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Secretary
Federal Communications Commission
445 12th Street, SW
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Re: WT Dockets 10-112 and 07-293

Dear Ms. Dortch:

This letter responds on behalf of Competing Applicants¹ to the ex parte notification submitted by AT&T, Inc. on July 16, 2012 summarizing the substance of AT&T's presentation to Commission staff on July 12. As will be set forth below, AT&T's proposals are both contrary to law and contrary to the public interest. Rather than clarifying the current situation, the proposal would muddy the waters further, overturn a half century of settled law on renewal expectancies, and set a dangerous precedent in support of spectrum warehousing. The proposal would also prevent Competing Applicants from having the opportunity granted by the rules and guaranteed by the Communications Act to demonstrate that their proposed ownership and use of the WCS spectrum would serve the public significantly better than AT&T's. Thus, while Competing Applicants agree that this matter should be resolved expeditiously, that resolution should not be accomplished by simply sweeping AT&T's and the other incumbents' derelictions as licensees under the rug and ignoring the competitive fresh air that would enliven the national broadband market if Competing Applicants become licensees of this long vacant spectrum. Indeed, had no challenges to AT&T's renewals been filed, there is little doubt that this spectrum would have continued to lie fallow while AT&T and the other incumbents continued to seek further delays of the build-out timetable. Instead of going down the unprecedented path suggested by AT&T, the Commission should adopt the comparative criteria which have been

¹ Competing Applicants are Green Flag Wireless, LLC, James McCotter, and CWC License Holding, Inc./Corr Investments I, LLC, each of which has filed a competing application against an AT&T-affiliated WCS licensee.

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proposed in this rulemaking proceeding and promptly designate the applications for a comparative hearing as required by the rules and longstanding precedent.

1. The thrust of AT&T's presentation to the Commission's staff seems to have been an effort to circumvent both the existing rules adopted by the Commission to handle precisely the situation that has arisen and the sixty-odd years of precedent establishing that incumbents may not simply be granted a renewal in the absence of substantial service. Instead, AT&T adopts an attitude of *prima facie* entitlement to the WCS spectrum and invites the Commission to join with it in devising a scheme to eliminate the irksome complication of competing applications. It is critical that the Commission be disabused of this entitlement premise at the very outset of its consideration of the AT&T presentation. In *every single judicial precedent* on the question of eligibility for license renewal, the D.C. Circuit has ruled that an incumbent licensee which does not provide substantial service during its license term has no claim whatsoever to a renewal expectancy. In the absence of a renewal expectancy, AT&T's renewal applications have exactly the same status as Competing Applicants': they each have an equal right to be considered and they must be considered at the same time. Competing Applicants have set forth in various comments and submissions the incontrovertible law on this point², so there is no need to repeat those precedents here.

The right to equal treatment is not merely a legal nicety that must give grudging obeisance. AT&T did absolutely nothing with these licenses during the license term. There are no equitable or other considerations that should give a regulator pause in stripping a do-nothing incumbent of its license. Indeed, in AT&T's case, the Commission *explicitly* warned it that it would be expected to meet the ordinary criteria applicable to renewal applicants despite the three year extension that was granted in 2006.³ Despite these warnings, AT&T has established a solid record of simply sitting on the spectrum that it owns, while at the same time (i) acquiring more spectrum and (ii) constantly bemoaning its shortage of spectrum. In evaluating the T-Mobile merger, the Commission seemed to recognize for the first time that bigger is not necessarily better, and that AT&T, with its long history of monopolization and anti-competitive behavior, is not necessarily the best steward of America's precious spectrum resources. The Commission must not let the AT&T brand and size conceal the woeful record of spectrum waste which AT&T has left in its wake. There is no reason for the Commission to feel any more empathy for AT&T here than it would for the numerous smaller licensees who have failed to meet substantial service deadlines, who have offered song and dance excuses about market uncertainties that impeded them from constructing, and who have nevertheless been ruthlessly held by the Commission to the letter of the law. Stated otherwise, AT&T has done nothing to justify the Commission's bending, twisting or outright ignoring its own rules and the controlling precedents of the Court. It deserves to be treated no better and no worse than any other competing applicant for a new license.

² See, for example, Competing Applicants' October 22, 2010 Petition for Reconsideration of the FCC's Conditional Grant of Renewals, their August 6, 2010 Petition for Reconsideration, and their September 21, 2007 Response to AWACS.

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

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2. AT&T appears to have cast oblique – or not so oblique – aspersions at Competing Applicants’ motives in filing their competing applications, suggesting that continued processing of their applications would somehow promote greenmail or other abusive filings. To the contrary, Competing Applicants filed with every intention of competing for and winning these licenses. Competing Applicants are all owner-operated businesses. Unlike AT&T, which uses its vast funding resources to acquire and eliminate competitors, Competing Applicants have had to survive the old fashioned way – by low prices, good service and attention to customer needs. Green Flag’s principals, for example, have successfully constructed and developed telecom tower resources across the nation, then branched out into successfully offering competitive, low cost, high quality wireless service when they saw important market niches that the majors were ignoring. CWC License Holding’s principals are part of a long time family-owned telecommunications company in Alabama that successfully built out a cellular system from scratch and served wireless customers in its home territory for more than twenty years. These companies are the epitome of the community-oriented, diversified, small-business carrier base that the Commission so often gives lip service to but rarely does anything to foster.

The opportunity to file for the WCS licenses presented a unique opportunity for a smaller company to acquire a large 30 MHz swath of broadband spectrum. In the auction scenario, only the giants of the industry have the resources to acquire a band of this size and breadth. Despite Congress’s injunction that small businesses and competing businesses should get access to auctioned spectrum,⁴ the auction dynamic usually leaves the small carriers with just the dregs of the most desirable spectrum. This case presents the Commission with a once-in-a-lifetime opportunity to award a spectrum band to a smaller entity without running afoul of the auction statute. The spectrum so awarded can then be made available by Competing Applicants on reasonable terms to other small carriers across the United States. Green Flag’s principals have consistently advocated spectrum allocation policies that will make it possible for smaller carriers to get the spectrum they need to compete. They have every intention of putting this spectrum to use quickly, widely, fairly, reasonably, and competitively. If anything, their need for the spectrum and their incentives to deploy promptly are far greater than those of the spectrum-rich incumbents who have plenty of other spectrum at their disposal which they have warehoused for years. Competing Applicants do not have the luxury of being able to sit on spectrum for 16 and ½ years like the incumbents have.

Of course, the suggestion that the potential for greenmail should be a basis for preventing all challengers from filing competing applications is spurious. Renewal challenges in the common carrier context are as rare as hens’ teeth. The undersigned can only think of a handful in the more than 30 years he has been practicing. And in each case, the challenge has been brought for good reason: either the incumbent was guilty of heinous misconduct that should disqualify it from licenseeship under any circumstances, or it did nothing with its license and a new licensee deserved a chance. Because these circumstances rarely arise, the opportunity for a sane challenge to a renewal applicant is extremely uncommon, and when it does occur, the Commission should actually be *encouraging* rather than discouraging a new applicant. These are precisely the circumstances when a change is called for in the public interest.

⁴ 47 USC Section 309(j)(3)(B).

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3. The D.C. Circuit which exclusively reviews the Commission's licensing actions has repeatedly rebuffed the Commission for attempting to protect incumbents by deferring renewal challenges, by limiting the ability of challengers to file competing applications, or by somehow skewing the renewal process so that challengers have virtually no chance to prevail. AT&T has apparently recognized that if the Commission applies the hearing procedures which Section 27.14(c) of the rules prescribe, it will lose. That is why it is suggesting that the Commission ignore or change the rules that were in place when it and the Competing Applicants filed their applications. How can this be viewed as anything but a transparent attempt to change the rules in the middle of the game? When you can't win by the rules, get the regulators to change them. Such a course would not only be grossly unfair to Competing Applicants but unlawful. The Commission can change its comparative process in mid-stream if it has a compelling reason to do so, but it must treat all affected applicants the same. To simply change the rules in order to guarantee that one of the competing applicants wins is the very essence of arbitrariness and could not possibly withstand judicial review.

The Court's mandates in this regard track the Commission's own fundamental policy on the subject. There is perhaps no statement of FCC law more venerable than the principle that "substantial service is service which is sound, favorable and substantially above a level of mediocre service which just might minimally warrant renewal." This bedrock formula undergirds all renewal case law and has guided the Commission's renewal policy for at least sixty years. Without repeating our discourse on this subject in other filings in this Docket, we will only observe that if this formula is to make any sense whatsoever, it *must* mean that there is some level of service below mediocre which is so poor that no renewal at all would be warranted. The Commission would have to renounce sixty years of policy to now find that *no* service is actually a sufficient level of service to justify renewal. Yet that is what AT&T is suggesting.

4. The foregoing principles of law make it unlawful, not to say bad policy, to adopt the "interim" measures proposed by AT&T in its *ex parte*. Although AT&T's alternative options for interim rules are not entirely clear, it appears that under one option the Commission would somehow adopt the renewal rules proposed in the pending renewal NPRM on an interim basis. The interim rules would be adopted permanently when the NPRM is resolved generally. In the meantime, however, Competing Applications would have been permanently dismissed and AT&T's renewal applications would have been unconditionally granted. There is nothing "interim" about that outcome for the applicants who would have received the death penalty. And why should the Commission apply an "interim" renewal processing rule to WCS applicants when it obviously has not yet decided whether such a rule should apply to renewals generally? Of course, AT&T did not even bother to address how this approach meets any of the requirements of the law that incumbents not be improperly vested with licenses permanently. It's just a roadmap to getting AT&T's licenses safely granted without regard to anything else.

If anything, because there are pending mutually exclusive applications in the WCS service (unlike other services), the obvious solution is not to try to change the rules for this service radically in mid-stream but rather to proceed to process those applications under the rules that exist right now. That solution meets the expectations of all parties, is equitable, duly applies the rules under which all mx applications were filed, satisfies all Court concerns about the proper handling of renewal applications (and would thus be immune from challenge in Court), and gives

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Competing Applicants a fair opportunity to demonstrate that the public interest will be better served by their stewardship of this long fallow spectrum. The only thing this approach does *not* do is guarantee that AT&T keeps licenses that it has consistently refused to put into service.

AT&T's second option is murky, but it seems to involve dismissing all pending applications, including both the Competing Applications and AT&T's pending renewal applications. Once AT&T's applications were dismissed, it would immediately lose the right it now has under Section 307(c)(3) of the Act to continue operating whatever facilities it is now operating. (Even if it immediately refiled, it is not clear that continued operating authority would be available under the statutory scheme.) The plan contemplates that the conditional grants of licenses that AT&T now enjoys would continue in effect even after the application that was conditionally granted had been dismissed. We do not see conceptually how a dismissed application could be the basis for a grant of anything, conditional or otherwise. The idea seems to be to try to put AT&T in the position that it would have been in five years ago if the Commission had adopted the rules it is now contemplating back then. While the Commission has many powers, it cannot travel backwards in time to create retroactively a scenario that did not then exist.

To make this plan work, AT&T recognizes that it must also get the substantial service standard changed retroactively so that its failure to construct or operate during the 1997 – 2007 license term cannot be held against it. In addition to time travel, this feature of the plan requires the Commission to effectively disclaim everything it has previously said about how the extension of the build out period granted in 2006⁵ did not in any way relieve WCS licensees of their obligations to meet applicable renewal standards.⁶ Again, all of this legerdemain is nothing more than a transparent attempt by AT&T to escape the consequences of its failure to meet clearly enunciated standards applicable to WCS licensees. And also again, there is no reason why the Commission should even consider going through these unlawful contortions to save a licensee from its own derelictions when perfectly innocent applicants who have abided by the rules fully stand ready to provide service without any need to turn the rules upside down.

In addition to the patent unlawfulness and unfairness of the AT&T proposals, they are just plain bad policy. The Commission has adopted stringent substantial service rules in most wireless services and is contemplating adopting such requirements across the board. While these rules apply not to renewals but to substantial service build-

⁵ *Consolidated Request of the WCS Coalition for Limited Waiver of Construction Deadline for 132 WCS Licenses*, 21 FCC Rcd 14134, Para. 15 (2006) (“*WCS Extension Order*”)

⁶ *Ibid.* “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.” The request for conditional grant of WCS renewal applications was likewise expressly rejected, yet AT&T’s new approach effectively contemplates precisely that. See also *AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd. 5662 (Pare. 182) (2007) (“*Merger Order*”). where the Commission advised AT&T that it would be expected to meet then applicable renewal standards when its WCS renewals came due. In both respects, AT&T is effectively seeking a grossly untimely reconsideration of the Commission’s 2006 actions.

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out showings, the precedent would have been established that licensees (especially the largest licensees) will not have to meet the requirements of the rules but will be excused by whatever retroactive hocus pocus is needed to let them maintain their licenses. “Technological uncertainty,” “pending rule changes,” and “difficult market conditions” will always be factors that laggard licensees can point to in attempting to justify a failure to meet the requirements of substantial service. Similarly, a licensee can always wait until the 11th hour of its license term and then complain that it should not have to throw up inefficient facilities just to meet regulatory requirements. Yet there is no excuse for having waited to the 11th hour in the first place. If the Commission grants the relief requested by AT&T, it will have undercut its rigorous substantial service requirements before they are even adopted.

5. AT&T continues to rely on 47 CFR Section 27.321 for the principle that no comparative hearing is required if the Commission finds that such a comparison is not in the public interest. The difficulty with this argument is that by law, in the absence of a renewal expectancy, the renewal applications and the competing applications are equal. Since AT&T provided no substantial service at all over its license term, and the license term is the only period that can be considered in adjudging renewal, there is no rational way that the Commission could prefer AT&T over the Competing Applications based on past performance. Since a lottery or an auction is not available for renewal applications, there is no way other than a comparative hearing based on forward-looking criteria for the Commission to make a fair or reasonable award to one of the applicants.⁷ Moreover, Competing Applicants have previously pointed out that, if Section 27.321 were able to be invoked at all, it would have to be invoked *against* rather than in favor of AT&T. Since, as explained above, both the Court and the Commission have consistently required some level of service to justify renewal, AT&T cannot possibly be granted a renewal. There is therefore no need to go through the motions of a comparative hearing that must necessarily result in the denial of AT&T’s renewal applications.

6. AT&T also suggests that the Commission should grant a further extension of time to WCS licensees to construct their facilities in accordance with the new substantial service standards adopted in Docket 07-293. This suggestion illustrates perfectly why these licenses are now a good fifteen years into their lives without serious construction or operation ever having been undertaken. The Commission has adopted an unprecedentedly forgiving attitude toward these licensees. First it gave them a full ten year license term to engage insubstantial service. Then in 2006 it granted them a generous three year extension of the build-out deadline, solemnly instructing them:

We expect WCS licensees to take advantage of this relief and aggressively develop equipment and service options for the 2.3 GHz band. The extension of the construction deadline until July 21, 2010, is intended to give WCS licensees additional flexibility to develop and deploy services based on opportunities available to them *in the near future*.

⁷ One possibility used in the Mobile Satellite Service was to force all competing applications to form a consolidated entity which would then hold the license. There is no indication that either AT&T or Competing Applicants would want this option.

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(Emph. added) (*WCS Extension Order*) That injunction was generally ignored. Instead, most of the incumbents returned three years later asking for yet another extension based largely on the same grounds they had asserted before. The Commission, while dismissing that request and the oppositions thereto, effectively granted it by giving the incumbents yet *another* three and a half years to meet their build-out requirements. Having now been given a whopping 16 and a half years to initiate operations, AT&T wants – surprise! – still more. And all of this comes at a time when the Commission is widely bemoaning the lack of available broadband spectrum. In short, the Commission has to put a stop to this never-ending cycle of repetitive extension requests for this service and actually insist that the licensees use their spectrum. Anything else would simply underscore the lengths to which the Commission is willing to bend over backwards to grant extraordinary favors to this group of incumbents.

Competing Applicants are willing to accept and meet whatever reasonable build-out obligations the Commission establishes. A period of one-third of the time already allotted to the incumbents should be more than adequate to accomplish a nationwide build-out, especially since we expect to make the spectrum readily available on economical terms to other small competing carriers or perhaps even to the public at large.

7. Finally, Competing Applicants take this opportunity to express their general support for the compromise technical solution which AT&T and Sirius XM submitted to the Commission on June 18. While severely limiting the utility of the C and D blocks for mobile service, the compromise should permit both parties to operate without interference concerns. Competing Applicants believe that their service plans and objectives can be generally met within the technical parameters proposed by AT&T and Sirius XM, which also make the band more suitable for LTE operations. As noted above, however, Competing Applicants do not believe that an extension of time should be granted to the incumbents in connection with this change in the technical rules. Sixteen and half years is enough.

Sincerely,

/s/

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