

ORIGINAL

Before the  
Federal Communications Commission  
Washington, DC 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 )  
)  
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 )

WT Docket No. 10-112

FILED/ACCEPTED  
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Federal Communications Commission  
Office of the Secretary

To: The Commission

CONSOLIDATED REPLY TO OPPOSITIONS  
TO  
PETITION FOR RECONSIDERATION

Donald J. Evans  
Fletcher, Heald & Hildreth, PLC  
1300 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209

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## SUMMARY

Petitioners reply to the points raised by AT&T, Inc., Horizon Wi-Com, LLC and the WCS Coalition as follows:

The Petition for Reconsideration was timely because the Commission's May 25 Order was a rule of general applicability that was required by the Administrative Procedure Act to be published in the Federal Register but was not.

The grant of 3-year relief to incumbent WCS licensees to meet the build-out obligation did not in any way relieve them of the separate and distinct substantial service requirement necessary to warrant renewal. Not only is this a simple matter of distinguishing the two different obligations, but the Commission repeatedly put AT&T and other WCS licensees on notice that they would be expected to meet the normal renewal requirements.

The Court of Appeals has consistently held that the Commission cannot insulate incumbent licensees from renewal challenges, thus investing them with a kind of permanent property right in their licenses. While the Commission can adopt procedures that fairly open licenses to everyone, it cannot effectively guarantee a license to an incumbent without giving other applicants a chance to apply.

In the 1996 Act, Congress left undisturbed the well-established rule that renewal applications must be subject to competing applications. The fact that Congress changed the law so as to permit the elimination of comparative broadcast renewals strongly underscores the fact that such renewal challenges remain available for all other exclusive radio services.

Dismissal of some competing applications without comparative evaluation is simply an end-run around *Ashbacker*. The Commission may lawfully apply dispositive and rational public interest comparative criteria in a summary fashion, but it cannot dismiss otherwise qualified

applicants without considering the comparative merits of their applications. *HITN v. FCC* is in full accord with that principle.

A license renewal may not be granted without some level of service defined by the Commission as substantial. The grant of a challenged renewal in the absence even mediocre service would contravene not only 75 years of precedent but every recent objective of the Commission to encourage the fullest use of the broadband spectrum that is currently available. Grant of the incumbents' applications would reward exactly the behavior that the Commission condemns.

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Green Flag Wireless, LLC, CWC License Holding, LLC and James McCotter ("Petitioners") hereby submit this Consolidated Reply to the Oppositions filed by AT&T, Inc. ("AT&T"), the WCS Coalition, and Horizon Wi-Com, LLC ("Horizon") in the captioned proceeding.

**I. The Petition for Reconsideration was Timely**

Horizon lodges a preliminary objection to Petitioners' Reconsideration Petition on grounds of timeliness. Horizon's objection relies on the oddity that the Commission did not publish the full text of the Order adopted on May 25, 2010 (FCC 10-86) in the Federal Register but only those portions of the text that dealt with the Notice of Proposed Rulemaking part of the released document. Horizon's conclusion is that the release issued on May 25 was a licensing decision that did not require publication in the Federal Register. Because it was not published, the argument goes, its release date started the time for filing appropriate petitions, and a reconsideration petition would therefore have been due no later than May 24. Unfortunately, this analysis fails because the Commission itself did not apply the proper procedures.

The Commission's failure to publish the full text of the May 25 release in the Federal Register was both curious and ineffective. The omission was curious because one can imagine perplexed potential petitioners being unsure of whether to file appeals or petitions on May 24; if they filed on that date, the Commission could very well have later published the full text of the May 25 release in the Fed. Reg., which would have rendered any appeal fatally premature. (The Court of Appeals dismisses premature appeals as ruthlessly as late appeals.) By taking the odd course of not publishing the full text of its May 25 release, the Commission now is effectively obligating prospective litigants in other cases to file appeals 30 days after the release date of an Order rather than awaiting the normal publication in the Federal Register for fear that the

Commission will fake them out by never publishing in the Federal Register. This will result in much wasted time and effort before the court on appeals which are premature but can simply be re-filed when the proper notice is duly published in the Federal Register.

But more importantly for present purposes, the Commission was actually obligated to publish the full text of the Order in the Federal Register. The May 25 Order took no action on any application pending before the Commission; rather, it adopted a policy for the Wireless Bureau to follow in processing the pending applications. No applications have actually been dismissed or granted based upon the May 25 Order (other than Green Flag's application for Hawaii which was dismissed pursuant to Footnote 272 of the May 25 Order). There would be no basis for any affected applicant to seek either reconsideration or appeal of a Commission action with respect to any application because no actual action on an application has occurred. The May 25 Order cannot therefore be deemed a "licensing" action.

Because the Order did not act on applications but rather announced a rule or policy which is to govern action on applications in the future, the Administrative Procedure Act would characterize the Order as a "substantive rule[ ] of general applicability adopted and authorized by law" or a "statement[ ] of general policy." 5 U.S.C. Section 552(a)(1)(D). The APA requires that such rules or policies be published in the Federal Register for the guidance of the public. (*Id.*) *Anderson v. Butz*, 550 F. 2d 459 (D.C. Cir. 1977); *Appalachian Power Company v. EPA*, 566 F. 2d 451 (D.C. Cir. 1977). When an agency fails to publish such rules – no matter how denominated by the agency – the rules are unenforceable. If the Commission intends to apply the policy which it adopted in the May 25 Order, it must duly publish that Order in the Federal Register as required by law. In the meantime, Petitioners' Petition is certainly not late; if anything, it is early.

## II. The December 2006 Extension of Time Did Not Relieve WCS Incumbents of Renewal-Related Substantial Service Obligations

AT&T argues that in granting an extension of time to meet the substantial service requirements of Section 27.14(a), the Commission was implicitly and *sub silentio* also granting some sort of waiver of the different substantial service requirement necessary for renewal.

There are a multitude of reasons why this claim is incorrect, not the least of which being that the Commission expressly *declined* to grant the very relief that AT&T now says it understood to be granted. In this regard, Petitioners made the following points in their Reply Comments in this proceeding, but they bear repeating here.

1. The December 2006 Order Made Clear That the Extension Granted Would Have No Effect on Renewals. 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.<sup>1</sup> ("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) *Id.* at Para. 15. 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 meeting the build-out threshold.

2. Because the renewal-related substantial service requirement is different from the build-out-related substantial service obligation, an extension granted for the latter does not imply an extension of the former. To understand the present situation, it is important to distinguish the four levels of service which are in issue.

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<sup>1</sup> *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Rcd 14134 (2006). ("December 2006 Order")

- The first service level is that necessary to meet the build-out requirement of Section 27.14(a). Such service is defined as service which is "sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal." See Section 27.14(a) of the Commission's rules. For WCS licensees, the Commission laid out very clear guidelines and safe harbors to establish the service thresholds that would meet this test. The Commission relieved the WCS incumbents of the obligation to meet this build-out-related level of service for three years.
- The second level of substantial service is that necessary to earn a renewal expectancy in a comparative hearing. Section 27.14(b) establishes that level using the same language as that for the build-out threshold. However, it appears that the Commission intends to take additional factors into account beyond mere coverage in weighing the right to a renewal expectancy. These are laid out in 27.14(c) of the rules. In other words, the Commission set the bar fairly high for an incumbent who faced a comparative challenge since it would have to provide service substantially above mediocre to earn the decisive renewal expectancy. As Petitioners pointed out in their original Petition, there is nothing novel or harsh about this – the Court has very consistently required the Commission to demand some heightened level of service by an incumbent to merit a renewal expectancy in the face of a challenge.

- Third, implicit in the FCC's longstanding renewal expectancy standard is a third level of substantial service – the level necessary to justify a renewal *in the absence of* a comparative challenge. If there is a level service which is "sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal," then there must logically be a mediocre level of service which is enough to merit a renewal in the absence of challenge.
- Finally, if there is a level of service which might minimally warrant renewal, then there must be a level of service below mediocre which would *not* warrant renewal. 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 should preclude renewal of a license." *Citizens Communications Center v. FCC*, 447 F. 2d 1201, 1213 (D.C. Cir. 1971).

The key point here is that the WCS licensees could have met the basic renewal-related threshold of substantial service (mediocre service) without necessarily meeting the level of substantial service necessary to satisfy either the build-out obligation or a renewal expectancy. That build-out 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<sup>2</sup>, the Commission relieved the WCS licensees of the

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<sup>2</sup> *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Red 14134 (2006).

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 mediocre service that would have justified a renewal in the absence of a challenge. 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 mediocre. They could, for example, have provided service to 10% or maybe even 5% of their mobile populations and rightfully claimed that as mediocre service. In short, grant of the Commission's December 2006 Order was not at all inconsistent with an expectation of at least a mediocre level of service at renewal time.

3. If this point required elucidation, the full Commission provided it in connection with AT&T's merger with BellSouth. In its *Memorandum Opinion and Order*<sup>3</sup> 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 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

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<sup>3</sup> *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd. 5662 (2007) ("*Merger Order*").

*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 March, 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 repeatedly advised 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.

### III. Competing Applications Must Be Entertained

AT&T and the WCS Coalition argue that the Commission is not required to entertain competing applications, despite the clear directives of the Court of Appeals to the contrary. As we saw in Petitioners' original Petition, the Commission repeatedly tried to end-run the 309(e) comparative hearing requirement by different mechanisms, including the simple expedient of not accepting competing applications until the incumbent had been adjudged unworthy. In *Carlisle Broadcasting Associates*, 59 FCC 2d 885 (1976), relied on very heavily by the Court in *New South Media Corp. v. FCC*, 685 F. 2d 708 (DC Cir. 1982), the Commission expressly found that not permitting challenges to renewal applications "would appear to create a property right in (a) frequency beyond the contemplation of both Congress and the courts." *Carlisle* at 890. The *New South* court concurred that the Commission could not insulate incumbents from challenge by the expedient of delaying or simply not accepting challenging applications. Thus, both the Commission itself and the Court have recognized that the Commission cannot create a virtual property right in a license by forestalling renewal challenges; if a renewal application is filed, there must be an opportunity for a challenger to file too.

The exceptions cited by AT&T and the WCS Coalition are clearly distinguishable. In a "first come, first served" filing situation, everyone has an equal chance to apply for the license at issue and, of course, if two applications are filed on the same day then they are mutually exclusive. The open filing procedure guarantees a fair and equal opportunity by all to file. This is not the case where a renewal filing triggers the opening of a window during which challengers may file. Similarly, in the Pioneer's Preference situation, the Commission established a two track process that favored innovative companies while also ensuring that other spectrum was available for non-innovative applicants. The Commission there specifically relied on the fact

that there was a strong public interest imperative to "encourage innovation and more rapid delivery of new services and technologies to the public." *Establishment of Procedures to Provide a Preference to Applicants Proposing Allocations for New Services*, 8 FCC Rcd. 1659 (1993). The Commission was very mindful of the Court's observation in the ARINC case, *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991), that any exceptions to the comparative hearing requirement of *Ashbacker* must be limited to highly unusual circumstances.

At a minimum, we believe any such departure from the statutorily prescribed and judicially recognized practice of resolving mutually exclusive applications through comparative hearings must be premised on some truly compelling grounds that are special to the particular proceeding in which the Commission proposes to adopt a consortium procedure - otherwise, the Commission could impose a consortium requirement in every license proceeding involving multiple applicants, rendering the comparative hearing requirement a nullity.

*Id.* A routine license renewal proceeding - particularly one where the incumbents have a record of service that is less than mediocre - hardly qualifies. We also note that the Commission's pioneer's preference rules were never reviewed by the Court of Appeals, so we cannot conclude that even that procedure would have passed judicial muster.

In addition, AT&T observes at some length that the Commission may determine whether the mutually exclusive applications are bona fide or meet the basic qualifications necessary to apply. With this we have no quarrel; the Commission has always been able to require applicants to meet basic qualification standards necessary to apply for any license. Here, of course, there is no question that Petitioners meet those requirements and are *bona fide* applicants so the observation has no pertinence to Petitioners' applications.

Finally, AT&T attempts to distinguish the *New South* case, *supra*, as "extraordinary." The case was perhaps extraordinary in the complexity of the various inter-related proceedings that led the Commission to try to prevent new competing applications from complicating matters even further than they already were. The Court took serious issue with the fact that the

Commission's procedure there – preventing competing applications from being filed while it figured out how to handle the incumbent's misconduct – had the effect of permitting the reprobate licensee to continue operating for many years beyond the expiration of its license. In effect, the FCC rewarded the licensee's misconduct by permitting it to retain its license without challenge well beyond the time when its license should have expired. AT&T fails to see that this exact problem taints its own situation.

AT&T and the other WCS incumbents had 10 full years in which they did absolutely nothing with their licenses. The Commission rewarded them with an additional three years to meet the build-out obligation. Then in the SDARS proceeding,<sup>4</sup> the Commission effectively granted them an additional three and one-half years in which to build out. The incumbents will therefore have 16 ½ years to do nothing with their licenses. At the same time, in this proceeding, the Commission proposes to dismiss the competing applications which have already been filed, not entertain any other competing applications, and grant the renewal applications with no showing whatsoever that the incumbents provided substantial service – or any service at all – during the previous license term. The incumbents have therefore been rewarded for their dilatoriness with a "go home free" pass. This procedure constitutes precisely the evil that the *New South* Court decried: licensees who have failed to measure up to established renewal standards are actually being insulated from attack, creating the kind of vested property interest in the licenses which the statutory scheme abhors.

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<sup>4</sup> *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, FCC 10-82, released May 20, 2010.

#### IV. Pertinence of the 1996 Act

As we have seen, the D.C. Circuit Court of Appeals has taken the very strong and consistent view that the Section 309(e) of the Act, coupled with the *Ashbacker* case and the repeated injunctions in the Act that licenses are not a property interest<sup>5</sup>, guarantees a right to challenge incumbent licensees via a comparative hearing. This interpretation of the Act was applied with unvarying constancy through 1996 when Congress, at the behest of the broadcast industry, modified the law to eliminate comparative hearings for broadcast licensees only. By not modifying Section 309(e) of the Act, Congress deliberately left in place for all other licensees the well settled principle that comparative hearings were required in the case of a renewal challenge.

AT&T would have us believe that nothing can be deduced from Congress's limited action. To the contrary, the easy inference is that Congress understood, correctly, that the law for radio licensees precluded the Commission from foregoing comparative hearings on license renewals. The Commission had several times tried to adopt procedures that would eliminate the need for comparative hearings for renewal applicants, and in every case it was slapped down by the Court. *Citizens Communications Center v. FCC*, 447 F. 2d 1201 (D.C.Cir. 1971). Arising as it does from Section 309(e) of the Act, the hearing obligation applies to all radio licensees, not just broadcasters. Only by an act of Congress – which Congress did enact in 1996 – could the Commission stop holding the comparative hearings which the Act otherwise required. Since the 1996 amendment to the Act was limited only to broadcast licenses, we can only assume that Congress fully intended for the pre-existing hearing requirement to continue to apply to all other categories of licensee which it did not exempt from the hearing requirement. Otherwise the

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<sup>5</sup> See *Central Florida Enterprises, Inc. v. FCC*, 598 F. 2d 37, footnote 4 (D.C. Cir. 1979) for an extended treatment of the Act's prohibitions against entrenching licensees.

limitation of the amendment to broadcasters only would have been meaningless. See, for example, *Demarest v. Manspeaker*, 498 U.S. 184, 188 (1991) (holding that where a category of persons was expressly excepted in only one part of a statute, that category is not excepted in the remainder of the statute). For the Commission to now do away with comparative hearings thus flies in the face of what Congress must have intended by leaving the hearing requirement intact.

Both AT&T and the WCS Coalition point to the fact that the Commission had adopted a two-step procedure for cellular renewals, a fact of which Congress must be presumed to have been aware. In that regard, we note that (a) the FCC's two-step process was never reviewed by the Court for compliance with the *Ashbacker* and 309(e) requirements. It is not at all certain that the two-step process would pass judicial muster given the *Citizens Communications* case, *supra*.; and (b) the two-step process established for cellular does provide for the filing of competing applications. 47 C.F.R. 22.935. The Commission has not "abandoned comparative hearings," as AT&T erroneously declares. This contrasts with the procedure proposed by the Commission here where no competing applications would be allowed at all. Accordingly, the cellular rules offer no guidance at all as to whether the rules now proposed either meet judicial requirements or suggest some Congressional blessing of the elimination of competing applications.

#### **V. Dismissal of Competing Applications Does Not Comport With *Ashbacker***

AT&T and the WCS Coalition rather blithely suggest that because merely filing an application creates no vested rights, the Commission may avoid a comparative hearing by simply dismissing Petitioners' applications. Petitioners have already explained in their original petition why Section 27.321 of the rules offers no comfort to the incumbents. In the present circumstances, that rule could only be used to dismiss *their* applications since they have not provided the minimal mediocre level of service required to warrant a renewal. More

importantly, the suggestion that *Ashbacker* can be evaded by simply dismissing the disfavored application and thus eliminating the mutual exclusivity is absurd. That course would be even more outrageous than the action condemned by the Supreme Court in *Ashbacker*; at least there the Commission pretended that it was going to give the non-granted application some consideration. Assuming the competing applicant is basically qualified and eligible for the license being applied for, the applicant actually does have a "vested right" to be considered with the incumbent. That's what *Ashbacker* was all about.

The WCS Coalition argues that, because the Commission may change its application processing rules in mid-stream, it may simply dismiss the Petitioners' applications while retaining and granting the incumbents'. As Petitioners stressed in their original Petition, the Commission's flexibility to change procedures in mid-stream does not extend to dismissing some but not all of the pending applications. There is no case where the Commission has ever done that, and obviously no court has ever blessed a procedure which would seem to violate *Ashbacker* on its face.

In this regard, the WCS Coalition's reliance on *Hispanic Information and Telecommunications Network, Inc. v. FCC*, 865 F. 2d 1289 (D.C. Cir. 1989) ("*HITN*") is sorely misplaced. There the Commission adopted licensing rules which gave a dispositive preference to local applicants. The Commission then evaluated the pending mutually exclusive applications according to the comparative criteria it had established, declared the local applicant the winner based on that evaluation, and dismissed the losing applications. It did not simply dismiss an entire category of mutually exclusive applications with no comparative evaluation. *HITN* simply stands for the proposition that once the Commission has adopted comparative criteria, it need not

consider other factors which it has already determined to be non-dispositive in a meaningless hearing. Petitioners have no argument with that.

A proper analog to the situation we have here would be if the Commission decided that it was going to give a dispositive comparative preference to incumbents who have done nothing or virtually nothing with their applications, and on that basis dismiss the mutually exclusive non-incumbents. That would accord with the *HITN* procedure but would also, of course, be irrational, arbitrary, capricious, and violative of some thirty years of FCC and circuit precedent. The comparative criteria which the Commission establishes and applies to the mutually exclusive applicants must pass the public interest smell test. The adoption of a dispositive preference for local applicants clearly passed that test in *HITN*; a dispositive preference for incumbents who have provided no service at all during their ten year term clearly would not.

On the other hand, Petitioners suggested in their comments in the NPRM in this proceeding that diversification of ownership of broadband licenses should be a key comparative factor in evaluating mutually exclusive WCS applications. No commenter objected to or opposed that suggestion. Petitioners would have no objection to a procedure like that applied in *HITN* where the Commission simply and quickly evaluated the incumbents and the challengers based on who has less existing spectrum in the particular market. As proposed by Petitioners, an applicant with less than 25 MHz of spectrum in a given license area would be summarily preferred over a licensee with more than that. The spectrum-rich applicant would be dismissed and the other application granted. Since the benefits of increased competition, new

entry, promoting small businesses, and promoting innovation are all served by such an evaluative procedure, it would likely be sustained by the Court under the *HITN* precedent.<sup>6</sup>

#### **VI. Renewal Requires Some Mediocre Level of Service**

The WCS Coalition argues that the Commission can make a public interest finding that would support renewal of the incumbents' applications in the absence of any service whatsoever. First, this proposition is totally at odds with the dictate of the *Citizens Communications Center* court, *supra*, that an incumbent must have provided substantial service (however the Commission defines it) to justify a renewal. No service does not do it. The grant of a renewal to a licensee who has done zero with its license in ten years would also be utterly inconsistent with 75 years of Commission precedent. There is no recorded case in which the Commission has granted a renewal to a licensee who has failed to put its license to any use whatsoever, and for good reason: the Commission has consistently placed the highest priority on licensees actually using their licenses. If they are not being used, the Commission without exception takes the license away and gives it to someone else. Apart from these legal objections to the WCS Coalition's suggestion, the fact is that some WCS licensees actually did do something with their licenses prior to 2007. The hurdles which the WCS Coalition posits as being bars to usage of the spectrum were obviously not so high that some licensees could not overcome them. Since it is an established fact that the spectrum was indeed usable during the license term, the incumbents' failure to do so is inexcusable and should not be condoned by a renewal unprecedented in FCC history.

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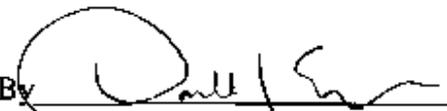
<sup>6</sup> To qualify for comparative evaluation on this basis, an incumbent would obviously have had to have provided at least mediocre service, as explained in Section II above. Without that it cannot qualify for renewal at all.

**VII. The Commission Should Grant Petitioners' Applications Promptly**

AT&T and the WCS Coalition complain that their renewal applications have been in limbo for three long years. At least their applications have been accepted for filing. Having sat on their licenses for ten years, and having then requested a further three year extension of time to build out, the incumbents can hardly complain with a straight face about being in limbo. Their track record of putting this valuable spectrum to use is abysmal. It is high time that the Commission give Petitioners an opportunity to put the spectrum to the new, immediate and innovative use which they plan. This is exactly the sort of changing of the guard in the public interest that the Communications Act and the Courts envisioned by not vesting any permanent rights to a license in any licensee. Renewal must be earned, the incumbents have failed to earn it, and somebody new should therefore be given the chance to do a better job.

Respectfully submitted,

GREEN FLAG WIRELESS, LLC  
CWC LICENSE HOLDING, INC.  
JAMES MCCOTTER  
NTCH-CA, INC.

By   
Donald J. Evans

Fletcher, Heald & Hildreth, PLC  
1300 North 17<sup>th</sup> Street, 11<sup>th</sup> Floor  
Arlington, VA 22209  
703-812-0400

Their Attorney

September 2, 2010

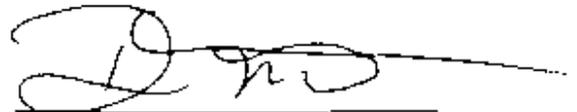
## CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the law firm of Fletcher, Heald & Hildreth, PLC, hereby state that a true copy of the foregoing CONSOLIDATED REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION was sent by first class mail, postage prepaid, this 2<sup>nd</sup> day of September, 2010, to the following:

Robert Vitanza  
Gary L. Phillips  
Paul Mancini  
Arnold & Porter LLP  
555 Twelfth Street, NW  
Washington, DC 20004  
*Counsel for AT&T, Inc.*

Thomas Gutierrez  
Lukas, Nace, Gutierrez & Sachs, LLP  
1650 Tysons Boulevard  
Suite 1500  
McLean, VA 22102  
*Counsel for Horizon Wi-Com, LLC*

Paul J. Sinderbrand  
Robert D. Primosch  
Travis E. Litman  
Wilkinson Barker Knauer, LLP  
2300 N Street, NW  
Suite 700  
Washington, DC 20037-1128  
*Counsel for The WCS Coalition*

A handwritten signature in black ink, appearing to read 'D. N. Lunt', written over a horizontal line.

Deborah N. Lunt