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July 16, 2012

VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 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; 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

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; IB Docket No. 95-91; GN Docket No. 90-357; RM-8610

Written Ex Parte Presentation

Dear Ms. Dortch:

On July 12, 2012, Michael Goggin, Jim Talbot and the undersigned of AT&T Inc. and David Lawson of Sidley Austin LLP met with Jane Jackson, Kathy Harris, Richard Arsenault, Clay DeCell, Roger Noel, and Linda Chang of the Wireless Telecommunications Bureau and David Horowitz and Andrea Kearney of the Office of General Counsel. At that meeting, we discussed proposals for addressing regulatory uncertainty in order to encourage investment in and deployment of broadband wireless services over WCS spectrum.

There is near-universal recognition that much more spectrum needs to be devoted to mobile broadband services, and the Commission is appropriately looking to underutilized WCS spectrum to help fill this gap. The uncertainty created by the conditional renewal status of WCS licenses and the still-pending competitive applications for those licenses, however, is a major obstacle to that goal. More than two years ago, the Commission issued a *Notice of Proposed Rulemaking* ("Notice")¹ proposing, *inter alia*, to dismiss the competing applications and remove the cloud this regulatory uncertainty casts over the substantial investments that will be necessary

¹ *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, & 101 to Establish Uniform License Renewal, Discontinuance of Operation, & Geographic Partitioning & Spectrum Disaggregation Rules & Policies for Certain Wireless Radio Servs.*, Notice of Proposed Rulemaking and Order, 25 FCC Rcd. 6996 (2010).

to make full use of WCS spectrum for mobile broadband services. The Commission has ample legal authority to implement this proposal, and it may do so in advance of the other issues in the *Notice*. Accordingly, AT&T Inc. and its WCS subsidiaries (collectively “AT&T”) urge the Commission to promote its core broadband policies by (1) severing the issues relating to the WCS licenses from the other issues in WT Docket No. 10-112, (2) issuing a Report and Order that establishes an interim rule that governs WCS renewal applications and that precludes the filing of competing WCS applications, (3) dismissing pending competing WCS applications, and (4) granting unconditional renewal to current WCS licensees where appropriate.

The *Notice* makes clear the Commission’s “concern[] about the uncertainty that a long-standing ‘pending’ renewal application can create within the Wireless Radio Services,” and “recognize[s] the importance of resolving this proceeding in a prompt manner.”² To be sure, the Commission granted conditional renewals to existing licenses that face competing applications, but it recognized that those grants would “mitigate [only] some of the uncertainty” surrounding such authorizations.³ It has now been nearly five years since the WCS renewal applications were filed, and it is critically important that the Commission take prompt action to lift the cloud of uncertainty hanging over these licenses and thereby foster the substantial investments needed for robust mobile wireless deployments in the WCS band.⁴

The Commission proposed comprehensive rule changes in the *Notice* that would eliminate that uncertainty on a permanent basis. Under the proposed rules, the Commission would shift the method of allocating licenses for almost all mobile wireless services to an entirely new process of renewal applications, petitions to deny and reassignment by competitive bidding if the incumbent fails to satisfy the renewal requirements, and, as a consequence, the Commission would prohibit the filing of competing renewal applications for WCS and other Wireless Radio Services licenses.⁵ The Commission also proposed to dismiss all *pending* mutually exclusive applications for such services once the new rules become effective.⁶

In proposing these changes, the Commission recognized that competing applications have become extremely ill-suited for allocating and renewing licenses for today’s mobile wireless

² *Id.* at 7039 ¶ 113.

³ *Id.* (emphasis added).

⁴ See *Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, & 101 to Establish Uniform License Renewal*, WT Docket No. 10-112, *Ex Parte* of WCS Coalition at 1 (filed Jul. 26, 2011) (“continued uncertainty given the conditional nature of recent WCS license renewals . . . has made it difficult for licensees and potential lessees or assignees to move forward with investment in the band.”); WT Docket No. 10-112, *Ex Parte* Presentation of CTIA at 3 (filed Nov. 10, 2010) (“the uncertainty created by conditional grants likely would chill investment.”); WT Docket No. 10-112, Comments of Sprint Nextel Corporation at ii (filed Aug. 6, 2010) (contending that a lack of clear standards in a renewal process would “discourage rather than encourage innovation and investment in new facilities and services”); see also *Amendment of Part 27 of the Comm’n’s Rules to Govern the Operation of Wireless Commc’ns Servs. in the 2.3 GHz Band*, WT Docket No. 07-293, et al., AT&T Inc. Petition for Partial Reconsideration at 13 (filed Sept. 1, 2010).

⁵ *Id.* at 7012 ¶ 40.

⁶ *Id.* at 7034 ¶ 100.

broadband providers. As the Commission explained, “the comparative renewal process can result in protracted litigation that may be unduly burdensome for an incumbent licensee and strain available Commission resources.”⁷ It makes no sense for a renewal applicant “to devote considerable resources to defend its authorization against competing applications” when it could be using those resources “to improve service to the public.”⁸ More importantly, the renewal process creates crippling uncertainty: “the public interest is ill served if a renewal applicant must operate under a cloud of litigation.”⁹ And, as the Commission recognized, the burdens and uncertainties of the comparative renewal process are made worse by “strike” applications filed for “possible anticompetitive purposes, to harass an applicant, or to exact a payoff.”¹⁰ The Commission reiterated that “even ‘weak applicants who may have a very slim chance of prevailing can file no-risk, no-cost [competing renewal] applications because they are virtually assured of recovering at least attorney’s fees and costs for dismissing their applications.’”¹¹ “The comparative renewal process was never intended to invite such abuse, and specious challenges needlessly drain Commission resources and disserve the public interest.”¹²

Based on these conclusions, the Commission posited that a petition to deny was a far better mechanism for determining whether to renew a license for the mobile broadband services at issue. A petition to deny “affords interested parties an appropriate mechanism to challenge the level of service and qualifications of licensees seeking renewal.”¹³ If for some reason an existing licensee is unable to make the necessary renewal showing, the Commission found that the public interest would be best served by opening the spectrum to all interested parties and auctioning the spectrum to the highest bidder, rather than giving a single applicant or limited number of applicants the opportunity to compete for spectrum through comparative hearings.¹⁴

These conclusions were eminently sound, and the public interest would be significantly furthered if the Commission resolves the pending WCS renewal applications and dispels the cloud of uncertainty *completely* with respect to those particular licenses. With certain rule changes, as recently proposed by AT&T and Sirius/XM, WCS spectrum can be used for wireless broadband services,¹⁵ but even in the best case scenario it will take years of planning,

⁷ *Id.* at 7012 ¶ 40

⁸ *Id.*

⁹ *Id.* at 7012-13 ¶ 40 (footnotes omitted).

¹⁰ *Id.* at 7013 ¶ 42.

¹¹ *Id.*

¹² *Id.* at 7013 ¶ 42 (footnotes omitted).

¹³ *Id.* at 7012 ¶ 41.

¹⁴ *Id.* at 7014 ¶ 43.

¹⁵ AT&T and Sirius/XM recently submitted a joint proposal for Commission rule changes that would allow WCS licensees to use that spectrum to offer LTE services, and the Commission should adopt that proposal expeditiously. See Letter from Joan Marsh, AT&T, and James S. Blitz, Sirius/XM, to Marlene H. Dortch, FCC, WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90-357, dated June 18, 2012; see also *Amendment of Part 27 of the Commission’s Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, et al.*, Report and Order and Second Report and Order, 25

investment, and deployment activity before services can be commercially offered using that spectrum.¹⁶ The uncertainty surrounding these licenses should be resolved before licensees begin committing the resources necessary to undertake those activities.

For these reasons, even if the Commission is not yet ready to complete the larger rulemaking adopting final rules governing the allocation and renewal standards for Wireless Radio Services, it should promptly and permanently resolve the status of the WCS licenses. Accordingly, the Commission should expeditiously adopt an interim rule tailored to the specific circumstances affecting WCS spectrum. It is well established that the Commission has the ability to act on severable issues in the *Notice* now and resolve the other issues later.¹⁷ It is also well-established that the Commission receives an extra degree of deference from reviewing courts when adopting interim rules that provide a stop-gap solution to pressing problems while the Commission continues to consider the more comprehensive issues in a larger rulemaking.¹⁸ Thus, the Commission can address the competitive renewal issues now and free existing WCS licensees from the shadow of uncertainty created by the competing applications.

Specifically, the Commission should adopt an interim rule for WCS services that has many of the same features of the final rule the Commission has proposed. The rule would fundamentally change the current method of allocating WCS licenses from a system of

FCC Rcd. 11710, ¶ 5 (2010) (WCS band lacks “a permanent regulatory framework” largely due to the “difficulty of resolving potential interference among the proposed operations of SDARS and WCS licensees in a manner that will permit the two services to co-exist”).

¹⁶ Even after the Commission makes the changes to its WCS technical, service and performance rules that are necessary to facilitate LTE deployments in that band, the industry will need years to develop the necessary LTE standards for that spectrum band, design and manufacture the necessary equipment and devices, and deploy the network facilities. Letter from Joan Marsh, AT&T, to Marlene H. Dortch, FCC, WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90- 357, dated June 15, 2012.

¹⁷ The Commission has clear authority to sever these WCS-related issues and resolve them independently of other issues raised in the *Notice*. Section 4(j) of the Communications Act gives the Commission the ability to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice,” 47 U.S.C. § 154(j), and the Commission has relied on that provision to sever complex and difficult proceedings into phases, *see Am. Tel. & Tel. Co. Revisions to Tariff F.C.C. No. 259, Wide Area Telecomms. Serv.*, Memorandum Opinion and Order, 86 F.C.C.2d 820, 826 (1981); *see also, e.g., Inquiry into Policies to Be Followed in the Authorization of Common Carrier Facilities to Meet Caribbean Region Telecomms. Needs During the 1985–1995 Period*, Report and Order, 3 FCC Rcd. 97, 100 ¶ 24 n.12 (1988); *U.S. Telecom Assoc’n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (“Although the FCC failed to resolve an impairment question pressed by the CLECs in this Order, the Commission need not address all problems in one fell swoop. The FCC generally has broad discretion to conducive to the efficient dispatch of business and the ends of justice. So long as the FCC’s decision to postpone consideration of the transiting issue doesn’t result in unreasonable delay or impose substantial hardship on the CLECs—which hasn’t been shown here—the Commission’s choice to organize its rulemaking docket in this way is lawful.”).

¹⁸ *See, e.g., MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984) (substantial deference by courts is accorded to an agency when the issue concerns interim relief); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 616 (5th Cir. 2001).

competing applications for renewal to a system in which, if the incumbent's license is not renewed, the spectrum reverts to the Commission for reassignment.¹⁹ Under this scheme, "competing renewal applications [would be] prohibited,"²⁰ and the Commission would dismiss the competing applications upon adoption of the interim rule.

The specifics of the interim rule could take one of two forms. First, the Commission could simply proceed along the lines it has already proposed in the *Notice*. For purposes of these interim rules, the Commission would adopt the same renewal regime for WCS spectrum that currently applies to 700 MHz.²¹ Although the Commission has proposed in the *Notice* that incumbent licensees would make somewhat different showings to obtain a renewal expectancy, at this stage of the proceeding the Commission should just adopt the established 700 MHz rules on an interim basis rather than attempting to justify a brand new standard. Such an interim approach would in no way pre-judge those issues with respect to the final rules. The Commission has already proposed in the *Notice* that if it adopts this sort of change in regime, it will at that time dismiss all pending competing applications and remove the condition on the renewal of the existing licenses.²² The Commission would take the same approach here: upon adoption of this interim rule, it would dismiss the competing applications and remove the condition on the renewals.

Alternatively, the Commission could adopt a somewhat different interim rule and apply it immediately. Under this second option, once the interim rule becomes effective the Commission would begin again on a clean slate. It would dismiss all of the competing applications and require incumbents to refile under the new rules. Incumbents would continue to hold their licenses during the pendency of such proceedings pursuant to the conditional grants they now have, and the Commission would make a new determination as to whether the incumbent could obtain a renewal for the remainder of the license term. Interested parties would be permitted to file petitions to deny.²³ In any instance in which an incumbent's license is not renewed, those filing petitions to deny, along with any other interested party, could participate in the reassignment of that spectrum through competitive bidding.²⁴

Under this second option, however, consistency under the APA would require the Commission to modify (solely on an interim basis) the showing required for renewal. Specifically, the interim rule for WCS would provide that, in light of the unique circumstances applicable to WCS spectrum – in particular, the impediments to the use of WCS spectrum for

¹⁹ See *Notice* ¶¶ 16-17.

²⁰ *Id.* ¶ 17.

²¹ See 47 C.F.R. § 27.14(e) ("Comparative renewal proceedings do not apply" to licensees holding authorizations for such spectrum, and "[e]ach of these licensees must file a renewal application in accordance with the provisions set forth in § 1.949, and must make a showing of substantial service, independent of its performance requirements, as a condition for renewal at the end of each license term").

²² See *Notice* ¶ 100 & n.273.

²³ *Id.* ¶¶ 40-42.

²⁴ *Id.* ¶ 41.

mobile services under the rules in effect during the license term – the Commission would not require the traditional substantial service showing in order to obtain a renewal expectancy. In other words, although the renewal application would, as the Commission, proposed in the *Notice*, provide details of the applicant’s use of the spectrum during the initial assignment period (as well as information regarding regulatory compliance, character and other aspects of the renewal showing contemplated in the rules proposed in the *Notice*), the Commission would not require a substantial service showing for this initial renewal proceeding. The Commission would have abundant justification for adopting such a provision on an interim basis.

The Commission has previously found that the lack of a permanent regulatory framework for WCS “impeded the development of WCS equipment” and services desired by customers.²⁵ In 2006, the Commission found good cause to extend the section 27.14 build-out deadline until July 21, 2010, because of the overwhelming technical problems WCS licensees faced in trying to make use of the spectrum and the effective impossibility that the WCS licensees could demonstrate substantial service within their initial license terms.²⁶ Three years after the initial license terms had passed, the Commission again postponed the build-out deadline,²⁷ finding that “many of the [regulatory] uncertainties [that had prevented growth and deployment of WCS services]. . . still exist[ed].”²⁸ Throughout their initial license terms, then, the WCS licensees have faced obstacles beyond their control to making effective use of the spectrum and earning a traditional renewal expectancy, and, as noted, regulatory obstacles created by the WCS technical, service and performance rules remain even today.

Moreover, as the Commission has also found, enforcement of unrealistic build-out and service requirements in this context would have a number of negative consequences and would be contrary to the public interest. As the Commission noted in the *WCS Extension Order*, holding licensees to such requirements would create counterproductive incentives, because otherwise “many if not all [WCS licensees] would build sub-optimal, stop-gap systems intended simply to preserve their licenses.”²⁹ The Commission correctly concluded “that the public interest would be ill-served by compelling WCS licensees to devote their resources to the construction of stop-gap legacy systems merely to meet the July 21, 2007 construction deadline rather than consumer demand,”³⁰ and the same is true here. Equally important, after allocating this spectrum by auction, it would be fundamentally unfair for the Commission now to decline to renew those licenses on substantial service grounds when it is the Commission’s own rules that

²⁵ *Consolidated Request of the WCS Coalition for Ltd. Waiver of Construction Deadline for 132 WCS Licenses*, Order, 21 FCC Rcd. 14134, 14139-40 ¶ 10 (WTB 2006) (“*WCS Extension Order*”).

²⁶ *Id.* at 14139-41 ¶¶ 9-13.

²⁷ *2010 WCS Order*, 25 FCC Rcd. at 11787-99 ¶¶ 188-224 (replacing former substantial service requirements with new performance requirements to be met within 42 months (i.e., by March 4, 2014) and 72 months (i.e., by September 1, 2016)).

²⁸ *Id.* at 11723 ¶ 27.

²⁹ *WCS Extension Order*, 21 FCC Rcd. at 14140-41 ¶ 12.

³⁰ *Id.*

create obstacles to the provision of such service.³¹ Participants in future auctions would be reluctant to make substantial bids for spectrum known to face near-term deployment challenges if the Commission sets a precedent for taking that spectrum away when such challenges make satisfaction of initial build-out projections impossible.

Accordingly, consistency with these prior conclusions and basic fairness would require the Commission to recognize these realities and make clear that renewal applicants can attain a renewal expectancy under the interim rule without a traditional substantial service showing. Once the Commission completes the larger rulemaking proceeding establishing the renewal standards for all Wireless Radio Services, future applications for renewal of WCS licenses will be governed by whatever standards the Commission adopts in the final rules, including applicable substantial service requirements.

The Commission has ample legal authority to take these pro-consumer steps to address the regulatory uncertainty that has discouraged investment in the WCS band. The competing applicants have claimed that dismissal would be improper on the theory that they have an absolute entitlement to comparative consideration under the *Ashbacker* doctrine,³² but that claim is incorrect. The D.C. Circuit has held that when the Commission fundamentally changes its method of spectrum assignment by rule, it may dismiss competing applications filed under the prior comparative hearing regime.³³ For example, in *Hispanic Info. & Telecomms. Network, Inc. v. FCC*, the court held that the Commission's dismissal of a non-local party's pending application after the Commission changed the rules to limit applicants for new ITFS licenses during a one year period to local educational broadcast licensees did not violate *Ashbacker*.³⁴ Similarly, in *Bachow Commc'ns, Inc. v. FCC*, the court held that the Commission's dismissal of all pending competing applications upon the adoption of a scheme of competitive bidding was permissible under *Ashbacker*.³⁵ The same result would apply here: the Commission's interim rule would establish an entirely new renewal scheme and as these cases make clear, *Ashbacker* does not preclude the Commission from applying that newly adopted scheme to pending

³¹ See, e.g., *Time Warner Entm't Co., L.P. v. FCC*, 144 F.3d 75, 81-82 (D.C. Cir. 1998) ("We do not look sympathetically to the Commission playing 'gotcha' either."); *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628-632 (D.C. Cir. 2000) (holding that due process bars the Commission from denying a renewal application without having provided the licensee with "fair notice" and "ascertainable certainty" of the Commission's interpretation of its rules); *Applications of Parkrell Broad., Inc., Prescott, Ariz.; S.W. Broad. Co., Prescott, Ariz. for Construction Permits*, Memorandum Opinion and Order, 59 F.C.C.2d 811, 814 ¶ 7 (1976) (refusing to interpret the Commission's instructions so as to set a trap for the unwary).

³² *Ashbacker Radio Corp. v. United States*, 326 U.S. 327 (1945).

³³ E.g., *Hispanic Info. & Telecomms. Network, Inc. v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989) ("*HITN*"); *Bachow Commc'ns, Inc. v. FCC*, 237 F.3d 683, 686 (D.C. Cir. 2001); *Maxcell*, 815 F.2d 1551 (D.C. Cir. 1987); *United States v. Storer Broad. Co.*, 351 U.S. 192, 197 (1956).

³⁴ *HITN*, 865 F.2d at 1294-95.

³⁵ *Bachow*, 237 F.3d at 686 ("the Commission reasonably feared that processing mutually exclusive applications under an antiquated and burdensome comparative application system would diminish the efficiency gains from competitive bidding").

applications.³⁶ That conclusion would be even more clear under the second option, which would also require all parties to immediately submit new filings in accordance with the new standards.

Thus, the fact that the competing applicants here already have applications on file is irrelevant. It is well-settled that the filing of an application does not create a vested right against a change in the rules mid-stream, and therefore the Commission has ample authority to dismiss the competing applications here once the new, interim rule becomes effective.³⁷ The Commission has already indicated that it “will dismiss all pending mutually exclusive applications” if it adopts new rules like those proposed in the *Notice*, and the same result should apply if the Commission adopts the interim rules proposed here.³⁸

In fact, the Commission would be on even stronger ground in dismissing these competing applications for WCS licenses than it was in previous cases. The Commission’s method for allocating WCS licenses has always been a bit of hybrid. The Commission initially allocated the licenses by competitive bidding – not by comparative hearing. Although it established a procedure for comparative hearings to determine who should hold these licenses on renewal,³⁹ the rules governing WCS licenses from their inception have *also* included Rule 27.321(b), which provides that “[a]n application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest.”⁴⁰ In other words, the method for allocating WCS licenses has always been essentially a competitive bidding scheme that gives the Commission the *option* to use comparative hearings on renewal if it believes that such a method would serve the public interest. Given that the competing applicants were never guaranteed an *Ashbacker* comparative hearing process even under the existing rules, the Commission would have an especially strong basis for dismissing these applications if it adopts the interim rules proposed here.

In sum, the Commission has the authority and the discretion to dismiss the competing renewal applications and to remove the condition of the existing renewals. The public interest requires that the Commission do so now to allow WCS licensees to deploy WCS systems to help meet the public’s demand for new and innovative broadband wireless services.

³⁶ See also *Bachow*, 237 F.3d at 691 n.10 (“[t]he right to a hearing recognized in *Ashbacker* applies only in a comparative application system . . . it does not apply when licenses are allocated by lottery or auction”).

³⁷ E.g., *Bachow*, 237 F.3d at 687-88; *HITN*, 865 F.2d at 1294-95 (“[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”).

³⁸ See *Notice* ¶ 100 & n.273 (citing *HITN*, 865 F.2d at 1294-95; *Melcher v. FCC*, 134 F.3d 1143, 1164-65 (D.C. Cir. 1998); *Chadmoore Commc’ns, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997)).

³⁹ 47 C.F.R. § 27.14.

⁴⁰ 47 C.F.R. § 27.321(b).

Marlene H. Dortch, Esq.

July 16, 2012

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In accordance with Commission rules, this letter is being filed electronically with your office for inclusion in the public record

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'J' and 'M' followed by a horizontal line.

Joan Marsh

cc:

Jane Jackson

Kathy Harris

Richard Arsenault

Clay DeCell

Roger Noel

Linda Chang

David Horowitz

Andrea Kearney