

**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)	

To: The Commission

Comments of Sensus USA Inc.

Sensus USA Inc. and its wholly owned subsidiary Sensus Spectrum LLC (collectively “Sensus”) is pleased to comment on the Commission’s Notice of Proposed Rulemaking (NPRM), released May 25, 2010, in the above captioned docket.

I. Introduction

a. Summary of Sensus’ Comments

Sensus agrees as a general matter that the construction, renewal and discontinuance rules should be tightened up. However, the NPRM goes too far. The NPRM appears to substantially raise the bar for renewal applicants. The NPRM introduces a new, quasi-adversarial, close-scrutiny proceeding with the Wireless Telecommunications Bureau (Bureau) without the protection of renewal expectancy. And, the NPRM introduces significant business risk and uncertainty to licensees by failing to identify renewal standards for affected services. Because of this additional uncertainty and risk, Sensus disagrees with the Commission’s proposed finding that these new procedures will encourage investment in wireless services. The Commission needs to put in place a clear renewal standard for each affected radio service and general

renewal expectancy for licensees that have followed the rules and provided substantial service.¹ The Commission can do this while still tightening up on construction, renewal and discontinuance requirements.

b. Interest of Sensus In This Proceeding

Sensus sells its systems to Critical Infrastructure utilities to operate their electric, natural gas or water distribution networks. Sensus customers include electric utilities (such as Southern Company, Alliant Energy, Portland General Electric, NV Energy and Sawnee EMC), gas distribution utilities (such as Atmos Energy which operates in 12 states) and water distribution utilities.

Sensus holds FCC licenses in the narrowband PCS and multiple address system (MAS) services. Sensus developed a narrowband technology called FlexNet that operates over licensed MAS and narrowband PCS frequencies. FlexNet is a state of the art radio system that utilizes spectrum: to read end-user meters and report on usage or trouble at the end point residence or business; to alert of outages, surges, imbalances or other emergencies occurring in a utility's network (including detection of leaks for water utilities); to enable the utility to engage in load balancing, peak load management and other smart grid functions; and to enable the end user to manage electrical, natural gas or water usage. Additional services include higher resolution meters, smart thermostat monitoring and control, multi-tiered pricing with daily updates, demand response device monitoring and control and distribution automation monitoring and control.

II. Summary of NPRM

A. NPRM Goals and Purposes

The stated purpose of the NPRM is to create consistent standards for license renewal and discontinuance of service and to clarify construction obligations for disaggregated or partitioned licenses by applying “the rules that have worked the best to a larger group of services.” NPRM para. 1. The NPRM proposes to largely adopt the “renewal framework that the Commission established for the 700

¹ As used in these Comments, the term “renewal standard” refers to the standard by which a license will be renewed in a non-adversarial context, and “renewal expectancy” refers to the standard used in an adversarial proceeding.

MHz Commercial Services Band in the *700 MHz First Report and Order*.² NPRM para. 2. In the NPRM, the Commission tentatively finds that adoption of uniform renewal policies and procedures “will provide certainty to licensees regarding renewal requirements” and “encourage licensees to invest in new facilities and services, and facilitate their business and network planning” and seeks comment on these findings. NPRM para. 7.

B. NPRM Implementation

The NPRM proposes to adopt renewal requirements for numerous wireless services based on the Commission’s model for the 700 MHz Commercial Services Band licensees, which the NPRM says is a three-part approach, as follows: (1) renewal applicants must file a detailed renewal showing, demonstrating that they are providing service and complying with the Commission’s rules, (2) competing renewal applications are prohibited, and (3) if the license is not renewed, the associated spectrum is returned to the Commission for reassignment. NPRM para. 16. The NPRM proposes to apply the draft rules to a large number of wireless services: common carrier and non-common carrier; broadband and narrowband; CMRS and non-CMRS; mobile and fixed. NPRM para. 20. The NPRM explains that under the new regime, “the substantial service showing made in support of a renewal application is distinct from any substantial service performance showing (also known as a buildout or construction showing) under the Commission’s service rules” and that “a licensee that meets the applicable performance standard might nevertheless fail to meet the substantial service standard at renewal.” NPRM para. 21.

With the Proposed Rules, the NPRM proposes to eliminate all rules granting renewal expectancy, including current Rule Sections 24.16 and 101.1327, 47 CFR §§ 24.16 and 101.1327, which currently give Sensus renewal expectancy upon demonstration of substantial service for Sensus’ NPCS and MAS licenses. For geographic area licensees, proposed Rule Section 1.949 requires a detailed Renewal Showing and a separate, detailed Regulatory Compliance Demonstration or Certification. The Proposed

² Service Rules for the 698-747, 747-762 and 777-792 MHz Bands, WT Docket No. 06-150, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064, 8092-8094 (2007) (hereinafter *700 MHz First Report and Order*).

Rules do not state that the licensee who has complied with FCC rules and has provided substantial service will enjoy renewal expectancy. Instead, Proposed Rule Section 1.949(h) provides that if the Commission or Wireless Telecommunications Bureau finds that a licensee's Renewal Showing or Regulatory Compliance showing "is insufficient, its renewal application will be denied, and its licensed spectrum will return automatically to the Commission for reassignment." Nowhere do the Proposed Rules tell the licensee what qualifies as sufficient or "insufficient" showings.

III. A Further NPRM Is Necessary To Address The NPRM's Legal Deficiencies

A Further Notice of Proposed Rulemaking is required to provide notice and comment for a license renewal standard for each affected service and to explain the Commission's change in policy.

a. The NPRM Fails To Identify The Public Interest Standard For License Renewal

i. Public Interest Standard

The Commission is empowered to grant an application for license renewal only if it determines that "the public interest, convenience, and necessity" will be served thereby. 47 USC §§ 308, 309(a). In order to fulfill this mandate, the Commission traditionally has articulated the "public interest standard" by which the agency will grant or deny renewal applications, particularly contested applications where the licensee's performance is scrutinized in a comparative hearing. The Commission has broad discretion in setting the public interest standard, and its public interest standard has changed many times. The public interest standard for broadcast licenses usually is different from non-broadcast licenses.

Under currently effective rules, if there is a comparative hearing that results in close scrutiny of the licensee's performance, renewal expectancy generally is awarded where the licensee (1) substantially complied with the Communications Act and FCC rules, and (2) provided "substantial service." *See e.g.* 47 CFR 24.16. Under current rules, for narrowband PCS, if there is no comparative hearing, there apparently is little or no scrutiny of a licensee's performance during the license term. For MAS EA licensees, if there is no comparative hearing, a substantial service assessment will nevertheless be made. 47 CFR 101.1327(c). If there is a comparative hearing, under current rules, the MAS EA licensee will

have renewal expectancy where it (1) demonstrates it provided continued substantial service, (2) demonstrates it substantially complied with FCC rules, (3) provides an explanation of the licensee's record of expansion, and (4) provides a description of investments made by the licensee in the system. 47 CFR 101.1327(a).

ii. NPRM Establishes Adversarial Proceeding

The NPRM proposes to eliminate comparative hearings for the radio services covered by the NPRM, including narrowband PCS and MAS. However, in place of the comparative hearing, Proposed Rule Section 1.949 requires a detailed Renewal Showing and a separate, detailed Regulatory Compliance Demonstration or Certification. The net effect of these proposed changes appears to be that all licensees affected by the NPRM will undergo close scrutiny of their performance at renewal time, similar to what a few licensees underwent in the comparative hearing. The main difference is that instead of a competing applicant opposing the renewal applicant at a formal hearing, the Bureau would closely scrutinize the licensee's performance in a more informal setting.

Under Proposed Rule 1.949, even though the renewal applicant would be subjected to close scrutiny of his performance during the license term, with the distinct possibility that the Bureau would find the showings insufficient and cancel the license, the renewal applicant is given no indication of the standard by which the Bureau would grant or deny the application. The Proposed Rules leave it totally in the discretion of the Commission or the Bureau. The NPRM proposes a uniform set of applications and processes with respect to the renewal of most Wireless Communications Services (WCS) licenses. But uniform procedure does not qualify as a public interest standard governing the substance of the agency's renewal decision.

iii. NPRM Avoids Setting A Standard

The NPRM goes to some length to avoid specifying whether or under what conditions the licensee would have renewal expectation. As noted above, current renewal rules generally establish a renewal standard for each service, and, generally, grant renewal expectancy where the licensee has

complied with FCC rules and has provided substantial service. However, for each affected radio service, the NPRM proposes to eliminate the rule or rules granting renewal expectancy in that service, or establishing a renewal standard or showing. For example, as recited above, for MAS EA licensees, current Rule Section 101.1327 provides that if there is no comparative hearing, a substantial service assessment will be made, 47 CFR 101.1327(c), while if there is a comparative hearing, the licensee will have renewal expectancy where it (1) demonstrates it provided continued substantial service, (2) demonstrates it substantially complied with FCC rules, (3) provides an explanation of the licensee's record of expansion, and (4) provides a description of investments made by the licensee in the system. 47 CFR 101.1327(a). The NPRM proposes to eliminate Rule Section 101.1327, thereby eliminating the renewal standard and renewal expectancy for MAS EA licensees. For each affected radio service, the NPRM similarly proposes to remove the counterpart to Rule Section 101.1327.

Paragraph 21 of the NPRM disabuses the licensee of the notion that satisfaction of construction requirements at renewal time will satisfy renewal requirements. Instead, we are told that "a licensee that meets the applicable [construction] performance requirements might nevertheless fail to meet the substantial service standard at renewal." Once again, the NPRM removes a current benchmark [continued satisfaction of construction requirement] but fails to substitute a replacement renewal standard. Paragraphs 27 to 29 of the NPRM seek comment on the various factors that currently serve to warrant renewal expectancy. This is getting close but still does not constitute a standard. A "nonexclusive list of the factors that applicants would address in renewal showings," NPRM para. 29, does not constitute renewal expectancy. A smorgasbord is not a standard.

A standard is a clear statement of the conditions under which renewal or renewal expectancy will be granted. Once again, the current standard for contested proceedings generally is that the licensee will have renewal expectancy where it has complied with FCC rules and provided substantial service. This is a relatively clear statement. Such a clear statement is lacking from the Proposed Rules. The NPRM does not seek comment on any such statement. By failing to specify a renewal standard for each affected

service, and general renewal expectancy, and failing to find that the respective standards serve the public interest, the Commission breaches its duty under Section 309(a) of the Act. The Commission needs to issue a Further Notice of Proposed Rulemaking to propose proper renewal standards for each affected service and seek comment on the proposed standards.

b. In Contravention of the APA, the NPRM Fails To Explain Its Policy Change

A casual reading might give the impression that this is simply a harmonization of rules and that the NPRM merely seeks to apply rules that have “worked the best to a larger group of services.” NPRM para. 1. Nothing could be further from the truth. In fact, the NPRM is proposing to apply -- to a very wide variety of wireless services -- rules that have never been codified before and are completely untried and unproven. Much of the NPRM is adapted from the *700 MHz First Report and Order*. This Order was released about three years ago, on April 25, 2007. In doing so, the Commission revised its rules to provide that initial authorizations for the 700 MHz Commercial Services Band will have a term not to exceed ten years from February 17, 2009, which was the deadline for DTV transition.³ Therefore, the 700 MHz Commercial Services Band licenses will first be up for renewal in February 2019. In other words, the 700 MHz Commercial Band rules have not been used to adjudicate a single renewal application. These rules could not possibly be “the rules that have worked the best.” In fact, they have not worked at all because they are too new to have been tested.

Moreover, Proposed Rule Section 1.949 is not the rule that “worked the best” because it was not previously codified. This proposed rule section is made of whole cloth. The license renewal portion of the NPRM is premised largely on dicta in the *700 MHz First Report and Order*. The Part 27 renewal rule that the Commission actually promulgated for the 700 MHz Commercial Services Band is similar to existing rules for other Commercial Wireless Services. *See* 47 CFR 27.14 (b) and (c). Ironically, the NPRM proposes to eliminate the current Part 27 renewal rule, NPRM page 53, and replace it with the

² *700 MHz First Report and Order, supra*, para 82.

Proposed Rules. If the NPRM really were applying the Part 27 rules that have “worked the best” it would not propose to eliminate this rule.

What is going on is a change in policy. The NPRM is proposing to substantially raise the bar for license discontinuance and renewal. The Proposed Rules impose stricter renewal application showings, give the Commission greater latitude to deny renewal applications, and impose tighter discontinuance rules. With a sweep of the hand, the NPRM proposes to slap off the table quite a few renewal rules for which the Commission previously made findings of fact and found that these rules serve the public interest. That qualifies as a change in policy.

The Commission certainly may change policy and establish more stringent requirements. However, when changing policy, particularly when making it easier to revoke licenses, the Administrative Procedure Act requires that the Commission (1) acknowledge that a policy change is in the works, and (2) provide a detailed justification for the policy change. *F.C.C. v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800, 1811, 2009 U.S. Lexis 3297, ***22-23 (2009). Under the APA, an agency must provide a more detailed justification for policy change “where its prior policy has engendered serious reliance interests that must be taken into account. . . . It would be arbitrary and capricious to do otherwise.” *Id.* The NPRM, which proposes to make it easier to revoke licenses that were purchased at auction, certainly implicates serious reliance interests that were engendered under the prior policy. Instead of forthrightly explaining why the Commission believes the current renewal and discontinuance policies no longer serve the public interest, the NPRM attempts to hide the policy change behind the guise of rule harmonization. The Commission needs to explain why its rationale and findings supporting the discarded rules are no longer valid. The Commission needs to explain its policy change in a Further Notice of Proposed Rulemaking.

IV. The Commission Should Implement Policies That Promote Further Investment

Sensus believes that the Commission’s spectrum auction and licensing regime has actually worked reasonably well. Spectrum auctions have raised large amounts of money for the U.S. Treasury,

and the U.S. wireless providers have invested further billions of dollars in wireless equipment and infrastructure. An active secondary market for spectrum has developed. The FCC's spectrum auctions have been copied by other administrations around the world. Sensus believes that "if it ain't broke, don't fix it." Therefore, any changes should be made at the periphery, not a wholesale revamp of licensing rules. With this in mind, Sensus offers the following suggestions.

a. The Commission Should Clarify That The Renewal Review Is Not Agenda-Driven, Establish A Clear Renewal Standard, and Retain The Renewal Expectancy

The NPRM proposes to eliminate comparative hearings. Although this theoretically helps most licensees, in practice, only a small fraction of licensees ever were subject to a comparative hearing. In place of the comparative hearing, however, the NPRM seems to substitute a different type of adversarial proceeding that affects all licensees who are subject to the NPRM. Proposed Rule Section 1.949 seems to contemplate a quasi-adversarial proceeding in which the Wireless Telecommunications Bureau is both opponent and judge. The outcome that seems to be favored by Proposed Rule Section 1.949 is that the Bureau deems the renewal applicant's showing to be insufficient, the license is cancelled and spectrum returned to the Commission.

This is coming against the backdrop of the Administration's and the Commission's strong focus on wireless broadband and on the enormous amount of additional spectrum said to be needed to fully develop broadband. The impression is that the Commission is changing policy so it can reclaim auctioned spectrum and donate or re-auction the same spectrum for broadband. The Commission should dispel this impression by clarifying that the Bureau's review is not adversarial and is not agenda-driven. The Bureau should not have a quota of spectrum to reclaim in the license renewal process.

As described above, the new rules need a clear statement of the renewal standard for each service. The rules also need renewal expectancy. In the *700 MHz First Report and Order*, the Commission eliminated comparative hearings for certain Part 27 licensees and also eliminated the renewal expectancy that went along with the comparative hearings.

i. Licensee Protection Is Needed For Adversarial Proceeding

Here, however, the Commission is replacing the comparative hearing with a quasi-adversarial, close-scrutiny proceeding in which the Bureau serves as opponent and judge. Apparently the Commission believes this new proceeding will not be subject to the formal requirements and protections accorded Adjudications by the Administrative Procedure Act. This makes it all the more important that the Commission retain renewal expectancy for this new proceeding. The NPRM establishes what appears to be an adversarial proceeding but omits the concomitant protection traditionally afforded a licensee in an adversarial proceeding. The Commission can tighten up on construction, operation and discontinuance standards and still retain renewal expectancy. What is needed is a clear statement of the conditions under which renewal expectancy will be awarded. Without renewal expectancy, the Commission's stated objective to "encourage licensees to invest in new facilities and services, and facilitate their business and network planning" will surely be thwarted.

Licensees and investors need regulatory certainty and predictability. Retaining clear renewal expectancy will help provide certainty for further investment in spectrum and infrastructure. The large dollar amounts that were spent on spectrum auctions and wireless networks are premised on regulatory predictability and assurance of continuity of operation. These billions would not have been spent if the investors believed the FCC were going to arbitrarily cancel the licenses at the end of a term because the spectrum was desired for another purpose or to give to favored set of actors. The FCC needs to preserve credibility with investors by maintaining clarity and integrity of licensing rules and procedures.

**b. Uniform Renewal Procedure Is Legitimate And Should Be Pursued.
Uniform Renewal Standard Is Impossible And Should Be Discarded.**

Sensus disagrees with the NPRM's claim that adoption of uniform renewal policies and procedures "will provide certainty to licensees regarding renewal requirements" and "encourage licensees to invest in new facilities and services, and facilitate their business and network planning. *See* NPRM para. 7. By introducing a new, apparently adversarial proceeding before the Bureau and by failing to

specify a renewal standard, the Proposed Rules introduce risk and uncertainty. These are things that discourage investment.

Sensus believes that uniform renewal application rules and procedures make sense and probably are workable. However, a uniform renewal standard is unworkable and should be discarded. Perhaps this is why the NPRM failed to specify a renewal standard: no single standard can uniformly cover all the radio services affected by the NPRM.

Notwithstanding the NPRM's claims of non-uniformity, most wireless services currently have about the same renewal expectancy, namely, that the licensee must substantially follow FCC rules and provide "substantial service." However, "substantial service" has to be defined differently depending on the type of FCC radio service, the business model, whether the license is common carrier, whether fixed or mobile, and other factors. A wireless licensee that is providing a broadband, mass-market, common carrier, mobile service is very different from a utility that uses its narrowband, fixed-station microwave or MAS licenses for internal use. And these two are in turn very different from a company, like Sensus, that uses spectrum as one element of a packaged offer for a major communications network. The term "substantial service," or whatever other criterion the Commission selects, has to be defined differently for each of these different types of licensees. A uniform renewal standard is possible only where a "rubber sheet" term like "substantial service" is utilized to stretch to cover all the different types of services.

The current construct of "substantial service" acknowledges the different circumstances of different types of licensees. The Commission should retain the "substantial service" standard and practice, and apply it to renewal applications. Licensees and investors have become accustomed to satisfying substantial service requirements and have made investments and have planned networks around it. To discard or radically alter this established construct would harm business plans and discourage further investment.

c. The Commission Should Take Into Account The Head Count and Time Needed To Do What the NPRM Proposes – Renewal Delayed Is Renewal Denied

The procedure proposed by the NPRM is somewhat similar to the MAS EA construction certification review undertaken by the Bureau. Therefore, the time and personnel commitment of the FCC occasioned by the MAS construction review should be instructive to the Commission in deciding on the procedures outlined by the NPRM. MAS EA licensees must demonstrate that they provide substantial service or percentage population coverage for their five-year construction certification and continued substantial service for the ten-year benchmark. 47 CFR 1325. Judging from the public record of these renewal grants, the Bureau conscientiously examined each substantial service showing submitted by the MAS renewal applicants, including the associated maps and other data, interviewed or requested further information from some applicants, and in some cases conducted two or three rounds of information requests. The Commission is privy to the number of man-hours expended by Bureau personnel in this process and can judge for itself the cost-effectiveness. Viewed from the outside, it took two to three years to process fewer than 50 MAS EA construction certifications. For the licensees involved, it appeared to be a time-consuming, resource intensive process.

The Commission should multiply the average number of man-hours taken to process the MAS EA construction certifications by the more than 30,000 economic area renewal showings the NPRM estimates the Commission will process over the next ten years. This does not count an estimated 400,000 site-based renewal applications. NPRM para. 7.

Sensus believes that the magnitude of what the NPRM is proposing – in terms of time, money and people – is staggering. Sensus believes the Commission is setting itself up for enormous backlogs and unacceptably long waits to get licenses renewed. The Commission should sharply streamline the showings required, the depth of information required of licensees and the level of review. The Commission should use check-the-box certifications for renewal applications, similar to its ULS applications, with penalties for false statements. The Commission should also impose a deadline of one

year where the license renews automatically one year after renewal application is made if the Bureau has not yet processed and adjudicated the application.

Commission delay in processing construction certifications and license renewals causes hardship for licensees with sophisticated customers or financiers who inspect the FCC database to determine whether certain licenses are being renewed. The average cellphone subscriber is not going to delay purchasing an iPhone while she waits for AT&T's FCC licenses to renew. Such a subscriber is oblivious to FCC matters. However, sophisticated companies making large purchases that involve radio services will routinely inspect the FCC database and will delay purchasing until they see the licenses renewed or certifications accepted. FCC delay in processing harms this type of licensee.

d. The Commission Should Consider The Effect On Secondary Markets

The NPRM raises practical questions with respect to leasing or assignment of licenses. When a license is leased, or assigned pursuant to a sale, the spectrum usually is expected to be cleared and de-constructed so the new lessee or assignee can operate interference-free. Similarly, in order for the existing licensee to make the business decision to lease or assign the license, the spectrum typically must have lain fallow for some period of time. The goals of full spectrum use and tighter enforcement of construction and operation requirements are somewhat inconsistent with a secondary market because spectrum has to lie fallow or be under-utilized for some period in order for leasing or transfers to work.

The Commission should relax its enforcement to take into account the practicality of leases and assignments. For example, where a nationwide license is purchased two to three years before the end of a license term, the new licensee faces a hardship to try to build out a nationwide network in two years in order to pass muster under the Commission's heightened renewal standards. In these circumstances, the Commission's stricter enforcement of construction and operation requirements would have the unintended consequence of discouraging fuller use of spectrum. Potential purchasers and lessees will utilize less spectrum because they risk stranding investment and customers where the Commission cancels the licenses at renewal time.

Respectfully Submitted,

SENSUS USA INC.
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A handwritten signature in black ink, appearing to read "Geo. Uram", with a long horizontal line extending to the right.

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