Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 27 of the Commission's Rules To Govern the Operation of Wireless Communications Services in the 2.3 GHz Band	)	WT Docket No. 07-293
	)	
Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 23100-2360 MHz Frequency Band	)	IB Docket No. 95-91 GEN Docket No. 90-357 RM-8610

To: The Commission

PETITION FOR RECONSIDERATION

Green Flag Wireless, LLC ("Green Flag"), CWC License Holding, Inc. ("CWC"), and James McCotter ("McCotter") (jointly, the "Petitioners") hereby petition the Commission to reconsider those aspects of the above-referenced order (the "WCS Order") that concern performance standards. As will be set forth below, the Commission's substantive standards are overly harsh and will prove counter-productive to broadband build out. In any case, new licensees should be afforded a somewhat longer period to accomplish build-outs given the 13 years which incumbents have already had to achieve the same thing. The Commission's apparent grant to incumbents of a *sub silentio* 3 ½ year extension of time to construct was unsupported, unsupportable, and failed to deal with the oppositions which had been lodged to the incumbents' actual extension requests. Finally, the Bureau's grant of an interim extension was *ultra vires* and unjustified.

I. The Performance Requirements Are Too Onerous

The Commission proposed new performance requirements for the WCS service in a last minute public notice released March 29, 2010. The performance requirements proposed there had nothing to do with the remainder of the issues at issue in Docket 07-293. That docket was generally concerned with the technical issues that had hung over the development of WCS and

terrestrial SDARS use for a decade. Out of the blue, the Commission suddenly proposed the most stringent performance rules ever imposed on wireless licensees. The industry had 15 days from the Federal Register publication date to comment and 14 days to reply. The Commission then adopted the captioned Order on May 20 – 17 days after the reply comment deadline. This unseemly haste in proposing, receiving comment on, and then evaluating momentous changes in this service was extraordinary, particularly given the more than ten years that the Commission has spent resolving the other issues regarding the SDARS/WCS spectrum.

The industry unanimously opposed the proposed benchmarks as being unprecedented and far too onerous. Commenters, including Petitioners, objected that the extent of the required build-out over the vast expanse of the United States was infeasible as a practical matter. Everyone also objected in particular to the unusual "death penalty" feature included in the proposal: if a licensee failed to meet the strict build-out obligations in the period allowed, it would lose its license and the entirety of its investment in infrastructure built out to date. All customers who were receiving service would be cut off, even if that meant denying service to millions of people and a loss of hundreds of millions of dollars in stranded investment.

The Commission responded to these comments by lengthening slightly the build out period from the original 30 months/60 months for 40%/75% coverage to 42 months and 72 months, respectively. Six years may seem like a long time to build out a nation-wide broadband system, but it is not. Note that the cellular rules took effect in 1982 and despite the enormous pent up demand for cellular, 75% of the country had not been reached by 1995. The Commission has presented no model and no business case that would support or justify so abbreviated a build-out period for new licensees. To the contrary, the facts adduced in the National Broadband Plan demonstrate that providing broadband service to the farthest reaches of the American population is a difficult task indeed. Yet the Commission seems to have taken the

position that simply mandating a build out in a certain period of time can somehow overcome all of the very real and practical obstacles involved. More specifically, the Commission erred in three significant respects which should be corrected on reconsideration.

A. Performance Metrics Contradict the Theory Under Which Spectrum is Auctioned

The very notion of a performance requirement is utterly antithetical to the Commission's oft-pronounced axiom that the auctioning of spectrum ensures that the spectrum is put into the hands of the licensee who will put it to its best and most productive use. "The Commission's rules presume that the entity that bids the most for a license in an auction is the entity that places the highest value on the use of the spectrum; such entities are presumed to be those best able to put the licenses to their most efficient use for the benefit of the public ...." *Morris Communications, Inc.*, 23 FCCR at 3179, 3194 ¶34 (2008); *Commnet Communications Network, Inc.* FCC Rcd 8612 (2007); *Tracy Corporation II*, 22 FCC Rcd 4071 (2007); *Lancaster Communications, Inc.* 22 FCC Rcd 2438 (2007); *Rapid Wireless, LLC.*, 22 FCC Rcd 1410 (2007). If this proposition is really true – and the Commission has relied on it repeatedly to justify its various auction-related policies[1] – there should be no need for performance benchmarks at all. The invisible hand of the market should be directing the licensees to wring the most from their spectrum by putting it to use as quickly as a reasonable return can be expected. To require them to deviate from those economic principles by building facilities and offering services that are not demanded by the market by definition results in economic waste. Economics 101 alone should dictate that performance-based requirements are not only unnecessary but actually counter-productive in allocating scarce resources – whether spectrum or cash – to meet economic needs. In other words, regardless of the benchmarks adopted, such

[1] Ibid.

artificial hurdles are in theory *not* likely to lead to the spectrum being put to its best and highest use by the people most motivated to do so. Only the market can do that.

B. The Situation of New WCS Licensees Must Be Distinguished From Incumbents Who Have Already Had Thirteen Years to Build Out

The Commission's performance rules fail to distinguish between new licensees and incumbents. As will be treated more fully below, the Commission has apparently given the incumbent licensees an additional 42/72 months to achieve the new build-out benchmarks.[2] This is on top of the 13 years that they have already had to build out their systems. Incumbents therefore have been allowed a minimum of 16 and a half years (!) to reach their first build-out benchmark. Sixteen+ years is an outrageous amount of time to let spectrum lie fallow, but that extraordinary allotment of time must be contrasted with the highly truncated time allotted to *new* WCS licensees. Petitioners have filed competing applications which are mutually exclusive with the renewal applications of the incumbent WCS licensees. We are confident that the Commission will, either of its own volition or at the insistence of the appellate courts, recognize that it must entertain and duly consider the comparative merits of these applications filed by Petitioners. Once these applications are granted, Petitioners will have only three and half years to construct 40% of a nationwide system. There is a basic unfairness to holding new licensees to a 42 month standard after having allowed incumbents more than 16 years to get to the same benchmark.

The equitable solution is to recognize that new licensees will be starting from scratch while the incumbents have had well over a decade already to plan, acquire equipment and arrange infrastructure. The Commission should therefore allow new licensees six years and ten years respectively to accomplish their 40% and 75% build-outs. This timeframe would still be

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[2] That the Commission intended such an effect is far from clear since the effect of dismissing the various build-out showings and extension requests was to cause the forfeiture of the incumbent licenses. See section III, *infra*.

much more rigorous than the original ten year time frame which applied to the service when Petitioners' applications were filed three years ago, while at the same time affording new licensees only a fraction of the time which has already allotted to the incumbents. Any other approach would be grossly unfair and ignore the lessons of history. In addition, such a requirement would avoid betraying the reasonable expectations of new WCS licensees that they would have a full ten years to achieve substantial service, as set forth in current Part 27 of the rules. By contrast, the incumbents have already had well over 13 years to achieve substantial service, so their expectations have been more than satisfied.

C. The Death Penalty Will Impede, Not Accelerate Broadband Build-Outs

Any circumstance in which a business enterprise is called upon to invest millions – and perhaps even hundreds of millions of dollars – with the risk that all of it could be forfeited due to factors beyond its control is a frightening one for the financial community. The riskier the venture, the less likely it is that the necessary capital will be invested, or if it *is* invested, the cost will be very high. The performance rules adopted by the Commission create the possibility, if not the likelihood, that WCS licensees will be caught in the situation of having deployed significant resources in an effort to meet the FCC's build-out rules but will come up short on meeting the rigorous benchmarks. For most licensees, build-out will be a massive financial and logistical undertaking equivalent in scope to building the pyramids. Experience teaches that equipment delays, tower issues, zoning and environmental issues will all conspire to prevent even the best laid construction plans from coming to fruition in the originally planned time frame. Yet the performance rules will hang over licensees like a Sword of Damocles; as the deadline approaches, we can expect sources of construction financing actually drying up because not only the financial community but equipment vendors and others will have no assurance that the licensee will be able to keep its license long enough to pay back the money already invested

or to be invested. All of this puts licensees under a triple whammy: they will have a harder time raising construction funds to begin with (and the cost of such funds will be higher than it needs to be); they will start to lose whatever sources of funding or credit they have as the short-term deadline draws near; and, because the deadline is so soon, they will not be able to fund later construction activity out of revenues because they will not have had sufficient time for significant revenues to develop. These factors all put a stranglehold on the WCS at the very moment in time when it should be permitted to thrive and grow rather than being clamped down by artificial constraints.

The Commission seems to feel that waivers will be available to handle the situation where thousands or millions of customers are receiving service on the day the deadline arrives with the population coverage percentages remaining unmet. While Petitioners would hope that the Commission would not pull the service rug out from millions of broadband customers, the possibility of a waiver can never be relied upon by anyone, especially the financial community, to justify continued investment. If a waiver would likely be available to prevent such a loss of service (as the Commission seems to strongly suggest), it makes far more sense to simply build that eventuality into the rules so everyone has something they can rely on. *I.e.*, if some percentage of service area population is receiving service, the licensee can retain at least that portion of its service area if it fails to achieve the extremely difficult overall goals.

We also note that, perversely, the build-out requirements effectively ensure that service to rural areas will be delayed. The need to demonstrate service to large percentages of their populations will drive licensees to build out the most populous parts of their service areas first because they do not have the luxury of bringing service to remote but less populated portions of their service areas. Those areas might actually need service more but, since they will not help in

the build-out equation, they will take a back seat. Again, the performance requirements will serve to defeat one of the very purposes they were intended to accomplish.

II. The Commission's Handling of the Existing Build-Out Showings is Unclear or Wrong

The Order leaves the state of the current build-out showings in a muddle. It is clear that the Commission dismissed as "moot" the pending requests for further extension of time to construct which had been filed by many WCS licensees. It is also clear that the Commission has dismissed as moot Petitioners' application for review of the previously accepted build-out showings of Horizon Wi-Com. These actions seem to imply that the Commission has effectively and *sub silentio* granted an extension of time to all of the WCS licensees to achieve substantial service. We reach this conclusion because one would think that if the Commission intended to effectively deny the extension requests and leave the licensees with two months to complete their build outs, it would have done so more explicitly. Also, the extension requests would not be "moot" if the present build-out deadline of July 21, 2010 remained in place.

On the other hand, if the Commission intended to grant a blanket three and a half year extension of a strict construction requirement, one would again think that it would have said that explicitly and would also have offered some justification for it. Instead it said neither – it simply adopted new build out requirements in lieu of the previous ones. It offered no rationale at all to justify an extension of the build-out period for incumbent licensees, despite its prior statements about the need for such licensees to stop warehousing and actually build out.[3] This is even more curious since the 42 month extension is more than any incumbent licensee had requested. It has the effect of giving them more than 16 and a half years to build out their systems in complete contravention of everything the Commission has said about the need for prompt build-outs and

[3] *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline*, 21 FCC Rcd 14134 (WTB 2006).

no warehousing. It becomes the most liberal build-out period ever established by the Commission rather than the most onerous. In so doing, the Commission also ignored the oppositions which Petitioners and Sirius XM had filed against the proposed extensions. By dismissing the extension requests (and the oppositions thereto) but then effectively granting them, the Commission attempted to relieve itself of any obligation to justify this bizarre action.

Whatever the Commission may have intended, it is at least clear that the Commission has not justified or explained in any way why the current incumbents should be granted an additional 42 months to achieve substantial service benchmarks that they have already failed twice to meet, despite having been given thirteen years to do so. Granting a further extension makes no sense and is inconsistent with the Commission's directive to the incumbents in 2006[4]. The Commission should therefore reconsider its blanket extension of time to incumbents to construct, if that is indeed what it granted, and hold the incumbents to the July 21, 2010 date established three years ago.

III. Ineffective Suspension of Substantial Service Deadline

The timing of the Commission's action on substantial service deadlines created a problem. The current deadline for incumbent WCS licensees to complete construction and provide service is July 21, 2010. Yet the Commission's Order seemingly extending the period to provide substantial service does not become effective until September 1, 2010 – well after the expiration of the deadline.[5] This left the incumbents with an effective deadline of July 21 – with automatic license forfeiture as a consequence – and no effective grant of an extension of time.

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[4] *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline*, 21 FCC Rcd 14134 (WTB 2006).

[5] The Order was not published in the Federal Register until August 2, 2010 and thus by its own terms did not become effective until September 1.

The Wireless Bureau apparently recognized this difficulty and purported to issue a Public Notice on June 29, 2010 absolving incumbents of the need to file substantial service showings until the new rules go into effect. *Wireless Telecommunications Bureau Advises 2.3 GHZ Wireless Communications Service Licensee That it Will Not Accept Substantial Service Performance Showings*, DA 10-1193, released June 29, 2010. The problem is that the Bureau exceeded its delegated authority in issuing the PN. The Public Notice itself indicates that it is issued "pursuant to the Commission's recent WCS Report and Order" (*i.e.*, the captioned Order) and pursuant to the Bureau's delegated authority in Section 0.131 of the rules. However, since the WCS Report and Order had not become effective at the time the Bureau issued the Public Notice, the Bureau had no more authority to rely on it than the licensees themselves. An ineffective Order cannot possibly be a basis for a delegated authority's power to take action. If that were the case, it would mean that a delegated authority can begin to apply an FCC order after it is released but before it is published in the Federal Register, even though the full Commission itself is required by law to await the 30 day publication period in the Federal Register.[6] This turns the concept of delegated authority upside down: a subordinate authority cannot do what the principal cannot do.

The Bureau offered no justification for the extension of time other than the adoption of the WCS Order. The Commission's policy has always been that extensions of time are not routinely granted, and in this case an extension of time had been duly opposed by Petitioners and XM-Sirius. Yet the Bureau offered no substantive basis for granting incumbents an extension and did not deal with the points raised by the oppositions at all.

The upshot is that the deadline set by the Bureau in *Consolidated Request of the FCC Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Rcd

[6] 5 U.S.C. Section 553(d).

14134 (WTB 2006) remained in full effect. In fairness to incumbents who may have relied on the Bureau's July 29 public notice, the incumbents should be allowed a brief window of time to file showings demonstrating the service that they were providing prior to July 21 but not including any additions to service which have occurred since then. Any licensees who fail to make such a showing should have their licenses terminated by operation of Section 1.946(c) of the rules.

IV. Conclusion

The Commission should reconsider (i) the application of the death penalty to WCS licensees who fail to achieve build-out benchmarks, (ii) apply a different build-out timetable to new WCS licensees as opposed to incumbents to account for the huge disparity in time that they will have had to accomplish full or partial build-outs, (iii) reverse the effective grant of an additional three and a half years of time to incumbents to partially build out their systems, and (iv) reverse the Wireless Bureau's grant of an interim extension of time based on application of an ineffective full Commission action.

Respectfully submitted,

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