

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,	)	WT Docket No. 10-112
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	)	
	)	

To: The Commission

**PETITION FOR RECONSIDERATION OF  
CTIA – THE WIRELESS ASSOCIATION®, AT&T SERVICES, INC.,  
CRICKET COMMUNICATIONS, INC., RURAL CELLULAR ASSOCIATION,  
SPRINT NEXTEL CORPORATION, T-MOBILE USA, UNITED STATES CELLULAR  
CORPORATION AND VERIZON WIRELESS**

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August 6, 2010

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**INTRODUCTION AND SUMMARY**

Pursuant to Section 1.429 of the Federal Communications Commission’s (the “Commission”) rules, CTIA – The Wireless Association®,<sup>1</sup> AT&T Services, Inc., Cricket Communications, Inc., Rural Cellular Association,<sup>2</sup> Sprint Nextel Corporation, T-Mobile USA, United States Cellular Corporation, and Verizon Wireless (“Petitioners”) respectfully submit this

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, and AWS, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> RCA is an association representing the interests of nearly 90 regional and rural wireless licensees providing commercial services to subscribers throughout the Nation and licensed to serve more than 80% of the country. Most of RCA’s members serve fewer than 500,000 customers.

Petition for Reconsideration of the Commission’s Order in the above-captioned proceeding involving harmonization of wireless license renewal standards and other requirements.<sup>3</sup>

In the Order, the Commission, without seeking public comment and as an interim license renewal procedure, directed the Wireless Telecommunications Bureau (“WTB”) to conditionally grant all license renewal applications filed prior to the release of final rules in this proceeding, subject to the outcome of the proceeding.<sup>4</sup> As discussed below, this aspect of the Order should be rescinded, and license renewal applications filed prior to the issuance of final rules in this proceeding should be granted, where appropriate, without condition. Conditional grant of license renewals constitutes impermissibly retroactive agency action in violation of the Administrative Procedure Act (“APA”) and well established court precedent, because it subjects past conduct to an as-yet undefined, future legal standard, and threatens to penalize licensees for failure to meet that standard – even though licensees could not possibly have known what that standard is during their past license term. Conditional grant also casts an unnecessary cloud over literally thousands of licenses, which is likely to chill investment in the wireless sector, disrupt sound and viable business plans, and interfere with achievement of the Commission’s policy goals for the wireless marketplace. Finally, as CTIA demonstrates in comments being filed in this proceeding, the new license renewal procedures proposed in the NPRM are seriously flawed and should not be adopted after the Commission reviews the record in this proceeding. Accordingly, the Commission should withdraw its interim license renewal application processing

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<sup>3</sup> *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*, Notice of Proposed Rulemaking and Order, 25 FCC Rcd 6996 (2010) (“NPRM” and “Order”).

<sup>4</sup> Order at ¶ 113.

procedures and instruct the WTB to process license renewal applications consistent with existing rules while the proceeding is pending.

## **I. THE DECISION TO CONDITIONALLY GRANT LICENSE RENEWALS AT THIS STAGE CONSTITUTES IMPERMISSABLE RETROACTIVE RULEMAKING**

The Commission's decision to conditionally grant license renewals at this stage constitutes impermissible, retroactive rulemaking in violation of well established Supreme Court precedent. As the Court in *Bowen v. Georgetown University Hospital*<sup>5</sup> made clear, "[r]etroactivity is not favored in the law."<sup>6</sup> In its later *Landgraf v. USI Film Products* decision, the Court further explained that:

[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.<sup>7</sup>

In addition, the *Landgraf* opinion noted that "the [Constitution's] Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not

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<sup>5</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219-20 (1988) (Scalia, J., concurring in the judgment).

<sup>6</sup> *Id.* at 208.

<sup>7</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994) (citing *Dash v. Van Kleeck*, 7 Johns. \*477, \*503 (N.Y.1811) ("It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C.J.); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, A Theory of Retroactive Legislation, 61 *Texas L. Rev.* 425, 471 (1982) ("The rule of law ... is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"))).

suffice' to warrant its retroactive application.”<sup>8</sup> Likewise, the D.C. Circuit has commented that, “[w]hen parties rely on an admittedly lawful regulation and plan their activities accordingly, retroactive modification or rescission of the regulation can cause great mischief.”<sup>9</sup>

In *Bowen*, Justice Scalia’s concurring opinion concluded that the APA, 5 U.S.C. § 551 *et seq.*, prohibits retroactive rulemaking actions. Justice Scalia noted that the 1947 Attorney General’s Manual on the APA (to which the Court has “repeatedly given great weight”) stated that all rules “must be of *future effect*, implementing or prescribing future law.”<sup>10</sup> The Manual explains that:

[T]he entire Act is based upon a dichotomy between rule making and adjudication.... Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations.... Conversely, adjudication is concerned with the determination of past and present rights and liabilities.<sup>11</sup>

Retroactive agency decision-making thus raises serious legal and policy implications that should not be dismissed cavalierly by the Commission.

Under applicable judicial precedent, retroactive agency decision-making can be impermissible in two ways: First, agency decisions that are primarily retroactive (*i.e.*, decisions that alter the past legal consequences of past actions<sup>12</sup> or “impose[] new duties with respect to transactions already completed”<sup>13</sup>) are impermissible unless specifically permitted by statute.<sup>14</sup> Second, agency decisions that are secondarily retroactive (*i.e.*, decisions that affect the future

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<sup>8</sup> *Landgraf*, 511 U.S. at 266 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)).

<sup>9</sup> *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-46 (D.C. Cir. 1986).

<sup>10</sup> *Bowen*, 488 U.S. at 218.

<sup>11</sup> *Id.* at 218-19.

<sup>12</sup> *See id.* at 208.

<sup>13</sup> *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997).

<sup>14</sup> *See Bowen*, 488 U.S. at 208.

legal consequences of past or ongoing actions<sup>15</sup>) are impermissible if not reasonably related to an expressed agency goal.<sup>16</sup> In this case, the Commission’s decision is impermissible under both retroactivity standards.

*Primary Retroactivity.* First, the conditional license renewal grants will subject some owners of renewed licenses to the possibility that their license renewals will be rescinded in the future for failure to comply with license renewal standards of which they were not aware and could not have been aware (and with which they could not comply) prior to seeking license renewal. This could occur despite the fact that the licenses would have been renewed without conditions under the existing license renewal standards. This situation raises a clear case of primary retroactivity – *i.e.*, thus contemplates a change in the legal consequences of past actions taken by the licensees in deploying their networks and imposes new duties with respect to transactions already completed – and is impermissible in the absence of statutory authority.

In *Bowen*, the Court recited the long-standing principle that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.”<sup>17</sup> In that case, the Court held that the retroactive application of a rule by the Secretary of Health and Human Services was invalid because the governing statute – in that case, the Medicare Act – contained “no express authorization for retroactive rulemaking,” nor was there any other indication of

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<sup>15</sup> See *Celtronix Telemetry, Inc. v. F.C.C.*, 272 F.3d 585, 588 (D.C. Cir. 2001).

<sup>16</sup> See *Bowen*, 488 U.S. at 220 (Scalia, J., concurring); *DIRECTV, Inc.*, 110 F.3d at 826.

<sup>17</sup> *Bowen*, 488 U.S. at 208-09 (internal citation omitted).

legislative intent to provide such authority.<sup>18</sup> In this instance, the statutory authority cited by the Commission for its decision to grant conditional license renewals contains no express authorization for retroactive action.<sup>19</sup> Therefore, the Commission's action is invalid.

*Secondary retroactivity.* As an initial matter, in adopting the conditional approach the Commission identified as a primary goal the removal of uncertainty that would result from authorizations remaining pending. However, as demonstrated above, it is arbitrary and capricious to conclude that the conditional approach removes or reduces uncertainty. Moreover, the Commission's decision is also an impermissible imposition of secondary retroactivity. As stated above, secondary retroactivity occurs when an agency action changes the future legal consequences of past or ongoing actions.<sup>20</sup> As shown above, it would be unlawfully retroactive to apply the new renewal standard to past conduct, and thus the mere collection of information on the new renewal showing standard is arbitrary and capricious. Put another way, secondary retroactivity "occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory *status quo* before the rule's promulgation."<sup>21</sup> Agency actions that affect the future legal consequences of past or ongoing actions are permissible only if reasonably related to a legitimate agency goal.<sup>22</sup> As one court previously told the Commission, "Any implication by

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<sup>18</sup> *Id.* at 213. The Court rejected the Secretary's argument that "important administrative goals may be frustrated unless [the rule could be] made applicable to past time periods." *Id.* at 215. As noted above, Justice Scalia's concurrence also determined, as had the court below, that the Secretary's action violated the APA: "When the Secretary prescribed [a new] formula for costs reimbursable while the prior rule was in effect, she changed the *law* retroactively, a function not performable under the APA." *Id.* at 220. "Where quasi-legislative action is required, an agency cannot act with retroactive effect without some special congressional authorization. That is what the APA says, and there is no reason to think Congress did not mean it." *Id.* at 224.

<sup>19</sup> See Order at ¶ 126 (citing Sections 4(i), 301, 303, 308 and 309 of the Communications Act).

<sup>20</sup> See *Celtronix Telemetry*, 272 F.3d at 588.

<sup>21</sup> *Mobile Relay Assoc., Inc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

<sup>22</sup> See *Bowen*, 488 U.S. at 220 (Scalia, J. concurring) (noting that the arbitrary and capricious standard of the APA is used to determine whether an agency action is invalid).

the FCC that this court may not consider the reasonableness of the retroactive effect of a rule is clearly wrong.”<sup>23</sup>

In this instance, conditioning license renewals could certainly change the future legal consequences of a licensee’s past or ongoing network deployment or other activities, particularly if the licensee loses its operating authority after the new rules are adopted. Moreover, conditioning license renewals is not reasonably related to the Commission’s stated goal of “maintain[ing] unimpeded operations in the affected services during this rulemaking.”<sup>24</sup> Therefore, the Commission was arbitrary and capricious in its decision to condition the license renewal grants.<sup>25</sup> As discussed in Section I, rather than “maintaining unimpeded operations,” the new procedure will impede significantly operations in the affected services by creating a clear and significant contingency regarding the renewed licenses. This contingency could cause investors to withhold funding and will force affected licensees to predict which, if any, of their conditionally renewed licenses will not be available for use in the future as a result of changed license renewal standards. As a consequence, interim service to the public could be impaired.

Moreover, the Commission states in the Order that “[o]ne of [its] principal goals in the proceeding is to harmonize the Commission’s varying requirements for the renewal of Wireless Radio Services licenses where such harmonization would advance the public interest.”<sup>26</sup> However, the Commission fails to explain how such harmonization goals are furthered by requiring all pending license renewal applications to be only conditionally granted. In sum, the Commission’s decision to direct only conditional grant of pending and future license renewal

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<sup>23</sup> *Nat’l Assn. of Indep. Television Producers and Distrib. v. FCC*, 502 F.2d 249, 255 (2<sup>nd</sup> Cir. 1974).

<sup>24</sup> Order at ¶ 113.

<sup>25</sup> *See Bowen*, 488 U.S. at 220.

<sup>26</sup> Order at ¶ 7.

applications is arbitrary and capricious, fails to meet the judicial standards for lawful retroactive decision-making, and should therefore be rescinded.

## **II. CONDITIONING LICENSE RENEWALS ON THE OUTCOME OF THE HARMONIZATION PROCEEDING WILL CAST A CLOUD OVER THE RENEWED LICENSES, CHILL INVESTMENT AND THWART THE ACHIEVEMENT OF THE COMMISSION’S WIRELESS POLICY GOALS**

Chairman Genachowski has remarked that “[s]pectrum is the oxygen of our mobile networks.”<sup>27</sup> Without spectrum licenses, wireless providers cannot operate and provide service. Moreover, none of the Commission’s broadband policy goals for the wireless sector can be achieved without robust use of wireless spectrum.<sup>28</sup> A grant of pending and future license renewal applications on the outcome of the pending proceeding will create uncertainty in the market, potentially disrupting business plans developed in reliance on existing rules. Spectrum licenses are strategic assets for wireless providers, and any shadow over the license renewal process creates significant concern for licensees and investors. Indeed, the Commission expressed concern regarding the uncertainty that would be caused by maintaining renewal applications in “pending” status during the pendency of the proceeding.<sup>29</sup> While it sought to “mitigate some of that uncertainty,” it failed to recognize that conditional grants are just as uncertain since licensees will remain in limbo until their applications are evaluated under whatever new standard the Commission may adopt. And it failed to consider the option that would provide the greatest certainty – *i.e.*, continuing to grant renewal applications in accordance with existing processing procedures.

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<sup>27</sup> Remarks of Chairman Julius Genachowski, CTIA Wireless I.T. & Entertainment, San Diego, California at 4 (Oct. 7, 2009), *available at*: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-293891A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.pdf).

<sup>28</sup> *See id.*

<sup>29</sup> Order at ¶ 113.

Particularly at this crucial period of economic hardship, when job creation and investment are essential to the success of the economic recovery, the Commission should not create disincentives for investment and job creation in the wireless sector.<sup>30</sup> Unfortunately, that is exactly what the Commission has done in directing the WTB to condition license renewals on the outcome of this proceeding. As a result of the conditional grants, neither the holders of renewed licenses, nor their investors or financiers, will know whether the renewed licenses will be available for use during a full new license term, or whether, as a result of changed rules at some point in the future, licenses that deserve today to be renewed for a full new term will be canceled or otherwise compromised by the Commission. This level of uncertainty could cause licensees and their investors to withhold funding needed for network deployment. Thus, the Commission's decision to conditionally grant the license renewal applications is far more than merely procedural in nature, given these serious and substantive consequences.

The NPRM in this proceeding seeks comment on a host of ambiguous new metrics to be used in making determinations on license renewal applications. Some licensees that clearly have satisfied the standards applicable to license renewals today possibly might not qualify for license renewal under the new rules, depending on what new renewal standard the Commission ultimately adopts. Any rescinded renewals or license cancellations will negatively impact consumers, as they will lose the services currently being provided by the affected licensees. Moreover, even for license renewals that are not rescinded after the adoption of the new rules, the Commission's decision to place the renewals in limbo during the pendency of this proceeding makes it more likely that licensees would postpone or even cancel viable business and network

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<sup>30</sup> *See id.* (“In an economy that certainly can use some pacesetters, we need [the wireless] industry to continue driving economic growth and job creation[,] . . . [a]nd we need mobile leadership to help our nation address core challenges that transcend economics.”).

deployment plans rather than risk stranding that investment. This, too, is contrary to the public interest, as it will result in reduced or delayed expansion of service to consumers.

The negative impact of the Commission's decision will be felt most acutely by smaller wireless licensees. These licensees, many with limited legal and financial resources, will now face new funding obstacles and the need to predict in their business planning which of their conditionally renewed licenses might not be available when final rules in this proceeding are issued. These problems may impact consumers disproportionately in rural and smaller markets.

The Commission should be doing all it can to promote the continued growth of the wireless sector. As the Commission itself has said, "government should take [actions] to encourage more private innovation and investment."<sup>31</sup> Conditional license renewals at this stage will have the opposite effect. The Commission should instead instruct the WTB to process without conditions all pending and upcoming license renewal applications under the wireless service standards that applied before the Order was issued.

### **III. THE NPRM'S PROPOSALS ARE MISGUIDED AND ARE NOT LIKELY TO BE ADOPTED AFTER REVIEW OF THE RECORD**

Concurrent with the filing of this Petition, CTIA is also filing comments in response to the NPRM issued in this proceeding. While the comments support certain of the Commission's harmonization proposals, CTIA strongly argues that the proposals related to changes in the license renewal process are seriously misguided and should not be adopted. The NPRM proposes a "renewal showing" requiring burdensome data collection related to a number of ambiguous metrics, yet at the same time fails to articulate any proposed standard that will be used to determine when a licensee's provision of service has been sufficient to warrant a license

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<sup>31</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at 21, available at: <http://www.broadband.gov/plan/>.

renewal. Because there has been no notice regarding the new renewal standard, the Commission will not be able to adopt any new standard based on the current NPRM without violating the APA. The Commission's failure to articulate a new renewal standard or explain its rationale for adopting a substantially more onerous and vague renewal process would constitute arbitrary and capricious decision-making.

For this and other reasons, the Petitioners believe that, after reviewing the proceeding record, the Commission will not adopt its proposals related to the new license renewal process. Thus, the Commission should not place a cloud of uncertainty over the thousands of license renewal applications that are likely to be filed during the pendency of this proceeding, in anticipation of new rules that most likely will not be adopted as currently proposed.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should rescind its decision to condition the grant of pending and future license renewal applications on the outcome of this proceeding, and should instruct the WTB to process such applications consistent with existing rules while the instant rulemaking proceeding is pending.

Respectfully Submitted,

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