

**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	)	
	)	

**REPLY COMMENTS OF AT&T INC.**

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and Spectrum Disaggregation Rules and )  
Policies for Certain Wireless Radio )  
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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 )

**REPLY COMMENTS OF AT&T INC.**

**I. INTRODUCTION AND EXECUTIVE SUMMARY**

AT&T Inc., on behalf of itself and its affiliates (“AT&T”), hereby submits reply comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-referenced proceeding.<sup>1</sup> In the NPRM, the Commission proposes to simplify the regulatory process for licensees by revising its license renewal, partitioning and disaggregation, and discontinuance rules. As detailed below, the record provides widespread support for the Commission’s high-level goals of harmonizing these rules and eliminating antiquated and burdensome procedural rules. Specifically, commenters applaud the Commission’s tentative conclusion to revise the existing renewal process by

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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*, Notice of Proposed Rulemaking and Order, WT Docket No. 10-112, FCC 10-86 (May 25, 2010) (“NPRM”).

prohibiting competing renewal filings and returning non-renewed licenses to the FCC inventory for subsequent auction.<sup>2</sup> The current framework—which permits comparative licensing proceedings—is inefficient and burdensome for both incumbent licensees and the Commission staff and encourages strike filings. Commenters also strongly support harmonizing the service discontinuance rules across services and eliminating duplicitous and outdated discontinuation requirements.

The record evidence, however, does not support adopting the proposals in the NPRM in their entirety. Commenters vigorously oppose—on legal and policy grounds—the NPRM’s proposal that licensees provide, for each market area license, over 12 new ambiguous, factual showings involving substantial amounts of data.<sup>3</sup> The vague requirements proposed in the NPRM—and, in particular, the nebulous “substantial service” standard—have no place in license renewal proceedings due to the draconian nature of the penalty implicated for failure to meet those requirements—license forfeiture.<sup>4</sup> Commenters also oppose the tentative conclusion to impose a construction obligation on both parties to a partitioning or disaggregation because it would upset longstanding private contractual relationships and discourage future secondary market transactions.

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<sup>2</sup> Unless otherwise specified, all comments referenced herein were filed in WT Docket No. 10-112 on August 6, 2010.

<sup>3</sup> NPRM at Appendix A, *Proposed Rules*, at 47 C.F.R. § 1.949(c) (“Proposed Rules”).

<sup>4</sup> As commenters explain, “substantial service” historically has been a safety valve for market-based licensees who cannot satisfy the numerical, objective safe harbors contained in service-specific construction performance rules. *See, e.g.*, Comments of AT&T Inc. at n. 5 (“AT&T Comments”) (detailing the Commission’s use of the “substantial service” standard as a safety valve); Comments of FiberTower Corporation at 4 (“FiberTower Comments”) (“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.”).

## **II. COMMENTERS APPLAUD THE COMMISSION'S EFFORTS TO HARMONIZE ITS LICENSING RULES AND TO ELIMINATE ANTIQUATED AND BURDENSOME PROCEDURAL RULES.**

Commenters universally approve of the Commission's over-arching goal of simplifying the licensing rules. With respect to specific reforms raised in the NPRM, commenters strongly support two proposals. First, commenters applaud the Commission's tentative conclusion to prohibit competing renewal filings and return non-renewed licenses to the FCC inventory for subsequent auction. Second, commenters widely support harmonizing the service discontinuance rules across services and eliminating duplicitous and outdated requirements.

### **A. Commenters Support FCC Efforts to Eliminate Competing Renewal Applications and to Return Non-Renewed Licenses to the FCC Inventory.**

Commenters strongly support the Commission's proposal to eliminate comparative licensing in renewal proceedings. Commenters detail how the current comparative renewal provisions are "historical vestiges" that no longer serve the public interest<sup>5</sup> and are "inefficient and burdensome for both incumbent licensees and the Commission staff."<sup>6</sup> Commenters also highlight that the existing process "invites abuse . . . through the use of strike applications and greenmail."<sup>7</sup> Fortunately, commenters agree that the Commission's proposal "eliminat[es] the opportunity for parties to use the renewal process to harass, financially burden or otherwise hold hostage incumbent licensees."<sup>8</sup>

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<sup>5</sup> Comments of the WCS Coalition at 1 ("WCS Coalition Comments"); *see also* Comments of the Wireless Communications Association International, Inc. at 2 ("WCAI Comments").

<sup>6</sup> Comments of Sprint Nextel Corporation at 14 ("Sprint Comments").

<sup>7</sup> Comments of CTIA - The Wireless Association at ii ("CTIA Comments"); *see also* Comments of LightSquared Inc. at 6-7 ("LightSquared Comments"); Comments of MetroPCS Communications, Inc. at 5 ("MetroPCS Comments").

<sup>8</sup> Sprint Comments at 14-15.

Commenters also emphasize that competitive market forces, interim substantial service build-out requirements not tied to renewal, and the petition to deny process already ensure improved licensee performance. LightSquared, for example, explains that “allowing third parties to file petitions to deny and to participate in the auction of any spectrum that may be returned to the Commission, if not renewed, should be sufficient incentive for those who may wish to challenge the sufficiency of a licensee’s use of spectrum or qualifications to remain a Commission licensee.”<sup>9</sup> Commenters also highlight that there “is a major public interest benefit in returning unrenewed spectrum to the Commission for reassignment by auction, rather than simply giving it to a competing applicant who happens to be the first in the queue.”<sup>10</sup> Relying on the competitive bidding process—which now is well-established—“improves the prospect that an unrenewed license ultimately will end up in the hands of a carrier who will put the spectrum to the highest and best use.”<sup>11</sup>

**B. Commenters Strongly Support the Commission’s Efforts to Apply Discontinuance Requirements in an Even-Handed Manner.**

Commenters also agree that the public interest dictates that the Commission apply any new or modified permanent discontinuance requirements in an even-handed manner across all wireless services.<sup>12</sup> Commenters explain that a uniform discontinuance framework will “encourage investment and promote enhanced service deployment while providing some

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<sup>9</sup> LightSquared Comments at 6; *see also* CTIA Comments at 30; Sprint Comments at 15; Verizon Wireless Comments at 14; WCS Coalition Comments at i.

<sup>10</sup> MetroPCS Comments at 7.

<sup>11</sup> *Id.*; *see also* Verizon Wireless Comments at 14-15.

<sup>12</sup> As AT&T explained in its opening comments, this proceeding also provides an appropriate venue for the Commission to eliminate outdated permanent discontinuance rules, including Section 101.305. *See* AT&T Comments at 35.

operational flexibility to wireless licensees.”<sup>13</sup> A uniform framework will also “enable the Commission to reclaim unused spectrum more expeditiously to ameliorate the severe spectrum shortage for mobile wireless services.”<sup>14</sup> For these reasons, the record evidence strongly supports harmonizing the discontinuance rules.

**III. COMMENTERS AGREE THAT ANY INCREASE IN THE BURDEN TO JUSTIFY RENEWAL FOR UNCONTESTED LICENSES WOULD BE POOR PUBLIC POLICY AND LEGALLY UNSOUND.**

The NPRM’s proposal to impose new substantial service requirements at renewal for uncontested licenses and increase the data collection process to support the new mandate is both unsound public policy and unlawful. As detailed below, the NPRM would impose burdensome requirements on licensees, as well as administrative costs on the FCC’s limited resources, while providing no offsetting benefit for consumers or licensees. Such requirements also would violate the APA<sup>15</sup> and constitutional due process rights. Accordingly, commenters agree that the Commission should retain existing renewal procedures for uncontested license renewals.

**A. The Record Clearly Demonstrates that Any Increase in the Burden to Justify Renewal Would Be Inequitable and Unsound as a Matter of Public Policy.**

Commenters universally agree that the renewal framework should be clear and equitable and promote rational investment in wireless infrastructure and services. But commenters also agree that the NPRM’s proposed renewal rules do not satisfy these policy goals for a number of reasons.

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<sup>13</sup> CTIA Comments at 31; *see also* MetroPCS Comments at 8; Sprint Comments at 16; Verizon Wireless Comments at 15.

<sup>14</sup> CTIA Comments at 31.

<sup>15</sup> 5 U.S.C. § 551(4).

*First*, because non-renewal would result in license forfeiture, commenters strongly oppose the NPRM’s failure to articulate safe harbors and objective standards.<sup>16</sup> Commenters explain that “if the Commission proceeds with the adoption of a list of factors to be considered for a renewal expectancy, it should codify a safe harbor in order to avoid unintended consequences and protect the legitimate expectations of carriers deserving a renewal.”<sup>17</sup> By failing to define safe harbors or objective standards for renewal applications, the Commission will “create[] an environment ripe for legal challenge, of not only this rulemaking, but also of each and every renewal application that is denied by the Commission based upon a subjective analysis.”<sup>18</sup>

*Second*, commenters widely agree that uncertainty—whether through ambiguous rules or through changing requirements mid-term—increases the risk of investing in licenses and thereby deters network build-out and broadband deployment.<sup>19</sup> To eliminate the “anxiety already being created among licensees,” commenters widely agree that the Commission should “quickly conclude this proceeding by rejecting the NPRM’s misguided proposals.”<sup>20</sup>

*Third*, commenters agree that the NPRM’s proposals go far beyond the goal of process reform into the unwarranted imposition of new substantive requirements. Commenters explain

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<sup>16</sup> See, e.g., MetroPCS Comments at 26; WCS Coalition Comments at 7; T-Mobile Comments at 8.

<sup>17</sup> MetroPCS Comments at 26.

<sup>18</sup> T-Mobile Comments at 8.

<sup>19</sup> See, e.g., US Cellular Comments at i; CTIA Comments at 2; T-Mobile Comments at 5.

<sup>20</sup> CTIA Comments at 2.

that the renewal requirements proposed in the NPRM inequitably upset licensees' reasonable reliance on existing rules to base planned network investments.<sup>21</sup>

*Fourth*, commenters roundly criticize the increased data collection process proposed in the NPRM because it will severely burden licensees and consume FCC resources with no offsetting benefit for consumers. Specifically, the NPRM proposes that licensees provide, for each market area license, over 12 new factual showings involving substantial amounts of data.<sup>22</sup> MetroPCS details how producing the information called for in “the long list of factors alluded to in the *NPRM* would be very burdensome, and consume much time, energy, many personnel resources, and substantial legal fees.”<sup>23</sup> The Blooston Rural Licensees agree that the “proposed renewal rules [will] require a significant amount of information not currently required in either the renewal context or in market-area build out showings.”<sup>24</sup> And CTIA explains that the “proposed detailed renewal showing and new renewal process reflects a step backwards, harkening to the Commission’s earlier comparative renewal process and the related lengthy application renewal requirements.”<sup>25</sup>

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<sup>21</sup> See, e.g., Verizon Wireless Comments at 3 (detailing how “[b]illions of dollars of investment have already been made in networks that provide voice, data, and broadband services in reliance on the existing construction and renewal requirements”); US Cellular Comments at 5-6 (explaining that it holds “licenses for cellular systems in which millions of dollars have been invested and in which hundreds of cells have been built, whose buildout requirements have long since been met and far surpassed”).

<sup>22</sup> Proposed Rules at 47 C.F.R. § 1.949(c).

<sup>23</sup> MetroPCS Comments at 21.

<sup>24</sup> Comments of The Blooston Licensees at 14 (“Blooston Comments”).

<sup>25</sup> CTIA Comments at 3. Commenters emphasize that the proposed, onerous requirements are particularly unnecessary because the current renewal process for almost all applications is straightforward and does not weigh down the FCC or renewal applicants with unnecessary administrative burdens. See Verizon Wireless Comments at 2.

*Fifth*, commenters are troubled by the Commission’s failure to define the specific information required for each of the factual showings required under proposed Section 1.949. Commenters point out that the Commission—by “denominating the list of factors as ‘nonexclusive’”—will “effectively force licensees, particularly in the first couple of renewal cycles after the new rules are in place, to take a ‘kitchen sink’ approach and file extensive descriptions of their services, potentially far beyond what is actually needed, due to the uncertainty of what the Commission would actually like to see.”<sup>26</sup> CTIA also highlights that “[a]lthough proposed Section 1.949 would require licensees to engage in extensive data collection efforts related to a number of ambiguous criteria to be included in the licensee’s renewal showing, there is no indication of the relative importance of each criteria, whether some or all are optional, or what level of performance under each criteria will be deemed sufficient to justify license renewal.”<sup>27</sup> At bottom, commenters agree that the NPRM gives licensees a “generalized laundry list of issues it might explore at renewal,” a list that “raises more questions than it answers.”<sup>28</sup>

**B. Commenters Agree that Any Increase in the Construction Burden to Justify Renewal Would Be Legally Infirm.**

The record evidence strongly supports a conclusion that the Commission’s proposed changes to the renewal process—as well as the Commission’s decision in the Order to apply any renewal rules adopted in this proceeding to currently pending renewal applications—are legally infirm. Specifically, and as detailed below, the proposed renewal requirements raise retroactivity

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<sup>26</sup> MetroPCS Comments at 22.

<sup>27</sup> CTIA Comments at 5.

<sup>28</sup> WCS Coalition Comments at 6; *see also* CTIA Comments at 5-6.

and vagueness issues, and thus, would conflict with the APA and constitutional due process rights.<sup>29</sup>

**1. Commenters Widely Agree that the Proposed Renewal Standards May Constitute Impermissible Retroactive Rulemaking.**

The record evidence strongly supports AT&T's conclusion that the NPRM and Order raise primary and secondary retroactivity concerns.<sup>30</sup> As AT&T explained in its opening comments, if the Commission intends to apply new renewal rules to currently pending renewal applications, as its related Order suggests,<sup>31</sup> such action would raise primary retroactivity concerns and violate fundamental principles of due process. Other commenters agree that the "Commission's action in the *Order*, conditionally granting renewals during the pendency of this proceeding subject to the rules it adopts, would generate primary retroactivity . . . as it would attach new legal consequences to events completed before its enactment."<sup>32</sup>

Commenters also agree that the proposed renewal rules are secondarily retroactive because they effectively alter the bounds of providers' licenses. Licensees purchased their wireless licenses—and spent billions of dollars building out their networks—with the reasonable expectation that those licenses would be renewed under the Commission's existing regulatory structure. The Commission now proposes to change that renewal structure to require

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<sup>29</sup> As AT&T explained in its opening comments, the Commission's proposals also are legally suspect because: (1) they would represent a dramatic reversal of policy that must satisfy particularly high hurdles under the APA's arbitrary and capricious standard; and (2) they would raise serious Takings Clause concerns because they would cause significant economic harm that interferes with settled, investment-backed expectations. *See* AT&T Comments at 22-26.

<sup>30</sup> For a detailed discussion on retroactivity and due process, *see id.* at 18.

<sup>31</sup> *See* NPRM at ¶ 113 (directing the Wireless Telecommunications Bureau "to grant currently pending applications for renewal, as well as applications for renewal filed during this rulemaking, on a conditional basis, *subject to the outcome of this proceeding*") (emphasis added).

<sup>32</sup> CTIA Comments at 22; *see also* T-Mobile Comments at n. 29; Verizon Wireless Comments at 7.

substantially more burdensome reporting requirements and potentially more onerous build-out standards, thereby affecting the desirability of past transactions. Verizon Wireless details how requiring the proposed showing “would upset the expectations of licensees who have collectively invested billions of dollars in reliance on the existing rules and standards.”<sup>33</sup> And CTIA agrees that “[w]hile secondary retroactivity is subject to the ‘arbitrary and capricious’ standard, it is hard to imagine a clearer cut case of arbitrary and capricious decision making than holding past licensee conduct to a newly created standard.”<sup>34</sup>

## **2. Employing a “Substantial Service” Requirement for License Renewal Would Be Unconstitutionally Vague.**

Commenters agree that the proposed “substantial service” standard for license renewal is unlawful because it is too vague.<sup>35</sup> In this case, the NPRM explains that “substantial service . . . is defined as service that is sound, favorable, and substantially above a level of mediocre service *that just might minimally warrant renewal.*”<sup>36</sup> But commenters explain that because this definition of “substantial service” is tied to whether a licensee qualifies for renewal, employing this standard as a basis for license renewal would render it completely circular and, thus, devoid of any meaning.<sup>37</sup> As a renewal requirement, then, the “substantial service” standard would be

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<sup>33</sup> Verizon Wireless Comments at 10.

<sup>34</sup> CTIA Comments at 22.

<sup>35</sup> “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Further, the Fifth Amendment’s Due Process Clause requires that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. U.S. Const. amend V, cl. 4.

<sup>36</sup> NPRM at ¶ 21.

<sup>37</sup> FiberTower Comments at 11 (explaining that “substantial service,” as a renewal standard, “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.”).

unconstitutionally vague;<sup>38</sup> licensees would be “[un]able to identify, with ascertainable certainty,” the standard and thus would be left to guess at its meaning.<sup>39</sup>

#### **IV. COMMENTERS STRONGLY OPPOSE THE NPRM’S PROPOSAL TO ALTER THE EXISTING PERFORMANCE REQUIREMENTS FOR PARTITIONED AND/OR DISAGGREGATED LICENSES.**

Commenters strongly oppose the Commission’s proposal to require that all parties to a disaggregation or partitioning transaction adhere to all construction requirements for their respective portion of the spectrum or market area in order to prevent free riders from acquiring spectrum. As an initial matter, commenters explain that the Commission’s concern—that absent a specific requirement a partitioned or disaggregated license might sit fallow—is unfounded.<sup>40</sup> Commenters also highlight that the proposed rules would obstruct important public policy goals. First, commenters point out that “[p]arties to existing agreements have made business and investment decisions – such as agreeing on a price for the spectrum that was partitioned or disaggregated – based on the existing rules.”<sup>41</sup> Imposing a construction obligation on both parties to a partitioning or disaggregation now would upset these longstanding private contractual relationships.<sup>42</sup> Second, commenters agree that the Commission’s proposal would discourage publicly beneficial arrangements in the future and thus stifle the build-out goals of the

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<sup>38</sup> See, e.g., CTIA Comments at 8; Verizon Wireless Comments at 6; Blooston Comments at 3.

<sup>39</sup> *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

<sup>40</sup> The current rules already prohibit a licensee from “rely[ing] on another licensee’s construction [in a partitioned area and/or using disaggregated spectrum] for the purposes of making the substantial service showing required to renew the license.” MetroPCS Comments at 31. Further, “there is no economic incentive for carriers to acquire a new license for spectrum or geographic areas in the secondary markets and then do nothing with it.” Verizon Wireless Comments at 17.

<sup>41</sup> CTIA Comments at 35.

<sup>42</sup> See AT&T Comments at 32.

National Broadband Plan. The current framework “is extremely valuable because it allows small and rural carriers and entrepreneurs to take risks that they might not otherwise take by agreeing to partition small and/or sparsely populated rural areas” without necessarily having to construct facilities across geographic areas to the same extent as the original licensee.<sup>43</sup> As commenters explain, the NPRM’s proposed “change could have a detrimental affect on secondary market activity” and this could prevent providers from acquiring the spectrum needed to “increase capacity and/or offer new advanced services,” including cutting-edge, niche services to rural areas.<sup>44</sup>

Commenters also request that the Commission take this opportunity to permit licensees to re-aggregate and de-partition spectrum, regardless of whether the Commission imposes new construction requirements on disaggregated and partitioned spectrum. Sprint, for example, explains that “[a]llowing consolidation of previously partitioned and/or disaggregated licenses will simplify the administration, tracking and use of geographic area licensing information for licensees, the Commission staff and the public.”<sup>45</sup> This is consistent with AT&T’s view that “[b]ecause partitioning and disaggregation were entirely voluntary, there appears to be no public policy that would be adversely affected by permitting licensees to reverse that process.”<sup>46</sup>

## V. CONCLUSION

The record evidence dictates that the Commission should eliminate competing mutually exclusive renewal applications; apply permanent discontinuance requirements in an even-handed manner; retain the effective, streamlined renewal process currently used for uncontested

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<sup>43</sup> MetroPCS Comments at 28.

<sup>44</sup> Verizon Wireless Comments at 17; *see also* Blooston Comments at 29; MetroPCS Comments at 30; CTIA Comments at 33; MetroPCS Comments at 28.

<sup>45</sup> Sprint Comments at 20.

<sup>46</sup> AT&T Comments at 34.

applications; and retain the existing performance requirements for partitioned and disaggregated licenses.

Respectfully submitted,

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