

LAW OFFICES
GOLDBERG, GODLES, WIENER & WRIGHT
1229 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036

HENRY GOLDBERG
JOSEPH A. GODLES
JONATHAN L. WIENER
LAURA A. STEFANI
DEVENDRA ("DAVE") KUMAR

HENRIETTA WRIGHT
THOMAS G. GHERARDI, P.C.
COUNSEL

THOMAS S. TYCZ*
SENIOR POLICY ADVISOR

*not an attorney

(202) 429-4900
TELECOPIER:
(202) 429-4912

e-mail:
general@g2w2.com
website: www.g2w2.com

July 31, 2012

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

Written Ex Parte Communication

Dear Ms. Dortch:

Snapline Communications LLC ("Snapline") by its attorneys, hereby submits this response to the *Written Ex Parte* Presentation of AT&T, dated July 16, 2012 (the "AT&T Letter"), wherein, *inter alia*, AT&T urges the Commission to adopt new "interim" rules retroactively to be applied so as to dismiss competing applications filed by Snapline and other parties for WCS spectrum.

Given the Commission's reluctance to consider additional pleadings in this proceeding, Snapline questions whether the *ex parte* process is the appropriate forum for airing the issues involving these competing applications and the comparative

qualifications of the relevant parties.¹ Nonetheless, to balance the record, Snapline must address the more egregious mischaracterizations of the record and internally conflicting statements in ATT's presentation. Snapline also notes the extraordinary irony that AT&T would seek to rely upon the fact of this country's shortage of broadband capacity as justification for giving it years more time to make use of WCS spectrum which it and others have allowed to lie fallow 15 years after being initially licensed, all the while staving off competing applications from those seeking to make use of this valuable spectrum.

AT&T's proposed retroactive changes in the rules governing the processing of competing applications directly conflicts with its position in this and other proceedings. AT&T's argues that the Commission need not trouble itself with due process concerns that would be raised by retroactively changing its rules so as to deny consideration of pending competing applications. This argument must be contrasted with the position taken earlier in this proceeding by AT&T that: "if the Commission intends to apply new renewal rules to currently pending renewal applications, ... such action would raise primary retroactivity concerns and violate fundamental principles of due process."² AT&T's position regarding the Commission's ability to change its rules midstream is equally at odds with the position that *it took on the very same day* that the Commission may not impose new interoperability requirements on existing licensees of auctioned spectrum, as such a retroactive change would violate the rights of existing auction winners.³ The underlying principle of AT&T's pleadings seems to be that retroactivity is not a concern, unless the rules in question benefit AT&T, in which event the rules should be deemed inviolate.

There is nothing "interim" about rules that would deny consideration of pending competing applications nor do cases involving fundamental changes in the criteria used to assess the relative merit of competing applications support dispensing with the consideration of pending competing applicants in favor of incumbent licensees. There is no merit to AT&T's assertion that the courts would grant the Commission greater deference in the dismissal of pending competing applications if somehow cast as a form of "interim" relief.⁴ There would be nothing "interim" about

¹ In its *Notice of Proposed Rulemaking and Order* in the above-captioned proceeding, 25 FCC Rcd 6996 (2010) ("*Notice*"), the Commission stated that it would not permit parties to file additional pleadings or correspondence regarding the pending competing applications. *Notice* at ¶ 102. Given AT&T's filing and what appear to be multiple meetings with the Commission's staff on the subject, Snapline assumes that this restriction is no longer operative.

² Reply Comments of AT&T, WT Docket No. 10-112 (August 23, 2010).

³ Reply Comments of AT&T Services Inc., WT Docket 12-69, Promoting Interoperability in the 700 MHz Commercial Spectrum (July 16, 2012), at 57-62.

⁴ AT&T Letter at 4-6.

the permanent dismissal of the competing applications of Snapline and other parties. Further, AT&T's argument on this point is completely at odds with its assertion two pages later in its Letter that such dismissal might be justified as a necessary consequence of some total sea change in Commission policies governing the consideration of competing applications.⁵ In fact, when laid bare, AT&T is suggesting neither some form of "interim" relief nor the kind of across the board change in Commission policy which would apply equally to all competing applicants, including incumbents, for which the limited precedent allowing retroactive effect might arguably apply. Rather, AT&T simply wants competing applications dismissed so that incumbents such as itself will not have to face consideration as to whether the public interest would be better served by granting such licenses to competing applicants. Neither Commission nor judicial precedent supports such a retroactive change in the Commission's rules.

There is no dispute as to the need for more spectrum to be devoted to mobile broadband services or that what AT&T describes as "underutilized WCS spectrum" (unused would be more accurate) is desperately needed to help full this gap.⁶ But this public interest does not justify keeping such spectrum in the hands of those who have sat on such spectrum for 15 years without putting it to use. Snapline is in complete agreement with AT&T as to the need for WCS spectrum to be put to use to address this country's immediate needs for more spectrum to be used for the delivery of mobile broadband services. That need was recently highlighted by Commissioner McDowell's statements that "[i]t looks like we're at a point where we have little or no federal spectrum going to auction in the near term" so that [i]n the meantime it's very appropriate for us to talk about imaginative ways to squeeze more efficien[cy] out of the airwaves."⁷

Particularly in times of spectrum shortage, it is not in the public interest for valuable spectrum to be unused and essentially warehoused while immediate needs for more broadband spectrum remain unmet. Yet, that is exactly what AT&T and other incumbent WCS licensees have done for the past 15 years. Even now, AT&T states that "in the best case scenario it will take years of planning, investment and deployment activity before services can be commercially offered using this spectrum."⁸ And then, in a remarkable turn of logic, AT&T suggests that, because the licensee incumbents for this spectrum have done nothing with it for fifteen years and are not even at the stage of developing its use, Commission should ease their way by disposing of competing

⁵ *Id.* at 7-8.

⁶ *Id.* at 1.

⁷ Communications Daily (July 20, 2012).

⁸ AT&T Letter at 3-4.

applications from those seeking to make use of the spectrum. AT&T blithely explains that it is the “cloud” of these competing applications that have discouraged such development.⁹ How, among other things, that explains the first 10 years of inactivity AT&T does not explain.

At bottom, what clearly must concern AT&T is that if and when the Commission comes to assessing the comparative merits of the competing applicants for the WSC licenses at issue, the fact that AT&T has made no use of the spectrum for which it was licensed and has done nothing to justify the grant of a renewal expectancy is not in its favor. That AT&T is such a dominant player in the mobile broadband market¹⁰ and, therefore, unlike a new entrant, might be content to sit on such spectrum waiting for its value to increase and keeping it from the hands of potential competitors might be another reason for it to avoid comparative consideration. Such good cause for AT&T to want to avoid comparative consideration is not, however, a basis for adopting the “interim” rules that it proposes.

⁹ *Id.* at 1-2.

¹⁰ See *Order, Applications of AT&T and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, DA 11-1955 (Nov. 29 2011).

Marlene H. Dortch, Esq.

July 31, 2012

Page 5

Snapline respectfully submits that AT&T and other incumbent WCS licensees have been given long enough to put WCS spectrum to use. It is time for others who years ago filed competing applications for such spectrum to be given the opportunity to do so.

Respectfully submitted,

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive style with a large, prominent "H" and "G".

Henry Goldberg
Jonathan Wiener

Attorneys for
Snapline Communications LLC

cc:

Jane Jackson
Kathy Harris
Richard Arsenault
Clay DeCell
Roger Noel
Linda Chang
David Horowitz
Andrea Kearney
Joan Marsh