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wireless license renewal processes seriously and significantly undermine the important renewal expectancy that is critical to foster investment in wireless broadband networks. The following is respectfully shown:

I. INTRODUCTION AND SUMMARY

The *NPRM* proposes uniform renewal requirements for all wireless radio service licenses.³ The Commission has tentatively concluded to retroactively apply the renewal framework first established in 2007 for the 700 MHz Commercial Services Band to all wireless services licensed by geographic area. Renewal applicants would be required to make a detailed “renewal showing,” and the Commission is considering codifying a non-exhaustive list of “factors” that applicants would be required to address in their renewal applications. Mutually exclusive applications competing with a wireless renewal would be prohibited and, if a renewal is denied, the licensed spectrum would revert to the Commission for reassignment.

The Commission also is proposing to adopt a uniform rule governing discontinuance of operations by CMRS wireless service providers, and to standardize the rules regarding partitioning and disaggregation so that every licensee has an independent continuing obligation to meet any applicable construction requirement.

Certain of the Commission’s proposals will have beneficial effects on the wireless industry by promoting greater certainty and investment. For example, the public interest clearly is served by the Commission’s proposal to eliminate competing renewal applications. The Commission’s archives are filled with examples of “strike” applications filed on top of renewal applications by competing applicants whose only objective was to extract “greenmail” in

³ “Wireless Radio Services” encompasses a broad area of radio services. *NPRM* at ¶ 2. The ones of particular concern to MetroPCS are PCS (Part 24) and AWS (Part 27) because MetroPCS is licensed in both of these services.

consideration for removing the license challenge. The Commission's adoption of the renewal expectancy, restrictions on settlement payments and, in some services, the two-step renewal hearing process, have reduced the instances of renewal strike applications. Nonetheless, eliminating competing renewal applications altogether would have further benefits.

Additionally, reassigning unrenewed spectrum by auction, rather than giving it to a competing applicant on a first-come, first-served basis, will increase the prospect of the spectrum being put to its optimal use and better fulfill the requirements of Section 309(j) of the Communications Act.

Harmonizing the discontinuance of service rules also makes sense so that the Commission will know when licensed spectrum is not in service. However, as is set forth in detail within, any uniform discontinuance of service rule needs to be carefully crafted to avoid unintended consequences.

The Commission proposal to require all future recipients of disaggregated and partitioned licenses to retain independent build-out obligations in the portion of the spectrum or area they receive also has merit. The public interest is not generally served by allowing licensees to ride the coattails of other carriers and not provide beneficial services in their own right. However, this goal is achieved by requiring both parties to a disaggregation or partitioning transaction to demonstrate substantial service at renewal, and no interim independent construction requirement is necessary.

Certain of the other Commission proposals pertaining to the license renewal process, though well intentioned, will have serious negative unintended consequences. MetroPCS understands and appreciates the Commission's goal, particularly in this era of wireless spectrum shortages, to ensure that existing licensees are putting their assigned spectrum to substantial,

beneficial uses. But it would be unwise and unfair for the Commission to seek to achieve this end by changing the conditions of renewal for a license in the midst of the license term. The Commission will only encourage needed investment in broadband wireless facilities if the rules governing wireless license renewals remain stable, and create a predictable renewal expectancy. Rules changes which alter licensee requirements and economic expectations for existing licenses drive away capital and prevent the Commission from achieving its goal of promoting the proliferation of wireless broadband services in a robustly competitive market.

In making this determination, the Commission must recognize that the wireless market has become an increasingly complex multi-tiered market. Many carriers no longer hold only a single wireless license in a market within which they are offering a single service. Rather, carriers often hold multiple licenses sometimes in multiple frequency bands in a single area, and offer diverse services that are evolving at a rapid pace. Trying to retrofit a new uniform renewal paradigm into this complex environment is fraught with peril.

The Commission should heed the maxim “*primum non nocere*” (first do no harm), and avoid making rule changes that will undermine the carefully crafted renewal expectancy that has worked well to attract needed capital into the wireless marketplace. It is through this lens that the Commission should focus its proposed rules. Rules changes that disrupt settled expectations or create disincentives to invest should be rejected; only rules that promote investment by bringing clarity and predictability to the renewal process should be considered.

With this framework in mind, MetroPCS is forced to conclude that certain of the proposed renewal changes, though well intended, are ill-advised because they will reduce certainty, breed litigation and inhibit investment. Indeed, some of the proposed new rules are legally unsustainable because they constitute retroactive rulemaking that is unfair and unlawful.

If adopted, these rules would place a dark cloud over the “renewal expectancy” that is so important to enable licensees to finance the construction and operation of advanced wireless networks. Thus, rather than fostering expanded and improved service, the proposed changes, if adopted, would have the unfortunate, unintended consequence of inhibiting investment.

In reviewing its wireless renewal standards, the Commission also needs to be vigilant to avoid any actions that would unfairly disadvantage a buyer of a spectrum license. Commission policy favors the free alienability of licenses and should encourage buyers to put spectrum to new uses. A new use may require dismantling (or not acquiring) a legacy system, meaning that the area and population served by the license could decline during a transition period. Once the FCC finds that an assignment or transfer of a license is in the public interest, the buyer should be given a fresh start and allowed time to meet any appropriate renewal standard.⁴ The issue at renewal time should be whether the buyer is providing substantial service in its own right, taking into consideration the length of time that the buyer has held the licenses, without regard to the activities of the predecessor in interest.

II. ELIMINATING COMPETING RENEWAL APPLICATIONS WOULD BE A STEP IN THE RIGHT DIRECTION

MetroPCS applauds the Commission’s proposal to eliminate the opportunity for renewal applications to be subject to competing filings. This proposed change meets the desired goals of creating greater certainty, fostering investment, and deterring speculation. In the not-too distant past, the Commission was inundated with speculative competing renewal applications that dissipated the resources of both the Commission and the renewal applicant. These competing applications, which were known as “strike applications,” were filed not for the *bona fide* purpose

⁴ This is especially true for licenses which have been transferred or assigned prior to the date of an order in this proceeding and which renew after the date of an order in this proceeding. This would be a form of retroactive rulemaking.

of providing public service, but rather to obstruct or impede the renewal application in the hope of extricating a “greenmail” settlement payment, or a license which the speculator could sell, for a quick profit rather than providing long-term service.⁵ As such, these competing filings often were found to have been made “for possible anticompetitive purposes, to harass an applicant, or to exact a payoff.”⁶

Happily, this renewal strike application activity waned over time thanks to the Commission’s clear articulation of the renewal expectancy, the adoption of settlement rules designed to discourage “greenmail,”⁷ and, in some cases, the adoption of the bifurcated, two-step renewal application process where competing applications are deferred unless and until the renewal applicant is found not to be worthy of a renewal expectancy. But, there still is a lingering risk of abuse by insincere applicants and MetroPCS supports the Commission proposal to take the next logical step and to eliminate the strike application opportunity altogether by eliminating competing renewal applications in all of the Wireless Radio Services.

Acting to eliminate competing renewal applications is beneficial even though there may be some instances in which a challenger is a sincere applicant. Competing applications filed at renewal time force the Commission to make an impossible “apples vs. oranges” comparison – comparing the promises of an untested newcomer with the performance of the incumbent. The

⁵ A strike application is on in which the principal or incidental motive for filing is to obstruct or delay another applications. *Camden Broadcasting Co., Inc., Camden, Tenn. For Construction Permit; Carroll Broadcasting Corp. (Assignor); and Huntingdon-McKenszie Broadcasting Co. (Assignee) For Assignment of License of station WKTA (FM), McKenzine, Tenn.*, 53 FCC 2d 512, ¶ 10 (1975); *see also Applications of John C. Roach, Calhoun, Ga. For Construction Permit; Gordon County Broadcasting Co. (WCGA), Calhoun, Ga. For Renewal of Broadcast License*, 20 FCC 2d 255 (1969) (Commission denied application partly due to participation in filing a strike application).

⁶ *NPRM* at ¶ 58.

⁷ 47 C.F.R. § 1.935.

better approach is to review the renewal licensee's record on a stand-alone basis and only to invite new applicants to apply if and when renewal is denied.

There also is a major public interest benefit in returning unrenewed spectrum to the Commission for reassignment by auction, rather than simply giving it to a competing applicant who happens to be the first in the queue. Relying upon the competitive bidding process – which now is tried and true – improves the prospect that an unrenewed license ultimately will end up in the hands of a carrier who will put the spectrum to the highest and best use. Auction processes also have a greater potential to distribute licenses in a pro-competitive fashion. Bidders with sound business plans are in the best position to attract the capital needed to succeed in the auction, and requiring applicants to pay a fair market price for spectrum deters speculation. Further, reaucting the spectrum better fits within the statutory scheme of Section 309(j), which favors auctions as a mechanism to resolve competing applications. Thus, there are unquestionable benefits in having unrenewed spectrum return to the Commission for reassignment by auction rather than forcing the Commission to grant it to a single competing renewal applicant who happens to have put its hat in the ring at renewal time.⁸

⁸ As MetroPCS has indicated in multiple proceedings in the past, auctions are most successful in resulting in a fair and publicly beneficial distribution of spectrum if licenses are configured in relatively small geographic areas and spectrum sizes so that both larger and smaller carriers have a meaningful opportunity to acquire licenses. Smaller licenses serve as building blocks that are capable of satisfying the needs of carriers of various size. *See, e.g.*, Comments of MetroPCS Communications, Inc., WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229, 13-22, filed May 23, 2007; Reply Comments of MetroPCS Communications, Inc., WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229, 4-12, filed Jun. 4, 2007; Comments of MetroPCS Communications, Inc., WT Docket No. 07-195, 8, filed Dec. 14, 2007; Comments of MetroPCS Communications, Inc., WT Docket Nos. 04-356 and 07-195, 57-59, filed Jul. 25, 2008. By taking the license back, the Commission has the added benefit of being able to assess whether the license area and spectrum block sizes are appropriate. For example, the Commission previously has broken recaptured 30 MHz license blocks into three 10 MHz license blocks, which provided additional opportunities for many new entrants. The Commission could also reconfigure geographic areas.

Finally, MetroPCS notes that returning unrenewed spectrum to the Commission for reauction has the incidental benefit of generating auction revenue for the federal treasury. In these times of major federal government deficits, it makes sense for the Government to recoup some benefit from the valuable public spectrum asset rather than having all of the value be captured as a windfall by the competing applicant who happens to file a strike application.

III. THE DISCONTINUANCE OF SERVICE RULES SHOULD BE CONFORMED BUT LICENSEE FLEXIBILITY MUST BE MAINTAINED

MetroPCS supports the Commission's proposal to harmonize the disparate discontinuance of service rules so that carriers providing similar competing services in different bands are operating on a level playing field. In the process, however, the Commission must recognize that there may be legitimate reasons for a carrier to discontinue service on a particular license for an extended period of time – particularly to implement a transition to new technology or advanced services. So, the uniform discontinuance rule must be flexible and allow a licensee to avoid automatic license forfeiture for good cause shown.

MetroPCS is aware of situations in which other licensed personal communications service ("PCS") carriers have built systems, sometimes using portable, non-permanent cell sites, in order to preserve licenses by filing construction completion notices, and then promptly deconstructed the facilities without ever providing beneficial service to the public. Abuses of this nature occur because, unlike the cellular service rules under Part 22, there is no discontinuance of service rule governing PCS facilities. MetroPCS supports the adoption of a uniform rule that applies to all Wireless Radio Services which puts the burden on a licensee to demonstrate that an extended discontinuance should not be treated as permanent and cause a forfeiture of the license. In the view of MetroPCS, the proposed 180 day period is a reasonable uniform standard for commercial services.

However, it is essential for carriers to be able to extend the 180 day period in particular circumstances for good cause shown. Consequently, MetroPCS strongly endorses the Extension Request concept embodied in proposed rule 1.953(f).⁹ However, the wording of the rule should be changed to remove the implication that the Commission is without authority to grant an extension filed less than 30 days prior to the 180 day discontinuance period. Unexpected last minute circumstances beyond the licensee's control may prevent service from being restored as planned, and the Commission's rules should expressly empower the Commission to approve an extension of the 180 day period in these circumstances.

In addition, the discontinuance of service rule should make clear that, for market area licenses such as PCS, AWS and 700 MHz, the rule will be applied on a complete market area basis, and not on a facility-by-facility basis. Today's wireless systems are constantly changing and being reconfigured to increase and adjust capacity. It is not uncommon for service from a particular site, or on a particular channel within a spectrum block, to be discontinued in the normal cell-splitting process. Evolutionary changes of this nature should not be considered discontinuances of service that are subject to the 180 day rule. Rather, the rule should only apply when service is discontinued on an entire licensed spectrum block throughout the entire licensed service area.

The Commission also should expressly indicate that, in considering whether to extend the 180 day discontinuance period with respect to a particular license, it will take into consideration whether the carrier continues to provide service in the affected area over other licensed

⁹ Proposed rule 47 C.F.R. § 1.953(f) states: "A licensee may file a request for a longer discontinuance period for good cause. An extension request must be filed at least 30 days before the end of the applicable 180-day or 365-day- discontinuance period. The filing of an extension request will automatically extend the discontinuance period a minimum of the latter of an additional 30 days or the date upon which the Wireless Telecommunications Bureau acts on the request."

frequencies. The original discontinuance of service rule was adopted in Part 22 in the early days of cellular service.¹⁰ At the time, facilities were licensed on a site-by-site basis and carriers only had a single license covering each area. The result was that a discontinuance of operation from a particular site generally meant that service to the public was affected. The goal of the rule was to ensure that, if a licensee did not restore service promptly to an area, the license would automatically terminate and be made available to someone who would provide such service. Without this rule, the sole remaining cellular provider in this duopoly service would have a monopoly, something the Commission was trying to avoid. Today, licensees often have multiple geographic area licenses covering a single market. And, it is not uncommon for customers served on a particular license to be transitioned to another license so that the cleared spectrum can be repurposed and devoted to a new more advanced technology or service (*e.g.*, 2G to 3G, 3G to 4G; CDMA to LTE, etc.). A discontinuance of service on a particular license under these circumstances does not result in any disruption of service to the public. Accordingly, the Commission should acknowledge in the new uniform rule that a discontinuance of service by a carrier on a particular license block in order to transition to a new service will not result in a license forfeiture as long as the licensee continues to maintain public services in the area on other blocks of spectrum. This clarification is necessary because the increasing technical complexity of modern system updates can easily result in service being discontinued for more than 180 days. A carrier must not suffer a cancellation of its license in these circumstances.

¹⁰ 47 C.F.R. § 22.317 (originally adopted 59 Fed. Reg. 59502, 59507 (Nov. 17, 1994)).

IV. AT RENEWAL TIME THE COMMISSION SHOULD CONSIDER A CARRIER'S SERVICE RECORD IN A MARKET ON ALL OF ITS LICENSED SPECTRUM

The Commission should take a similar “total spectrum” view at renewal time. There is a material difference between a carrier who holds a single license in a market and has failed to provide substantial beneficial services to the public, and another carrier who holds multiple licenses in a market, is providing robust services to the public on one license, and is holding the second license in inventory for meeting increased demand over time or for deploying the next generation of technology when it becomes available. Carriers should not be forced by government renewal policies to initiate service on multiple licenses – at substantial additional cost – solely to garner a renewal when one license can be more fully developed to meet the immediate need while the second license is held in reserve to meet the future demand that has been forecast.¹¹ Licensees also should not be incented to delay upgrading systems for fear that a transition that is in process at renewal time which involves a deconstruction of previously operating facilities will jeopardize the license. Rules that unnecessarily promote delays in upgrades to networks (or delay in licenses being assigned) do not serve the public interest.

A simple example highlights the wisdom of the total spectrum view approach. Consider Carrier A which holds a 30 MHz license in market A, and Carrier B which holds three 10 MHz licenses in market B. Assume that both have built out networks with robust coverage that serve the same area and population, and the same number of customers. The only difference is that

¹¹ Carriers would not be required to plan ahead and hold licenses in reserve if they could count on new spectrum becoming available for licensing at the precise moment that increased capacity or new spectrum resources were needed. Unfortunately, that is not the market reality. Spectrum auctions occur relatively infrequently and at often unpredictable times. When an auction occurs, a prudent, responsible carrier must endeavor to acquire sufficient spectrum not only to meet its immediate needs, but also to meet reasonably foreseeable needs. This is not “warehousing” but rather is prudent inventory management.

Carrier A has built out all 30 MHz of spectrum and is using 50% of the available capacity, and Carrier B has built out two 10 MHz channels, one of which is fully loaded, and the second of which is partially loaded. The third channel is being held in reserve for next generation technology (*e.g.*, LTE). Presumably, Carrier A would have its license renewed routinely. The same conclusion should be reached with respect to Carrier B which is very similarly situated. But that might not be the case if the third channel is viewed in isolation for renewal purposes. This demonstrates that the Commission should view all of the spectrum held by a carrier in a market on a consolidated basis when making a determination of whether the carrier is providing substantial service.

With this total spectrum approach in mind, MetroPCS generally supports the “Common Expiration Date” concept embodied in proposed rule section 1.949(b). However, the limitation that license dates can only be shortened by a year and not lengthened means that many overlapping licenses will not be eligible for conformed dates. Also, carriers no doubt will be reluctant to invoke this rule section because doing so can only reduce a current license term. So, it is important for the Commission to adopt an approach at renewal time which considers all of the carrier’s operations in a market even if licenses do not share a common expiration date.

V. THE COMMISSION SHOULD NOT REVISE ITS RENEWAL STANDARD RETROACTIVELY FOR PREVIOUSLY ISSUED LICENSES

The *NPRM* cites section 308(b) of the Communications Act as enabling the Commission to require renewal applicants to provide whatever information the Commission deems necessary and appropriate to determine that a grant of the renewal will serve the public interest.¹² But, this statutory provision does not permit the Commission to retroactively impose renewal requirements first adopted in 2007 only for the 700 MHz Commercial Service Band licenses as a

¹² *NPRM* at ¶ 25.

model for all wireless renewals. The Commission proposal, if adopted, will create substantial uncertainty for existing licensees, deter investment and is contrary to applicable law.

The *NPRM* correctly concedes that the renewal standard adopted in the *700 MHz First Report and Order*¹³ represented “a new paradigm for renewal of wireless licenses.”¹⁴ Section 308(b) may indeed empower the Commission to impose this new paradigm on a prospective basis on licensees who acquired their 700 MHz commercial licenses with advance notice of the renewal standard that would apply. This does not mean, however, that the Commission can impose this new paradigm, which is essentially a new construction standard, on previously granted licenses on a retroactive basis. Doing so would run afoul of clear Supreme Court precedent. The Court traditionally applies a presumption against retroactive rulemaking, noting that “[e]lementary 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.”¹⁵ According to Justice Scalia, this is especially true for administrative rules because Section 551(4) of the Administrative Procedure Act (“APA”) limits the definition of a rule to a substantive law or policy of “future effects,”¹⁶ which he has taken to mean that “rules have legal consequences only for the future.”¹⁷ This retroactive-averse attitude has prevailed for the better half of the last century, as shown by the explanation in the 1947 Attorney’s General Manual on the Administrative Procedures Act that:

¹³ Service Rules for the 698-746, 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 (2007) (the “*700 MHz Band Order*”)

¹⁴ *NPRM* at ¶16.

¹⁵ *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

¹⁶ 5 U.S.C. § 551(4).

¹⁷ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 217 (1988) (Scalia, J. concurring).

Rule making is agency action which regulates the future conduct of either groups or of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations.¹⁸

A regulation applies illegal retroactive effects when it would “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”¹⁹ If more stringent renewal requirements are imposed on previously issued licenses in the middle of a license term, the Commission would no doubt face challenges that it is impairing the rights the licensee acquired at the time of the initial license auction, increasing a licensee’s “liability for past conduct” (*e.g.*, imposing the ultimate sanction of license forfeiture because the licensee (or worse yet, a prior licensee) failed to build out more quickly or more extensively) and “impos[ing] new duties with respect to transactions already completed.”²⁰ Thus, MetroPCS urges the Commission not to apply its new paradigm to old licenses.

As is discussed in greater detail within, this new renewal standard is particularly harsh when applied to successors in interest who have acquired licenses in the midst of a license term with the consent of the Commission. Purchasers have only a limited ability in the course of due diligence to ascertain every pertinent aspect of the predecessor’s operating history. Consequently, the buyer may not have the information now called for by the new proposed uniform renewal standard. This could deter responsible carriers from purchasing underdeveloped licenses and could cause significant uncertainty about whether current licenses will be renewed. The Commission instead should be adopting policies which encourage the

¹⁸ United States Department of Justice Attorney General’s Manual on the Administrative Procedure Act, 13-14 (1947), available at <http://www.law.fsu.edu/library/admin/1947cover.html>.

¹⁹ *Landgraf v. USI Film Products*, 511 U.S. at 272-273.

²⁰ *Id.*

transfer of licenses to responsible carriers, and not tar the buyer with the brush of a predecessors' poor service record.

The unfairness of applying a new stricter renewal standard to long-issued licenses is exacerbated by the revisionist history that the *NPRM* offers when discussing the longstanding “substantial service” standard. In the early days, the substantial service requirement referred to service that did not meet a fixed construction benchmark – *e.g.* the one-third (five year) and two-thirds (10 year) population coverage required for 30 MHz licenses under 47 C.F.R. §24.203 – but was nonetheless beneficial. Indeed, the Commission explicitly recognized that a carrier might not be serving the percentage of population required by the fixed construction benchmark but nonetheless could be offering a valuable “niche” service that served the public interest.²¹ For example, in allowing a showing of substantial service as an alternative for 10 MHz (and later 15 MHz) broadband PCS licensees, the Commission specifically recognized that licensees could meet the substantial service standard by providing specialized services to smaller populations. The Commission provided the specific examples of “residential, cutting edge niche services” and “services to business or educational campuses where the population may be small except during business or during school hours.”²² There was no discussion at the time suggesting that the date the system was constructed, the manner in which the system evolved over time or the other renewal factors the Commission now points to, were expected to be part of the showing for

²¹ *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957 (1994).

²² *See Amendment of the Commission Rules to Establish New Personal Communications Services*, GN Docket No. 90-314 Memorandum Opinion and Order, 9 FCC Rcd 4957, 5019 (1991). In addition, when responding to questions about broadband PCS C-block licenses, the Bureau pointed out that the substantial service alternative “is specifically tailored for licensees interested in providing ‘niche’ services, for example, to campuses and business parks where population levels may be small.” *See Wireless Telecommunications Bureau Staff Responds to Questions about the Broadband PCS C Block Auction*, *Public Notice* No. 54270, 78 RR 2d 727, 732-733 (Jun. 8, 1995).

substantial service. Substantial service, like the fixed construction benchmark, was to be judged at a point in time.

The fact that substantial service represents a less robust service than one meeting a fixed construction benchmark is evidenced by the Commission's own definition of substantial service as "service that is sound, favorable and substantially above a level of mediocre service that would barely warrant renewal."²³ It is difficult to deny that a legal standard that uses "mediocre service" as a reference point is not designed to be highly exacting. Commission precedent leaves no doubt that substantial service is a lesser standard than the fixed population based performance requirements. For example, in *Cingular Interactive, L.P.*,²⁴ the Commission found that, even though the licensee served less than one-third of the population which would have been required to meet the fixed construction benchmark, the licensee still met the substantial service requirement because it was providing a technologically sophisticated niche service to a significant number of customers. Indeed, the Commission recently has stated that "[w]e agree that in certain cases the demonstration of a level of coverage below the construction requirement benchmark when coupled with the provision of actual service can lend some support to a demonstration of substantial service."²⁵ These cases and statements confirm the view, which was well known in the carrier community, that the Commission intended the fixed population based construction requirements to serve as a safe harbor, while allowing licensees the opportunity to meet a lesser and more flexible "substantial service" standard by showing that they were providing beneficial services to a meaningful number of subscribers.

²³ *Id.*

²⁴ *Cingular Interactive, L.P.; Showing of Substantial Service Pursuant to Section 90.665(c), Order*, 16 FCC Rcd 19200 (WTB 2001).

²⁵ *Scott D. Reiter, Demonstration of Substantial Service for PCS Station WPTB505*, 24 FCC Rcd. 3974, 3979 (2010).

It also is clear that, prior to the adoption of the 700 MHz renewal paradigm in 2007, substantial service had the same meaning both as a construction benchmark and as a renewal benchmark. When the Commission adopted service rules from the AWS band, it credited arguments that fixed construction benchmarks were inherently arbitrary. The Commission decided to forgo an interim construction benchmark, and adopted the flexible “substantial service” standard as the 15 year requirement.²⁶ The Commission also adopted the same “substantial service” requirement as the renewal standard for AWS licenses at the 15 year mark. There was absolutely no suggestion that substantial service for purposes of meeting the construction requirement was different from the substantial service renewal standard. Indeed, the substantial service construction and renewal requirements were bundled together in a single rule section – section 27.14 – entitled “construction requirements; criteria for renewal.” Thus, there was no basis for the acquirer of an AWS license to suspect, let alone presume, that the phrase “substantial service” had different meanings in the 15-year buildout and the renewal contexts. An AWS licensee also could not have predicted that the Commission, four years into the license term, would change the renewal rule to require a licensees to show more than would have been required under the longstanding “substantial service” standard.

This proposed change is of more than merely academic interest to MetroPCS. The record in the AWS proceeding reflects that MetroPCS was a continuous advocate that the AWS licenses be configured to serve small geographic areas.²⁷ It lost on this point, and many AWS-1 licenses ended up being offered on a large regional economic area grouping (REAG) basis. MetroPCS

²⁶ 47 C.F.R. § 27.14.

²⁷ Comments of MetroPCS Communications, Inc., WT Docket No. 07-195, 8, filed Dec. 14, 2007.

acquired certain REAG licenses at the AWS-1 auction.²⁸ In doing so, MetroPCS fully intended, and still intends, to develop the licenses fully and to provide beneficial services to the public. MetroPCS was one of the first carriers to start rolling out services on its AWS licenses and promptly built systems covering the largest metropolitan areas and surrounding relating areas. MetroPCS also has continued to expand the initial systems. However, in pursuing its market-driven and resource-driven construction timetable, MetroPCS has taken considerable comfort in the fact that these large geographic area licenses were subject to the flexible (and less exacting) “substantial service” standard, and that MetroPCS could garner renewal of its REAG licenses by providing valuable “niche” services in some but not all of the licensed territory.

The *NPRM* raises a serious concern that the Commission is proposing a “bait and switch” tactic. It was not until 2007 in the *700 MHz Band Order* that the Commission suggested, *for the first time*, that “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 requirements might nevertheless fail to meet the substantial service standard at renewal.”²⁹ It codified this dual standard in section 27.14(e) of the Commission’s rules that provides that a renewal applicant “must make a showing of substantial service, *independent of its performance requirements*, as a condition for renewal.”³⁰ The problem is that the Commission now proposes to proceed as if the differential between substantial services for

²⁸ See call signs WQGA731 and WQGA732, authorized in ULS File No. 0002773870.

²⁹ *700 MHz Band Order*, 22 FCC Rcd at 8093, ¶ 75. Of course, there are ways in which a licensee could meet the performance requirements and not provide substantial service – such as a licensee which constructs a system and then deconstructs it after the reconstruction deadline has passed, with no intention of reconstructing the system. However, in this instance, the licensee would not be providing any services, nor should the licensee keep the license.

³⁰ 47 C.F.R. §27.14(e) (emphasis supplied).

performance and substantial service for renewal – that only applies to 700 MHz commercial licenses – also pertains to other wireless licenses. The *NPRM* incorrectly contends that “confusion... may have arisen from our using the “substantial service” terminology in both the renewal and performance contexts” and purports to resolve the confusion by adopting a separate and newly defined term --“renewal showing.” – and then imposing the new renewal showing standard on all wireless licenses, not just 700 MHz commercial licenses. The truth is there was no “confusion” with regard to AWS and other pre-700 MHz licenses. The substantial service construction standard and the substantial service renewal standard were the same. By defining and applying a new renewal showing requirement the Commission is indulging in impermissible retroactive rulemaking.³¹

VI. THE PROPOSED RENEWAL FACTORS WILL NOT SERVE THE PUBLIC INTEREST

The *NPRM* also seeks comment on whether “the public interest could be served by codifying in section 1.949 a nonexclusive list of factors that applicants should address in renewal showings.”³² The Commission suggests that enumerating factors “would provide members of the wireless industry regulatory certainty in an area where there currently is scant precedent.”³³

Enumerating factors is a bad idea. Rather than providing certainty, a long list of factors will serve as an invitation to litigation. For example, if service to rural areas, or to populations with limited access to telecommunications service, or to other underserved areas, are enumerated

³¹ Further, the language for 700 MHz is ambiguous. It could mean that the licensee had to meet a more stringent requirement for renewal than the performance requirement. Or, it could mean that, even if the licensee met the performance requirements, it still needed to provide service at renewal. Thus, even 700 MHz licensees were not on notice that, even if they met the performance requirements and left their system in place, the license still might not be renewed.

³² *NPRM* at ¶ 29.

³³ *Id.*

as renewal factors, then a service provider such as MetroPCS who specializes in providing low cost, fixed price unlimited service in major metropolitan areas in competition with major nationwide carriers could be subject to a renewal challenge. Indeed, any laundry list of factors will serve as a roadmap for potential litigants. The strike renewal applications of the past will be replaced by strike renewal petitions, which would not represent progress. Further, rather than providing certainty, factors will cause confusion because renewal applicants won't know how such factors will be applied, and what weights will be given to each.³⁴ The Commission needs investment in order to achieve its *National Broadband Plan*, and creating a punch list of factors, some of which will not be met by many if not all renewal applicants, will only deter that investment. Carriers and financial backers will not invest the hundreds of millions of dollars required to develop advanced networks if there is a chance that licenses necessary for such systems might not be renewed based upon a licensee's failure to satisfy a long list of ill-defined and previously unknown factors.

The Commission has failed to demonstrate that the factors enumerated in the *NPRM* are necessary or useful in the renewal process. First of all, producing the information called for the long list of factors alluded to in the *NPRM* would be very burdensome, and consume much time, energy, many personnel resources, and substantial legal fees. For example, the Commission is contemplating requiring “[a] list, including addresses, of all cell transmitter stations constructed.”³⁵ Carriers could have thousands of such cell transmitter stations. Putting this list into a presentational format in a renewal application would take enormous resources. The collection of this information would also be a significant burden, which will require significant

³⁴ This could be especially problematic when competing carriers file petitions to deny the renewals of their competitors. This has happened in the past.

³⁵ *NPRM* at ¶ 27.

resources – resources which would have to be taken away from building new spectrum and offering new services.

In addition, some of the requested information would be competitively sensitive, such as the location of sites, “[a]n explanation of the licensee’s record of expansion, including a timetable for the construction of new sites to meet changes in demand for service” and “[a] description of its investments in its system.”³⁶ This is proprietary information normally contained only in confidential business plans and should not be subject to scrutiny in a public filing. Such confidential business information will allow competitors to understand where a carrier has constructed facilities, potential gaps or holes in coverage, and how a business allocates its resources. This is especially problematic for carriers such as MetroPCS which are forced to compete with carriers such as AT&T and Verizon Wireless, which could use such information, along with their significant resources, to duplicate MetroPCS’ business plan.

Equally important, the Commission should not put itself in the business of reviewing the business plans of wireless licensees for substantive renewal purposes. The Commission often has said that it is not in the business of picking “winners and losers”³⁷ But, that is exactly the business it will be putting itself in if it plans to consider the nature and extent of each carrier’s service offerings, construction timetable and expansion plan in judging whether renewal is justified.

³⁶ *Id.*

³⁷ *See, e.g.*, Prepared Remarks of Chairman Julius Genachowski Federal Communications Commission, “Innovation in a Broadband World,” The Innovation Economy Conference (Dec. 1, 2009) (the Commission “has done best for the country when it has encouraged free and open markets, when its rules have empowered consumers to pick winners and losers”); Dissenting Statement of Commissioner McDowell, *U.S. Department of Health and Human Services Substance Abuse and Mental Health Services Administration Petition for Permanent Reassignment of Three Toll Free Suicide Prevention Hotline Numbers; Toll Free Service Access Codes*, 24 FCC Rcd 13022 (2009) (“[a]s a general principle, the Commission should not be in the business of picking winners and losers”).

MetroPCS also is concerned that denominating the list of factors as “nonexclusive” will effectively force licensees, particularly in the first couple of renewal cycles after the new rules are in place, to take a “kitchen sink” approach and file extensive descriptions of their services, potentially far beyond what is actually needed, due to the uncertainty of what the Commission would actually like to see. This would be a major step backward from the current renewal processes which MetroPCS has found to be quite straightforward and manageable. MetroPCS encourages the Commission to do all it can to limit the administrative burdens and the associated legal fees required of licensees during the renewal process.

MetroPCS also is troubled that several of the factors on which special showings could be required bear no relationship to the criteria that were in place when MetroPCS acquired its licenses. For example, MetroPCS acquired its AWS-1 REAG licenses knowing that they were subject to a substantial service build-out requirement, and that this requirement, as articulated by the Commission, specifically recognized that niche services could meet the substantial service requirement. Now, the Commission is suggesting that, in order to renew its AWS-1 licenses, MetroPCS would have to make showings pertaining to the extent to which it provides services in rural areas,³⁸ or the extent to which service is provided to qualifying tribal lands.³⁹ These are brand new criteria that cannot be found in the AWS-1 rulemaking and related rules upon which MetroPCS relied in making the decision to purchase AWS-1 spectrum.⁴⁰ It is important for the Commission’s rules and allocation policies to be stable. It may be that, in hindsight, the Commission wishes that it had adopted stricter construction requirements or renewal standards

³⁸ See *NPRM* at 54 (proposed rule section 1.949(c)(3)).

³⁹ *Id.* (proposed rule section 1.949(c)(4)).

⁴⁰ If MetroPCS wanted to do so, it could have applied for tribal credits and universal services funds. MetroPCS chose not to do so, and should not now be punished for its decision.

for AWS licenses. However, it did not, and MetroPCS and others bought licenses in good faith reliance upon the rules and standards at the time. It would not be fair to change the renewal criteria after the fact, which is exactly what the *NPRM* proposes to do.

The inclusion of a wide range of factors also could significantly diminish the important benefits of the “renewal expectancy.” If the Commission institutes a long laundry list of criteria by which it judges a renewal application, a carrier no longer can proceed with its business operations confident that it will receive a renewal expectancy. Such ambiguity would severely limit investment in the wireless industry. The Commission previously has recognized – correctly – that a strong renewal expectancy serves the public interest by “(1) encouraging investment in facilities; (2) avoiding the replacement of an acceptable service provider with an inferior one, based on unproven promises; and (3) ensuring continuity of service.”⁴¹ The entire thrust of the prior FCC decisions which created and refined the renewal expectancy was to add greater predictability and certainty to the process. Commission licensees already operate at a disadvantage when borrowing capital because they cannot grant lenders a direct security interest in one of their biggest assets – their FCC licenses.⁴² This disability is made all the more serious by the relatively brief license terms, which frequently turn out to be shorter than the term of necessary loans. Thus, lenders are faced with a dual disability: (i) less security in a principal asset than they would like; and, (ii) a risk that a principal asset will evaporate at renewal time without recourse. The Commission’s prior decisions wisely sought to address the latter disability

⁴¹ *Amendment of Part 22 of the Commission’s Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, CC Docket No. 90-358, REPORT AND ORDER, 7 FCC Rcd 719 (1991).

⁴² The Communications Act makes clear that a licensee is granted no property interest in the airways it is licensed to use, which has led to decisions prohibiting licensees from granting a direct lien on a license. *See, e.g., FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940).

by creating the expectation – *i.e.*, the renewal expectancy – that renewal was highly likely as long as the carrier was providing beneficial services. The rule changes proposed in the *NPRM* would completely undermine this needed consistency. While the Commission purports to be acting under the guide of consistency, the easily discernable message from the *NPRM* is that the Commission is seeking to put pressure on carriers to expand and improve service at a faster rate in furtherance of the *National Broadband Plan*. This will send shockwaves through the capital markets.⁴³

MetroPCS suspects that, given the increasing demands for broadband wireless spectrum, some at the Commission regret the prior decisions to afford carriers so much flexibility with the manner and timetable of their license buildout. The Commission should harbor no such regrets. The use of periodic auctions to assign radio spectrum has been extremely successful and beneficial, but does have one unavoidable consequence. Carriers have no choice but to add to their spectrum inventory at times dictated by the Commission’s spectrum auction schedule in geographic area and block sizes dictated by the Commission, rather than at the precise point when market demand requires additional capacity. This is one of the reasons that MetroPCS consistently has opposed larger license areas, large blocks, and harsh inflexible buildout deadlines – particularly geography-based requirements – that often require a carrier to build to an inherently arbitrary “one-size-fits all” standard that may not be optimal for a particular market.⁴⁴ Regrettably, MetroPCS recently has been losing these construction standard debates. Now, the

⁴³ MetroPCS considered it to be prudent to add a risk factor to its SEC disclosures based upon the actions proposed in the *NPRM*. This clearly evidences that the concerns expressed by MetroPCS are real.

⁴⁴ Comments of MetroPCS Communications, Inc., WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229, 11-12, filed May 23, 2007; Reply Comments of MetroPCS Communications, Inc., WT Docket Nos. 96-86, 06-150 and 06-169 and PS Docket No. 06-229, 17-24, filed Jun. 4, 2007.

Commission appears poised to compound its error by suggesting that a carrier may not qualify for renewal even if all applicable construction benchmarks have been met on a timely basis.

This would be a clear step backward that would chill needed investment at the precise time that the Commission is seeking to foster broadband proliferation. Worst of all, the negative impact of the change would be felt most harshly by smaller and mid-tier carriers who already find it extremely difficult to borrow needed capital. The Commission should not try address a spectrum shortfall by taking pounds of flesh from smaller carriers and new entrants. The Commission should instead be acting to support and assist these carriers in order to promote beneficial competition in a wireless marketplace that increasingly is becoming overtaken by two dominant industry members.

In sum, retrofitting a new renewal paradigm into the diverse wireless marketplace, and injecting an ill-defined list of factors into the renewal process, will undermine the much needed renewal expectancy and adversely affect broadband investment and the continued deployment of advancing networks across the country. In an era where the Commission should be promoting investment and innovation in the wireless industry, it should not adopt any rules that may have the exact opposite effect. Indeed, the current system is working and, again, the Commission should strive to “do no harm.”

VII. THE COMMISSION SHOULD BOLSTER THE RENEWAL EXPECTANCY BY RECOGNIZING A “SAFE HARBOR” AT RENEWAL TIME FOR LICENSEES WHO HAVE TIMELY MET ALL APPLICABLE BUILD OUT STANDARDS

The Commission is heading in absolutely the wrong direction by changing the rules for non-700 MHz licenses such that a licensee’s renewal showing will be considered “independent of its performance requirements.”⁴⁵ MetroPCS can say without question that, based upon the

⁴⁵ *NPRM* at n.62 (quoting 47 C.F.R. § 27.14(e)).

construction and renewal standards in place at the time that it acquired the licenses it holds, MetroPCS clearly was of the view that it would “enjoy a renewal expectancy and retain its licenses if it timely met all applicable construction deadlines and continued to provide requirement compliant service at the time of renewal.”⁴⁶ The Commission should not interfere with reasonable expectations of carriers of this nature by altering the renewal standard in mid-stream.

Accordingly, MetroPCS believes that, if the Commission proceeds with the adoption of a list of factors to be considered for a renewal expectancy, it should codify a safe harbor in order to avoid unintended consequence and protect the legitimate expectations of carriers deserving a renewal. If changes are made, the Commission’s standard renewal showing should be that the licensee timely met all applicable construction requirements and continues to offers beneficial service to unaffiliated subscribers at the time of renewal. This renewal showing should not differ from the construction showing. That is, once a carrier has shown that it is “continuing to operate consistent with [its] applicable construction notification(s) or authorization(s)”⁴⁷ and has begun providing service, it should be granted a renewal expectation for that license as serving the public interest. For future renewals, the applicant should certify that it is continuing to meet the relevant construction requirements for that spectrum.

Without such a safe harbor, the carriers that would be adversely affected by the Commission’s new requirements would those the Commission be is counting on to offer

⁴⁶ MetroPCS is not seeking to protect carriers who build “license-saver” systems that are designed to meet coverage requirements but do not provide substantial commercial service to non-affiliated customers. MetroPCS also is not seeking to protect carriers who build systems, file construction completion notices, and then take advantage of liberal discontinuance of service rules to deconstruct and go dark, nor licensees who only hold a single license without building it. However, the Commission can address these particular instances while maintaining the safe harbor that MetroPCS advocates.

⁴⁷ *NPRM* at ¶ 18.

additional competition in the wireless and broadband marketplaces – potential new entrants, and small, rural and mid-tier carriers. These carriers do not have the resources to blindly build facilities over and above those necessary to meet the performance obligation in an effort to meet an indeterminate “independent” renewal threshold.

VIII. THE COMMISSION SHOULD AVOID BURDENSOME RENEWAL SHOWINGS

In addition to its concern that the contemplated renewal showing is ill-conceived and counterproductive, MetroPCS is concerned about the administrative burden it places on licensees. The renewal process envisioned by the rules proposed in the *NPRM* would become an applicant’s filing nightmare and a lawyer’s dream. As an initial matter, the *NPRM* proposes requiring the inclusion of “copies of all FCC orders finding a violation or an apparent violation of the Communications Act or any FCC rule or policy by the licensee.”⁴⁸ But the *NPRM* does not stop there. It also proposes the required filing of orders pertaining to all affiliated licensees, “whether or not such an order relates specifically to the license for which renewal is sought.”⁴⁹ Or, if no such orders exist, the applicant must “certify the absence of any such findings.”⁵⁰ And, as previously discussed, the proposed rules also contemplate carriers providing a description of its investments, a list, including addresses, of all cell transmitter stations constructed, and identification of the type of facilities constructed and their operational status.⁵¹ Such an overload of information would impose an undue burden upon licensees that is unnecessary, and would be detrimental to the ability of new entrants and small, rural and mid-tier providers to compete in the wireless and broadband marketplaces. Further, it appears that the showing would extend to

⁴⁸ *Id.* at ¶ 38.

⁴⁹ *Id.*

⁵⁰ *Id.* at ¶ 39.

⁵¹ *Id.* at ¶ 27.

10% owners, even though they have no control over the licensee. This would make the showing similar to the list of affiliations required for an auction application – but would require significantly more information – all of which has little relevance when the affiliate does not control or is not under common control with the licensee. Having been a participant in many auctions, MetroPCS knows first hand how difficult and burdensome it can be to have to garner licensing information from every disclosable interest holder that has a 10% or greater interest in the licensee.

Incredibly, the Initial Regulatory Flexibility Analysis that accompanies the *NPRM* makes the wholly incorrect statement that:

Harmonization of the rules in the affected wireless services will not impose any more administrative burden on a licensee than the licensee must currently comply with. The Commission believes its proposed action will have the effect of lessening the recordkeeping burden by make the renewal process more straight-forward; this is particularly so for an FCC licensee with authorizations in more than one of the affected services.⁵²

The patent flaw in this analysis is that the Commission is purposefully conforming the renewal process to the most stringent prior standard – the new paradigm adopted for the 700 MHz commercial band. The Commission cannot possibly sustain this regulatory flexibility analysis if it adopts a whole list of renewal factors that a carrier must address in a renewal showing. The better course is to maintain the streamlined renewal application process that now exists and has resulted in the prompt, uncomplicated renewal of constructed licenses.

⁵² *Id.* at 65 (initial Regulatory Flexibility Analysis ¶ 17).

IX. THE PROPOSED RULES WOULD HAVE A SERIOUS CHILLING AFFECT ON THE FREE ALIENATION OF LICENSES

One of the most alarming aspects of the proposed rules is the requirement that an applicant's renewal showing "must include a detailed description of the applicant's provision of service during the entire license period and address: (1) the level and quality of service provided by the applicant (*e.g.*, the population served, the area served, the number of subscribers, the services offered); (2) the date service commenced, whether service was interrupted, and the duration of any interruption or outage; ..." ⁵³ The new rules also contemplate a "service certification" requiring the applicant to certify that it "is continuing to operate consistent with its most recently filed construction notification..." ⁵⁴ These renewal showings may make sense when a license has been held from the inception by a single carrier and the Commission is seeking to assess that carrier's performance throughout the license term. But the market reality is that many licenses are assigned and transferred in the course of the license term. As often as not, the buyer is planning to put the acquired spectrum to a different use than the seller. This means that the buyer may acquire the spectrum without the previously constructed network facilities, or the buyer may deconstruct the acquired system in order to put the spectrum to a higher and better use under a different operating model. It makes no sense for the FCC-approved buyer in this circumstance to describe the service provided during the "entire license period," nor should the successor in interest be required to certify that it is continuing to operate consistent with a construction completion notice filed by its predecessor in interest – which may not even have the same business model.

⁵³ *See Id.* at 54 (proposed rule section 1.949(c)(1) and (2)) (emphasis supplied).

⁵⁴ *Id.* at proposed rule section 1.949(d).

Once again, the MetroPCS concern in this regard is not merely theoretical but rather is based upon its actual circumstances. For example, MetroPCS acquired spectrum licenses in Detroit and Dallas that Cingular was obligated to divest when it acquired AT&T Wireless.⁵⁵ Cingular is a GSM carrier; MetroPCS is a CDMA carrier. As a consequence, MetroPCS had no need for the network facilities that had been built and placed in service by Cingular and so it acquired spectrum only with the understanding that Cingular would deconstruct and clear the spectrum prior to the closing. This entire plan was fully revealed to the Commission in the related assignment application and approved by the Commission by its grant of consent to the assignment. The ultimate result was that MetroPCS was starting from scratch in Dallas and Detroit. The service MetroPCS now provides in these markets bears little relationship to the services provided by Cingular in the early years of the license, and the facilities MetroPCS operates bear no direct relationship to the construction notifications filed by Cingular prior to the MetroPCS acquisition.⁵⁶

This concrete example demonstrates that the Commission's renewal standards, if changed, must make clear that a buyer who acquires spectrum with the consent of the FCC will not be expected or required at renewal time to describe, defend or maintain the service record of its predecessor in interest. In effect, an FCC-approved assignee or transferee should be considered to have a fresh start, and renewal should be granted if the buyer has made meaningful steps in the time available to provide beneficial services to the public.

⁵⁵ *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶ 40 (2004).

⁵⁶ MetroPCS focuses its initial construction efforts on providing depth of coverage in urban areas and then expands over time to cover less populated areas. Cingular seemed to focus on breadth of coverage and had a system and customers throughout the entire area.

The approach recommended by MetroPCS will advance the well-established Commission policy in favor of protecting and encouraging the free alienation of licenses.⁵⁷ The public interest is not served if licenses languish in the hands of licensees who do not put them to their optimal use. But carriers will be disinclined to buy licenses from an underperforming carrier if they are at risk of being held accountable at renewal time from the previous licensee's poor record of public service. Similarly, a carrier will be disincented to deconstruct an acquired operating system in order to devote the spectrum to a more efficient or more advanced use if, at renewal time, the buyer will be at risk if the total area and population served by the advanced system has decreased.

X. THE DISAGGREGATION AND PARTITIONING RULES DO NOT NEED TO BE CLARIFIED

The Commission proposes that all parties to a disaggregation or partitioning transaction be subject to a continuing independent obligation meet all applicable construction requirements pertaining to their respective portion of the spectrum or market area in order to prevent one party from riding the coat tails of another's construction.⁵⁸ MetroPCS respectfully submits that the proposed changes are unnecessary because the current rules already preclude a "free ride" by imposing a substantial service obligation on both licensees at the time of renewal. In the view of MetroPCS, the current rules do not allow a licensee to rely on another licensee's construction for the purposes of making the substantial service showing required to renew the license. Thus, an independent construction requirement already exists.

⁵⁷ See "Secondary Markets Initiative," FCC.gov, available at http://wireless.fcc.gov/licensing/index.htm?job=secondary_markets; *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, First Report and Order, 18 FCC Rcd 20604 (2003); *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, 19 FCC Rcd 17503 (2004).

⁵⁸ See *NPRM* at ¶ 72.

The question then becomes whether the current independent construction requirement should be made more rigorous by requiring each party to meet every interim construction standard. The answer is “No.” Allowing carriers initially to allocate the interim construction responsibilities among themselves provides needed flexibility and promotes beneficial partitioning and disaggregation transactions.

There could be substantial unintended adverse consequences from the rule change the Commission proposes. For example, a carrier in a rural area might seek to acquire spectrum in the outer reaches of a licensed market area where the original licensee has chosen not to build. If the license is subject to a population-based performance requirement, and the acquisition takes place well into the original license term, the buyer could find itself facing an unmettable deadline if it must independently meet the applicable performance requirement in the partitioned area to avoid a license forfeiture.

Indeed, the Commission specifically recognized this problem when it adopted the current partitioning and disaggregation rules. In the CMRS *Partitioning and Disaggregation Order*, the Commission held that “[b]ecause our rules do not dictate a minimum level of spectrum usage by the original PCS licensee, we believe it would be inconsistent to impose separate construction requirements on both disaggregation and disaggregate for their respective spectrum portions.”⁵⁹ The Commission disfavored this because it “could inadvertently discourage disaggregation by imposing a heavier regulatory burden on parties who choose to disaggregate than was required of the original licensee,”⁶⁰ and the Commission believed that “increasing the number of parties that

⁵⁹ *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING*, 11 FCC Rcd 21831, at ¶ 62 (Dec. 20, 1996).

⁶⁰ *Id.*

may obtain partitioned PCS licenses will lead to more efficient use of PCS spectrum and will speed service to underserved or rural areas.”⁶¹

In sum, the better approach is to leave the existing rule in place and not require each licensee of a partitioned license to construct to the benchmark.⁶²

XI. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission not retroactively impose the new renewal paradigm from the 700 MHz commercial band on non-700 MHz licenses, and not impose a laundry list of new renewal factors that will breed uncertainty and litigation. While certain of the Commission’s other proposals pertaining to competing renewal applications and harmonizing the discontinuance of service rules to a greater extent are worthy of further consideration, the Commission must proceed carefully to avoid unintended consequences.

⁶¹ *Id.* at ¶ 1.

⁶² To the extent a construction benchmark has the same standard as the renewal standard, such as AWS, no change is needed since each licensee would have to independently meet the substantial service at renewal.

Respectfully submitted,

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