

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95,) WT Docket No. 10-112
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)

To: The Commission

**REPLY COMMENTS
OF
JOINT COMMENTERS ON PROPOSED RULES**

August 23, 2010

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Green Flag Wireless, LLC, CWC License Holding, LLC and James McCotter ("Joint Commenters") hereby offer these Reply Comments in the captioned proceeding. We observe that most commenters, who currently hold wireless licenses, were naturally quite comfortable with the proposed renewal procedures which would insulate them from competitive challenge. None of the supporting comments, however, addressed the applicability of Section 309(e) of the Act, *Ashbacker* and its extensive progeny to the situation. That body of law clearly governs the situation and precludes the procedure proposed by the Commission. One commenter, N.E. Colorado Cellular, Inc., which has apparently filed a competing cellular application, did examine the provisions of Section 309(e) of the Act and its direct application to renewal challenges. N.E. Colorado Cellular, Inc. accordingly agrees with Joint Commenters that the Act guarantees a comparative hearing.

One additional matter related specifically to Wireless Communications Service renewals warrants brief comment. Joint Commenters proposed that WCS licensees who had not provided any service during their license term are not entitled to a renewal at all. As we noted in our initial Comments, logically implicit in the FCC's longstanding renewal requirement¹ is that there is a level of mediocre service which just might minimally merit a renewal grant but does not merit a "renewal expectancy" in a comparative case. Let us call this "Sub-mediocre Service." This also necessarily implies that there is a level of service below Sub-mediocre that does not merit a renewal grant. We need not split hairs as to how far below mediocre a licensee's performance must fall in order to justify non-renewal, because here there was no performance at all. This principle is fully supported by the Court of Appeals: "Insubstantial past performance

¹ "Substantial service' is defined as service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal."

should preclude renewal of a license." *Citizens Communications Center v. FCC*, 447 F. 2d 1201, 1213 (D.C. Cir. 1971).

Incumbent WCS licensees may, however, complain that they assumed that the Commission's grant of an extension of the substantial service deadline beyond their renewal deadline implicitly relieved them of the basic obligation to provide at least Sub-mediocre Service in order to qualify for a renewal. This argument fails on at least four distinct grounds.

1. The Commission's December, 2006 Order² extended the date for compliance by most WCS licensees with the substantial service obligation of 27.14(a) of the rules. That substantial service obligation involved providing service to a relatively large portion of the licensees' service areas -- the stated safe harbors of 20% of the mobile population or four links per million of population give an idea of breadth of service that was expected to constitute substantial service. In the December 2006 Order, the Commission relieved the WCS licensees of the requirement to achieve this rather weighty level of service necessary to avoid forfeiture under Section 27.14(a), but it expressly did not relieve them of the obligation to provide the level of Sub-mediocre Service that would have justified a renewal. The WCS licensees could safely rely on the fact that they were not going to suffer a forfeiture if they did not achieve the safe harbor levels necessary to comply with 27.14(a), but they had no reason at all to think that they had been exempted from providing the far lesser level of service necessary to qualify as Sub-mediocre. They could, for example, have provided service to 10% or maybe even 5% of their mobile populations and claimed that as Sub-mediocre Service. In short, the Commission's December 2006 Order relieved them of the obligation to provide substantial service but it did not relieve them of the obligation to provide any service at all.

² *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Rcd 14134 (2006).

2. This should have been clear from the December 2006 Order itself. The WCS licensees explicitly asked for conditional renewal of their licenses or extension of the term of their licenses in addition to relief from the substantial service obligation of Section 27.14(a). The Commission expressly considered and denied these requests. December 2006 Order at Paragraph 15. ("Thus, while we are extending the deadline to meet the construction requirements, we remind WCS licensees that wish to renew their licenses that they must timely file a renewal application in compliance with the Commission's rules for its licenses.") (Footnote omitted) The Commission was stressing that the normal renewal rules and procedures would apply to WCS licensees and they were in no way insulated from the risk of competing applications or of non-renewal based on not providing Sub-mediocre Service.³

3. If this point required further elaboration, the full Commission provided it in connection with AT&T's merger with BellSouth. In its *Memorandum Opinion and Order*⁴ approving the merger, the Commission considered allegations that AT&T/BellSouth would warehouse their BRS and WCS spectrum. *Id.* at para. 182. The full Commission rejected the challenges, concluding that its BRS substantial service standards would be sufficient to prevent warehousing. It added: "Since WCS licensees are required to demonstrate substantial service at renewal, the same logic applies to WCS spectrum." *Id.* In the *Merger Order*, the Commission was well aware that AT&T had applied for and received a waiver of the build-out deadline for its WCS licenses since it imposed express conditions on the merger parties with respect to those

³ The Commission's allusion at Footnote 62 of the December 2006 Order to Section 1.946 of the rules is a clear indication that the licensees had not been granted a pass to do nothing. Rule 1.946 indicates that, *regardless of meeting substantial service obligations*, a license would be terminated if the licensee "fails to commence service or operations by the expiration of its the construction period..." That is, a license could be lost not only by failing to meet the substantial service threshold of service but also by providing no service at all during the construction period, which here was the license term. This would be consistent with the statutory scheme and court precedents. The Commission was therefore issuing a clear warning that providing no service at all could be fatal to the WCS licensees despite the waiver they had been granted.

⁴ *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd. 5662 (2007) ("*Merger Order*").

build-out requirements. *Id.* at Appendix F. Yet the Commission at the same time reiterated that WCS licensees like AT&T were required to demonstrate substantial service at renewal. Clearly, the Commission was well aware of what it was doing in both the December 2006 Order and the *Merger Order*: it was extending the build-out date while expressly advising WCS licensees that their status at renewal remained subject to whatever rules normally apply to renewals and renewal challenges. AT&T and all other WCS licensees were therefore fully apprised as early as 2007 that the Commission was expecting substantial service (in the renewal sense) to be demonstrated at renewal time regardless of the waiver granted in the December 2006 Order.

4. Finally, if any more evidence of the Commission's intent in the December 2006 order is needed, we have the clear articulation by the Chief of the Wireless Bureau of the very principle espoused by Joint Petitioners here: “[E]ven in instances where the Commission has granted waivers or extensions of construction requirements for periods extending beyond a licensee’s initial term, the licensee was subject to renewal requirements triggered by the its original license expiration date.” [citing the *WCS Order* as an example of this principle]. *Petition for Extension of Terms for 220-222 MHz Band Phase I Nationwide Licenses Held by Access 220 LLC*, 22 FCC Rcd 18508 (WTB, 2007).

All of these factors demonstrate that the WCS licensees could not reasonably have had any basis for belief that they had essentially either been granted a de facto extension of their license terms or had been guaranteed a renewal regardless of their compliance with governing minimal requirements for license renewal. The Commission kept advising them that exactly the opposite was true -- that they were not guaranteed anything and they would need to comply with normal renewal requirements. There is therefore no unfairness at all in the Commission actually enforcing the very measures which it repeatedly advised them it intended to enforce.

Joint Commenters recognize that application of the rules to the WCS licensees will work a forfeiture on some of them. But the Commission routinely and unceremoniously strips licensees of licenses when they fail to meet construction requirements. Usually this happens to small licensees rather than big companies like AT&T or Sprint or Nextwave -- a circumstance that sometimes causes the public to wonder if there is one law that applies to big companies and another that applies to small ones. That, of course, cannot be the case. Having failed to meet even the level Sub-mediocre Service necessary to justify renewal, the reprobate WCS renewals must be denied.

Respectfully submitted,

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