

**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 USA MOBILITY, INC.

USA Mobility, Inc. submits these comments in response to the Notice of Proposed Rulemaking and Order adopted by the Commission on May 20, 2010 in the above-referenced proceeding (the “*NPRM*”). In the *NPRM*, the Commission notes the “patchwork of rules governing renewal and discontinuance obligations for wireless services”¹ In response, the Commission proposes to “create consistent requirements for renewal of licenses and consistent consequences for discontinuance of service”²

USA Mobility appreciates the Commission’s efforts to bring uniformity to its permanent discontinuance and license renewal rules for wireless services. At the same time, USA Mobility urges the Commission to ensure that such uniformity does not compromise the broad—and beneficial—flexibility that the Commission has afforded licensees in determining the highest and best uses of their licensed spectrum in response to technological and market

¹ *NPRM* ¶ 1.

² *Id.*

conditions. While it makes sense for the Commission to adopt a uniform standard, that standard should not restrict such flexibility or mandate a “one-size-fits-all” approach.

The primary goal of the Commission’s permanent discontinuance and license renewal rules should be to ensure that licensees are making good-faith efforts to use their spectrum resources efficiently and productively. The evaluative tests reflected in the Commission’s permanent discontinuance and license renewal rules should reflect this goal. Toward that end, the Commission’s rules should provide appropriate incentives, but should not dictate particular results. The proposed “renewal showing” embraces this view, recognizing that the Commission must evaluate a variety of factors in a holistic manner in order to assess fairly how “substantial” a licensee’s service is.

However, the proposed definition of “permanent discontinuance” takes a much narrower view of licensee performance, evaluating *only* whether a licensee is currently providing service to a single customer. That proposal ignores the fact that a licensee’s decision *not* to use spectrum resources on a *temporary* basis may be reasonable and efficient in the longer run (*e.g.*, a temporary cessation in preparation for more extensive operations). Accordingly, the Commission should adopt a definition of “permanent discontinuance” that permits a *temporary* cessation of operations (of any length), provided that the licensee has met all applicable build-out requirements, certifies after 180 days that it intends to resume operations, and explains how and when it intends to resume operations.

I. THE MULTIDIMENSIONAL APPROACH REFLECTED IN THE PROPOSED “RENEWAL SHOWING” WOULD SERVE THE PUBLIC INTEREST

The *NPRM* proposes a standardized approach to license renewals that would incorporate a multidimensional “renewal showing.”³ The Commission proposes to evaluate a diverse array of factors as part of this showing, including: (i) the licensee’s geographic and population coverage; (ii) the licensee’s record of investment, construction, and expansion; (iii) the degree to which the licensee offers specialized or technically sophisticated service; and (iv) whether the licensee serves niche markets or populations.⁴ Other factors may be evaluated, depending on input received from commenters in this proceeding.⁵

USA Mobility supports the Commission’s efforts to create a standardized process through which renewal applicants can make a “renewal showing” to the Commission. Further, USA Mobility supports the Commission’s tentative conclusion that it will consider multiple factors in evaluating the sufficiency of any such showing. That being said, USA Mobility urges the Commission to clarify that: (i) it will take a holistic view of licensee performance, recognizing that different licensees may provide “substantial service” in different ways; and (ii) that the sufficiency of any “renewal showing” will be evaluated in light of prevalent technological and market conditions. These concepts are implicit in the multidimensional approach adopted by the Commission, but making them explicit would provide greater certainty to licensees and their investors—and thereby serve the public interest.

³ See *id.* at ¶ 17.

⁴ *Id.* at ¶ 27.

⁵ *Id.* at ¶ 28.

II. THE RESTRICTIVE DEFINITION OF “PERMANENT DISCONTINUANCE” PROPOSED IN THE *NPRM* WOULD DISSERVE THE PUBLIC INTEREST

The *NPRM* proposes to define a “permanent discontinuance” of service as “180 consecutive days . . . during which a [CMRS licensee] does not serve at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier.”⁶ A permanent discontinuance would result in automatic termination of the underlying license—without Commission intervention or any evaluation of the public interest implications of such termination.⁷ As explained below, such a rigid definition would deny licensees the flexibility necessary to respond to changing market and technological conditions, while undermining important Commission policies—all of which would be contrary to the public interest.

A. Licensees Must Respond Flexibly to Complex Technological and Market Conditions in Order To Provide Efficient Service to the Public.

The Commission wisely has granted licensees significant flexibility to determine how to use their licensed spectrum efficiently in response to changing technological and market conditions. In doing so, the Commission has recognized that “enabl[ing] spectrum users to make fundamental choices about how they will use spectrum . . . tends to lead to efficient and highly-valued spectrum uses.”⁸ The National Broadband Plan observes that “[s]pectrum flexibility, both for service rules and license transfers, has created enormous value.”⁹

The Commission has a legitimate interest in ensuring that licensees actually are making *some* use of their spectrum. The Commission has addressed such “warehousing” concerns primarily by auctioning spectrum—forcing licensees to internalize the costs of non-

⁶ *Id.* at ¶ 55.

⁷ *Id.* at ¶ 54.

⁸ *Spectrum Policy Task Force Report*, ET Docket No. 02-135, at 16 (Nov. 2002).

⁹ *Connecting America: The National Broadband Plan*, at 79, available at <http://www.broadband.gov/plan/> (2010) (“National Broadband Plan”).

use—and through construction and “substantial service” requirements.¹⁰ Notably, these requirements reflect an intentionally light regulatory touch; compliance is evaluated at wide intervals, with consideration of a wide variety of factors.¹¹

In contrast, the Commission’s “permanent discontinuance” rules have served a different purpose—namely, to expedite the Commission’s ability to reclaim spectrum where it clearly is not being used. In the absence of automatic cancellation as a result of a “permanent discontinuance,” the Commission would need to use more complex Section 312 enforcement procedures to reclaim such spectrum.¹² Critically, though, “permanent discontinuance” procedures do not permit a fulsome analysis of the “permanence” of any discontinuance and do not facilitate a substantive analysis of the public interest implications of license cancellation in any given case. Therefore, those procedures serve the public interest only where there is reason to believe that such “permanence” is certain (or nearly so). Where a licensee has built out its network and operated that network for years, such certainly is rarely present. In fact, under those conditions there is a significant likelihood that any cessation of operations will be temporary—undermining any presumption that rigid application of the “permanent discontinuance” procedures would serve the public interest.

¹⁰ See, e.g., *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957, at ¶ 154 (1994) (noting that competitive bidding, spectrum caps, and construction requirements would reduce the likelihood of spectrum warehousing).

¹¹ See, e.g., 47 C.F.R. § 24.103(d) (allowing narrowband PCS licensees to satisfy construction obligations by providing “substantial service” within 10 years of license grant).

¹² See 47 U.S.C. § 312.

B. By Hamstringing a Licensee’s Ability To Respond Flexibly to Changing Conditions, the Proposed Definition of “Permanent Discontinuance” Would Eliminate the Public Interest Benefits Extending from This Flexibility.

The proposed permanent discontinuance rule would be appropriate only if it were clear that automatically cancelling a license after a cessation of 180 days would always—or nearly always—be reasonable and efficient. This simply is not the case. To the contrary, there are many cases in which it could be reasonable and efficient for a licensee to cease operations for 180 days or more. For example:

- Economic conditions could warrant a *temporary*, but not *permanent*, cessation of operations. Indeed, economic theory suggests that such temporary cessations are efficient where marginal costs exceed marginal benefits. Notably, economic cycles typically last for more than 180 days, such that conditions might not favor a resumption of operations during this time period.
- A licensee could be waiting for next-generation equipment or infrastructure, which could take more than 180 days to develop or deliver. In such circumstances, it would be efficient for the licensee to wait for such equipment or infrastructure, instead of wasting limited resources on last-generation equipment or infrastructure.
- A licensee could have ceased operations pending efforts to divest itself of its spectrum rights. Notably, the divestment process frequently takes more than 180 days to complete.
- A licensee could have ceased operations pending negotiations with one or more large customers, which could take more than 180 days to complete.

In USA Mobility’s experience, maintaining flexibility in these scenarios can enhance greatly the efficiency of a licensee’s operations, as well as its ability to serve the public. USA Mobility has built out its network fully, and has provided valuable consumer service for years. Yet, USA Mobility has found that discontinuing the use of certain spectrum resources on a temporary basis can be both reasonable and efficient. For example, from time to time USA Mobility may temporarily discontinue operations on some frequencies in order to reconfigure its networks or consolidate its operations, optimize its network configuration, increase efficiency, or

free resources for alternate uses (*e.g.*, new services, divestments, etc.). The proposed definition would risk precluding USA Mobility and other licensees from realizing these and other efficiencies.

C. Conversely, There Are Many Cases in Which Cancelling a License Simply Because the Licensee Has Ceased Operations for 180 Days or More Would Be Contrary to Established Commission Policy and the Public Interest.

At the same time, adopting an inflexible definition of “permanent discontinuance” would undermine established Commission policy—and thus the public interest. In particular:

- ***The proposed definition of “permanent discontinuance” and resulting threat of license cancellation would undercut reliance interests and deter critical investment in next-generation systems.*** The Commission has emphasized, in the National Broadband Plan and elsewhere, the need to craft policies that encourage investment in next-generation networks, including by providing the stability and certainty necessary to facilitate private sector investment.¹³ A licensee’s ability to attract such investment turns on its ability to minimize risk and ensure that an investor can realize returns even in the face of that risk. Investors need to know that a licensee will have the flexibility to make intelligent decisions in response to prevalent market and technological conditions—including by temporarily ceasing operations over particular channels where necessary or prudent. The proposed definition of “permanent discontinuance” would compromise such flexibility, and thus make it more difficult for licensees to attract investment going forward.
- ***The proposed definition of “permanent discontinuance” would undercut the Commission’s Secondary Markets framework.*** The Commission’s *Secondary Markets* framework provides licensees with the flexibility and incentives to divest themselves of spectrum rights that they cannot use efficiently.¹⁴ The framework also recognizes, as a matter of federal policy, that licensees should be able to realize the economic value of spectrum that they cannot themselves use efficiently.¹⁵ Consequently, licensees have little incentive to retain spectrum that

¹³ See, *e.g.*, National Broadband Plan at 147 (proposing changes to the High-Cost program to “creat[e] greater certainty and stability for private sector investment.”).

¹⁴ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, First Report and Order, 18 FCC Rcd 20604 (2003) (“*Secondary Markets First Report and Order*”); Second Report and Order and Order on Reconsideration, 19 FCC Rcd 17503 (2004).

¹⁵ *Secondary Markets First Report and Order* at ¶ 21 (noting Commission’s efforts to “identify ways to encourage existing licensees to lease their unused spectrum usage rights to other users . . .”).

they have no intention of using, and, conversely, licensees who retain unused spectrum normally have good reason for doing so. Cancelling a license because the licensee has ceased operations for 180 days or more would undercut this framework by preventing licensees from: (i) resuming operations after 180 days where it would be efficient for them to do so; or (ii) leasing or transferring unused spectrum to third parties—and thus recouping some of the economic value of that spectrum— where it would be inefficient for licensees to use that spectrum themselves.¹⁶

- ***The proposed definition of “permanent discontinuance” would conflict with policy objectives reflected in the Commission’s auction policies and procedures.*** The existing spectrum auction framework seeks to ensure that spectrum rights go to their highest and best uses (*i.e.*, to the highest bidders), while maximizing auction receipts.¹⁷ These objectives are served best where potential bidders can formulate reasonable expectations about the future value of spectrum being auctioned—*i.e.*, where: (i) established reliance interests are protected; and (ii) licensees are able to recoup a substantial portion of their investment from a third party if they cannot make efficient use of their licensed spectrum themselves.¹⁸ The proposed definition would compromise the Commission’s ability to establish such reliance interests and facilitate efficient divestitures. Consequently, that definition would undermine the efficiency of the Commission’s auction machinery, while at the same time depressing auction receipts.
- ***The proposed definition of “permanent discontinuance” would impose unnecessary burdens on the Commission and the public.*** The process of identifying unused spectrum, reclaiming that spectrum, and then reaucting that spectrum to a third party is costly and time-consuming. Further, it is costly and

¹⁶ This result would be particularly ironic in light of National Broadband Plan proposals to allow broadcast licensees to realize an economic upside from “incentive auctions” of broadcast spectrum—even though broadcast spectrum was obtained by stations at no cost. *See* National Broadband Plan at 80, 90-91. In stark contrast, the Commission is contemplating the automatic cancellation of licenses acquired at auction at substantial cost—even where licensees (including paging carriers) plan to make use of them in the future or could sell them on the open market.

¹⁷ As the Commission observed in establishing the auction framework, “[a]warding licenses to those who value them most highly . . . will likely encourage growth and competition for wireless services and result in the rapid deployment of new technologies and services.” *Implementation of Section 309(j) of the Communications Act—Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, at ¶ 5 (1994).

¹⁸ *See, e.g., Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162, at ¶ 26 (2003) (“The flexible policies adopted in [the *Secondary Markets*] proceeding and with respect to the AWS bands will allow more entities access to the AWS spectrum and permit the marketplace to decide what use is made of this spectrum.”).

time-consuming for a winning bidder to construct and implement its own network. Where network infrastructure already exists, and a licensee has indicated that it wishes to resume operating that infrastructure, it may be inefficient and counterproductive for the Commission and the public to bear those costs—instead of simply waiting for the licensee to resume operations.

- ***The proposed definition of “permanent discontinuance” could eliminate critical excess capacity for public safety and other operations.*** As the Commission is well aware, demand for spectrum resources often spikes during natural disasters and other emergencies. It often is difficult to anticipate exactly how much capacity will be necessary to support rescue and recovery operations, or which networks will remain viable during those efforts. Consequently, it may be beneficial to maintain available capacity to support those operations even if it is not being used on a continuous basis.

D. The Commission Should Safeguard Licensee Flexibility, and Its Own Policy Objectives, By Adopting a More Flexible Definition of “Permanent Discontinuance.”

In order to ensure that licensees retain adequate flexibility and that the Commission’s policy objectives are not undermined, the Commission should adopt a more flexible definition of “permanent discontinuance” that permits a *temporary* cessation of operations (of any length), provided that the licensee has met all applicable build-out requirements, certifies after 180 days that it intends to resume operations, and explains how and when it intends to resume operations. This definition would more appropriately balance the public interest benefits of ensuring licensee flexibility with the Commission’s need to monitor spectrum use and ensure that spectrum does not lie fallow on a permanent basis.

If the Commission nevertheless determines that it should cancel licenses after a fixed period of non-use, it should allow licensees additional time after this period has elapsed (*e.g.*, one year) so that they may explore efficient transactions that would transfer control of the license to a party that intends to make immediate use of it. Such an approach would facilitate the efficient use of the underlying spectrum, without requiring the Commission to reclaim and

reauction that spectrum. At the same time, it would avoid sudden and abrupt cancellation of licenses, the threat of which would create destabilizing uncertainty.

III. CONCLUSION

For the reasons set forth above, USA Mobility respectfully requests that the Commission adopt rules in this proceeding that are consistent with these comments.

Respectfully submitted,

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