

September 8, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: 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) -- WRITTEN EX PARTE PRESENTATION

Dear Ms. Dortch:

In the WCS Coalition's August 23, 2010 Opposition to the petition of Green Flag Wireless, LLC, CWC License Holding, LLC and James McCotter (collectively, "Green Flag") for reconsideration of the May 25, 2010 *Order* in this proceeding, the WCS Coalition cited to the decision by the United States Court of Appeals for the District of Columbia Circuit in *Hispanic Information and Telecommunications Network v. FCC* ("*HITN*")¹ for the proposition that the Commission may lawfully adopt the two-step renewal process proposed in the *Notice of Proposed Rulemaking* and may apply that process to pending applications for renewal of WCS licenses and competing applications.² Last week, Green Flag submitted a Consolidated Reply that, among other things, mischaracterizes the Court's decision in *HITN*. I am writing to set the record straight.

Green Flag would have the Commission view *HITN* as involving nothing more than a garden variety comparative hearing dispute, suggesting that the case arose from the Commission having "evaluated the pending mutually exclusive applications according to the comparative criteria it had established," determining "the winner based on that evaluation" and dismissing the other applications.³ However, that is not what occurred. To the contrary, there the Commission established a rule limiting eligibility for consideration during an initial processing round to a

¹ 865 F.2d 1289 (D.C. Cir. 1989).

² See Opposition of WCS Coalition to Petition for Reconsideration, WT Docket No. 10-112, at 17-18 (filed Aug. 23, 2010).

³ Consolidated Reply of Green Flag Wireless, LLC *et al.* to Oppositions to Petition for Reconsideration, WT Docket No. 10-112, at 13 (filed Sept. 2, 2010).

Marlene H. Dortch
September 8, 2010
Page 2

single class of applicants,⁴ provided for expanded eligibility to an additional class of applicants in a second round should licenses become available, and dismissed during the first round an applicant only eligible to file during the second round. And that is exactly what the Commission is proposing to do here with its two-step renewal system.⁵

The history behind *HITN* is relatively simple and straightforward. Concerned about the number of applications being submitted by nonlocal entities proposing to secure Instructional Television Fixed Service (“ITFS”) licenses, the Commission in 1985 adopted a new regulatory regime to govern ITFS licensing.⁶ The new approach established two classes of ITFS applications, local applications and nonlocal applications. A one-year “local priority period” was established during which a nonlocal applicant would be ineligible to secure an ITFS license. “During this [local priority] period . . . only local entities are eligible to apply for or receive ITFS authorizations.”⁷ The Commission made clear that “[n]o applications can be filed by nonlocal applicants prior to” the expiration of the one year local priority period and that “applications currently on file by nonlocal applicants will not be considered in effect during [that] period.”⁸ Following the one-year local priority period, nonlocal applications were eligible for consideration (although they were at a comparative disadvantage under the point system adopted to resolve competing ITFS applications after the local priority period expired).⁹

The *HITN* case arose out of the staff’s application of the Commission’s new approach to ITFS licensing to a specific case involving competing applications filed in 1984, before the rule change, by a local applicant and a nonlocal applicant. The staff did not engage in a comparative process, as Green Flag now claims. Rather, the staff recognized that the nonlocal applicant was

⁴ In the rulemaking leading up to *HITN*, the Commission restricted eligibility to local applicants, while here it is proposing to restrict eligibility during the first step of the two-step renewal process to the incumbents seeking license renewal.

⁵ There, for the second round, the Commission allowed nonlocal applicants to seek authorizations that were not claimed in the first round by local applicants, although nonlocal applicants would be at a competitive disadvantage under the point system used to compare applications during the second round. Here, the Commission is proposing to make competing applicants eligible to participate in a competitive bidding round, should the license not be retained by the incumbent.

⁶ See Amendment of Part 74 of the Commission’s Rules and Regulations In Regard to the Instructional Television Fixed Service, *Second Report and Order*, 101 F.C.C.2d 50 (1985) [“*ITFS Second Report and Order*”], on recon. Memorandum Opinion and Order, 59 Rad. Reg. 2d (P&F) 1355 (1986) [“*ITFS Licensing Reconsideration Order*”].

⁷ *ITFS Licensing Reconsideration Order* at 1358 (citation omitted). On reconsideration, the Commission specifically rejected claims that the ITFS local priority period would violate the rights of pending nonlocal applicants would violate *Ashbacker* and *Citizens Communications Center* because “[a]n ineligible applicant is not so entitled to a hearing. . . . and nonlocal entities are not currently eligible to receive new ITFS authorizations.” *Id.* at 1361 (citations omitted).

⁸ *ITFS Second Report and Order*, 101 F.C.C.2d at 58.

⁹ See *id.* at 69.

Marlene H. Dortch
September 8, 2010
Page 3

not eligible for consideration because a local applicant had filed prior to the expiration of the local priority period, and dismissed the nonlocal applicant. The full Commission affirmed upon finding that “the staff correctly found that [the nonlocal] application was not eligible for consideration with [the local] application.”¹⁰

The D.C. Circuit certainly did not view this as the garden variety comparative renewal case Green Flag suggests. Rather, the Court recognized that the Commission had changed its ITFS eligibility rules such that the nonlocal applicant was not eligible for consideration during the first round, and held that “[t]he filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed.”¹¹ Thus, the *HITN* decision provides strong support for the Commission’s proposed transition to two-step WCS renewal processing. The Court affirmed the Commission’s right to revise its eligibility rules to restrict initial eligibility to a single class, and to deem pending applicants that are not members of the class ineligible for consideration. As the Commission did with respect to ITFS, it is here proposing to limit eligibility during a first round of renewal processing to a single class of applications – incumbent licensees seeking renewal. And, just as the Commission deemed nonlocal ITFS applicants eligible to seek any available ITFS licenses after applications submitted during the local priority period were processed, the Commission here has proposed to deem non-incumbent competing applicants eligible to secure any available WCS licenses in a round commencing after the renewal applications are evaluated. The parallels are clear, as is the Commission’s legal authority to proceed along the lines outlined in the *Order*.

Pursuant to Sections 1.1206(b)(1) and 1.49(f) of the Commission’s Rules, this letter is being filed electronically with the Commission via the Electronic Comment Filing System. Should you have any questions regarding this supplement, please contact the undersigned.

Respectfully submitted,

/s/ Paul J. Sinderbrand

Paul J. Sinderbrand

Counsel to the WCS Coalition

¹⁰ Daytona Beach Community College, *Memorandum Opinion and Order*, 3 FCC Rcd 1951 (1988).

¹¹ 865 F.2d at 1294-95. Indeed, the Court specifically considered and rejected a claim by the nonlocal applicant that nonlocal applicants were eligible during the local priority period, but merely at a comparative disadvantage. *See id.* (“*HITN* as simply misread the *Reconsideration*. . . . We believe that the *Reconsideration* unequivocally reaffirmed the earlier decision to establish the local priority period, providing for ‘the processing and grant of pending and new applications by local entities without competition by nonlocal entities during that time and notwithstanding any mutually exclusive pending nonlocal applications.’”) (citation omitted).