

**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	)	

**HORIZON WI-COM’S REPLY COMMENTS AND OPPOSITION  
TO PETITION FOR RECONSIDERATION**

**I. INTRODUCTION**

Horizon Wi-Com, LLC (“Horizon”) by counsel, hereby submits its Reply Comments and Opposition to Petition for Reconsideration (“Reply”) in the captioned proceeding. By this Reply, Horizon demonstrates why, in the instance of WCS, the Commission’s decision in its (“Order”) and its proposed decision in its Notice of Proposed Rulemaking (“NPRM”) are both reasonable and serve the public interest. (Together, the Order and the NPRM are referred to herein as the “Release”).<sup>1</sup>

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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, 25 FCC Rcd 6996(2010), 75 Fed. Reg. 38959 (July 7, 2010).

## II. ARGUMENT

### A. The Green Flag Petition is Procedurally Defective and Must Be Dismissed

As an initial matter, the Petition for Reconsideration submitted on August 6, 2010 by Green Flag Wireless, LLC (“Green Flag”) and its supporters (“Green Flag Petition”)<sup>2</sup> is untimely and must be stricken in its entirety. It appears that the Green Flag Petition was filed based upon the mistaken belief that the Order was published in the Federal Register on July 7, 2010. In actuality, only the NPRM portion of the Release was published in the Federal Register on that day. The Order itself has never been published in the Federal Register. Nor is there any need for such publication: the Order addresses specific licensing matters only, and there is thus no need for Federal Register publication.

The Note to Section 1.4(b)(1) of the Commission’s Rules addresses this issue directly. It provides that where a single document contains both a rulemaking matter and an adjudicatory matter, the deadlines for the adjudicatory portion are governed by Section 1.4(b)(2) (calculating deadlines from release date), rather than Section 1.4(b)(1) (calculating deadlines from *Federal Register* date), even though the deadlines for those seeking reconsideration of the rulemaking portion of the same FCC document have the later deadline afforded by Section 1.4(b)(1).

Because the Order is adjudicatory and was never published in the Federal Register, the starting date for calculating the time within which to submit a petition for reconsideration was the release date of the Release, i.e., May 25, 2010. Section 1.106 (f). Thus, pursuant to the

Commission's rules, in order to be timely, the Green Flag Petition was required to be filed no later than June 24, 2010.<sup>3</sup> Clearly, it was not timely filed. Moreover, no request for permission to file late was made, and no such relief has been granted. Even if a request were made, the Commission would not be empowered to grant an extension given that Section 405 of the Act<sup>4</sup> mandates a 30-day filing period. Most certainly, no after-the-fact waiver can be granted now. On this basis alone, the Green Flag Petition should be dismissed without consideration.

**B. The Green Flag Renewal Applications Do Not Meet the Section 27.321(b) Requirements for Eligibility for Comparative Hearings**

The first substantive flaw with Green Flag's logic is its unfounded predicate that it has ever been entitled to a comparative renewal hearing. The Commission's rules are clear that renewal hearing rights spring into being only after the FCC makes an affirmative holding that such a hearing would serve the public interest. Specifically, Section 27.321(b) of the rules provides that

“An application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest.”

47.C.F.R. § 27.321(b).

The Commission has never made the showing required by Section 27.321(b) that would entitle Green Flag to comparative renewal rights. In fact, as set forth in Section II. C. below, the

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<sup>2</sup> Petition for Reconsideration in WT Docket No. 10-112, submitted on August 6, 2010 by Green Flag, CWC License Holding, Inc., James McCotter and NTCH-CA, Inc.

<sup>3</sup> The Petition for Partial Reconsideration of Atlantic Tele-Network, Inc. and Tisdale Telephone Company, LLC was timely filed on that date, and that petition cited Section 1.4(b) to demonstrate timely filing.

<sup>4</sup> 47 USC §405, The Communications Act of 1934, as amended.

Commission took exactly the opposite action in another Part 27 service. At a minimum, that action signaled to Green Flag that the required public interest finding would likely not be made for WCS.

**C. Green Flag's Due Process Arguments, While Possibly Applicable to Other Services, Present No Basis for Undermining the Commission's Order and the NPRM As It Relates to WCS Licenses**

Despite Green Flag essentially arguing that it was surprised unfairly by the Commission's Order, and therefore deprived of due process, the simple fact is that the Commission made known prior to any Green Flag competing renewal filing that it did not intend to accept competing renewal applications for certain Part 27 licenses. See specifically the Commission's Report and Order and Further Notice of Proposed Rulemaking, in WT Docket No. 06-150, 25 FCC Rcd 8064, (2007). There, the Commission explained that it was then amending Section 27.14 of the rules by "eliminating the filing of competing applications to requests for renewal" of certain other Part 27 licensees. In so doing, the Commission properly observed that

"We are mindful of the potential costs and the burdens they impose on both the Commission and licensees. We agree with MetroPCS that such administrative processes "harken back to an old era...where competitors were known to file 'strike' applications against a renewal in the hope of getting a payoff." Under the revised Section 27.14 of the Commission's rules, we are therefore adopting a process by which 700 MHz Commercial Services Band licenses comes back to the Commission for re-auction if a license is not renewed. The existing petition to deny process, coupled with the ability of a petitioner to participate in any subsequent auction to re-license spectrum that is returned to the Commission for lack of renewal, creates sufficient incentives to challenge inferior service or poor qualifications of licensees at renewal. This approach protects the public interest without creating incentives for speculators to file "strike" applications."

25 FCC Rcd. At 8093.

**D. The Absence of Specificity in Part 27 Renewal Rules Lends Further Justification to the Commission's Order and NPRM**

Even if there may be reasons that the Commission's proposed rules should not apply to other services,<sup>5</sup> they are still applicable to Part 27 services such as WCS.

In other services, general parameters for renewal challenges have long been codified. See, e.g., 22.940. That section sets forth with specificity a host of comparative issues to be considered in any comparative hearing that may be needed for cellular radio that certainly carries with it a sense entitlement otherwise not present. In contrast, in Part 27, the rule governing renewals has never set forth the factors that the Commission will consider in connection with a license renewal application. Under such circumstances, there is nothing that even approaches entitlement, and the Commission's proposal in no way violates due process.

**E. CONCLUSION**

The Green Flag Petition is both procedurally and substantially defective. Procedurally, it is late-filed – a failing that is not subject to cure. Substantively, the issues that Green Flag presents, while possibly applicable to other wireless services, simply do not apply to WCS given the Commission's prior pronouncements regarding Part 27 renewals.

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<sup>5</sup> Horizon takes no position on services other than WCS.

For all of the foregoing reasons, Horizon urges the Commission to dismiss the Green Flag Petition; to affirm its Order; and to implement for WCS, the renewal proposals in its NPRM.

Respectfully Submitted,

HORIZON WI-COM, LLC

/s/ Thomas Gutierrez  
By: Thomas Gutierrez, Esquire  
Lukas, Nace, Gutierrez & Sachs, LLP  
Its Attorney

August 23, 2010

**CERTIFICATE OF SERVICE**

I, Gary L. Smith, do hereby certify that on this 23<sup>rd</sup> day of August, 2010, I caused copies of "*Horizon Wi-Com's Reply Comments and Opposition to Petition for Reconsideration*" to be served upon the following via U.S. mail:

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Gary L. Smith