

**Before the  
Federal Communications Commission  
Washington, DC 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 JOINT COMMENTERS ON PROPOSED RULES**

August 6, 2010

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## SUMMARY

Joint Commenters, who are themselves mutually exclusive applicants with certain renewal applicants, submit these suggestions to guide the Commission in handling comparative renewal situations. First, as discussed at great length in Joint Commenters' companion Petition for Reconsideration in this Docket, the Communications Act does not permit the Commission to grant renewal applications without accepting and simultaneously processing challenging applications. Both the interim procedure adopted by the Commission during the pendency of this rulemaking and the permanent application of that procedure are therefore impermissible.

With respect to the pending mutually exclusive applications, the Commission should group the pending applications for simultaneous processing, accept the challenging applications for filing, determine whether the incumbents offered any service during their last license term that might qualify as sufficiently mediocre to warrant renewal, designate the applications of any incumbents who qualify under that standard for a comparative hearing with the challengers, and consider (i) past substantial service, (ii) diversity of ownership, and (iii) future service plans in evaluating the applicants. Hearings should be conducted on a streamlined basis as much as possible to avoid protracting the process.

Comparative renewals in the future should be rare given the substantial service requirements which the Commission is adopting, but the Commission could adopt a late-license term substantial service review to largely weed out non-performing licensees and obviate most if not all comparative renewal proceedings.

No permanent discontinuance of service rules are needed for auctioned services since the Commission's theory is that auctions put licenses into the hands of people who will put the

licenses to their best and highest use. Any artificial use requirements distort economic reality and thus disserve the public.

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Green Flag Wireless, LLC ("Green Flag"), CWC License Holding, Inc. ("CWC"), James McCotter ("McCotter"), and NTCH-CA, Inc. (jointly, the "Joint Commenters") hereby offer these comments on the Commission's proposed renewal procedures.

**A. The Grant of the Incumbents' Renewal Applications and Dismissal of Challenging Applications Without a Comparative Hearing is Unlawful**

Joint Commenters incorporate by reference, without repeating, the arguments set forth in their simultaneously filed Petition for Reconsideration of the Commission's decision in this Docket to conditionally grant the renewal applications of incumbents and dismiss the challenging applications without a hearing. Briefly stated, Section 309(e) of the Communications Act, as

consistently interpreted by the *Ashbacker*<sup>1</sup> court and the D.C. Circuit, preclude the Commission from granting one application in a mutually exclusive group while dismissing or separately processing the others. Nor does the Act permit the Commission to adopt the two-step renewal process now in place for broadcast licensees since that process was only permitted by an amendment of the Communications Act limited to broadcast licensees only.

**B. The Commission Must Adopt Procedures to Deal with the Mutually Exclusive Applications Already on File**

Because the Commission may not lawfully adopt the procedure which it originally planned for the presently filed mutually exclusive applications, it must adopt a new procedure to handle those applications. Joint Commenters suggest the following:

1. **The Commission should declare the group of mutually exclusive applications closed.** *Ashbacker* contemplates that the Commission may consolidate mutually exclusive applications into sets so that it can process them. *Id.* at n.9. Because the rules do not set an outside date by which applications competing with renewal applications must be filed, the presumption must be that at some point the Commission would simply cut off the filing of any new applications and start processing the ones that had already been filed. Otherwise, under the rules as they now stand, there could never be a point at which comparative consideration could begin.

[T]he device of (a) cutoff (is) a reasonable and necessary limitation in the statutory right to a comparative hearing. There must be some point in time when the Commission can close the door to new parties to a comparative hearing or, at least hypothetically, no licenses could ever be granted.

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<sup>1</sup> *Ashbacker Radio Corp. v. FCC*, 326 U. S. 327 (1945).

*Committee for Open Media v. FCC*, 543 F. 2d 861 (D.C. Cir. 1976), citing *Radio Athens, Inc. (WATH) v. FCC*, 401 F. 2d 398 (400-401 (D.C. Cir. 1968)). It is therefore perfectly appropriate for the Commission to start that process now.

The mutually exclusive WCS applications were all filed more than three years ago and have been sitting ever since. Anyone who had the desire or inclination to file an application for a new WCS application has thus had the full opportunity for more than three years to do so. In the absence of a regulation which "for orderly administration, requires an application for a frequency, previously applied for, to be filed within a certain date," *Ashbacher, supra*, at note 9, the Commission should simply group applications which were filed in the same time frame together for simultaneous processing – a procedure which makes logical administrative sense for the "orderly administration" of its business.

Prior to the institution of modern cut-off rules, the Commission did just that. Responding to the *Ashbacher* court's suggestion, the Commission would gather mutually exclusive applications and designate them for a consolidated hearing. There was no cut-off date other than the date that the Commission actually designated them for hearing. *Logansport Broadcasting Corp.*, 4 FCC 188 (1948); *Hearst Radio, Inc.* 11 FCC 809 (1946). This procedure proved unwieldy since it was difficult to hold things steady long enough for a designation order to be issued, so the Commission eventually adopted a cut-off process. *AM Processing Procedure*, 18 RR 1565, 1566 (1959) The court of appeals had approved the Commission's practice of grouping contemporaneously filed applications for consolidated processing without any prescribed cut-off date other than the actual designation for hearing. "It seems to us logical, reasonable and fair, as well as to promote orderly procedure." *Colonial Broadcasting v. FCC*, 105 F.2d 781, 783 (D.C.Cir. 1939).

The Commission could fairly take all the mutually exclusive applications that were filed prior to the freeze imposed on May 25 and process them together.<sup>2</sup> This would limit the competing applications to a manageable number and permit the immediate designation of the applications for hearing, as set out below. There would be no unfairness to other prospective applicants since everyone had the same opportunity to file competing applications when the original renewal applications were filed in 2007, and the Commission could have closed off additional competing applications at any time. It would also deter "opportunistic late-comers" from piling on years after the original filings were made. *City of Angels Broadcasting, Inc. v. FCC*, 745 F. 2d 656, 663 (D.C. Cir. 1984). When the Commission gave notice of the acceptance for filing of the incumbents' renewal applications, it opened the window under Section 1.227(b)(3) of the rules for any potential applicant to file a competing application. Having kept the window open for three years, the Commission may now safely close it in the confidence that the public has had a full and fair opportunity to file an application.

It is axiomatic that no one has a right to file applications indefinitely as long as there has been a fair opportunity to file in the first place. *City of Angels, supra*. Treating the currently filed applicants as a single mutually exclusive set fairly deems those applications that were filed in close temporal proximity to be deserving of contemporaneous consideration. In the absence of an established cut off procedure, nothing more is required or appropriate.

**2. The Commission should accept the competing applications for filing.** The renewal applications have all been accepted for filing and have been through the petition to deny period, but the challenging applications have not. In order to move the process forward, the public must have an opportunity under 309(d) of the Act to file appropriate petitions. The

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<sup>2</sup> Some of the competing applications may be subject to dismissal for non-compliance with the rules.

petition process would, of course, go only to the basic qualifications of the applicants to hold a license.

**3. The Commission should determine whether there is any basis on which incumbents could be granted a renewal.** As the Commission has repeatedly stated, the most basic prerequisite for grant of a license renewal is that the licensee must have provided at least some level of mediocre service during its license term. This is implicit in the Commission's age-old formula for awarding a renewal expectancy: "Substantial service' is defined as service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal." See, for example, 47 C.F.R. 27.14. Logically, if there is some mediocre level of service which just might warrant renewal, then there must be some level of service *below* that level at which renewal is *not* warranted. At a minimum, therefore, there must be *some* service to justify renewal. "Insubstantial past performance should preclude renewal of a license." *Citizens Communications Center v. FCC*, 447 F. 2d 1201, 1213 (D.C. Cir. 1971). The record in this case takes "insubstantial past performance" to the nth degree – no performance at all during the 1997 - 2007 license term. Under the rules and policies which have historically and consistently guided the Commission, the incumbents are that rare case where there is not even the slightest question as to whether they deserve a renewal. They plainly do not. The Commission could therefore grant the challengers' applications under Section 27.321(b) of the rules without the need for a hearing because there are no substantial questions of fact to be resolved.

There are some incumbents who engaged in some minimal levels of service during the license term, but whether it qualifies as substantial must be evaluated. In those cases, present rule 27.14(c) and (d) dictate what information must be supplied preliminarily. The incumbents

should be required to submit that information as well as any additional information which the Commission determines in the course of this proceeding to require as part of its future substantial service evaluations. The Commission may then make a preliminary determination, with appropriate input from challengers, as to whether the incumbent is eligible for a renewal of its license – *i.e.*, did it provide the level of mediocre service during the license term which just might minimally warrant renewal in the absence of a challenge but not a renewal expectancy? If not, its application would be dismissed and the application of the challenger granted. If so, the renewal applicant would be eligible to compete with the challenger in a comparative proceeding.

It must be stressed that the substantial service evaluations of incumbents must be made on the basis of service during the license term. The Commission has consistently and properly held that service provided after a license term is irrelevant since a renewal applicant must be judged on the basis of what it did with the license during the term that was originally allotted to it. "An incumbent applicant may be entitled to a renewal expectancy if its performance during the preceding license term has been " 'substantial,' " meaning " 'sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal.' " *Monroe Communications Corp. v. FCC*, 900 F. 2d. 351, 353 (D.C. Cir. 1990, citing *Cowles Broadcasting, Inc.*, 86 F.C.C.2d 993, 1015 (1981), (quoting *Cowles Florida Broadcasting, Inc.*, 62 F.C.C.2d 953, 955-56 (1977)) (emph. added). *See also* 27.14(b). Any other approach would simply encourage licensees to do the minimum with their licenses until they see that there is a challenger and then engage in furious post-term back-filling to shore up their chances of success. *See Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 22 FCC 2d 424, 427 (1970), recon. den. 24 FCC 2d 383 (1970), reversed on other grounds, *Citizens Communications Center, supra*.

4. **The Commission should then designate any remaining mutually exclusive applications for a consolidated hearing.** At this point there should be very few, if any, situations where a comparison of applicants is necessary. However, in those few cases the Commission should put the competing applicants before an ALJ for resolution of the matter. The suggested comparative issues would be:

(a) Is the incumbent entitled to a renewal expectancy? Joint Commenters believe that an incumbent licensee who has provided substantial service during its license term should be entitled to a renewal expectancy – a comparative plus of strong significance. Such an expectancy is essential to long-term planning and investment in licenses, as the Commission has often recognized. But in order to be awarded such an expectancy, the incumbent must earn it. For current incumbent licensees it would be unfair to impose new substantial service requirements which they were unaware of during the 1997- 2007 license term. However, the WCS licensees were certainly aware of the substantial service obligation of Section 27.14(a) and the showings required by Section 27.14(c). Similar obligations under Section 24.203 were known to PCS licensees. It is therefore perfectly reasonable to measure their substantial service, at a minimum, by those standards. Critical to this evaluation is the number of actual subscribers which the incumbent had during the renewal term. While it is settled that a renewal expectancy involves the provision of service "substantially above" a mediocre level of service, it would be useful for the Commission to flesh out just *how much* above mediocre one has to be. Benchmarks or safe harbors might be useful in affording licensees the comfort that they have satisfied this standard on a going-forward basis.

(b) Does the applicant provide diversity of ownership? Given the severe consolidation in the CMRS industry, the Commission should strongly favor diversity as a

comparative factor. The Commission's auction policies have tried with little success to foster license ownership by small businesses as a competitive foil to the majors who dominate the industry. The renewal process could help to implement that policy by a different route. Experience tells us that smaller competitive carriers in the CMRS market have been leaders in initiating pre-paid plans to serve less economically well-heeled customers and other service innovations. The smaller carriers have to be creative, flexible, quickly responsive to customer needs, and very cost-conscious because that is the only edge they have over the majors. The presence of new and different carriers in any market almost always serves to drive down the prices offered by the majors in the same way that the entry of a low cost airline into any market immediately results in price reductions by the larger legacy carriers. The public experiences immediate benefits whether it buys service from the new small carrier or the bigger carrier at a lower cost. An applicant who has less than 25 MHz of other spectrum holdings and no other cable or wired broadband capacity in a given market should therefore be given a substantial comparative credit exceeded only by the renewal expectancy credit.

(c) Because criteria (a) and (b) are by far the most important criteria, the Commission need only go to "tier-breaker" criteria if the applicants come out even on (a) and (b). Because (a) and (b) are relatively easily determined and applied, most hearings should be able to be resolved quickly on that basis. However, if no superior applicant emerges by application of those two criteria, the Commission could move to more granular factors: What are the applicant's plans for building out the system, including timetable, extent of coverage, service to unserved or underserved areas and niches, speed of broadband service, and innovative services not presently available in the market? An applicant should receive separate pluses for superior

proposals in each of these categories. The feasibility of an applicant's proposals should be subject to examination to ensure that the proposals are meaningful and likely to be effectuated.

The difficulty with this latter category is that the incumbents will likely have a "headstart" on building out their systems due to the 13 year period they have already had to plan. By the time the hearing is over, they may already have initiated or expanded construction activities. Yet the Court of Appeals has made it very plain that the Commission may not stack the deck in favor of incumbents by using comparative criteria that inherently give the incumbent an advantage.

Because the Federal Communications Act fairly precludes any preference based on incumbency *per se*, the practical bias arises from the Commission's discretionary weighing of legally relevant factors ... It is the judicial function to insure that such discretionary choices as are entailed in these proceedings are rigorously governed by traditional principles of fairness and administrative regularity.

*Central Florida Enterprises, Inc. v. FCC*, 598 F. 2d 37, 41 (D.C. Cir. 1979) To avoid building a structural bias into the comparison, the incumbent must not be credited with activity since the end of its renewal term since that would give it an unfair comparative advantage over challengers.

The renewal proceedings should be conducted on an expedited basis. No one benefits while a license is in limbo. The Commission should therefore provide for a streamlined hearing process in which discovery is limited and exchanged quickly, oral presentations and cross examination are used only when absolutely necessary, and the evidence is received in written form and exchanged electronically. The ALJ should be directed to issue an initial decision in a short but reasonable time after the record is closed – perhaps two months per every applicant in the proceeding. The hearing should be limited to only those matters designated by the Commission or the Bureau for the ALJ to consider – any additional issues which might be

requested would have to be added by the Commission itself. All of these measures will serve to speed the decision-making process along while giving the ALJ and the parties a reasonable opportunity to present their cases, look into the other applicant's case, present proposed findings, and issue a decision.

**C. Future Renewal Proceedings.**

As we have seen, the Commission may not lawfully preclude new applicants from filing competing applications with renewals under the structure of the Communications Act. The Commission could, however, achieve a similar result by turning the currently proposed "renewal showing" into a "substantial service showing" which would have to be filed one year before the expiration of the license term. The Commission would review that showing and either accept it as sufficient or reject it no later than 60 days before the expiration of the license term. If the showing was rejected, the license would be cancelled at the end of the renewal term and no renewal application by the incumbent or by any other applicant could be filed. As of the end of the license term, therefore, the license would simply lapse and the associated spectrum could go back into the auction pool for re-auction. Under this procedure, the Commission would in effect be using the same procedures it uses now to evaluate substantial service by PCS licensees at the 5 year mark under Section 24.203; that process can result in the simple forfeiture of the underlying license without any impact on the renewal process. The suggestion here would simply be to conduct that analysis nearer the end of the license term so that the status of the license could be determined before renewals come up for filing. If the substantial service showing were accepted as adequate, the incumbent would file its renewal application normally. The Commission would still have to entertain competing applications, but any such applicants would be filing with the full knowledge that the substantial service showing for the incumbent

had been accepted and therefore it would likely be receiving a dispositive preference in the comparative analysis. The Commission's pre-filing determination of substantial service would not preclude the challenger from submitting evidence to challenge that showing, but there would presumably be considerable evidence in the record already for a potential challenger to assess whether there was any point in mounting a challenge. Strict greenmail rules would preclude mischief-makers from filing competing applications with no reasonable prospect of success.

**D. No Permanent Discontinuance Rule is Necessary.**

The Commission proposes to establish 180 days as an across-the-board time frame to measure permanent discontinuance. Joint Commenters believe that in today's world a 180 day discontinuance period does not and should not constitute permanent discontinuance. In our experience, there are often many factors both inside and outside the licensee's control that necessitate a temporary discontinuance of operations. Sometimes the circumstances are financial, but often they relate to other complicated factors such as construction delays, zoning issues, inability to get vendors, customers or suppliers lined up, weather considerations, and many others. Quite often a licensee has every intention of putting its station back on the air after a temporary cessation of operations but is frustrated in that intent by circumstances.

Regardless of the circumstances, however, the licensee's incentives will almost always be to put its license to use as quickly as possible. This follows logically and necessarily from the Commission's oft-pronounced axiom that the auctioning of spectrum ensures that the spectrum is put into the hands of the licensee who will put it to its best and most productive use.

The Commission's rules presume that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum; such entities are presumed to be those best able to put the licenses to their most efficient use for the benefit of the public ....

*Morris Communications, Inc.*, 23 FCCR at 3179, 3194 ¶34 (2008); *Commnet Communications Network, Inc.* FCC Rcd 8612 (2007); *Tracy Corporation II*, 22 FCC Rcd 4071 (2007); *Lancaster Communications, Inc.* 22 FCC Rcd 2438 (2007); *Rapid Wireless, LLC.*, 22 FCC Rcd 1410 (2007). If this proposition is really true – and the Commission has relied on it repeatedly to justify its various auction-related policies<sup>3</sup> – there should be no need for permanent discontinuance rules at all. The invisible hand of the market should be directing the licensees to wring the most from their spectrum by putting it to use as quickly as a profit can reasonably be expected. To require them to deviate from those economic principles by building facilities and offering services that are not demanded by the market by definition results in economic waste. Economics 101 alone should dictate that performance-based requirements are not only unnecessary but actually counter-productive in allocating scarce resources – whether spectrum or cash – to meet economic needs. In other words, regardless of what discontinuance period is established, the imposition of an artificial use requirement is in theory *not* likely to lead to the spectrum being put to its best and highest use by the people most motivated to do so. Only the market can do that.

Axiomatically, an auction winner will put the spectrum to its highest use and, if the highest use is to let the spectrum temporarily lie fallow, that is, from an economic and public interest standpoint, the course that should be permitted. Everyone can agree that no purpose whatsoever is served by compelling licensees to put spectrum to some minimal use simply in order to satisfy FCC regulations when the sensible business and economic decision might be to wait for the business climate to change or to work out other problems that are causing a delay in spectrum usage. The artificial imperative to "put the spectrum to use" even if that use is not

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<sup>3</sup> *Ibid.*

economically useful is actually contrary to the public interest. It doesn't result in good additional service and it simply increases the ultimate costs of service to the public when real service is eventually delivered in accordance with market dictates. In short, the Commission needs to either stop asserting that auctions logically and necessarily result in spectrum being assigned to the licensee who will put it to the best and highest use, or stop imposing artificial construction or use obligations on licensees which are, presumptively, not the best and highest use because they were not driven by economics.

Of course, as a practical matter, the renewal showing (or "substantial service showing," if our proposal above is adopted) which the Commission is now proposing to apply will require licensees to show that they have been making substantial use of their spectrum during their license term. If a licensee has indeed permanently discontinued service, it will not be able to make the renewal showing and will lose its license at renewal time. On the other hand, if it has indeed provided substantial service over the course of its license term, a temporary discontinuance of service of some length should not result in its license being forfeited. The very mechanics of the substantial service process will serve to ensure that licensees do not waste their spectrum by unjustified non-use. The other reforms proposed in this Docket effectively eliminate the need for a permanent discontinuance rule. No permanent discontinuance rule is therefore required.

**E. The 700 MHz Proceeding.**

Much of the Commission's model for dealing with renewals in the future seems to be based on the paradigm it adopted for the 700 MHz service. As Joint Commenters have demonstrated here and in their Petition for Reconsideration. The bifurcated renewal procedure

which the Commission adopted there is actually in conflict with the Communications Act and the *Ashbacker* progeny that require renewal challenges to be entertained. It does not appear that the issue was raised in the 700 MHz proceeding, but the Commission should revise the 700 MHz rules now – well in advance of the first renewal cycle for that service – to ensure that the renewal rules there pass muster and are harmonized with the renewal procedures proposed here.

**F. Contingent Waiver Request**

Commenters are treating the *NPRM* as a rulemaking proposal which is open to comment from the public. Indeed, the *NPRM* expressly indicates that a final decision in this proceeding will be made "in the light of the record to be developed." *NPRM* at Para. 101. This seems to suggest that comments from parties regarding the proposed procedures are welcome and would not fall under the blanket prohibition on pleadings or filings with respect to applications. *NPRM* at Para. 102. If, however, the *NPRM* is intended to preclude any formal commentary from the affected parties on the proposed disposition of their own or the competing applications, Petitioners respectfully request a waiver of the blanket prohibition. Under ordinary principles of administrative law, the adoption of rules affecting a private party's direct interests would be subject to comment. Indeed, a party's right to question the FCC's action in subsequent court proceedings would be impeded if it did not raise its issues with the Commission in the first instance. Since the Commission's proposals with respect to the treatment of pending renewal applications and their mutually exclusive challengers was not the subject of any prior proceedings, no one has had an opportunity to address the lawfulness or propriety of the proposed procedures. Petitioners must present their position to the Commission before a Court appeal can be pursued. To the extent that the *NPRM* may bar Petitioners from commenting on

the procedures, waiver of that prohibition is necessary to permit Petitioners their right to comment.

Petitioners assume that it was not the Commission's intent to violate the provisions of Section 553(c) of the Administrative Procedure Act which expressly guarantees "interested persons an opportunity to participate in the rulemaking through the submission of written data, views, or arguments with or without opportunity for oral presentation." The Commission may not simply overrule the United States Code by refusing to accept the input which is permitted by the statutory scheme. Unless the Commission accepts these comments, Petitioners will have been permanently denied their statutory right not only to comment on the proposed rules but to challenge the Commission's action before the agency and/or before the Court. That cannot have been what the Commission intended. Accordingly, Petitioners request waiver of the portion of the *NPRM* requiring dismissal of pleadings filed in connection with the renewal applications insofar as is necessary to allow Petitioners their rights under the Administrative Procedure Act.

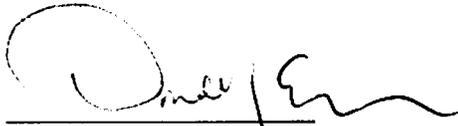
**G. Conclusion.**

The Commission must accept the structure created by the Communications Act which precludes the procedure proposed by the Commission here. It also precludes the procedure which the Commission has adopted for the 700 MHz licenses, though no party has yet been in a position to challenge those rules. The Commission should promptly review the now pending mutually exclusive applications according the procedures proposed above, not foreclose the filing of future renewal challenges, and apply the procedures proposed above to such future renewal proceedings. It should not adopt rules that impute permanent discontinuance of service to wireless licensees, both because such an approach is inconsistent with the basic theory of

auctions and because the new substantial service rules will serve to deter licensees from warehousing spectrum.

Respectfully submitted,

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