

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

To: The Commission

**COMMENTS OF COMMNET WIRELESS, LLC**

Commnet Wireless, LLC (“Commnet”), by its attorneys and pursuant to Section 1.419 of the Commission’s Rules, hereby submits these Comments in response to the Commission’s *Notice of Proposed Rulemaking and Order*, FCC 10-86, released May 25, 2010, summary published 75 *Fed. Reg.* 38959 (July 7, 2010) (the “NPRM”).<sup>1</sup> In particular, Commnet focuses on two aspects of the NPRM: 1) the need to clarify that the proposed discontinuance of service rules for Commercial Mobile Radio Service (“CMRS”), p.26 at ¶56, continue to permit the use of a

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<sup>1</sup> Commnet is the direct 100% parent of Tisdale Telephone Company, LLC (“Tisdale”) and the direct 100% subsidiary of Atlantic Tele-Network, Inc. (“ATN”). Tisdale and ATN on June 24, 2010 submitted a Petition for Partial Reconsideration and/or Clarification of Order Regarding the Processing of Pending, Cut-off Cellular Applications (“Recon Petition”) and on July 27, 2010 submitted a Supplement thereto. Those pleadings were addressed to the portion of the NPRM which constituted an adjudicatory matter involving Tisdale’s pending cellular application, File No. 0003848206. If and to the extent the Commission deems it necessary for such matters to also be raised in a pleading entitled “Comments”, Commnet hereby incorporates by reference the Recon Petition and the Supplement, and urges that the relief requested therein be immediately granted by the Commission.

“carriers’ carrier” business model; and 2) the Commission’s proposal, pp.19-20 at ¶¶40-42, to eliminate all incentive for any private person to act as a “private attorney general” to investigate incumbent licensee wrongdoing.

### **COMMNET’S INTEREST IN THIS PROCEEDING**

Commnet is the nation’s foremost CMRS carriers’ carrier, handling incoming roaming volume of approximately seven hundred million voice minutes and twenty-four million megabytes of data traffic in 2009. Those figures will be exceeded in 2010. Commnet operates both CDMA and GSM systems, and enables every large and mid-size CMRS carrier in the United States, as well as hundreds of smaller or foreign carriers, to add the areas within Commnet’s coverage footprint to their own coverage footprints. Because Commnet concentrates its efforts mainly on more remote and rural areas, it enables the retail carriers it serves to focus their own capital budgets on their own areas of greatest need, while still ensuring quality service to rural America.<sup>2</sup>

Of perhaps more importance to the Commission’s public interest perspective, Commnet provides critical emergency support in remote areas. Of Commnet’s 400+ cell sites, there are approximately 100 where Commnet is the *only* wireless service available, providing both CDMA and GSM service and the only wireless 911 service. Another 125 of those sites represent areas where Commnet is the *only* carrier for one or the other wireless technology (*i.e.*, Commnet is the only CDMA or the only GSM service), meaning that Commnet is the only wireless 911 service for incoming roamers using that technology.

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<sup>2</sup> By way of example only, Commnet provides significant service to each of AT&T, Verizon Wireless, T-Mobile, Cricket (Leap), US Cellular, Sprint, and Alltel (now an affiliate of Commnet).

Commnet handles literally hundreds of 911 calls each month. In the last month alone, Commnet's 911 service saved three lives in two unrelated incidents in Death Valley.<sup>3</sup> If the only "constructed" cell sites are those which serve "local" subscribers, Commnet would have to rip down these remote sites and the new regulations would be the cause of people dying.

Commnet came to prominence during the past decade, its growth spurred by the Commission's decision in 2002 to remove the prior regulatory prohibitions on the use of a carriers' carrier model. Commnet's current success is a testament to the wisdom of the Commission's decision in 2002. As such, Commnet has a major interest in ensuring that its carriers' carrier business model remains lawful under Commission rules. Commnet therefore requests the Commission clarify that any rule change respecting the definition of "discontinuance of service" not be accidentally construed to reimpose the former, misguided, regulatory prohibition on engaging in business as a carriers' carrier.

**I. THE COMMISSION SHOULD CLARIFY THAT THE WORD "SUBSCRIBER" IN THE PROPOSED DISCONTINUANCE OF SERVICE RULE INCLUDES INCOMING ROAMERS**

**A. Background of the Discontinuance of Service Rule in Part 22**

Prior to 2002, Section 22.946 of the Rules contained the following language:<sup>4</sup>

A cellular system is not considered to be providing service to the public if . . . the system intentionally serves only roamer stations.

However, in 2001, the Commission proposed to remove this language and instead consider a cellular system to be providing service to the public even if it only served roamers.<sup>5</sup> Following receipt of comments, the Commission did just that, explaining:

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<sup>3</sup> See attached July 21, 2010 news article from the *Eastern Sierra News*.

<sup>4</sup> This text was originally located at former Section 22.946(a)(1), which was later renumbered as former Section 22.946(b).

We conclude that the competitive state of the mobile telephony market makes unnecessary the rule prohibiting carriers from serving only roamer stations. As consumers now have numerous mobile telephony offerings from which to choose, the concern regarding lack of competition no longer exists. Accordingly, we will remove the provision that prohibits service only to roamer stations.

(Emphasis added.) *Year 2000 Biennial Regulatory Review--Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, Report and Order*, 17 FCC Rcd 18401, 18433 (2002).

#### **B. Need for Clarification**

In the NPRM, p.26 at ¶56, the Commission proposes to require that a CMRS system be deemed to have permanently discontinued service if, for 180 consecutive days, the system “does not provide service to at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier.” Absent a review of the history of this wording in current Section 22.317 and the associated past changes to Section 22.946, it could appear ambiguous as to whether “subscriber” in the quoted text refers to both local subscribers and roamers, or only to local subscribers of the providing carrier. That is especially so where, as here, the Commission is proposing to move the text out of Part 22 and into Part 1 so as to apply to multiple wireless services.

Accordingly, the Commission should, either through a clarifying sentence in the rule itself, or at least clarifying language in the adopting report and order, state expressly that service to incoming roamers constitutes “service to subscribers” for purposes of the new, uniform

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<sup>5</sup> See *Year 2000 Biennial Regulatory Review--Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, Notice of Proposed Rulemaking*, 16 FCC Rcd 11169 (2001).

discontinuance of service rule, and that a CMRS system may lawfully, intentionally serve only roamers.

## **II. PROHIBITING COMPARATIVE RENEWAL APPLICATIONS IS POOR PUBLIC POLICY; IT REMOVES ALL INCENTIVES FOR PETITIONS TO DENY AGAINST UNQUALIFIED INCUMBENTS**

In the NPRM, pp.19-20 at ¶¶40-42, the Commission proposes to prohibit the filing of competing applications mutually exclusive with renewal applications filed by incumbents. The Commission says that even without comparative applications competing with a renewal applicant, outside entities will have substantial incentive to prosecute petitions to deny renewal applications because they will have the prospect of being able to bid on the open spectrum at auction if the petition to deny succeeds. *Id.*, at ¶41. The Commission also analogized to Section 309(k) of the Act, 47 U.S.C. §309(k), which prohibits the filing of competing applications against broadcast renewal applications.

Neither of these arguments stands up to scrutiny. Congress, in enacting Section 309(k), specifically relied upon the continued ability of outsiders to prosecute petitions to deny against broadcast renewal applications.<sup>6</sup> However, in the broadcast context, the Commission and the courts have long afforded standing to any listener (as to radio) or viewer (as to television). Neither the Commission nor the courts have ever afforded standing to a subscriber or potential subscriber of a CMRS system. Moreover, as discussed below, Commission precedent denies standing even to a potential participant in a future wireless auction.<sup>7</sup>

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<sup>6</sup> See H.Rep. No. 104-204(I), at 123, n.115 (1995), *reprinted in* 1996 U.S.S.C.A.N. 10, 91 (“*House Report*”).

<sup>7</sup> Commnet does not necessarily agree that the Commission precedent on standing in the wireless telecom context was correctly decided. However, for purposes of this rulemaking proceeding, the Commission must assume that its own adjudicatory decisions are good law, or else expressly overrule them. For the Commission to do otherwise would be *per se* arbitrary and capricious.

Without standing, there is no right to prosecute a petition to deny. And without the prophylactic of either petitions to deny or competing applications, there is no mechanism for unearthing disqualifying facts about an incumbent licensee.

The most recent full Commission decision on the issue of standing in the wireless context is the decision in *Paging Systems, Inc.*, 25 FCC Rcd 4036 (April 16, 2010) (“*Paging Systems*”). In that case, the Commission held an auction of wireless licenses. One of the qualified bidders, PSI, challenged the grant of licenses to two other bidders (collectively, “Havens”). PSI itself had won as many licenses as it was possible for it to have won in light of the size of its pre-auction upfront payment, and Havens challenged PSI’s standing to protest. Havens argued that since PSI could not have possibly won more licenses than it had won, PSI was not injured by the grant of licenses to Havens.

PSI argued in response that: (a) it would have submitted a larger upfront payment but for the actions of Havens which were the subject of the protest; and (b) in any event, PSI was now ready to participate in a re-auction of the licenses if Havens were disqualified. Affirming the earlier decision of the Wireless Telecommunications Bureau (“Bureau”), the Commission ruled that PSI lacked standing to protest the Havens applications. 25 FCC Rcd at 4044.

The Commission and the Bureau have consistently maintained a very narrow view of standing in the wireless context. Thus, as far back as *Clifford Heinz Trust dba CSH Cellular*, 11 FCC Rcd 5354, 5357 (1996) (“*Heinz*”), the Commission held that a dismissed applicant does not have standing to petition to deny the application of a mutually-exclusive applicant for the same license whose application had not been dismissed. Similarly, in *DCR PCS, Inc.*, 11 FCC Rcd 16849, 16857 (WTB, 1996) (“*DCR*”), the Bureau held that where an auction participant’s upfront payment only rendered it eligible to bid on some licenses, that participant lacked

standing to petition to deny an auction-winning application for any other licenses sold during the same auction.<sup>8</sup>

Thus, an entity which claims it intends to bid on the same license in a future auction, if the pending application is denied, nevertheless lacks standing to prosecute a petition to deny, according to the Commission's decisions. The NPRM said, pp.19-20 at ¶41:

Interested parties that might otherwise file a competing application would, under our proposed framework, have the opportunity to participate in the auction of spectrum recovered from any geographic licensee or to apply for spectrum recovered from a site-based licensee (provided the spectrum did not revert to a geographic overlay licensee).

However, the above-quoted statement has no foundation -- under *Paging Systems, Heinz, DCR* and *Nextwave, supra*, someone desiring to participate in a future auction does not qualify as an "interested party". Therefore, there is absolutely no standing on the part of anyone to file a petition to deny under the Commission's proposed rules. The Commission's proposal effectively precludes the filing of any petition to deny whatsoever.

Even Congress, in enacting Section 309(k) of the Act in the broadcast context, recognized the critical importance of maintaining the outlet of petitions to deny against renewal applications, and relied heavily upon the past holdings of the Commission and the courts giving a broad interpretation of standing in the broadcast context. *House Report, supra*. Unless and until the Commission overrules its prior adjudicatory decisions and declares that the intention to participate in a future auction (if spectrum is recovered) is enough of an injury to confer standing

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<sup>8</sup> The same holding was reiterated in *Nextwave Personal Communications, Inc.*, 12 FCC Rcd 2030, 2034 (WTB, 1998) ("*Nextwave*").

on a person, the Commission cannot rationally eliminate the filing of competing applications to renewal applications.<sup>9</sup>

Separately, eliminating competitive applications to renewal applications is poor public policy, because there have not been abuses of the existing regulatory regime, which has worked magnificently for fifteen years in CMRS. The existing regime prohibits greenmail filings, and provides an overwhelming comparative preference to virtually every incumbent CMRS licensee. These two existing rule provisions have successfully eliminated the filing of competing applications in all but the most unusual and egregious cases, where, in fact, the incumbent licensee does not deserve to be renewed.

Although there are over one thousand four hundred cellular licenses nationwide, there have been only two competing applications filed against incumbents in cellular in the last ten years. (Cellular licenses have ten-year terms.) This does not constitute a “problem” that the Commission needs to remedy.<sup>10</sup> The contrary and unsupported tentative conclusion in the NPRM (*viz.*, that there is an existing problem in need of a solution) is simply irrational.

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<sup>9</sup> The entire discussion in Part II of these Comments assumes, for the sake of argument, that the chance to participate in a future auction of recovered spectrum, somewhere years in the future, is sufficient incentive to cause legitimate parties to spend the money on investigating an incumbent licensee and filing a petition to deny. Commnet, which has been repeatedly frustrated by the Commission’s refusal to timely auction individual unserved areas until several years after mutual exclusivity is established and competing auction applicants have achieved cut-off status, disagrees.

The prospect of the Commission taking two years to grant a petition to deny, and then processing at least one round of reconsideration/review, then opening a new auction filing window two or three years after that, and then with the successful petitioner having no advantage over any other auction participant, is insufficient for any rational person to prosecute a petition to deny.

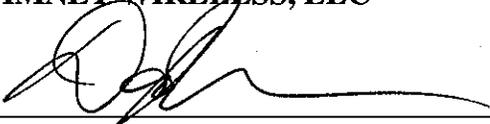
<sup>10</sup> These numbers are based on Commnet’s review of publicly available information in the Commission’s ULS data base.

## CONCLUSION

The Commission should clarify, either in the text of the new rule or at least in the adopting report and order, that service to incoming roamers constitutes “service to subscribers” for purposes of assessing discontinuance of service. That interpretation of the phrase “service to subscribers” has served the public interest well, expanding CMRS service footprints and saving lives in emergencies.

The Commission should not adopt its proposal to eliminate all competitive renewal applications. Past Commission decisions on the issue of standing in the wireless context mean that prohibiting competing applications is tantamount to prohibiting petitions to deny, and tantamount to eliminating all oversight on the activities of incumbent wireless licensees. Separately, in the real world, even if the problem of standing could be overcome, there is no real incentive to file a petition to deny, given the Commission’s past record in the timing of auctioning in the cellular unserved area and other “orphan” spectrum contexts. Finally, the record as contained in the ULS data base shows there is no “problem” in need of such a “fix.”

Respectfully submitted,  
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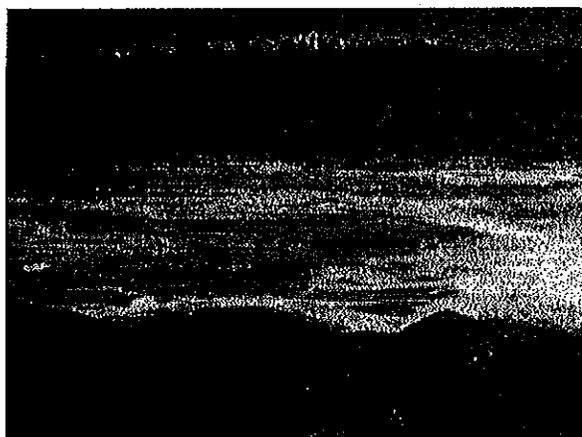


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# New Cell Tower Helps Save Three Lives in Death Valley

*Written by Tom Woods*  
Wednesday, 21 July 2010 15:14



A new cell tower installed at Furnace Creek may have helped save lives in two separate incidents.

Brent Pennington, the Chief Ranger for Death Valley National Park reports that two French Nationals, a 27-year-old male and a 21-year-old Female, were rescued from the extreme heat on Monday after making a phone call that may not have connected before this cell tower was installed in recent months.

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Heat related deaths are all too common in Death Valley during the summer months. On Monday morning Rangers responded to a 911 call from the two stricken hikers who didn't know where they were, but thought they were near Dantes's View. The temperature was about 117 degrees, and the two hikers had no water. Pennington reports that their vehicle was found at the Zabriskie Point parking lot. With Rangers searching on foot, a Navy helicopter out of China Lake spotted the two and hoisted them to safety.

Pennington says that there was "potential for a very dire situation," and added that before the cell tower was installed at Furnace Creek, the two may not have been recovered until it was too late. The cell coverage is not widespread in Death Valley, he says, but in this case it worked.

In another incident on Monday the 13th, a young man from Fredericksburg, Virginia decided to hike from Badwater to the Mahogany Flat Campground high in the Panamint Mountains. The man left at 5:00 in the morning and planned to meet his girlfriend at the campground at 2:00 pm. The girlfriend called the authorities when the man didn't show up by 4:00 pm.

At around 6:00 pm, Pennington says that the missing man used a cell phone to place a 911 call. After hiking all day in temperatures in the low 120's, the man had crossed the eight mile wide valley and made to the foot of the Panamint Range where he sat down by a spring to rehydrate. The man had been carrying perhaps a gallon of water, but by the time he got to the spring, he was so dehydrated and nauseas that he couldn't keep water down. Pennington estimates that the man had about a half an hour to live when rangers reached him.

The cell phone call made the difference. Pennington says that rangers have seen six people die over the years from trying this exact hike.

The extreme temperatures of Death Valley in the summer lead park staff to recommend that people not hike in the lower elevations and if they do, to stay in sight of their cars.

In these two cases a recently installed cell tower allowed rescuers to arrive in the nick of time. Fortunately no one died, but as Chief Ranger Pennington said, it was, "not for lack of trying."

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