the specific adjudication process as licensees may behave differently during that matter because of the “lifetime” obligation to file adverse orders with *all* future license renewals.

<sup>28</sup> The Commission routinely reviews the qualifications of applicants to hold wireless licenses as part of its review of mergers, acquisitions and other transactions, as well as during the auction process. It is unclear whether the Commission is suggesting that it apply a different, and arguably higher, standard in the renewal context.

<sup>29</sup> The Order that accompanied the *Licensing NPRM* ordered that during the pendency of this rulemaking, renewal applicants were to file applications “in accordance with *current* Commission rules,” but also ordered the Commission staff 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.*” See *Licensing NPRM*, 25 FCC Rcd at 7039 (emphasis added). The Commission’s decision to condition wireless licenses pending adoption of a new renewal showing for the already past license term amounts to retroactive rulemaking, which is prohibited by the Administrative Procedure Act.

For example, many of the PCS C and F Block licenses that were auctioned in 2001 in Auction No. 35 will be subject to renewal within the next two years. These licensees (including T-Mobile) have been operating in good faith pursuant to the existing service rules. Under the proposed renewal showing, however, the Commission would take into consideration such new factors as the provision of service to rural and tribal areas, levels of investment, and whether service has been interrupted or discontinued during the *entire license term*. These licensees have not had the opportunity to adjust business plans, strategies, and priorities, or change administrative practices as may be required to satisfy the new rules.

Holding licensees accountable to a standard that did not exist for the vast majority of their license terms is unreasonable by any measure, and subject to legal challenge as retroactive rulemaking. The Administrative Procedure Act authorizes only prospective rulemaking – specifically, it limits the definition of a “rule” to substantive law of “future effect.”<sup>30</sup> The Commission does not have authority to engage in retroactive rulemaking unless specifically authorized by Congress,<sup>31</sup> and the Communications Act does not grant the Commission such authority, either with respect to rulemaking or as to renewal and licensing.<sup>32</sup> Accordingly, the Commission may not base the renewal of a license on actions (or inactions) taken prior to the adoption of new substantive rules.<sup>33</sup>

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<sup>30</sup> 5 U.S.C. § 551(4).

<sup>31</sup> *Bowen v Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *see id.* (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

<sup>32</sup> *See* 47 U.S.C. §§ 154(i), 201(b), 303(r), 307, 309.

<sup>33</sup> *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took

## VI. CONCLUSION

T-Mobile supports the Commission's efforts to harmonize the license renewal requirements that apply to wireless licensees. The Commission's proposed renewal showing, however, should be based upon reasonable, clear and objective standards that provide licensees with certainty regarding the renewal process.

Respectfully submitted,

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place has timeless and universal appeal.”) (footnote and internal quotation marks omitted) (*citing General Motors Corp. v. Romein*, 503 U. S. 181, 191 (1992), *quoting Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U. S. 827, 855 (1990) (Scalia, J., concurring)).