

ORIGINAL

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  
)

FILED/ACCEPTED

AUG - 6 2010

Federal Communications Commission  
Office of the Secretary

To: The Commission

**PETITION FOR RECONSIDERATION**

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## SUMMARY

Joint Petitioners have filed applications which are mutually exclusive with the applications of WCS and PCS renewal applicants. The procedures adopted by the Commission will unlawfully deprive Joint Petitioners of their right to a comparative hearing with the incumbents. Joint Petitioners seek reconsideration of the Commission's May 25, 2010 Order in this Docket on numerous grounds:

The "conditional" grant of the renewal applications directly violates *Ashbacker Radio Corp. v. FCC*, 326U.S. 327 (1945). That seminal Supreme Court case, as interpreted many times by the D.C. Circuit, guarantees a hearing to a challenger against an incumbent. This guarantee arises from Section 309(e) of the Act and may not be discarded or ignored by the Commission.

The incumbents' applications cannot be granted even conditionally if they did not provide substantial service during the license term. Because renewal of a license requires, at a minimum, a mediocre level of service, the complete absence of *any* service precludes renewal. In those circumstances, the applications of the challengers may be granted without the need for a comparative hearing.

The Commission's action here both usurps Congress's power to change the law and goes well beyond the changes enacted by Congress in 1996 for broadcast licensees alone. Here, unlike the amendment adopted by Congress in 1996, the Commission is not requiring a showing of past substantial service and it is also not protecting the competing applications that were in the pipeline prior to the proposed rule change.

The Commission may change its procedural rules in mid-stream, but it must do so for *all* applicants, not just some. Moreover, it must heed the equities of applicants whose reasonable

expectations based on the existing rules have been upset. The Commission's action here disregards these principles.

In addition to violating the Communications Act, the Commission's action contravenes the rules it had established for these services without the slightest showing that the current rules needed changing. The maneuver seems patently designed to simply protect incumbents.

The Commission also ordered a freeze on competing applications pending the outcome of this proceeding, while directing the continued processing of existing and new renewal applications. This procedure effectively insulates incumbents from the possibility of challenge, something the Court specifically decried in *Kessler v. FCC* and *New South Media Corporation*. The procedure ensures that all renewals granted during this period will be under a cloud at least until the Commission reconsiders its decision or until the courts remedy the situation. During that time period, no such licenses could be cleanly assigned or transferred, a situation which will bring chaos to the secondary market.

Finally, the Commission has refused to entertain pleadings with respect to the mutually exclusive applications, even when such pleadings (such as petitions for reconsideration) are authorized by the Communications Act. Again, the Commission has attempted to over-ride its governing statute.

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Renewal Applications for Certain Wireless Radio )  
Services and the Processing of Already-Filed )  
Competing Renewal Applications )

To: The Commission

**PETITION FOR RECONSIDERATION**

Applicants Green Flag Wireless, LLC ("Green Flag"), CWC License Holding, Inc. ("CWC"), James McCotter ("McCotter"), and NTCH-CA, Inc. (jointly, the "Petitioners") hereby petition the Commission to reconsider the elements of the referenced Notice of Proposed Rulemaking and Order<sup>1</sup> that direct the Wireless Telecommunications Bureau to "conditionally" grant all pending renewal applications, forbid the filing of applications competitive with those applications, and preclude the filing of pleadings or petitions authorized by the Communications Act. For the reasons set forth below, the Petitioners submit that the grant of these applications, conditional or otherwise, was erroneous, and directly inconsistent with the Commission's rules, a host of circuit court decisions, and the *Ashbacker* doctrine. The grants should therefore be

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<sup>1</sup> 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, FCC 10-86, released May 25, 2010, 75 Fed. Reg. 38959 ("*Interim Order*")

reversed and the renewal applications restored to pending status until the Commission determines which of the mutually exclusive applications should be granted. The freezing of competing applications also serves to immunize newly filed renewal applications from challenge, in contravention of principles repeatedly enunciated by the D.C. Circuit. Finally, the refusal to accept pleadings or petitions with respect to the renewal applications contravenes rights granted to parties by the Communications Act to challenge Commission actions with respect to pending applications.

### **I. Background**

Joint Petitioners have filed approximately 144 applications which are mutually exclusive with Wireless Communications Service (WCS) renewal applications. Joint Petitioner NTCH-CA, Inc. has filed one application mutually exclusive with a PCS renewal application. All of these applications were predicated on the absence of substantial service by the incumbent licensee, the provisions of the Commission's rules that establish a framework for comparative renewal proceedings between challengers and incumbents, and an unbroken series of decisions by the D.C. Circuit ensuring the rights of renewal challengers to a comparative hearing. Joint Petitioners firmly believe that they can and will provide better service to the public than the incumbents, and, indeed, that the lack of substantial service by the incumbents must, under governing precedents, result in the non-renewal of their licenses.

The chain of legal requirements that establishes the comparative hearing requirement may be outlined quite simply. (i) Section 309(e) of the Communications Act requires the Commission to hold a hearing when it is unable to make the finding required by Subsection (a) of 309 that the grant of a particular application is in the public interest. (ii) This language is the same language that formerly appeared in 309(a) which the Supreme Court has interpreted as

requiring a hearing when mutually exclusive applications are filed. (iii) Renewal applications are no different from any other applications in being subject to the comparative hearing requirement. (iv) The Commission may not insulate renewal applicants from competing applications. (v) The Commission may not directly or indirectly prevent, impede or skew the resulting comparative hearing in favor of incumbents. As will be set forth below, all of these requirements have been repeatedly enunciated and reaffirmed by the D.C. Circuit.

Sections 27.14 and 1.227 of the Commission's rules establish the procedural framework for handling renewal challenges. An application will be considered mutually exclusive if it is filed at least one day before action on the competing application. Joint Petitioners' applications were filed after certain renewal applications were filed and before they were granted. Once mutual exclusivity is established, a comparative renewal proceeding is to take place in which the incumbent receives a renewal expectancy if it demonstrates that it has provided substantial service during the preceding license period. Section 27.14(c) carefully lays out the minimum that such a showing must include, a showing that the challenged incumbents cannot make. Absent a renewal expectancy, the incumbent must first show that it is entitled to a renewal at all (insubstantial service does not warrant a renewal grant) and, if so, that it is comparatively superior to the challenger. Despite the presence of these rules on the books and their clear applicability to the situation at hand, the Wireless Telecommunications Bureau did nothing to process these applications for more than three years. It unaccountably did not even accept the challengers' applications for filing, in complete disregard for the usual processing procedures. The incumbents and the Joint Petitioners' applications have simply been in limbo.

Now the Commission, instead of proceeding under the procedures established by its own rules, has ordered the grant of the renewal applications and proposes to simply dismiss the

challenging applications. The Commission's actions are contrary to well-established law and should be reconsidered.

## **II. The Grant of the Renewal Applications Without a Hearing Violates *Ashbacker***

The *Interim Order* is in direct violation of *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945). *Ashbacker* is the gold standard for administrative agencies when it comes to the treatment of mutually exclusive applications. It enunciates the single most fundamental principle of communications law, a principle so well-established that it should be emblazoned over the main portal to the FCC: "We only hold that where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." *Ashbacker* at 333. The Commission's *Interim Order* flagrantly contravenes this fundamental principle.<sup>2</sup>

In *Ashbacker*, one applicant had filed an application for a new broadcast station. While that application was pending, an existing licensee filed an application to modify its license in a manner which would overlap with the signal of the newly proposed station and therefore was technically inconsistent with it. Both applications could not be granted. Instead of processing both applications together and deciding which proposal was superior, the Commission granted the new application subject to whatever action it might later take on the other application. The Supreme Court recognized the obvious – that the grant of the first application subject to some later revocation or divestiture had the effect of entrenching the first applicant in a way that was

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<sup>2</sup> We note that the hearing requirement in *Ashbacker* was originally found in Section 309(a)'s requirement that the Commission hold a hearing whenever it cannot determine that the public interest, convenience and necessity will be served by the grant of a particular application. That same requirement is now found in Section 309(e) of the Act. The Supreme Court interpreted this language as requiring a comparative hearing when mutually exclusive applications were on file. The D.C. Circuit has recognized that the original 309(a) requirement is carried forward in 309(e). *New South Media Corporation v. FCC*, 685 F. 2d 708, 714 (D.C. Cir. 1982).

patently unfair to the other applicant.<sup>3</sup> It constituted, in effect, a prejudging of the very issue that was supposed to be decided. The D.C. Circuit has described the Supreme Court's "lowering" decision in *Ashbacker* as its "beacon" in reviewing the Commission's treatment of those who would compete for a radio license. *New South Media Corporation v. FCC*, 685 F. 2d 708, 714 (D.C. Cir. 1982). Measured by this lofty standard, the Commission's action here comes up woefully short.

The courts have repeatedly chastised the Commission for its attempts to circumvent the hearing requirement in order to somehow favor incumbent licensees. *New South, supra*; *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971); *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960); *Central Florida Enterprises, Inc. v. FCC*, 683 F. 2d 503 (D.C. Cir. 1982); *Kessler v. FCC*, 326 F. 2d 673 (D.C. Cir. 1963). The Commission's present Order is *déjà vu* all over again. The *Interim Order* acknowledges that Petitioners' applications are mutually exclusive with the associated renewal applications. The D.C. Circuit has consistently confirmed that renewal applications are no different than any other applications when it comes to the requirement of simultaneous consideration with competitors. *New South, supra*, at 714; *Central Florida Enterprises, Inc. v. FCC*, 598 F. 2d 37, 41 (D.C. Cir. 1979), citing *Citizens Communications Center v. FCC*, 447 F. 2d 1201, 1211 (D.C. Cir. 1971). Indeed, the *Central Florida* court describes Section 309(e) as "guaranteeing" a renewal challenger a hearing. *Op. cit.* at 42.

The D.C. Circuit has also made it plain that the use of a "conditional grant" mechanism is no different in substance than the "grant subject to later remedial action" which was used in

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<sup>3</sup> "While the statutory right of petitioner to a hearing on its application has in form been preserved, it has as a practical matter been substantially nullified by the grant of the [first applicant's] application." *Id.* at 334.

*Ashbacker*. See, for example, *New South Media Corp. v. FCC*, 685 F. 2d 708, 716 (D.C. Cir. 1982). ("By extending RKO's conditionally granted licenses and deferring competing applications in the manner described, the Commission's order strays from the path *Ashbacker* marked....") In *New South* the Commission had conditionally granted RKO's renewal applications subject to the outcome of a separate proceeding, while deferring acceptance of challenging applications. Not only has the Commission deferred any action on the challenging applications for three, or in some cases, four years, but it is also granting (albeit conditionally) the renewal applications in issue. The Commission has thus done *exactly* what the Supreme Court in *Ashbacker* was at pains to forbid, without so much as a nod to one of the seminal administrative law cases of all time.

Significantly, the Commission's *Interim Order* makes explicit the entrenchment that the grant of the renewal applications – conditional or otherwise – creates. As the Commission put it:

We are concerned about the uncertainty that a long-standing 'pending' renewal application can create within the Wireless Radio Services, and believe such conditional grants will mitigate some of that uncertainty.

*Interim Order* at Para. 113. The Commission must have an open mind about whether to grant the renewal applications or the challenging applications. How could a truly conditional grant mitigate the incumbent licensees' "uncertainty" about the future unless the intent was to signal the eventual disposal of the challenging applications? The Supreme Court's assessment of what is really going on here is just as true now as it was in 1945.

As a practical matter, we should point out that the "conditional grant" policy, coupled with the freeze on competing applications, will cast a thick pall over the secondary market for wireless licenses. First of all, the Wireless Bureau's strict policy has been to not act on applications to assign or transfer licenses while any challenge to the license renewal is pending.

The "conditionality" of a grant under the *Interim Order* would seem to preclude action on assignments under those procedures. But even if assignments were permitted, no one holding such a conditional license could comfortably sell it because there would be no assurance that, when the freeze is lifted, competing applications would not be accepted. The buyer would have no assurance that it was actually buying a license rather than an opportunity to engage in a comparative hearing. This will be disastrous to the normal functioning of the secondary market.

To make matters worse, the sole stated purpose for the Commission's conditional grant of the renewals – to "maintain unimpeded operations in the affected services"<sup>4</sup> – is demonstrably bogus. In the vast majority of cases, there are no actual operations to "maintain." Most of the WCS licensees requested extensions of time to construct their systems, having provided little or, in most cases, nothing in the way of actual service. Even where minimal facilities have actually been constructed, there is no indication that any customers are receiving service. Moreover, because the Communications Act preserves the right of a licensee to provide service while its renewal application is being processed,<sup>5</sup> the licensees would automatically be entitled to continue providing service to any members of the public while the Commission decides among the competing applications. The conditional grants are therefore completely unnecessary to "maintain unimpeded operations" during the pendency of the Commission's deliberations.

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<sup>4</sup> *Id.*

<sup>5</sup> See 47 U.S.C. 307.

Instead, such grants serve to assure the incumbents with a broad wink and a nod that they have nothing to fear regarding the ultimate disposition of their applications.<sup>6</sup>

Finally, we note that in *Citizens Communication Center v. FCC, supra*, the Court struck down the Commission's "Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants"<sup>7</sup> because it foreclosed the full comparative inquiry mandated by the statute as construed in *Ashbacher*. Under that *Policy Statement*, a licensee who made a showing of past substantial service would be granted a renewal without comparative consideration. As the *Central Florida* court put it, "*Citizens* stands for the proposition that 'the Commission may not use renewal expectancies of incumbent licensee to shortcircuit the comparative hearing.'" *Central Florida* at 42-43. Astoundingly, the Commission has taken the very evil condemned by the Court in *Citizens* and pushed it one step further: here the renewal applicants have not even demonstrated a scintilla of past substantial service, but the Commission is nevertheless insulating them from challenge and granting their renewal applications.

Simply stated, the Commission's action directly violates a host of venerable court decisions which remain perfectly good law. The Court's consistent interpretation of Section 309(e) as requiring a hearing between a challenger and a renewal applicant remains as valid and as compelling in 2010 as it was in the '60's, 70's and 80's. The *Interim Order* is just the latest in series of attempts by the Commission to short-circuit the comparative hearing required by the Act, and, as with all other attempts, it violates the Communications Act.

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<sup>6</sup> The Commission's normal processing procedures forbid the assignment or transfer of licenses which are subject to reconsideration or other appeal. It is unclear whether assignments and transfers of renewals which have been "conditionally" granted will be permitted. Allowing such assignments and transfers would enormously complicate the hearing process and may create extreme pressures to grant renewals when third party assignees who were not around during the initial license term have taken title to the licenses.

<sup>7</sup> 22 FCC 2d 424 (1970).

### III. Dismissal of the Competing Applications Would Be Unlawful

The Commission proposes to dismiss Joint Petitioners' applications while granting the renewal applications. As explained above, the grant of the renewal applications without a comparative hearing is itself unlawful, but the dismissal of the competing applications would also be unlawful on numerous grounds.

A. First, the Commission supports its freedom to dismiss the applications by citing to several cases holding that the filing of a mutually exclusive application "does not in and of itself create in the applicant a vested right." *Interim Order* at note 273. To be sure, the Commission may modify its basis for selecting among competing applicants after the applications are filed,<sup>8</sup> and it may even dismiss all of the applications filed if it decides to use a different selection method, subject to the equitable considerations and interests of the pending applicants. *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001). What it may not do is dismiss some of the applications in the mutually exclusive group but retain others. The renewal applicants have no more "vested rights" than the challengers, and there is no basis cited by the Commission or otherwise evident for preferring the incumbents over the challengers.<sup>9</sup> They are all just mutually exclusive applicants, and that being the case the Commission may not simply dispose of some of these applicants in preference to others. Unless *all* are dismissed, none may be dismissed.

B. Second, the *Maxcell* Court, *supra*, described *Ashbacker* as holding "that the Commission could not award a license without granting a timely competing applicant the

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<sup>8</sup> *Maxcell Telecom Plus, Inc. v. FCC*, 815 F. 2d 1551 (D.C. Cir. 1987).

<sup>9</sup> Section 309(j)(6)(D) specifies that the fact that these licenses were acquired by auction does not in any way justify renewal treatment different from non-auctioned licenses. In other words, the fact that these licenses were procured by auction is not a basis for relieving the incumbents of any of the normal rules applicable to renewal applicants.

comparative hearing required by its own rules." *Ibid.* at 1561. Here, in addition to the requirements of Section 309(e), the Commission's own rules entitle challenging applications to "comparative consideration." Section 1.227(b)(3) provides:

Common carrier cases: (i) General rule. Where an application is mutually exclusive with a previously filed application, the second application will be entitled to comparative consideration with the first or entitled to be included in a random selection process, only if the second has been properly filed at least one day before the Commission takes action on the first application.

This general rule is echoed and given fuller effect in Part 27, where the Commission lays out the criteria for the award of a renewal expectancy for WCS licensees in "a comparative renewal proceeding." 47 C.F.R. 27.14(b) and (c). This procedure was expressly clarified by the Commission in 2004:

In the case of renewals, if an incumbent files an appropriate and timely application and neither the public nor the Commission objects, the license will typically be renewed for another term. However, if another party objects or files a competing application, a licensee must demonstrate that it is entitled to a renewal expectancy . . . As a general matter, if a renewal applicant satisfies these requirements, the applicant will be granted a renewal expectancy and other competing applications will be dismissed.<sup>10</sup>

Since it is undisputed that Petitioners' applications were filed before Commission action on the renewal applications, they are entitled to comparative consideration with those renewal applications.

The Commission's attempt to guarantee the grant of the incumbents' applications without a comparative hearing runs headlong into the D.C. Circuit's repeated holdings that incumbents may not be entitled by right to renewal in the face of a competitive challenge.

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<sup>10</sup> *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation*, 19 FCC Rcd 19078 69, Para. 145 (2004).

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 v. FCC, supra*, at 41. The Court went on to explain that the hearing required by Section 309(e) of the Act requires a full comparison between a renewal applicant and a challenger. The Commission's constant attempts over the years to stack the deck in favor of incumbents have just as constantly been swatted down by the Court.

AT&T has argued in the course of this proceeding that Section 27.321(b) of the Commission's rules prescribes comparative consideration of mutually exclusive applications only when the Commission determines that such consideration will serve the public interest.<sup>11</sup> For some reason, AT&T concludes that application of this rule should result in the dismissal of the challengers and grant of the AT&T application. Actually, the opposite is true. It is undisputed that AT&T provided no service whatsoever during the course of its ten year license term. At a time when the U.S. was falling farther and farther behind the rest of the world in broadband deployment, AT&T chose to simply sit on its twenty or so MHz of broadband spectrum across much of the country.

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

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<sup>11</sup> September 18, 2007 letter from James Talbot to Marlene Dortch.

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. Yet AT&T and most other incumbents provided *no* service 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 Petitioners' applications under Section 27.321(b) without the need for a hearing,<sup>12</sup> but it could not work the other way. This is especially true since the Commission has always justified its renewal expectancy policy on the grounds that the past record of performance by a licensee is the strongest indicator of how it will perform in the future.<sup>13</sup> "[I]ncumbent licensees should be judged primarily on their record of past performance. Insubstantial past performance should preclude renewal of a license ...." *Citizens Communications Center, supra*. at 1213. The record in this case takes "insubstantial past performance" to the uth degree - no performance at all.

C. Third, the Commission's proposed course of action violates the Communications Act. As we have seen in Section I above, Section 309(e) of the Act, as repeatedly interpreted by the courts, requires the Commission to hold a comparative hearing when it is confronted with mutually exclusive applications (absent the availability of lotteries or auctions as alternative means of resolving the mutual exclusivity). The comparative hearing requirement may seem

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<sup>12</sup> The Supreme Court has made it clear that the Commission need not conduct a comparative hearing if one of the potential parties is not basically qualified. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956). Here, because a renewal cannot possibly be justified for most of the incumbents, there is no need to "compare" them against the challengers.

<sup>13</sup> See, for example, *Central Florida, supra*, where the Commission argued that past performance was the best predictor of future performance. Here the past performance during the license term was nil. There can be no factual predicate whatsoever for preferring the incumbent.

quaint in a world where most contested licenses are awarded by auction, but in the case of renewals, Congress chose *not* to authorize the Commission to auction off the licenses at issue, nor are lotteries an option. That leaves a comparative proceeding as the sole means of deciding the issue.

We note in this regard that the Commission's proposed procedure here mimics the procedure adopted by Congress for the broadcast services: holding a preliminary proceeding to determine whether a renewal expectancy is warranted, and if one is not warranted, dismissing the renewal applicant and returning the license to the auction pool.<sup>14</sup> The problem is that Congress chose *not* to apply this renewal paradigm to common carrier services in 1996; rather, it expressly limited the new approach to broadcast licenses, leaving the traditional comparative hearing requirement intact for common carrier renewals. Surely if Congress had intended to permit the Commission to abandon for *all* wireless services the license renewal procedures which had been in effect for more than sixty years, it would not have expressly limited the reach of the 1996 amendment to broadcast renewals only. The Commission is therefore usurping unlawfully the legislative power of Congress and substituting its own judgment for that of Congress as expressed in Section 309(e). The Commission may no more abandon comparative hearings here than it could have abandoned comparative broadcast renewal proceedings prior to the 1996 amendment of the Act that obviated such proceedings. *Citizens Communications Center, supra*.

Not only has the Commission one-upped Congress by effectively excising Section 309(e) from the Act, but it actually goes beyond what Congress did in 1996. Congress recognized that there were competing broadcast renewal applications pending at the time it enacted new Section 309(k) of the Act. It therefore ordained that the new procedures would not apply to those

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<sup>14</sup> See Section 204 of the Telecommunications Act of 1996.

applications that were already in the pipeline but only to applications filed *after* May 1, 1995. Section 204(c) of 1996 Act. In this regard, the Commission is not only usurping Congressional authority but actually thumbing its nose at Congress by ignoring the equities of pending applicants that Congress considered crucial enough to preserve and protect in the broadcast context. If the Commission wishes to follow the Congressional course adopted in 1996 for broadcast renewals, it should at least make the change prospective-only, as Congress did.

Moreover, in granting immunity from comparative challenge to broadcast incumbents, Congress required incumbents to make a prima facie showing that "the station has served the public interest, convenience and necessity." *Ibid.* at subsection 1(A). Here the Commission is not even requiring that. It is simply giving incumbent licensees immunity from comparative challenge without adopting any of the legal or equitable requirements that Congress ordained as the minimal requirements to justify such insulation.

D. Fourth, the Commission's sole stated reason for doing away with challenging applications is that incumbents might have to devote considerable resources to defending their authorizations against competing applications. *Interim Order* at Para. 40. Protracted litigation would be unduly burdensome for the incumbents and would "strain available Commission resources." This is a slim reed indeed to support abandonment of 50 years of jurisprudence and evasion of a direct requirement of the Communications Act. More importantly, it is factually and logically unfounded on multiple grounds:

- The Commission's administrative law judges are hardly "strained." At present there are no active cases being litigated. If the procedures proposed by Joint Petitioners in their companion "Comments" in this Docket are adopted, there are unlikely to be many actual hearings. Moreover, to the extent that comparative hearings are required by the Act, the strain on Commission's resources should be no more a consideration than the "strain" imposed by having to issue public notices, consider petitions to deny, or comply with other bothersome provisions of the law.

- Renewal challenges in the common carrier services are few and far between. Since most wireless services have or will have substantial service requirements that will effectively require substantial service to be provided during the course of the license term, there will be few if any situations in the future where a renewal challenge would make sense. The Commission's draconian and unlawful action here is therefore unnecessary going forward because the perceived danger to be averted is not a danger at all.
- Litigation is burdensome for challengers as well as incumbents. No prudent challenger would undertake the expense and effort of a renewal challenge if there were not a significant likelihood of success, *i.e.*, unless the incumbent was seriously deficient in its public service. And in that case the "burden" on both the challenger and the incumbent is clearly justified.
- In that regard, Petitioners agree that "greenmail" filings should be discouraged. The Commission's current rules preclude applicants from profiting by the filing of a competing application. See 47 C.F.R. Section 1.935. There is no reason why any sane applicant would file a challenge if its only expected gain was to get back the money it had already expended. When the Commission adopted similar anti-greenmail rules in the broadcast context, greenmail-type applications were eliminated entirely. There is no reason to think that greenmail has been or will be a significant problem in the wireless context.
- The Commission wishes to spare incumbents the anxiety of possibly being subject to "a cloud of litigation."<sup>15</sup> Yet at the same time, it invites litigants to challenge renewal applicants via petitions to deny. Shouldn't the Commission spare incumbents that anxiety also? As long as incumbents have nothing whatsoever to worry about, they will devote all their efforts to serving the public interest – right?
- Wrong. Experience teaches us that the threat of a renewal challenge has a dramatic effect on incumbents. In the LMDS service, for example, the largest licensee filed substantial service showings for all or most of its markets prior to the renewal deadline, despite having been granted an extension of time to effectuate the build-out. The licensee may have observed that renewal challenges had been filed against WCS licensees under similar circumstances and the prudent thing to do was to head off such a challenge by actually building facilities and providing service. Absent the threat – real or imagined – of competing applications, the LMDS service might still be lying largely

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<sup>15</sup> The *New South* Court expressly rejected the Commission's concern for incumbents being under a "cloud" of uncertainty about their licenses. As the court nicely put it, the only cloud involved obscured the Commission's view of the detrimental effect of preventing or delaying competitors from having an opportunity to prove that they are best qualified to serve the public interest. *Ibid.* at 717.

follow. Human nature being what it is, if you have nothing to worry about, you won't provide the kind of service that you would if you knew you might have to stack up against a challenger.

E. Fifth, the Commission's retroactive application of its proposed new "no competing applications" policy is inequitable to applicants such as Petitioners who relied in good faith on the Commission's rules as they were in effect for many years. The challenging applicants have expended considerable resources in pursuing their applications on the premise that the Commission would follow and adhere to its own rules and procedures. Instead, at the first hint of a filing that might upset the incumbent applicant, the Commission first sat on the applications for three years and now proposes to dismiss them while changing the underlying rules. *McElroy Electronics Corp. v. FCC*, 86 F. 3d 248 (D.C. Cir. 1996) stands for the proposition that the Commission must follow its own procedural rules and that it must take into account the equitable interests of applicants before dismissing them. Here the Commission has evidenced no concern at all for the equitable interests of the challenging applicants, instead focusing on the equitable interests of the incumbents who have earned no right to favored status.

F. Finally, and perhaps most importantly, there is no reason whatsoever to believe that the challenging applications are in any way inferior to the incumbents. The incumbents did nothing or virtually nothing during their license terms and therefore by law cannot and should not be awarded any renewal expectancy. Indeed, as set forth above, they are not entitled to a renewal at all. The track record of the incumbents here evidences nothing more than a desire to warehouse, to temporize, and to put the spectrum to no use whatsoever. Some of the WCS incumbents even asked for *another* three years to start providing service.<sup>16</sup> (The Commission

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<sup>16</sup> *Amendment of part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, FCC 10-82, rel. May 20, 2010, Paragraph 218.

eventually granted them a three and a half year extension, which means that, unless that action is reconsidered, the incumbents will have had 16 and ½ years to do nothing with their licenses and yet will be guaranteed a renewal.) In an era when the Commission is looking for additional spectrum to make available for broadband, it should not be giving its blessing to a generation of blatant warehousing while at the same time penning *more* years of warehousing in the future. It is unclear why the Commission went to the effort of adopting a National Broadband Plan if it was going to ignore it in this context.

In addition, the Petitioners' applications have the strong public interest benefit of proposing diversification of ownership of the broadband media and the promise of a new and innovative service as opposed to the same tired old approaches that have kept the United States 15<sup>th</sup> in world broadband penetration. In other words, the challengers' applications provide a demonstrably superior public interest alternative to the incumbents'. Why under these circumstances should the incumbents be given a free pass?

#### **IV. The Freeze on Filing of Competing Applications is Unlawful**

While holding the current competing applications in limbo pending the completion of this rulemaking proceeding, the Commission has ordered that no new challenges to new renewal applications be entertained. That is, renewal applications filed between now and the completion of this proceeding will be free from any challenges and will be granted conditional renewals. Again, the Commission has not read its history books. The D.C. Circuit in *Kessler v. FCC*<sup>17</sup> specifically ruled that the Commission could not preclude applicants from filing competing applications against applications which had already been filed and were thus eligible for grant in the absence of mutual exclusivity. As interpreted in *Bachow Communications, supra*, at 689,

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<sup>17</sup> 326 F. 2d 673 (D.C. Cir. 1963)

*Kessler* "decided that *Ashbacker* procedural rights apply also to prospective applicants whose applications would have been mutually exclusive but for an application freeze." *Kessler* therefore requires the Commission either to entertain competing applications against the new renewals that are filed or to hold those applications in pending status pending the completion of this rulemaking and then entertain competing applications. It may not simply preclude competing applications while granting the incumbent applications, conditionally or otherwise.

#### **V. The Freeze on Certain Pleadings is Unlawful**

In addition to its other interim measures in the *Interim Order*, the Commission ordered the staff to dismiss any pleadings or petitions filed with respect to pending renewal applications. Because the Commission plans to grant hundreds of renewal applications conditionally, Joint Petitioners would be in a position of not being able to oppose or challenge that action before the Commission and therefore would not be able to seek later recourse at the court. Section 405 of the Communications Act gives parties an unqualified right to petition the Commission to reconsider its actions. By purporting to refuse the acceptance of such filings before they are even filed, the Commission has attempted to immunize itself from any challenge to an action that directly contravenes decades of direct judicial precedent. The Commission's decision to grant the renewal applications of the incumbents appeared for the first time in the *Interim Order*; so no party and no member of the public was given a chance to comment on the proposed action in advance or even had a hint that the action was in the offing.

How simple life in the Portals would be if the Commission could simply refuse to accept any challenges to its actions and thereby preclude challenges to its actions before the court. (Courts typically require appellants to have raised their issues before the administrative agency before they may raise the matter judicially.) Petitioners earnestly hope that this was not the

Commission's intent, for abrogating a statutorily mandated right is something that would have merited at least a few words of explanation or justification. The Commission provided no explanation whatsoever for this highly unusual procedure. See Para. 102 of the *Interim Order*. The procedure is especially odd since the Commission expressed a willingness to entertain *ex parte* meetings about the matters in issue. To be sure, the Commission will allow petitions to deny to be filed against new renewal applications (presumably because the statute requires it), but if that is the case why would not other statutorily allowed petitions (such as petitions for reconsideration) be entertained?

As of this date the Bureau has not acted to conditionally grant the pending mutually exclusive renewal applications. We assume the Bureau is awaiting the effective date of the *Interim Order* to do so, although, oddly, the Bureau dismissed Petitioner Green Flag's application for Hawaii based on the *Interim Order* without awaiting the effective date. Because the *Interim Order* contemplates subsequent actions on the actual pending applications, Petitioners are treating the *Interim Order* as a rulemaking decision rather than an action on specific applications which might fall under the blanket prohibition on pleadings or filings with respect to applications. *Interim Order* at Para. 102. If the *Interim Order* is nevertheless deemed to be a licensing action in itself, Petitioners respectfully request a waiver of the blanket prohibition. A waiver is justified because under ordinary principles of communications law, the grant of the renewal applications would become final if Petitioners did not either challenge the grant at the Commission or file an appeal of the grant with the D.C. Circuit within 30 days. Since the Commission's action came out of the blue with no opportunity for anyone to address its lawfulness or propriety, Petitioners must present their position to the Commission before a Court

appeal can be pursued. Yet the *Interim Order* on its face seems to preclude any such pleading from being filed.

Petitioners assume that it was not the Commission's intent to violate the provisions of Sections 405 and 402(b) of the Communications Act which expressly guarantee the right of aggrieved parties to seek reconsideration of Commission actions and then seek appropriate judicial redress. The Commission may not simply overrule the United States Code by refusing to accept the petitions or pleadings which are permitted by the statutory scheme. Unless the Commission accepts this petition, Petitioners will have been permanently denied their statutory right not only to a hearing but to challenge the Commission's action before the agency and before the Court. That cannot have been what the Commission intended. Accordingly, Petitioners request waiver of the order requiring dismissal of pleadings filed in connection with the renewal applications insofar as is necessary to allow Petitioners their rights under the statute to challenge the grants as unlawful.

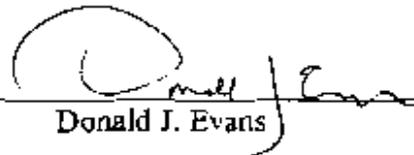
## **VI. Conclusion**

The measures which the Commission adopted regarding the pending renewal applications and their mutually exclusive challengers are patently unlawful under the Communications Act and repeated interpretations of the Act by the Court of Appeals. The Commission should therefore reconsider its decision to grant the renewal applications. It should, rather, accept the challenging applications for filing and, if there is no question that no service was provided by incumbents during the last license term, the renewal applications should be dismissed and the challenging applications granted. The Commission should also rescind its orders insulating new

renewal applications from challenge during the pendency of this proceeding and preventing the filing of statutorily allowed petitions for reconsideration and related applications for review.

Respectfully submitted,

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