

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

**COMMENTS OF FIBERTOWER CORPORATION**

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FiberTower Corporation (“FiberTower”), through its undersigned counsel, hereby submits these comments on the Commission’s May 25, 2010 Notice of Proposed Rulemaking and Order (“NPRM”)<sup>1</sup> in the above-captioned proceeding.

**I. INTRODUCTION AND SUMMARY.**

FiberTower uses a combination of wireless spectrum assets, including licenses in the 24 GHz and 39 GHz wide-area millimeter wave bands, and fiber optic assets to offer its backhaul and access services to mobile wireless carriers, competitive and other local exchange carriers, first-responder networks, and government and enterprise customers nationwide. Through partnerships and master lease agreements, FiberTower has access to more than 100,000 towers

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<sup>1</sup> See generally *In re 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; 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*, Notice of Proposed Rulemaking and Order, 25 FCC Rcd. 6996 (2010) (“NPRM”).

across the country on which it can deploy carrier-class and government-class networks. Indeed, nine large mobile wireless carriers are among FiberTower's largest customers. FiberTower has master services agreements with Verizon Business and Qwest Communications to provide federal agencies with broadband services on the General Services Administration ("GSA") Networx contract, and FiberTower provides services under GSA Schedule 70. FiberTower's services provide customers with a long-term solution, characterized by superior signal availability and network reliability, to meet the increasing demand for backhaul capacity.

FiberTower applauds the Commission's effort to establish a new framework for the renewal of wireless licenses. FiberTower is encouraged by the Commission's proposal to harmonize its varying license renewal requirements to the extent that doing so would establish the preconditions for investment that encourages positive market trends and that enhances consumer welfare.<sup>2</sup> FiberTower agrees that the Commission should "promote the efficient use of spectrum resources."<sup>3</sup> As discussed herein, the Commission's existing framework for the renewal of 24 GHz and 39 GHz licenses illustrates the flaws in the current licensing regime. Among other things, the current framework (1) often discounts or misapprehends the steps that companies must take in order to prepare for and execute entry in specific geographic areas; (2) inappropriately treats the "substantial service" standard as a minimum requirement for renewal and thus has caused the Commission to relinquish the flexibility to grant a license renewal application where the licensee has not satisfied the substantial service standard; and (3) effectively elevated quantitative "safe harbor" examples of how the substantial service standard can be satisfied into the sole benchmarks for renewal. In order to address these and other flaws,

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<sup>2</sup> *See id.* ¶ 7.

<sup>3</sup> *Id.*

the Commission should replace the existing regime with one in which licensees are able to meet the substantial service standard by relying on a wide range of appropriate supporting information, including information that the Commission has mistakenly refused to consider in past renewal proceedings. Consistent with the original intent of the substantial service standard, the Commission should also retain the flexibility to renew licenses where the licensee has failed to meet the substantial service standard. Accordingly, the Commission should adopt a two-part renewal showings framework in which a licensee can (1) obtain a renewal expectancy if the licensee can demonstrate substantial service based on a non-exhaustive list of qualitative factors (as well as any quantitative factors); and (2) obtain renewal even if the licensee does not meet the substantial service standard if it can demonstrate that renewal is nevertheless in the public interest. As part of the first prong of the framework, the FCC should grant a renewal expectancy to a licensee that demonstrates that it is a leader in developing the license band(s) in question in order to make them more valuable and useful in serving the community.

This approach has several advantages. *First*, it would give the Commission the ability to consider appropriate information to determine whether the substantial service standard is met. *Second*, it would provide licensees with guidance as to the meaning of the substantial service standard—a significant benefit in an area in which, as the Commission recognizes, “there currently is scant precedent and varying requirements.”<sup>4</sup> *Third*, it would allow the Commission to retain the flexibility to renew a license where the substantial service standard is not met but where renewal is consistent with sound policy. In sum, such a framework would “encourage

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<sup>4</sup> *Id.* ¶ 29.

licensees to invest in new facilities and services, and facilitate their business and network planning” while preserving maximum flexibility for the agency.<sup>5</sup>

Additionally, FiberTower agrees with the Commission’s tentative conclusion to prohibit the filing of competing wireless license renewal applications.<sup>6</sup> Competing renewal applications make little sense for wireless licenses that were obtained via auction or through the open market. This is because licensees that have paid for spectrum already have an incentive to use that spectrum and obtain a return on their investment. As the Commission observes, “spectrum auctions most likely will result in the licensing of spectrum to a party that most highly values the spectrum.” *Id.* ¶ 41. FiberTower also concurs with the Commission that such applications strain the resources of both licensees and the Commission and force renewal applicants to “operate under a cloud of litigation.”<sup>7</sup> In any event, FiberTower agrees that the Commission’s existing petition to deny process “affords interested parties an appropriate mechanism to challenge the level of service and qualifications of licensees seeking renewal.”<sup>8</sup>

## **II. THE SUBSTANTIAL SERVICE STANDARD ORIGINATED AS PART OF A REGIME IN WHICH THE COMMISSION RETAINED THE FLEXIBILITY TO RENEW LICENSES WHERE THE STANDARD WAS NOT MET.**

The concept of substantial service first arose in the context of comparative renewal proceedings for broadcast licenses. The Commission’s policy with respect to such proceedings consistently included a preference for incumbents. More specifically, a renewal applicant would be preferred over challengers if it could demonstrate that it had provided “meritorious” or

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<sup>5</sup> *Id.* ¶ 7.

<sup>6</sup> *See id.* ¶¶ 3, 40.

<sup>7</sup> *Id.* ¶ 40.

<sup>8</sup> *Id.* ¶ 41.

“substantial” service to the public during its license term.<sup>9</sup> The Commission’s intent in awarding such preferences or “renewal expectancies” was to provide licensees with reasonable assurance that they would not be dispossessed of their licenses.<sup>10</sup> The Commission reasoned that giving renewal expectancies based on a showing of substantial service would (1) encourage licensees to make investments that they would not make “without reasonable security of tenure”;<sup>11</sup> (2) ensure continuity of acceptable service;<sup>12</sup> and (3) promote industry stability.<sup>13</sup>

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<sup>9</sup> See, e.g., *In re Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, Second Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd. 5179, ¶ 88 (1988) (“*Comparative Renewal Process Second Further NOP*”). In a series of cases in which it reviewed the Commission’s adoption and application of this policy, the D.C. Circuit made clear that the Commission could not establish an irrebuttable presumption in favor of the incumbent licensee. See generally *Citizens Commc’ns Ctr. v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971) (“*Citizens*”); *Cent. Florida Enter., Inc. v. FCC*, 598 F.2d 37, 51 (D.C. Cir. 1979), cert. dismissed, 441 U.S. 957 (1979) (“*Central Florida I*”); *Victor Broad., Inc. v. FCC*, 722 F.2d 756, 760-61 & 765 (D.C. Cir. 1983). Nevertheless, the court recognized that “licensees should be judged primarily on their records of past performance” and that “a plus of major significance” should be awarded to a renewal applicant whose past record warrants it. *Citizens*, 447 F.2d at 1213.

<sup>10</sup> See, e.g., *Central Florida I*, 598 F.2d at 44 (quoting *FCC v. Nat’l Citizens Comm. for Broad.*, 436 U.S. 775, 805-06 (1978)) (“In the past, the Commission has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest, both in its direct consequence of bringing proven broadcast service to the public, and in its direct consequence of rewarding and avoiding losses to licensees who have invested the money and effort necessary to produce quality performance. Thus, . . . both the Commission and the courts have recognized that a licensee who has given meritorious service has a ‘legitimate renewal expectancy’ that is ‘implicit in the structure of the Act’ and should not be destroyed absent good cause.”).

<sup>11</sup> See *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, Notice of Inquiry, 88 F.C.C.2d 120, ¶ 7 (1981) (alteration and internal citation omitted).

<sup>12</sup> See *In re Applications of Cowles Broadcasting, Inc. (WESH-TV) Daytona Beach, Florida For Renewal of License et al.*, Decision, 86 F.C.C.2d 993, ¶ 62 (1981) (“*Cowles Broadcasting*”), *aff’d*, *Cent. Florida Enter., Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982) (“There is no guarantee that a challenger’s paper proposals will, in fact, match the incumbent’s proven performance. Thus, not only might replacing an incumbent be entirely gratuitous, but it might even deprive the community of an acceptable service and replace it with an inferior one.”).

Importantly, as originally designed, the substantial service standard for obtaining a renewal expectancy required something *more than* the minimum showing required for renewal. The Commission defined substantial service warranting a renewal expectancy as “sound, favorable and substantially *above* a level of mediocre service which might just minimally warrant renewal.”<sup>14</sup> The Commission explained that “substantial” means “more than ‘minimal’ but less than ‘superior’ or ‘exceptional.’”<sup>15</sup> While an incumbent licensee that provided “substantial” service would receive a preference in a comparative renewal proceeding and an incumbent licensee providing “superior” service would receive an even stronger preference, an incumbent licensee providing “minimal” service would simply receive no preference.<sup>16</sup> “Minimal” service would not justify a renewal expectancy but would be sufficient to obtain renewal in the absence of a competing renewal application.<sup>17</sup> In addition, in the face of a competing renewal application, the renewal application of an incumbent providing minimal service could still be granted if the incumbent was deemed comparatively superior. Thus, the

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<sup>13</sup> See *id.* ¶ 61 (explaining that “[c]omparing incumbents and challengers as if they were both new applicants could lead to a haphazard restructuring of the broadcast industry”).

<sup>14</sup> *Id.* ¶ 40 (internal quotations omitted) (emphasis added). It should be noted that while the Commission considered adopting quantitative standards for substantial service, it expressly rejected doing so. See *In re Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process*, Report and Order, 66 F.C.C.2d 419, ¶ 21 (1977), *aff’d*, *Nat’l Black Media Coal. v. FCC*, 589 F.2d 578 (D.C. Cir. 1978) (explaining that quantifying the concept of substantial service would restrict licensees’ program discretion, “would not simplify the hearing process, and [] could not offer a licensee any real assurance of renewal”). Indeed, the Commission held that quantitative standards “are a simplistic, superficial approach to a complex problem, and we will not adopt them.” *Id.*

<sup>15</sup> *Cowles Broadcasting* ¶ 46; see also *Comparative Renewal Process Second Further NOI* ¶ 88.

<sup>16</sup> See *Cowles Broadcasting* ¶ 61; see also *Comparative Renewal Process Second Further NOI* ¶ 89.

<sup>17</sup> See *Comparative Renewal Process Second Further NOI* ¶ 88.

failure to demonstrate substantial service, without more, did not automatically result in license termination.

The Commission extended its practice of awarding renewal expectancies based on “substantial service” (i.e., “sound, favorable and substantially above a level of mediocre service which might just minimally warrant renewal”) to cellular radio comparative renewal proceedings in 1993.<sup>18</sup> The Commission adopted a two-step procedure under which it grants a renewal application without conducting a full comparative hearing if a threshold hearing determines that the incumbent has performed substantial service and is entitled to a renewal expectancy.<sup>19</sup> Similar to the broadcast context, the Commission permitted incumbent cellular radio licensees to obtain renewal expectancies based on a demonstration of substantial service as an ameliorative measure to make it easier for licensees to renew their licenses in comparative renewal proceedings and to avoid the costs associated with such proceedings.<sup>20</sup> The Commission’s rationale was, among other things, to facilitate investment:

We believe that ensuring that cellular incumbents are not subject to competing applications once they have demonstrated substantial performance serves the public interest by assisting in achieving the same three objectives for which we awarded a renewal expectancy in the first place. These objectives are: (1) to encourage investment in cellular facilities; (2) to avoid the risk of replacing an acceptable service provider with an inferior one, based on unproven promises, and (3) to avoid disruption of cellular radio service. With regard to encouraging investment in cellular facilities, . . . renewal expectancies provide assurance to investors and other sources of financing that their funds will not be placed in jeopardy. Further, if the carrier can demonstrate its substantial performance during the license term, the two-step hearing lends a high degree of probability to

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<sup>18</sup> See *In re Amendment of Part 22 of the Commission’s Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 2834, ¶ 7 (1993) (“*Cellular Radio License Renewals Order*”).

<sup>19</sup> See *id.* ¶ 3.

<sup>20</sup> See *id.* ¶¶ 13-18.

the retention of the license, which in turn creates a favorable environment for investment and financing that otherwise would be compromised by the vagaries of the comparative hearing process. Ultimately this likelihood of renewal, and the investment that will result from it, are beneficial to cellular customers.<sup>21</sup>

As in the broadcast context, the substantial service standard for obtaining a cellular radio license renewal expectancy required that the licensee *exceed* the showing normally required for renewal. That is, even if the licensee failed to meet the substantial service standard and did not merit a renewal expectancy, its license could nevertheless be renewed if the licensee were judged to be comparatively superior.<sup>22</sup> Thus, the Commission retained the flexibility to renew the license even if the substantial service standard was not met.

### **III. THE COMMISSION’S EXISTING FRAMEWORK FOR RENEWAL OF 39 GHz AND 24 GHz LICENSES IS FLAWED.**

In adopting and applying regulations governing 39 GHz and 24 GHz licenses, the Commission has departed from its longstanding license renewal policies, including its flexible treatment of the substantial service standard. In so doing, the Commission has unnecessarily foreclosed or jeopardized license renewals where the public interest might support such renewals.

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<sup>21</sup> *Id.* ¶¶ 13-15.

<sup>22</sup> *See id.* ¶ 25 (explaining that “[i]f the Presiding Judge determines that the renewal applicant does not merit a renewal expectancy but is not disqualified on basic qualifications issues, then all the applications filed for that market will be compared in a hearing (step two)”); *see also* 47 C.F.R. § 22.935(c).

**A. The Commission’s Current Framework For Renewal Of 39 GHz Licenses Ignores Market Realities And Lacks Flexibility, Clarity, And Transparency.**

In the 1997 *39 GHz Order*, the Commission adopted renewal requirements to facilitate the provision of backhaul services.<sup>23</sup> The Commission intended its framework for renewal of 39 GHz licenses to be characterized by stability, flexibility and minimal regulation.

*First*, in an effort to promote a stable regulatory environment, the Commission held that 39 GHz licensees would receive renewal expectancies based on a showing of substantial service.<sup>24</sup> The Commission held that a renewal expectancy would “facilitate investment for the industry, provide stability over the long run, and better serve the public by reducing the possibility that proven operators will be replaced with less effective licensees.”<sup>25</sup>

*Second*, in order to “impose the least regulatory burden on licensees as possible,” the Commission decided to “combine the showing traditionally required for build-out and the showing required to acquire a renewal expectancy into one showing at the time of renewal.”<sup>26</sup>

The Commission held that requiring performance at renewal rather than earlier in the license

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<sup>23</sup> See *In re Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands*, Report and Order and Second Notice of Proposed Rulemaking, 12 FCC Rcd. 18600, ¶ 4 (1997) (“*39 GHz Order*”).

<sup>24</sup> See *id.* ¶¶ 3, 49.

<sup>25</sup> *Id.* ¶ 49; see also ¶ 38 (explaining that the Commission’s rationale in the broadband PCS context had been that a renewal expectancy would provide “a stable regulatory environment that is conducive to investment” and that commenters in the 39 GHz proceeding agreed that the Commission should adopt a similar approach for the 39 GHz band because of “the benefits that such a presumption offers”).

<sup>26</sup> *Id.* ¶ 47. It should be noted that while the *39 GHz Order* (¶ 3) explicitly provides that licensees that demonstrate that they are providing substantial service at renewal will receive a renewal expectancy, the Commission’s implementing rule, 47 C.F.R. § 101.17, entitled “Performance requirements for the 38.6-40.0 GHz frequency band,” does not reference any renewal expectancy and merely states that “licensees adjudged not to be providing substantial service will not have their licenses renewed.” *Id.*

term would give licensees “sufficient time in which to develop market plans, secure necessary financing, develop and incorporate new technology in their systems, accommodate equipment manufacturers’ production schedules, and build a customer base.”<sup>27</sup>

*Third*, the Commission adopted “substantial service” as the standard for demonstrating performance and obtaining a renewal expectancy in order to give 39 GHz licensees “a significant degree of flexibility.”<sup>28</sup> The Commission held that “an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings 39 GHz licensees can provide” and implied that a substantial service standard would allow licensees to tailor their showings to reflect the services they offer.<sup>29</sup> The Commission expressly rejected its previous proposals that licensees meet specific build-out benchmarks because such “build-out requirement[s] would be unduly restrictive and burdensome, thus unnecessarily limiting licensees’ service options.”<sup>30</sup> Rather, the Commission held that requiring a showing of substantial service would “permit flexibility in system design and market development, while ensuring that service is being provided to the public.”<sup>31</sup>

Unfortunately, in adopting this framework, the Commission’s treatment of the substantial service standard subverted the stated objectives of the *39 GHz Order*. This is because the Commission failed to recognize that the substantial service standard *exceeds* the showing required for renewal. Instead, the Commission established substantial service as the new

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<sup>27</sup> *39 GHz Order* ¶ 48.

<sup>28</sup> *Id.* ¶ 42.

<sup>29</sup> *See id.* (“Permitting licensees to demonstrate that they are meeting the goals of a performance requirement with a showing tailored to their particular type of operation avoids this pitfall.”).

<sup>30</sup> *Id.* ¶ 43.

<sup>31</sup> *Id.* ¶ 46.

*baseline* for renewal. The Commission relinquished the flexibility to grant a renewal for a licensee that has not met the substantial service standard. In so doing, the Commission actually diminished the level of regulatory stability and flexibility for 39 GHz licensees and increased the level of regulatory involvement in the marketplace.

The Commission compounded this error by failing to expressly define “substantial service” in the *39 GHz Order*. Because the Commission noted that “the use of a substantial service standard has precedent in our Rules,” one can presume that the definition of “substantial service” for purposes of renewal of 39 GHz licenses is the same as the definition of “substantial service” in the Commission’s cellular and PCS rules.<sup>32</sup> That is, “substantial service” means “service that is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal.”<sup>33</sup> As a renewal standard, however, this definition makes little sense because *in order to obtain renewal*, a licensee would have to show that it provides service *above the level of service that would warrant renewal*. In other words, the definition of substantial service as a renewal standard is circular.

The Commission further misapplied the substantial service concept by defining substantial service using quantitative safe harbors. In an effort to provide licensees with some guidance as to what would constitute substantial service in the 39 GHz band, the Commission held that “one example of a substantial service showing for a traditional point-to-point licensee might consist of four links per million population within a service area.”<sup>34</sup> The Commission

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<sup>32</sup> See *id.* ¶ 40 & n.96 (citing 47 C.F.R. § 24.203(b) (construction requirement for broadband PCS licensees)); see also *id.* at n.86 (citing 47 C.F.R. § 22.940(a)(1) (renewal expectancies for cellular licensees) & *id.* § 24.16 (renewal expectancies for PCS licensees)).

<sup>33</sup> See, e.g., 47 C.F.R. § 24.16.

<sup>34</sup> *Id.* ¶ 46; see also *id.* ¶ 42 (“[O]ur examples of presumed substantial service, based on a specific number of links per population standard, provides licensees with a degree of certainty []

provided this example of substantial service (also known as a “safe harbor”) notwithstanding its express intent to refrain from adopting specific build-out benchmarks.<sup>35</sup>

In the years since it issued the *39 GHz Order*, the Commission has relied almost exclusively on quantitative safe harbors when evaluating 39 GHz renewal applications. In the 2002 *39 GHz Renewal Grant Order*, for example, the Wireless Telecommunications Bureau (“Bureau”) held that, in light of the fact that the licensees at issue “had less than one-third of a full ten-year license term to satisfy the substantial service requirement,”<sup>36</sup> it would grant renewal because those licensees were either (1) operating at 50% or better of the Commission’s safe harbor example of one link per 250,000 population,<sup>37</sup> or (2) operating ten or more links within their service area.<sup>38</sup> In 2003, relying on the *39 GHz Renewal Grant Order*, the Bureau granted Pacific Bell Wireless’ 39 GHz license renewal applications where the licensee was operating at 50% or better of the Commission’s safe harbor example after less than half of its full license

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regarding their license requirements.”); *In re IDT Spectrum, LLC Request for Waiver, Extension of Time to Meet Coverage Requirements and Extension of License Period; 99 Applications for Renewal of License of Common Carrier Point-to-Point Microwave Stations et al.*, Order on Reconsideration and Memorandum Opinion and Order, 23 FCC Rcd. 12005, n.41 (WTB 2008) (“*IDT Spectrum Order*”).

<sup>35</sup> See *39 GHz Order* ¶ 45 (rejecting a requirement that licensees “construct a specific number of link installations based on the market’s population” because “a requirement for a fixed number of links may interfere with the market decisions of a particular licensee . . .”).

<sup>36</sup> *In re Renewal of Licenses to Provide Microwave Service In the 38.6-40.0 GHz Band*, Memorandum Opinion and Order, 17 FCC Rcd. 4404, ¶ 8 (WTB 2002) (“*39 GHz Renewal Grant Order*”).

<sup>37</sup> See *id.* ¶ 10.

<sup>38</sup> See *id.* ¶ 11. The Commission’s rationale for granting the renewal applications of licensees in this latter group was that prior to the issuance of the *39 GHz Order*, “39 GHz band licensees were compliant with the performance requirements as long as the licensee operated one link in the service area within eighteen months regardless of population size,” and here, licensees had constructed at least ten links in their service areas after 34 months. See *id.*

term had elapsed.<sup>39</sup> In the 2003 *Winstar Order*, the Bureau granted Winstar’s 39 GHz license renewal applications only after Winstar was able to demonstrate compliance with the Commission’s one link per 250,000 population safe harbor.<sup>40</sup> In the 2008 *IDT Spectrum Order*, the Bureau held that IDT Spectrum failed to demonstrate substantial service because it had not “constructed a sufficient number of links to satisfy the [four links per million population] safe-harbor standard in each license area.”<sup>41</sup>

Thus, the Commission has effectively treated the safe harbors as strict definitions of substantial service rather than mere examples of how the substantial service standard can be satisfied. Stated differently, the Commission has elevated safe harbors into benchmarks that, if not satisfied, will result in license termination. This is inconsistent with both the “significant flexibility” that the Commission sought to provide licensees in the *39 GHz Order* and the flexibility that the Commission sought to retain for itself when it first used the substantial service concept in the context of broadcast and cellular license renewal proceedings.

Treating safe harbors in this manner has several harmful consequences in the context of the 39 GHz band. For example, it is inconsistent with the manner in which a backhaul services provider must build its business. Backhaul is the transport of voice, video and data traffic from a wireless carrier’s mobile base station, or cell site, to its mobile switching center or other

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<sup>39</sup> See *In re Applications of Pacific Bell Wireless LLC For Renewal of 39 GHz Service Stations WMT596, San Diego, CA, and WMT597, Las Vegas, NV*, Memorandum Opinion and Order, 18 FCC Rcd. 8150, ¶¶ 10-11 (WTB 2003) (finding that “[Pacific Bell Wireless] is operating at approximately sixty-three percent of the Commission’s safe harbor example of four links per million population” after “approximately thirty-four months”).

<sup>40</sup> See *In re Applications of Winstar Wireless Fiber Corp. for Renewal of Licenses to Provide Microwave Service in the 38.6-40.0 GHz Band*, Memorandum Opinion and Order, 18 FCC Rcd. 24674, ¶ 18 (WTB 2003) (“*Winstar Order*”).

<sup>41</sup> *IDT Spectrum Order* ¶ 23.

exchange point where the traffic is then switched onto a wireline telecommunications network. That business requires that FiberTower make its transmission services available to wholesale customers on a regional or national basis. This is because mobile wireless carriers demand that their backhaul providers offer service on this basis. In addition, a large network footprint is necessary for fixed wireless licensees to achieve the requisite economies of scale.

Establishing a regional or national network footprint requires that the licensee incur enormous upfront costs. FiberTower offers services, via facilities it owns or leases, to other carriers, to prime government contractors and government agencies, as well as to enterprises. In particular, FiberTower utilizes wireless spectrum and fiber assets to construct and operate high-coverage, high-capacity hybrid microwave and fiber networks. FiberTower's services provide wireless carriers with a *long-term solution* for their increasing demand for backhaul capacity while giving them increased availability and reliability. Establishing a *long-term solution* involves creating a system for procuring, distributing, installing, maintaining and monitoring equipment. It also includes the need to hire and train highly skilled personnel to perform all of these functions. As such, this is a capital intensive business. In order to raise the required capital to build and maintain the necessary networks (e.g., to enter into site leases, to establish the necessary support for fiber networks, to establish a Network Operations Center (NOC)) and to develop and acquire equipment from suppliers in a manner necessary to achieve declining average equipment costs associated with volume purchase agreements, FiberTower (and other licensees) must be able to operate pursuant to a stable licensing regime that rewards investment in national network assets.

The Commission's stated intentions when adopting the 39 GHz band (and the 24 GHz band) regime comport with this objective,<sup>42</sup> but the actual implementation of the 39 GHz licensing regime has undermined this objective. By relying almost exclusively on quantitative safe harbors, the Commission has narrowly limited its review to whether a licensee has made investments specifically for the service area and frequencies at issue in the renewal application instead of considering investments made by the licensee to place it in a position to even develop its spectrum on a nationwide or regional basis.<sup>43</sup> Investments in fiber, in real estate rights, in equipment warehousing and a distribution network, in a NOC, and in the development of reliable long-term relationships with equipment partners make it possible for FiberTower to provide service in the relevant area even though the investment is not considered for purposes of the safe harbor. In fact, the investments necessary to groom the spectrum for commercial long-term use often represent more than 90% of the actual costs of providing service. In other words, more than 90% of the costs must be incurred prior to ever installing a radio. The Commission's current license renewal process fails to consider this highly relevant market reality.

Strict use of safe harbors can also result in "defensive" construction of facilities. That is, when the Commission focuses solely on whether licensees have satisfied a safe harbor, licensees may be forced to temporarily disregard their larger business plans and deploy resources only to those licenses that are due for renewal. This is an inefficient use of resources and is flatly contrary to the Commission's policy goal of promoting efficient investment. It specifically

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<sup>42</sup> See *39 GHz Order* ¶¶ 38, 49.

<sup>43</sup> See, e.g., *id.* ¶¶ 20-22 (rejecting licensee's substantial investments and efforts to develop its 39 GHz licenses as evidence of substantial service); see also *Winstar Order* ¶¶ 16-18 (finding that licensee was providing substantial service because it was operating at least one link per 250,000 population and implicitly rejecting licensee's argument that "its investment in a national network combined with the facilities it has constructed in many of its licensed markets demonstrate substantial service warranting license renewal").

diverts resources from the development of a long-term commercially viable network on the spectrum in question and ultimately harms the communities the license is meant to serve.<sup>44</sup>

Not surprisingly, the Commission has provided little guidance on how 39 GHz licensees can meet the substantial service standard at renewal *other than* by satisfying quantitative safe harbors. If licensees are not able to assure investors that their licenses can be renewed in a market in which they do not meet the safe harbors, licensees will be unable to obtain financing for construction of their networks or will, at the very least, experience higher costs of capital than should be the case. In order for licensees to obtain capital at affordable rates, investors need assurance that licensees will be able to employ a flexible approach to their network build-out and their business plans and that the Commission will give licensees the benefit of the doubt in close renewal cases. The licensees' customers also need such steady assurances. Instead, the Commission's current framework puts the agency in the position of substituting its judgment for that of the marketplace and effectively deciding whether a particular business plan should no longer be pursued.

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<sup>44</sup> As the Commission has recognized, defensive construction of facilities is contrary to the public interest. *See, e.g., In re Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses; Request of WCS Wireless, LLC for Limited Waiver of Construction Deadline for 16 WCS Licenses; Request of Cellutec, Inc. for Limited Waiver Of Construction Deadlines for Stations KNLB242 and KNLB216 in Guam/Northern Mariana and American Samoa*, Order, 21 FCC Rcd. 14134, ¶ 12 (WTB 2006) (granting an extension of construction deadlines because “the public interest would be ill-served by compelling WCS licensees to devote their resources to the construction of stop-gap, legacy systems merely to meet the [deadline] rather than consumer demand”); *In re Pacific Communications LLC and Coral Wireless, LLC; Request for a Waiver and Extension of the Broadband PCS Construction Requirements*, Memorandum Opinion and Order, 19 FCC Rcd. 15574, ¶ 6 (WTB 2004) (noting that although the applicant was prepared to construct a “bare-bones” system that would meet its construction requirements, the public interest would not be served by forcing the applicant “to construct a technologically inferior system solely” to preserve its license).

**B. The Commission’s Current Framework For Renewal Of 24 GHz Licenses Ignores Market Realities And Is Characterized By Redundancy And Uncertainty.**

When it adopted rules governing renewal of licenses in the 24 GHz band in 2000, the Commission sought to “establish a flexible regulatory [] framework”<sup>45</sup> that was somewhat consistent with the approach taken in other wireless services bands, including the 39 GHz band.<sup>46</sup> Accordingly, the Commission adopted a renewal expectancy based on substantial service for 24 GHz licensees.<sup>47</sup> Citing to the *39 GHz Order*, the Commission also held that “we should incorporate [a] build-out showing into the showing required at renewal.”<sup>48</sup> Nevertheless, in the *24 GHz Order*, the Commission inexplicably adopted two separate performance and renewal expectancy rules—both requiring “substantial service” showings at renewal—for 24 GHz licensees.<sup>49</sup>

By requiring substantial service showings at renewal, the Commission again applied the substantial service concept in a manner that is inconsistent with the original intent of that concept. Rather than viewing substantial service as something that is *more than* what is necessary for renewal, the Commission again established it as a *minimum* requirement that, if not met, would result in termination of the license.

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<sup>45</sup> *In re Amendments to Parts 1, 2, 87 and 101 of the Commission’s Rules To License Fixed Services at 24 GHz*, Report and Order, 15 FCC Rcd. 16934, ¶ 1 (2000) (“*24 GHz Order*”).

<sup>46</sup> *See id.* ¶¶ 37, 41.

<sup>47</sup> *See id.* ¶ 41.

<sup>48</sup> *Id.* ¶ 39 & n.133 (citing *39 GHz Order* ¶ 47).

<sup>49</sup> *See id.*, Appendix C, at C-11; *see also* 47 C.F.R. §§ 101.527, 101.529.

Moreover, while the Commission adopted a “substantial service” standard in the *24 GHz Order* because of the flexibility that such a standard offers,<sup>50</sup> the Commission again provided a quantitative “safe harbor example[.]”<sup>51</sup> While the Commission also held that another safe harbor example “may consist of . . . service to an area that has very limited access to either wireless or wireline telecommunications services”<sup>52</sup> and that it would consider other factors in determining whether a licensee has provided substantial service at the end of the license term,<sup>53</sup> it is unclear how much weight the Commission will give these qualitative factors in cases where the quantitative safe harbor example is not met. To FiberTower’s knowledge, the majority of active 24 GHz licenses do not expire until February 1, 2011 and therefore, there is little, if any, Commission precedent applying the safe harbor examples or the qualitative factors listed in the *24 GHz Order*. In light of the Commission’s strict application of quantitative safe harbors in the 39 GHz license renewal context, licensees are understandably concerned that the Commission will elevate the *24 GHz Order* quantitative safe harbor example into the *de facto* renewal standard for 24 GHz licensees. At this point, 24 GHz licensees cannot be sure that they will be able to meet the substantial service requirements in Sections 101.527 and 101.529 of the Commission’s rules without satisfying the quantitative safe harbor in the *24 GHz Order*. Again, this outcome is in conflict with the flexibility that the Commission sought to provide licensees in

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<sup>50</sup> See *24 GHz Order* ¶ 38.

<sup>51</sup> See *id.* (holding that a “safe harbor example[] for a 24 GHz point-to-point/multipoint licensee may consist of a showing of four links per million population within a service area”).

<sup>52</sup> *Id.*

<sup>53</sup> These factors are as follows: “i) whether the licensee’s operations service niche markets or focus on serving populations outside of areas serviced by other licensees; ii) whether the licensee’s operations serve populations with limited to access to telecommunications services; and iii) a demonstration of service to a significant portion of the population or land area of the licensed area.” *Id.*

the *24 GHz Order* and the flexibility that the Commission retained for itself under the original substantial service regime. Furthermore, it has the same harmful effects as the current renewal framework for 39 GHz licenses, including chilling investment.

**IV. THE COMMISSION SHOULD ADOPT A TWO-PART FRAMEWORK FOR LICENSE RENEWAL SHOWINGS THAT MAXIMIZES AGENCY DISCRETION AND RECOGNIZES INDUSTRY-LEADING INVESTMENT IN NETWORKS DESIGNED TO UTILIZE THE BAND ACCORDING TO MARKET AND COMMUNITY NEEDS.**

The Commission should adopt a license renewal regime under which it eliminates unnecessary redundancy, provides meaningful guidance to licensees as to the meaning of the substantial service standard, considers all relevant information when applying that standard, and, in all events, retains the discretion to renew a license if a licensee has not met the substantial service standard. In the NPRM, the Commission proposes that “renewal applicants must file a detailed renewal showing, demonstrating that they are providing service to the public . . . and substantially complying with the Commission’s rules (*including any performance requirements*) and policies and the Communications Act.”<sup>54</sup> As explained, under the Commission’s current rules, 24 GHz licensees are subject to a substantial service performance requirement at renewal<sup>55</sup> and 39 GHz licensees are also subject to a substantial service performance requirement at renewal.<sup>56</sup> The Commission’s proposed reform of the renewal process would therefore retain the duplicate substantial service performance requirement for 24 and 39 GHz licensees. It would also make substantial service a prerequisite for license renewal even though the purpose of substantial service was to provide licensees with a means of renewing licenses by demonstrating

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<sup>54</sup> NPRM ¶ 17 (emphasis added).

<sup>55</sup> See 47 C.F.R. § 101.527.

<sup>56</sup> See *id.* § 101.17.

a level of performance that *exceeds* that required for renewal. As explained, the Commission had always intended to retain the flexibility to renew licenses where this higher level of performance was unmet.

The Commission should eliminate this redundancy and adopt an integrated approach to performance and renewal. That is, the new renewal showings framework should require a demonstration of performance (based on a “substantial service” standard) in order to obtain a *renewal expectancy*, but not as a prerequisite for renewal. Rather, a renewal applicant who cannot demonstrate substantial service should still receive a grant of renewal if it can show that renewal is in the public interest. Indeed, Section 309(a) of the Act provides that “the Commission shall determine, in the case of each application filed with it to which [S]ection 308 applies [(e.g., renewal applications for station licenses)], whether the public interest, convenience and necessity will be served by the granting of such application.”<sup>57</sup>

Under the first part of this two-part renewal showings framework, a finding of substantial service required to obtain a renewal expectancy should be based not only on quantitative safe harbors but also on qualitative factors. Perhaps most importantly, the FCC should grant a renewal expectancy to licensees who demonstrate that they are established leaders in developing a band in order to make the band more valuable to customers and the communities served. In addition, the Commission should consider the following qualitative factors in its substantial service analysis, many of which are proposed in the NPRM:

- “A description of the licensee’s current service in terms of geographic coverage and population served”;<sup>58</sup>
- “A list, including addresses, of all cell transmitter stations constructed”;<sup>59</sup>

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<sup>57</sup> 47 U.S.C. § 309(a).

<sup>58</sup> NPRM ¶ 27.

- “Identification of the type of facilities constructed and their operational status”;<sup>60</sup>
- “An explanation of the licensee’s record of expansion, including a timetable for the construction of new sites to meet changes in demand for service”;<sup>61</sup>
- A description of the licensee’s network (e.g., number of switching or data centers, route miles of fiber, network architecture, numbers of hub sites, etc.);
- “A description of [the licensee’s] investments in its system”<sup>62</sup> (e.g., investments in Network Operations Centers and network monitoring tools; investments in site access; investments in supporting fiber networks; investments in Operational Support Systems and software to support marketing, ordering, provisioning, maintenance and billing of services; hiring of personnel, including engineers, field technicians, and sales people);
- A description of customer agreements signed;
- A description of strategic relationships with contractors, tower operators, and equipment manufacturers, including investments designed to utilize or ultimately utilize the spectrum band(s) at issue;
- A description of efforts to develop equipment for use in the spectrum band that responds to market and community needs;
- A description of whether the spectrum is being made widely available on a secondary market basis;
- “Consideration of whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to benefit customers”;<sup>63</sup>
- “Consideration of whether the licensee’s operations serve niche markets or focus on serving populations outside of areas served by other licensees”;<sup>64</sup>
- “Consideration of whether the licensee’s operations serve populations with limited access to telecommunications services”;<sup>65</sup> and

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

- Other factors that the Commission deems appropriate.

Under the second part of this two-part renewal showings framework, the Commission may conclude that renewal is in the public interest even if the substantial service standard is not met. This would be the case if factors in addition to those listed above cause the Commission to conclude that the public interest is served by retaining the current licensee. It is inappropriate to provide an exclusive list of factors that would be considered in this inquiry, because the purpose of the proposed renewal showings framework is to provide the Commission with discretion to consider factors the relevance of which it cannot now anticipate. In making a renewal determination under the proposed framework, the Commission's focus should not be on the showings that renewal applicants have made in the past (as the Commission has done by relying almost exclusively on safe harbors in 39 GHz license renewal decisions), but on the showing made by the instant renewal applicant. That is, the Commission should assess whether the showing made by the instant applicant justifies renewal, not whether the instant applicant has made precisely the same showing as previous applicants whose licenses have been renewed.

This two-part framework would redress some of the flaws in the Commission's existing approaches to renewal in the 24 GHz and 39 GHz bands by (1) restoring the flexibility originally contained in the substantial service regime; (2) providing licensees, their investors, and their customers with the knowledge that industry-leading efforts to develop the spectrum licenses at issue will result in a renewal expectancy; (3) providing licensees with clear and transparent guidance on how they can obtain a renewal expectancy or a grant of renewal without satisfying quantitative safe harbors; (4) affirmatively recognizing whether the spectrum is being made

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<sup>65</sup> *Id.*

available for uses in the community; and (5) decreasing the regulatory burden imposed on licensees by redundant requirements based on substantial service at renewal.

**V. CONCLUSION.**

For the foregoing reasons, the Commission should adopt the two-part renewal showings framework described herein.

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