

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
)	
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,)	WT Docket No. 10-112
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)	

**COMMENTS OF METROPICS COMMUNICATIONS, INC. IN SUPPORT OF
PETITION FOR RECONSIDERATION OF
CTIA – THE WIRELESS ASSOCIATION®, AT&T SERVICES, INC.,
CRICKET COMMUNICATIONS, INC., RURAL CELLULAR ASSOCIATION,
SPRINT NEXTEL CORPORATION, T-MOBILE USA, UNITED STATES CELLULAR
CORPORATION AND VERIZON WIRELESS**

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MetroPCS Communications, Inc. (“MetroPCS”),¹ by its attorneys, hereby respectfully submits its comments in support of the Petition for Reconsideration² filed on August 6, 2010 by

¹ For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

² MetroPCS submits that the Petitioners properly filed the Petition under 47 C.F.R. § 1.429. However, out of an abundance of caution, MetroPCS is filing these comments in accordance with the procedures set forth in 47 C.F.R. § 1.106, as discussed in the WTB’s *Public Notice* on the matter. *Wireless Telecommunications Bureau Extends Time to File Oppositions to Petitions*

(continued...)

CTIA – The Wireless Association, AT&T Services, Inc., Cricket Communications, Inc., Rural Cellular Association, Sprint Nextel Corporation, T-Mobile USA, United States Cellular Corporation and Verizon Wireless (collectively, “Petitioners”) (the “Petition”) in opposition to the *Order* in the above-captioned proceeding.³ As is set forth in greater detail below, MetroPCS supports the Petition because conditioning all wireless license renewal grants as provided in the *Order* constitutes an impermissible retroactive rulemaking affecting hundreds of licenses issued by the Commission. Further, the *Order* establishes bad public policy because it will deter investment at the very time the Commission seeks and needs greater broadband investment by wireless licensees. Further, there is a serious risk that the secondary market for license transfers will be impeded while the rulemaking is underway. In support of the Petition, the following is respectfully shown:

I. INTRODUCTION AND SUMMARY

In the *Order*, the Commission directs the Wireless Telecommunications Bureau (“WTB”) to “conditionally grant all license renewal applications filed prior to the release of final rules in this proceeding, subject to the outcome of this proceeding.”⁴ This action constitutes unlawful retroactive rulemaking, and MetroPCS fully supports the Petition seeking to reverse the *Order*. The *Order* violates principles of fairness by subjecting licensees to primary (or at a minimum, secondary) retroactivity. The *Order*, if not rescinded, will impose significant legal liabilities on

(...continued)

for Reconsideration of Freeze Order, Public Notice, WT Docket No. 10-112, DA 10-1537 (WTB 2010).

³ *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*, Notice of Proposed Rulemaking and Order, 25 FCC Rcd 6996 (2010) (“*NPRM*” and “*Order*”).

⁴ Petition at 2 (citing *Order* at ¶ 113).

wireless licensees for lawful past actions, which the agency cannot do. In addition, the *Order* harms the interests of wireless licensees, who invested hundreds of millions – and, in some cases, billions – of dollars at FCC auctions to obtain spectrum licenses, all in reliance on the licensing rules that were in place at the time. The Commission’s decision to grant renewal applications only on a conditional basis subject to the outcome of this proceeding is changing the rules at halftime, and would throw the industry into a cloud of license renewal uncertainty and undermine the “renewal expectancy” that has been carefully crafted over the years to foster needed investment. The *Order* also may cause the vibrant secondary market for license assignments and transfers to halt while the rulemaking is unresolved, because participants will have difficulty valuing licenses without a clear view of whether they ultimately will be renewed.

Further, the Commission erred in not supplying reasoned decision-making when ordering the WTB to grant only conditional renewals during the pendency of this proceeding. The lone speculative sentence the agency offers in support of its decision does not meet the judicial standards of a “satisfactory explanation” for agency action.⁵ Finally, the conditional grant of license renewal applications simply is bad public policy. At a time when the country is relying on a vibrant wireless sector to bolster recovery efforts, the Commission should be actively encouraging – not discouraging – investment in wireless infrastructure. Indeed, infrastructure investment is an important goal of the recently released and broadly supported *National Broadband Plan*.⁶ The *Order* will increase uncertainty, decrease investment and is highly susceptible to judicial review on multiple grounds. In light of the above, MetroPCS urges the

⁵ *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁶ FCC, CONNECTING AMERICA: A NATIONAL BROADBAND PLAN FOR OUR FUTURE, 9, 11, 23 (2010) (“*National Broadband Plan*”).

Commission to grant the Petition immediately and rescind its decision to subject license renewals to conditions while this proceeding is pending.

II. CONDITIONAL LICENSE GRANTS UNDER THESE CIRCUMSTANCES CONSTITUTE IMPERMISSIBLE RETROACTIVE RULEMAKING

MetroPCS agrees with Petitioners that “[t]he Commission’s decision to conditionally grant license renewals at this stage constitutes impermissible, retroactive rulemaking in violation of well established Supreme Court precedent.”⁷ First, the mere act of conditionally granting license renewals pending the outcome of this proceeding is likely to “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed”⁸ – and thus will run afoul of the judicial ban on primary retroactivity. For example, a carrier may hold a license that is not subject to interim construction requirements but requires a substantial service showing at renewal time. For business or financial reasons, the licensee may choose not to begin building out the license facilities until the latter half of the license term. This would be a perfectly permissible and lawful decision under the current licensing regime. For instance, a carrier might be waiting for the next generation of technology to be commercially available before building out the spectrum, or for demand to require expanded system capacity, or be deferring construction until conditions are more favorable in the capital markets for the borrowing necessary to build and operate the facilities. However, if the Commission in the course of this renewal standards proceeding adopts a requirement that carriers must show that license build-out was accomplished through a steady, year-by-year progression, this carrier’s past lawful conduct has immediately become an unexpected, incurable present renewal liability.

⁷ Petition at 3.

⁸ *Landgraf v. USI Film Products*, 511 U.S. 244, 272-273 (1994).

Similarly, many carriers have relied on the Commission's fixed population coverage requirements as a safe harbor that will garner a renewal expectancy.⁹ Now, these safe harbors are at risk based upon the Commission's new indication that meeting all interim construction deadlines may not suffice to meet the renewal standard.¹⁰ Once again, a carrier's past lawful actions (timely build-out satisfying fixed coverage requirements) may have substantial adverse consequences (non-renewal of a license based on newly-adopted standards) with no advance notice and no ability to take corrective action. The unfairness is further compounded for licenses acquired in the middle of their license terms. The subsequent licensee will, in effect, be punished for the behavior of the prior licensee without any prior notice that this behavior should have been taken into account in purchasing the license.

The *Order* also imposes "new duties with respect to transactions already completed."¹¹ For example, a licensee may have acquired a license in the middle of its initial 10 year license term with the reasonable expectation that it would have five years to take the steps necessary to be providing substantial service by the renewal date. Since the Commission now is proposing to take into consideration construction progress throughout the entire term, the new licensee may be

⁹ See, e.g., 47 C.F.R. § 24.203(b) (stating that licensees of 10 MHz PCS blocks must provide service "with a signal level sufficient to provide adequate service to at least one - quarter of the population in their licensed area within five years of being licensed").

¹⁰ Notice at ¶ 21 (tentatively adopting the 700 MHz renewal standards, in which the Commission explained "that the substantial service showing made in support of a renewal application is distinct from any substantial service performance showing (also known as a buildout or construction showing) under the Commission's service rules" and that "a licensee that meets the applicable performance requirements might nevertheless fail to meet the substantial service standard at renewal") (citing *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 8064, ¶ 75 (2007); 47 C.F.R. § 27.14(e)).

¹¹ *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997).

disadvantaged by the poor service record of its predecessor, or find itself to have an immediate construction standard well before the end of the license term if it wants to assure renewal.

In the above examples, the carriers are being punished for past lawful behavior. A carrier cannot go back in time and alter its business plan to include incremental build-out any more than it can change the portion of a licensed population that was covered on a specific date in the past. Simply put, it is impossible for carriers to go back and cure these defined “defects” – even though they were not defects at the time that such decisions were made. And, there can be no penalty more severe than license forfeiture, which has been referenced in the past by the Commission as “the ultimate sanction.”¹² As Petitioners rightly point out, this type of primary retroactivity is unfair and is contrary to a substantial body of Supreme Court law.¹³

Ironically, the Commission’s conditional renewal policy serves to demonstrate conclusively the unlawful retroactive nature of the renewal standard changes the Commission is considering. Based on section 309(a) of the Communications Act, the Commission can only grant a renewal application based on a determination and finding that “the public interest, convenience, and necessity will be served by the granting thereof.”¹⁴ The Commission could not make this determination and finding unless the renewal applicant met the renewal standard in effect at the time that the renewal application was filed. Thus, the only purpose of the imposed condition is to enable the Commission to reach back and terminate the license by retroactively

¹² *Application of Wharton Communications, Inc. For Renewal of License for Radio Station KANI, Wharton, Tex.*, 44 F.C.C.2d 489, ¶ 14 (1973) (stating that “the denial of license renewal is the ultimate sanction [the Commission] can impose”).

¹³ Petition at 3-8.

¹⁴ 47 U.S.C. § 309(a). This section applies to each application filed with the Commission “to which section 308 applies.” Section 308, in turn, applies to applications for “station licenses . . . or renewals thereof.” 47 U.S.C. § 308(a).

applying a new stricter standard as of an earlier date before the new rules would even have become effective. There can be no clearer example of agency action that “alters the *past* legal consequences of past actions.”¹⁵

Second, even if the conditional grant of licenses were not deemed to constitute primary retroactivity, there can be no serious question that the Commission’s proposed “action changes the future legal consequences of past or ongoing actions.”¹⁶ Secondary retroactivity has been found to occur where “an agency’s rule affects a regulated entity’s investment made in reliance on the regulatory *status quo* before the rule’s promulgation.”¹⁷ As MetroPCS has stated in this proceeding, “MetroPCS and others bought licenses in good faith reliance upon the rules and standards at the time.”¹⁸ Now, the *NPRM* proposes to change these standards mid-license term, and the *Order* seeks to retroactively subject all renewals granted during the pendency of this proceeding to these new higher standards. Importantly, the *Order* fails to explain in sufficient

¹⁵ *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 219 (1988) (emphasis in original). There have been some circumstances in which the Commission has granted licenses, other than renewal licenses, subject to the outcome of pending proceedings. For example, license grants in Auction 35 were made subject to the outcome of the proceedings in which Nextwave Personal Communications, Inc. was seeking to overturn the FCC decisions cancelling its PCS licenses and proceeding to reauction the spectrum in Auction 35. See, e.g., *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to Nextwave Personal Communications Inc., Nextwave Power Partners, Inc. and Urban Comm-North Carolina, Inc.*, Public Notice, 17 FCC Rcd 17079 (2002). This prior situation is clearly distinguishable because the winners in Auction 35 had notice prior to the commencement of the auction that any license would be subject to the outcome of the Nextwave proceedings. So, there was no element of retroactivity.

¹⁶ Petition at 6.

¹⁷ *Mobile Relay Assoc., Inc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

¹⁸ MetroPCS Comments at 23. In particular, MetroPCS bought certain REAG licenses in the AWS auction taking comfort in the fact that it had 15 years to meet the flexible “substantial service” standard, which prior precedent indicated could be met with specialized services and “niche” services.

detail why granting licenses conditionally is necessary at all,¹⁹ meaning that a court is likely to find the conditional renewal grant decision to be arbitrary and capricious.

The conditional grant of all renewal applications during the pendency of this proceeding will have a substantial adverse impact on wireless carriers and wireless investment – and yet the Commission devotes just a single paragraph of the *Order* to this drastic, industry-altering step.²⁰ Within that lone paragraph, only one single sentence is offered to rationalize the Commission’s decision: “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.”²¹ There is no discussion of alternative approaches to mitigate uncertainty, no weighing of any competing proposals, and quite simply no analysis whatsoever of the impact that such a decision may have on the wireless marketplace. As Petitioners correctly note, the Commission entirely “failed to consider the option that would provide the greatest certainty – *i.e.*, continuing to grant renewal applications in accordance with

¹⁹ The Court’s prior tolerance for the imposition by the Commission of “freezes” on the filing of certain applications pending the outcome of proceedings in which rule changes were under consideration will not support the Commission’s actions here. Those freezes were designed to maintain the *status quo* and to prevent speculation while the Commission undertook an orderly process to change its rules. Here, the conditional renewal grant order is altering the *status quo*, and renewals are not susceptible to speculation by the license holder since a renewal application can only be filed in a window around the time the license expires. Nor will the Commission be able to show that the imposition of conditional grants was necessary for an orderly conclusion of the underlying proceeding.

²⁰ *Order* at ¶ 113.

²¹ *Id.* MetroPCS agrees that it would not serve the public interest for the Commission to defer action on granting renewal applications during the pendency of this proceeding. However, that does not mean that the Commission can or should make all renewals conditional on the outcome of this proceeding, especially since the Commission fails to explain how such conditional grants would work (*e.g.*, would the licensee have to make a *post hoc* showing in order to keep the license?).

existing procedures.” The Commission’s utter failure to explain its reasoning or to consider alternatives makes the *Order* unsustainable on appeal.

Under the Administrative Procedure Act (“APA”), courts will set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²² And, where an agency makes a decision without supplying a reasoned analysis of that decision (such as here), that decision is considered to be arbitrary and capricious. Specifically, “[t]o survive review under this standard, the FCC must examine and consider the relevant data and factors, ‘and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”²³ As shown above, the Commission did not “articulate a satisfactory explanation for its action,” much less “include[] a rational connection between the facts found and the choice made.”²⁴ Indeed, the Commission found no facts at all. This lack of reasoned analysis makes the Commission’s decision extremely susceptible to reversal as arbitrary and capricious, and should be reconsidered.

III. CONDITIONAL RENEWAL OF LICENSES WILL CHILL INVESTMENT AND UNDERMINE THE GOALS OF THE NATIONAL BROADBAND PLAN

In addition to constituting impermissible, retroactive rulemaking and being arbitrary and capricious decision-making, conditional license renewal is contrary to Commission policies, the goals of the *National Broadband Plan*, and the public interest generally. As Petitioners correctly note, “[w]ithout spectrum licenses, wireless providers cannot operate and provide service.”²⁵

Spectrum licenses are the one input that a wireless provider simply cannot do without. In most

²² 5 U.S.C. § 706(2)(A).

²³ *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 301 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43).

²⁴ *Motor Vehicle Mfrs.*, 463 U.S. at 43.

²⁵ Petition at 8.

instances, the underlying spectrum license is a wireless carrier's most valuable asset. These spectrum assets form a substantial portion of the value of a wireless company, and investors and lenders must be certain that, when the licenses are put to beneficial uses, they will remain with the company in the long term. Investors and lenders crave certainty, and the Commission's current policies regarding license renewals are intended to bring predictability to the industry.²⁶ Where certainty reigns, capital investment flows and innovation thrives. Indeed, prior Commission decisions display an explicit understanding of the important relationship between certainty and capital investment. Specifically, the Commission has found that a strong expectation of license renewal had the benefit of "(1) encouraging investment in facilities; (2) avoiding the replacement of an acceptable service provider with an inferior one, based on unproven promises; and (3) ensuring continuity of service."²⁷ Although carriers are not permitted to grant lenders a direct security interest in wireless licenses, this reasonable expectation of renewal gave investors and lenders the comfort necessary to lend substantial amounts of money to wireless carriers over periods of time that often exceed the term of the license. It is this very access to capital that has permitted the wireless industry to grow at such an extraordinary rate.

²⁶ Purportedly, the Commission's decision to condition all renewal grants was intended to create certainty. In fact, certainty only would be accomplished by allowing licenses to be renewed under the existing standards and only applying any updated renewal standards to newly issued licenses acquired with advance knowledge of altered renewal standards. Applying new renewal standards only to newly auctioned licenses would be consistent with the approach the Commission took with wireless open network access requirements. The Commission imposed such requirements on the newly licensed 700 MHz Block C licenses, *see* 47 C.F.R. § 27.16, but has not imposed such requirements retroactively on previously issued licenses.

²⁷ *Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 7 FCC Rcd 719, ¶ 3 (1991).

Simply put, stability and predictability of licenseholdings is critical to the wireless industry. Unfortunately, as Petitioners note, “conditional grants are just as uncertain [as leaving renewal applications in ‘pending’ status] since licensees will remain in limbo until their applications are evaluated under whatever new standard the Commission may adopt.”²⁸ Investors and lenders – already unable to hold a direct security interest in wireless licenses – will now be faced with the erosion of the renewal expectancy that they have relied on. Under these circumstances, many lenders and investors will simply choose not to lend money to or invest money in wireless providers, particularly given the current volatile economic climate. Stopping the flow of capital could not come at a worse time, as the country is struggling to pull itself out of a deep recession. It would be a sad result indeed if the Commission created disincentives to investment at a time when it should be doing everything in its power to enable the wireless marketplace to help buoy the economy. The Commission has recognized the importance of increased broadband infrastructure to meeting its *National Broadband Plan* goals.²⁹ Without the necessary capital to back such investment, needed infrastructure simply will not be built, and millions of Americans will remain un- or under-connected.³⁰

²⁸ Petition at 8.

²⁹ See, e.g., *National Broadband Plan* at 9, 11, 23.

³⁰ Wireless broadband is a particularly important component of the Commission’s goal of bridging the digital divide. A number of rural, low-income or minority citizens use wireless broadband as their sole or primary means of accessing the Internet. The Commission must make it a front-and-center policy to ensure that a lack of investment in wireless infrastructure does not see these rural, low-income or minority users left behind. See Cecilia Kang, “Going wireless all the way to the Web,” WASH. POST, A6 (Jul. 10, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070905521.html>.

IV. THE CONDITIONAL RENEWAL GRANT POLICY WILL HAVE OTHER NEGATIVE UNINTENDED CONSEQUENCES THAT DISSERVE THE PUBLIC INTEREST

In addition to the legal infirmities in the Commission's conditional grant policy, and the adverse impact it will have on achieving the National Broadband Plan, other negative unintended consequences are likely to occur.

For example, the conditional grant policy will impede the important secondary market for licenses. The Commission has expressly recognized that "facilitating the development of secondary markets in spectrum usage rights is of critical importance as the Commission moves forward in implementing spectrum policies that increase the public benefits from the use of radio spectrum."³¹ The conditional renewal policy will undermine this critically important objective. The secondary market relies upon stable rules that allow purchasers to understand the value of licenses, and permits these purchasers to conduct due diligence on potential acquisitions. Without a clear set of renewal standards in place – and with a condition of unknown impact imposed on the renewed license – potential purchasers will be deterred from purchasing additional licenses on the secondary market. And, without a fully-functioning secondary market, licenses which could be put to higher and better uses by potential purchasers may remain underutilized in the hands of the existing licensee. This is particularly ill-advised given the general consensus by members of the Commission and the industry that there is a severe wireless spectrum shortage. Imposing rules that will halt the free transferability of licenses will exacerbate, not reduce, the spectrum crunch. Because spectrum is the primary input needed in order to build a wireless broadband network, any Commission rules or policies that disrupt an

³¹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 20604, ¶ 1 (2003).

active secondary license market will have a profound negative effect on the investments necessary to deploy wireless broadband networks.

The decision to grant renewals only on a conditional basis pending the outcome of the renewal standards proceeding also will breed litigation that will needlessly divert the resources of both the Commission and renewal licensees. Section 1.945(e) of the Commission’s rules, entitled “Partial and Conditional Grants,” provides that “conditional grants are final unless the FCC revises its action in response to a petition for reconsideration.”³² Indeed, the *Order* presents renewing applicants with a Hobson’s choice: Either accept the unfairly imposed conditional grant and suffer the potentially dire consequences of a *post hoc* decision denying renewal or reject the conditional grant and file a petition for reconsideration which will put a dark cloud over the unrenewed license. MetroPCS suspects that any prudent renewal applicant who objects to the threatened retroactive imposition of a higher renewal threshold – which will be most if not all renewal applicants – will feel compelled in this situation to reject the conditional grant and to timely file a petition for reconsideration. And, the Commission will be obligated to process these petitions. In effect, the Commission’s hastily granted conditional renewal policy will open a floodgate of otherwise unnecessary litigation and create further uncertainty regarding the value and security of existing licenses.

The Commission previously has recognized the public interest benefit of wireless licensing policies that “conserve Commission resources.”³³ The Commission also routinely

³² 47 C.F.R. § 1.945(e).

³³ See, e.g., *Amendment of Part 22 of the Commission’s Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service Amendment of Part 22 of the Commission’s Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service*, Report and Order, 9 (continued...)

seeks to implement licensing policies that “reduce burdens on licensees.”³⁴ The Commission’s conditional renewal policy flies in the face of these worthy public interest objectives.

V. CONCLUSION

The foregoing premises having been duly considered, MetroPCS respectfully requests that the Commission grant the Petition, and “rescind its decision to condition the grant of pending and future license renewal applications on the outcome of this proceeding, and should instruct the WTB to process such applications consistent with existing rules while the instant rulemaking proceeding is pending.”³⁵

(...continued)

FCC Rcd 6513, ¶ 80 (1994) (adopting streamlined licensing procedures *inter alia*, to conserve Commission resources).

³⁴ See, e.g., *Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27 and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services*, Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 13900, ¶ 44 (2005) (streamlining the rules affecting wireless licensees).

³⁵ Petition at 12.

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