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

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| In the Matter of<br><br>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<br><br>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 | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | WT Docket No. 10-112 |

To: The Commission

# COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®


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August 6, 2010

## EXECUTIVE SUMMARY

The Commission's current renewal process for wireless services has generally worked well over the years. The *NPRM* does not identify any specific problems, and CTIA is unaware of any concerns from their members. Despite this record of success, the *NPRM* seeks comment on harmonizing the Commission's varying regulations for the renewal of wireless licenses, using an approach that includes the filing of a detailed renewal showing, prohibiting competing renewal applications, and returning spectrum for reassignment if a license is not renewed. As discussed below, CTIA supports the latter two elements, but strongly oppose the proposed "detailed renewal showing" as unnecessary, vague, and burdensome, without any clearly articulated standard to govern renewals. As an alternative, CTIA supports using, for all wireless services, the more streamlined certification process proposed for site-based licenses, which would harmonize renewal requirements without imposing unnecessary burdens, uncertainty, and application processing delays.

*The Proposed Detailed Renewal Showing Is A Step Backwards*. The proposal moves in the opposite direction from a long line of precedent in which the Commission has adopted streamlined processes that foster innovation, flexible use, and regulatory certainty, while also reducing burdens on both licensees and Commission staff. Without any articulated standard for how the Commission will use the renewal showings to evaluate applications, service providers and their investors will be left wondering as to the future status of their most valuable assets, with investment chilled and network deployments delayed as a result.

*The Absence Of A Clear Renewal Standard Is Vulnerable To Judicial Challenge.* Courts do not give "substantial deference" to an agency's interpretation of its own rules if the agency has failed to adopt "an intelligible decisional standard." If the Commission does have a new renewal standard in mind, the *NPRM* has failed delineate it in reasonable detail or to put parties on adequate notice. Thus, if the *NPRM's* proposal is adopted, the Commission will likely face the same criticism from the D.C. Circuit as it did in *Northeast Cellular*, where the court remanded a decision as arbitrary and capricious, finding that the Commission had "nothing more than a 'we-know-it-when-we-see-it' standard," and had "not simply deviated from [existing] standards; [but had] never stated any standards in the first place."[1] Therefore, the Commission will need to issue a further public notice to seek comment on its proposed renewal standard, describing "the range of alternatives being considered with reasonable specificity" in order to satisfy the requirements of the Administrative Procedure Act.

*The Specific Renewal Factors Are Ambiguous, Burdensome, And May Violate The APA.* Even if the Commission had announced a new renewal standard, licensees would still be confused by the lack of any explanation of the vague renewal showing factors contained in the proposed Section 1.949. Compiling the data needed for the new showing will significantly increase licensing compliance costs for most licensees, especially those holding multiple, smaller-area licenses, including regional and rural carriers. Some of the factors are so ambiguous, are of such dubious use, and are likely to result in filings that are so difficult to process, that OMB may well reject the Commission's proposed information collection as being

[1] *Ne. Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990).

non-compliant with the Paperwork Reduction Act, just as it did with the key aspects of the Commission's emergency backup power rules.

*The Proposal May Only Be Applied Prospectively.* If the Commission does adopt its misguided renewal process changes, it must ensure that they are only applied prospectively. Concurrent with these comments, CTIA and others are filing a Petition for Reconsideration of the Commission's decision in the *Order* to condition all renewal application grants on the ultimate outcome of this proceeding. This decision will result in impermissible primary retroactivity under well established court precedent, as the Commission has no explicit statutory authority to apply rules retroactively. It will also constitute impermissible secondary retroactivity because altering future legal consequences (*i.e.*, a licensee's authority to operate) based on the licensee's past conduct cannot be considered "reasonably related" to the Commission's stated goals. Retroactivity would also occur with regard to many renewal applications filed after new rules are adopted, especially where most of the license term being evaluated has already elapsed by the time the rules are adopted.

In addition to the proposed renewal showing, CTIA comments on other issues raised in the *NPRM*:

- *Eliminating Competing Renewals*. CTIA supports the Commission's proposal to eliminate the filing of competing renewal applications. The existing process can lead to protracted litigation and can strain Commission resources. It also invites abuse of the Commission's process through the use of "strike" applications and "greenmail."
- *Returning Spectrum from Non-renewed Licenses*. CTIA supports the Commission's proposal to return spectrum from non-renewed licenses automatically. Doing so would help streamline and expedite the transition of the spectrum to new licensees. Likewise, CTIA supports the proposal to revert spectrum from non-renewed site-based licenses to the encompassing geographic area license(s).
- *Regulatory Compliance Demonstration/Certification*. CTIA does not oppose requiring renewal applicants to certify that they have substantially complied with the Communications Act and the Commission's rules, but requiring the submission of copies of (rather than just listing) pending petitions to deny and the Commission's own enforcement orders is unnecessary and duplicative. Furthermore, any certification or demonstration should only extend to the renewal applicant and its direct ownership chain. The proposal to require applicants to certify on behalf of all entities under common control is unreasonably burdensome, especially for business structures in which affiliates are operated as different lines of business or with different management teams.
- *Discontinuance Rules*. CTIA generally supports the Commission's proposal to harmonize discontinuance rules across wireless services to provide greater regulatory certainty and ensure that licensed spectrum is put to use. However, instead of a 180-day period, the Commission should adopt a 12-month period to avoid unnecessarily penalizing licensees that have built out and continue to operate in certain remote or highly seasonal areas that may be uninhabited for more than half of the year. The permanent discontinuance period should commence on the date the initial construction notification is due to the Commission, to ensure that licensees deploying services early are not unfairly penalized.

- *Partitioning/Disaggregation*. If the Commission adopts the proposal to require each party to a partitioning or disaggregation arrangement to individually satisfy any service-specific performance requirements, it should: a) grandfather existing arrangements so as not to impose any new requirements retroactively; and b) not apply the rule to purely *pro forma* spectrum assignments involving partitioning or disaggregation, given that many operators divide their spectrum holdings among different affiliates for reasons of operational efficiency and should not be penalized for having such structures. Moreover, the Commission should be aware that its proposal could have the unintended consequence of discouraging new market entrants and network deployment, particularly in rural areas, as it will increase regulatory risk for new entrants and could decrease the total number of partitioning/disaggregation transactions, thereby reducing the overall amount of spectrum that is deployed.

* * *

While a few of the proposed rule changes are worthy of adoption, the *NPRM* overall sends exactly the wrong message to an industry that, at the moment, is focusing its efforts on ensuring the rapid expansion of mobile broadband throughout the nation. As articulated in the National Broadband Plan, the Commission should share this focus and not become distracted by proceedings that seek to solve non-existent problems by adding burdens and uncertainties that threaten to slow wireless investment and deployment.

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**COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

## I. INTRODUCTION

CTIA – The Wireless Association®[1] respectfully submits these comments in the above-captioned proceeding, in which the Commission proposes to harmonize a number of rules affecting the Wireless Radio Services.[2] While CTIA is not generally opposed to the concept of harmonizing rules, any such effort must be balanced against other important public interest considerations, such as promoting investment for the expansion of mobile broadband to every American. Particularly at this time, as the Commission seeks to implement the National

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[1] 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.

[2] *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*").

Broadband Plan with the goal of establishing the U.S. as the world leader for mobile broadband,[3] it should be careful not to slow progress in this area by unnecessary tinkering with existing renewal procedures – which have worked well for years – in a way that creates both new burdens and new uncertainties.

Most of the proposals in the *NPRM* would undoubtedly create far more problems than they would solve, especially given that the *NPRM* does not identify the problems that need to be solved. The Commission does, however, establish certain goals, including: simplifying the regulatory process, eliminating confusion, providing licensees with greater certainty, and encouraging investment. While these are laudable goals, the *NPRM* unfortunately misses the mark. In particular, the complete absence of any discussion of how the license renewal standard will change, combined with the vague and burdensome new renewal showing, will work against each of these goals. Indeed, the proposals appear to be a step backwards – resembling the long-outdated and reformed comparative renewal process and related renewal requirements – rather than the streamlined procedures generally applied to wireless services. The proposed process will add not only uncertainty but administrative burdens for both licensees and the Commission staff, leading to processing delays and more uncertainty.

With service providers and their investors left wondering as to the future status of their most valuable assets – their licenses – investment could be chilled and network deployment may be delayed. To eliminate the anxiety already being created among licensees, the Commission should quickly conclude this proceeding by rejecting the *NPRM*'s misguided proposals.

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[3] *See* Remarks of Chairman Julius Genachowski, CTIA Wireless I.T. & Entertainment, San Diego, California at (Oct. 7, 2009), *available at*: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293891A1.pdf ("We also need the mobile industry to continue its progress toward global leadership. To compete in the global marketplace in the information age, U.S. companies of every sort will increasingly need to rely on world-class mobile networks.").

## II. THE *NPRM* PROPOSES AN OVERLY BURDENSOME AND UNNECESSARY RENEWAL SHOWING, YET FAILS TO ARTICULATE ANY STANDARD THAT WILL GOVERN RENEWALS

The Commission's current renewal process for wireless services has generally worked well over the years. The Commission has not identified any specific problems. Likewise, CTIA is unaware of any concerns from their members. Despite this record of success, the *NPRM* seeks comment on harmonizing the Commission's varying regulations for renewal of wireless licenses, based on a new paradigm adopted for 700 MHz licenses. This approach includes the filing of a detailed renewal showing, prohibiting competing renewal applications, and returning spectrum for reassignment if a license is not renewed. As discussed below, CTIA supports the latter two elements, but strongly oppose the proposed "detailed renewal showing" as unnecessary, vague, and burdensome, as well as for failing to adopt a clearly articulated approach to govern renewals.

The proposed detailed renewal showing and new renewal process reflects a step backwards, harkening to the Commission's earlier comparative renewal process and the related lengthy application renewal requirements. Until the Commission reformed the broadcast renewal process, license renewals could take years and often tie up licenses in lengthy challenges. The Commission's current approach works well, and there is no reason given for returning to burdensome filings and an ambiguous renewal approach, with lengthy delays and related uncertainties. CTIA would support the more streamlined certification process proposed for wireless site-by-site licenses for all wireless licenses, however, which would harmonize renewal requirements without imposing unnecessary burdens and uncertainty.

### A. The Absence of a Clear Renewal Standard Would Create Confusion and Uncertainty, and Could Lead to Arbitrary and Capricious Renewal Decisions

#### *1. The Proposed Renewal Process Changes Do Not Resolve Any Identified Problems and Would Not Achieve the Commission's Stated Objectives*

In the *NPRM*, the Commission seeks comment on its finding that its proposed new renewal policies and procedures will: "promote the efficient use of spectrum resources," "provid[e] licensees certainty regarding their license renewal requirements," "encourage licensees to invest in new facilities and services," and "facilitate their business and network planning."[4] While CTIA supports these goals, the *NPRM* does not explain how the proposed new renewal showing would meet these objectives. Moreover, as noted above, the Commission does not identify any specific problems that have developed under the existing license renewal rules that might suggest a need to amend the rules.

Although CTIA recognizes that the current renewal standards for a few wireless services are somewhat vague (such as those where there is only a "substantial service" requirement with no safe harbors enunciated),[5] the FCC's overall past practices and streamlined renewal processes have provided a strong level of comfort and certainty to wireless licensees regarding renewal expectations, while at the same time allowing licensees considerable flexibility in structuring their services and network deployments. As the Commission's precedent and policies in the wireless context have long recognized, flexible, "light touch" regulatory requirements are the key

[4] *NPRM* at ¶ 7.

[5] Even in these cases, however, there is at least some Commission precedent to provide examples of what is considered sufficient under this standard. *See, e.g., Chasetel Licensee Corp.*, Order, 17 FCC Rcd 9351 (Deputy Chief, Commercial Wireless Div., Wireless Telecommunications Bur. 2002). While this precedent, in the form of formal orders, may be "scant," *NPRM* at ¶ 29, the Commission could improve access to substantial service precedent by facilitating in ULS a means for locating substantial service filings, so that other licensees could more easily determine what showings the Commission has found acceptable, and what showings it has denied.

to promoting innovation, competition and expansion of services in the marketplace.[6] Instead, the Commission now proposes to move in the other direction, with a far more detailed and cumbersome showing and no clearly articulated renewal standard.

While CTIA supports the general concept of harmonizing rules where doing so will provide administrative efficiencies and greater regulatory certainty, the *NPRM*'s proposed renewal showing rules would not only fail to satisfy those goals, but would work against them. Rather than "eliminate[ing] any potential confusion,"[7] adoption of the *NPRM*'s proposal would create both considerable confusion and uncertainty, chiefly because the *NPRM* fails to provide any hint as to what the new renewal standard would be. Although proposed Section 1.949 would require licensees to engage in extensive data collection efforts related to a number of ambiguous criteria to be included in the licensee's renewal showing,[8] there is no indication of the relative importance of each criteria, whether some or all are optional, or what level of performance under each criteria will be deemed sufficient to justify license renewal.[9] The Section 1.949 criteria raise a number of questions. For example, what level of "quality of service" does a licensee need

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[6] *See, e.g., Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 19064 at ¶ 58 (1998) ("These actions are intended to establish a flexible regulatory framework … that will encourage spectrum efficiency, technical innovation, and competition …"); *Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1670-1675 MHz and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980 at ¶¶ 10-11 (2002) (adopting "a streamlined licensing framework that will foster innovation, flexible use and regulatory certainty").

[7] *NPRM* at ¶ 29.

[8] *See* discussion *infra* at Section II.B.

[9] Moreover, proposed Section 1.949(h) states that if the licensee's renewal showing "is insufficient, its renewal application will be denied…," *NPRM* at Appendix A, but does not specify whether the renewal applicant would first be given the opportunity to supplement its renewal showing with additional documentation, particularly in regard to the vague criteria such as "other factors associated with the level of service to the public." *Id.* In any event, CTIA notes that the renewal applicant retains the right specified in Section 309(d)(2) and (e) of the Communications Act of 1934, as amended, to a hearing in the event there is a substantial and material unresolved question of fact.

to provide? Does a licensee need to provide service to rural areas or tribal lands in addition to meeting its construction requirements? How will the Commission assess service interruptions or discontinuances?[10]

Up until now, licensees have understood that if they have met their construction obligations (where those exist) and have complied with other material regulatory obligations, they could reasonably expect their license to be renewed. The *NPRM* seems to eliminate this expectation, without replacing it with any other expectation. In short, if the renewal showing factors are meant to form the basis of some type of "report card" for a licensee's performance with regard to each license, the Commission has failed to provide any guidance as to how to achieve an overall passing grade. This inherent vagueness and ambiguity will lead to licensee angst, creating concern that the Commission might adopt an arbitrary, subjective, or constantly evolving approach to renewals based on particular (but unannounced) aspects of the renewal showings, rather than maintaining some type of an "expectancy" of renewal.[11] This could cause licensees to focus on certain renewal factors while discouraging more fruitful innovation and investment in other areas.

The lack of an articulated standard will also lead to renewal application processing delays, as Commission staff struggle to decide how to evaluate each applicant's responses to the multiple factors contained in the renewal showings. Thus, in addition to facing the uncertainty

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[10] Creating further ambiguity and confusion, the *NPRM* also contains inconsistent proposals, including with respect to the proposed regulatory compliance demonstration or certification (which is discussed in more detail below in Section IV). For example, the *NPRM* proposes requiring renewal applicants to file copies of all FCC orders finding a violation *or an apparent violation* of the Communications Act or any FCC rule or policy, while proposed Section 1.949(e) refers only to violations (not apparent violations) of the Act or FCC rules or policies.

[11] CTIA recognizes that the current "renewal expectancy" embodied in the rules for many wireless services is relevant only when a competing renewal application is filed. However, CTIA submits that licensees have come to understand that a broader *de facto* renewal expectancy exists, based on the consistent pattern of renewal application grants by the Commission over the course of many years.

of *how* the Commission will rule on their applications, licensees will also face the uncertainty of *when* the Commission will rule on their applications.

Finally, as the *NPRM* repeatedly noted, the positive impact of reforms adopted in the broadcast station renewal process can be instructive in resolving the current proceeding.[12] The experience in the broadcast context serves as a lesson that simpler, clearer renewal standards can ease the Commission's and licensees' administrative burdens while continuing to serve the goal of ensuring compliance with the requirements of the Communications Act and Commission rules. Under the reformed broadcast renewal process, as directed by Congress, the Commission must grant a broadcast renewal application if it finds that: the broadcast station has served the public interest, convenience and necessity; there have been no serious violations by the licensee of the Communications Act or Commission rules; and there have been no other violations of the Communications Act or Commission rules which, taken together, would constitute a pattern of abuse.[13] The improved clarity of the broadcast renewal criteria has yielded increased certainty for broadcasters, which in turn has encouraged investments that serve the public interest, such as, for example, the significant industry-wide investments that accomplished the broadcast digital transition. Without clear renewal guidelines setting the path for continued access to spectrum, wireless licensees and investors will hesitate to risk capital to implement improvements that serve the public interest.

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[12] *See, e.g., NPRM* at ¶ 40, ¶ 42, n.115, n.117, n.119, n.120.

[13] *See* 47 U.S.C. § 309(k); *Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 at ¶ 3 (1996) ("*Broadcast License Renewal Procedures*").

### 2. *The Failure to Articulate a Renewal Standard Could Not Withstand Judicial Scrutiny and Cannot Be Remedied Without a Further Notice*

If the Commission were to adopt the renewal application changes as currently proposed in the *NPRM*, the resulting regulatory scheme would be vulnerable to challenge in the courts as being impermissibly vague. Courts have long disfavored agency decision-making based on vague or unintelligible standards. In *SEC v. Chenery Corp*., the Supreme Court established that:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be exempted to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."[14]

In *Checkosky v. SEC*, the D.C. Circuit explained that standard-less agency decision-making violates the APA:

> When an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act. … [W]e have held on occasion that an "agency's failure to state its reasoning or to adopt an intelligible decisional standard is so glaring that we can declare with confidence that the agency action was arbitrary and capricious." In addition, an agency violates the APA when it fails to include in its adjudicatory decision a meaningful "statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."[15]

The court noted that "although we owe 'substantial deference to an agency's interpretation of its own regulations,' we cannot defer to an agency when 'we are at a loss to know what kind of standard it is applying or how it is applying that standard to this record.'"[16]

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[14] *SEC v. Chenery Corp*., 332 U.S. 194, 196-97 (1947) (internal citations omitted).

[15] *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998) (internal citations omitted) (citing 5 U.S.C. § 557(c)(3)(A)).

[16] *Checkosky*, 139 F.3d at 225 (internal citations omitted).

The D.C. Circuit routinely remands agency decisions where an agency has "failed to articulate a coherent … standard,"[17] often instructing the agency "to develop a standard that is comprehensible."[18] For example, in remanding a waiver grant decision to the FCC, the court found that the Commission's decision was based on what "amount[ed] to nothing more than a 'we-know-it-when-we-see-it' standard.'"[19] The court held that the decision was arbitrary and capricious, noting that "the FCC has not simply deviated from [existing] standards; it never stated any standards in the first place."[20] If it adopted the *NPRM*'s proposed renewal procedures, the Commission would likely be headed towards an eventual remand here as well.

If the Commission ultimately decides to articulate a new renewal standard – and one that can withstand judicial review – it will need to issue a further public notice. Specifically, it will need to provide clear notice and opportunity to comment on how it intends to evaluate any new detailed factors and what level of service is sufficient for renewal. The many wireless licensees that have purchased their spectrum at auction or in the secondary market and have made substantial investments in deployment over the past 16 years are entitled to a renewal process that clearly articulates the Commission's standard for achieving renewal.

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[17] *See, e.g., Int'l Ass'n of Machinists and Aerospace Workers, Dist. Lodge 64, AFL-CIO v. Nat'l Labor Relations Bd.*, 50 F.3d 1088, 1093 (D.C. Cir. 1995); *see also Int'l Longshoremen's Ass'n v. Nat'l Mediation Bd.*, 870 F.2d 733, 736 (D.C. Cir. 1989) (agency's failure to articulate basis for its decision "frustrate[s] effective judicial review" because court "cannot defer to what [it] cannot perceive") (internal citations omitted); *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437 F.3d 75, 81 (D.C. Cir. 2006) (remanding an agency determination because it "never provided a clear and coherent explanation" for its decision).

[18] *See Allegheny Ludlum Corp. v. NLRB,* 104 F.3d 1354, 1356 (D.C. Cir. 1996) ("the Board has yet to articulate a clear standard to guide employers, employees, and its own administrative law judges in reconciling these mandates. Accordingly, we remand the case to the Board with instructions to develop a standard that is comprehensible ….").

[19] *Ne. Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1167 (D.C. Cir. 1990).

[20] *Id*.

The current *NPRM* does not even explicitly state an intent to change the renewal standard, much less seek comment on what the standard should be. The courts have long held that, under the APA, any final agency rule must be a "logical outgrowth" of the rulemaking proceeding.[21] Whether an agency has met the "logical outgrowth" test depends on whether parties "should have anticipated" the agency's final course in light of the initial notice.[22] As the D.C. Circuit has stated, "agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision making."[23] Here, the Commission has not explained any "range of alternatives" it is considering for a new standard. Therefore, the *NPRM* does not provide adequate notice for any new standard to be adopted without a further notice.

### B. The FCC's Renewal Showing Proposal Imposes New Burdens and Costs that Outweigh the Potential Benefits

Rather than adopting a streamlined service certification requirement for renewal applications for both site-based and geographic-area licensees as CTIA recommends in Section III below, the *NPRM* proposes to require most geographic-area licensees to submit a detailed multi-factor "renewal showing" as part of their license renewal applications. Specifically, proposed Section 1.949 requires a "detailed description" of the licensee's service during "the

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[21] *See United Steelworkers v. Marshall,* 647 F.2d 1189, 1221 (D.C. Cir. 1980) (final rule must be a "'logical outgrowth' of the rulemaking proceeding") (quoting *S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974) and citing 5 U.S.C. § 557(b)(3)).

[22] *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 548-49 (D.C. Cir. 1983).

[23] *Id.*; *see also Rodway v. USDA*, 514 F.2d 809, 814 (D.C. Cir. 1975) (general reference to changes in food stamp program is inadequate notice of particular change); S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945), reprinted in Senate Judiciary Committee, Administrative Procedure Act: Legislative History 187, 200 (Comm. Print 1946) ("APA Legislative History") (notice must "fairly apprise interested persons of the issues involved").

entire license period," addressing the following factors:

> (1) the level and quality of service, including population, area served, number of subscribers, services offered;
> (2) the date service commenced and whether service was ever interrupted, and the duration of any interruptions or outages;
> (3) the extent to which service is provided to rural areas;
> (4) the extent to which service is provided to tribal lands; and
> (5) any other factors associated with the level of service to the public.[24]

The FCC has not identified any specific problems regarding the level or quality of service that it is attempting to address with this new filing requirement, which is considerably more detailed than those applicable to most services. Moreover, this additional regulatory burden hardly accomplishes the goal of "simplify[ing] the regulatory process for licensees."[25] Nor would it "facilitate their business and network planning," or accomplish any of the Commission's other stated objectives.[26] The Commission's current renewal procedures have worked well for many years, across many different wireless services. Therefore, CTIA questions whether there are any public interest benefits to be gained that outweigh the greater administrative burdens that would be imposed on licensees.

Although the Commission seeks to "eliminate any potential confusion" with its new rules,[27] the proposed renewal showing factors are so vague that they will, in fact, create considerable confusion. For example, what is meant by "level of service" and "quality of service?" Are they meant to consist of various objective technical measurements, such as signal strength, or are they meant to reflect a more subjective, customer-based perspective of the

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[24] *See NPRM* at ¶ 23 and Appendix A.

[25] *See id*. at ¶ 1.

[26] *See id*. at ¶ 7.

[27] *See id*. at ¶ 29.

licensee's services? Because the showing is meant to cover the "entire license period,"[28] rather than being just a "snapshot,"[29] should the licensee report the various factors – subscribers, areas covered, services offered, etc. – for each year of its license term? Each month? What is the difference between a service "interruption" and an "outage?" Is this merely a duplication of the information already contained in the Commission's Network Outage Reporting System (NORS), or something different? What type of information is sought regarding "other factors associated with the level of service to the public?" Clearly, much more guidance is needed if the Commission truly wishes to "eliminate confusion."

Moreover, the proposed new renewal showing will significantly increase regulatory compliance costs for most wireless licensees. Several of these factors will require additional research and collection of new information by licensees, including population statistics and whether the service area includes "rural areas" or tribal lands. Recordkeeping obligations will also increase, if the showings are, in fact, to cover the entire license period – *i.e.*, ten years – far beyond any current recordkeeping obligations for any significant Commission regulatee.[30]

Because an individual renewal showing will be required for each license, the administrative costs and burdens will fall disproportionately on those licensees holding many licenses covering smaller geographic areas, compared to licensees holding a smaller number of larger, regional or nationwide licenses. For example, a service provider holding a license for REAG4 would have to make only one (admittedly large) filing every ten years. Another service provider covering the exactly same area, but holding BTA-sized licenses, would have

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[28] *Id*. at Appendix A.

[29] *Id*. at ¶ 22.

[30] *See, e.g.*, 47 C.F.R. § 42.11 (requiring detariffed interexchange service data to be retained for two years and six months); 47 C.F.R. § 42.6 (requiring telephone toll records to be retained for 18 months).

93 individual filings, possibly in various years, depending on expiration dates. And a provider holding CMA licenses for the same area would have 138 filings. Likewise, smaller regional and rural licensees may be disproportionately impacted, both because they are less likely to have sufficient in-house staff to compile the showings, and are more likely to hold multiple, small-area licenses.

In addition to burdening licensees, the new detailed renewal showings will add administrative burdens to the Commission's own staff. Indeed, the proposal runs counter to the Commission's traditional preference for streamlining administrative processes in order to preserve Commission resources by easing burdens on staff.[31] For example, the Commission in 1994 recognized that certain licensing requirements for public mobile services were "unnecessary," and that eliminating those requirements "would conserve Commission and industry resources."[32] This streamlining, the Commission stated, would reduce staff burdens, benefit providers and users of mobile services, and further the Commission's goals of "stimulating economic growth and expanding access to mobile radio networks and services."[33] Moreover, adoption of the *NPRM's* proposal will likely delay the processing of renewal

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[31] *See, e.g., Electronic Tariff Filing System*, Notice of Proposed Rulemaking, WC Docket No. 10-141, FCC 10-127 at ¶ 9 (rel. July 15, 2010) (justifying a proposal to require online tariff-filing because it would "reduc[e] burdens on carriers and the Commission"); *Review of the Commission's Part 95 Personal Radio Services Rules*, Notice of Proposed Rulemaking, WT Docket No. 10-119, FCC 10-106 at ¶ 26 (rel. June 7, 2010) (proposing to license General Mobile Radio Service operations by rule to "reduce administrative and other burdens on GMRS users, as well as on the Commission"); *Revision of Procedures Governing Amendments to FM Table of Allotments*, Report and Order, 21 FCC Rcd 14212, 14257 (2006) (Statement of Commissioner Tate) ("The revisions to our allocations procedures that we adopt in this item … promise to ease administrative burdens on Commission staff, [and] substantially reduce regulatory delays experienced by licensees …").

[32] *See, e.g.*, *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, Report and Order, 9 FCC Rcd 6513 at ¶¶ 22, 25 (1994); *see also* ¶¶ 48, 84, 89.

[33] *See, e.g.*, *id.* at ¶¶ 1, 22, 25, 48, 84, 89.

applications unless the Commission anticipates hiring a significant number of additional staff to handle the increased workload.

In addition to the renewal showing criteria proposed in Section 1.949, the *NPRM* also seeks comment on the possible addition of other, even more onerous factors that are equally difficult to understand. For example, licensees would have to determine if they are serving "populations with limited access to telecommunications services" or "niche markets," or if they are offering "a specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers."[34] Requiring licensees to address these additional criteria would add substantially more time to the renewal process for both the applicants and the Commission, without any countervailing public interest benefits.

Finally, some of the factors that the Commission is considering as part of the new renewal showing would require the submission of competitively sensitive information. For example, data related to a provider's market share – such as the subscriber numbers sought by Section 1.949 – have traditionally been considered worthy of confidential treatment by the Commission.[35] Equally significant, some of the potential factors – such as "a timetable for the construction of new sites" – could be considered forward-looking statements with potential legal consequences beyond the Commission's purview.[36] Should the Commission move forward with

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[34] *See NPRM* at ¶ 27.

[35] *See, e.g., Access Charge Reform*, Order, 17 FCC Rcd 8252 at ¶ 3 (Chief, Wireline Competition Bur. 2002) (noting confidentiality of line counts); *Applications of Midwest Wireless Holdings, LLC and Alltel Communications, Inc*., Memorandum Opinion and Order, 21 FCC Rcd 11526 (2006) (market share data submitted on a confidential basis).

[36] "Forward-looking statements" are defined under Section 27A of the Securities Act of 1933, as amended, to include statements "of the plans and objectives of management for future operations." 15 U.S.C. § 77z-2(i). In some circumstances, public companies can be held liable for statements of plans that do not ultimately materialize. In order to take advantage of the Securities Act's "safe harbor" that protects companies from liability, the presence of forward-looking statements in public documents must be properly identified and accompanied by a cautionary statement. 15 U.S.C. § 77z-2(c).

its unwise plan for onerous disclosures, at a minimum, competitively sensitive information must be afforded confidential treatment. Moreover, the Commission should not require licensees to prognosticate about potential future events when doing so could trigger legal consequences external to the Commission's regulatory processes.

### C. The Renewal Showing Proposal Would Violate the Paperwork Reduction Act

The Commission acknowledges in the *NPRM* that it is proposing new and modified information collection requirements.[37] Consequently, the Commission is obligated to seek comments on the proposed information collection requirements from the public and the Office of Management and Budget ("OMB") pursuant to the Paperwork Reduction Act of 1995 (the "PRA").[38] Under the PRA, in order to support proposed new information collection requirements, the Commission must certify and provide a supporting record that each collection of information meets ten factors outlined in the statute.[39] As currently proposed in the *NPRM*, the renewal showing requirements would fail a number of the PRA factors. Thus the Commission can expect disapproval of the proposal by OMB if it is not significantly altered in

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[37] *NPRM* at ¶ 121.

[38] Public Law 104-13; 44 U.S.C. §§ 3501 *et seq.*

[39] The PRA showing requires that the information: "(A) is necessary for the proper performance of the functions of the agency, including that the information has practical utility"; "(B) is not unnecessarily duplicative of information otherwise reasonably accessible to the agency"; "(C) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, including with respect to small entities"; "(D) is written using plain, coherent, and unambiguous terminology and is understandable to those who are to respond"; "(E) is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of those who are to respond"; "(F) indicates for each recordkeeping requirement the length of time persons are required to maintain the records specified"; (G) includes a statement as to why and how the information will be used and the estimate of the burden of collection; "(H) has been developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected, including the processing of the information in a manner which shall enhance, where appropriate, the utility of the information to agencies and the public"; "(I) uses effective and efficient statistical survey methodology appropriate to the purpose for which the information is to be collected"; and "(J) to the maximum extent practicable, uses information technology to reduce burden and improve data quality, agency efficiency and responsiveness to the public." 44 U.S.C. §§ 3506(c)(3).

the Commission's Report and Order. This is not an insignificant risk, as OMB has already disapproved the Commission's information collection proposal that was an essential component of its emergency backup power rules.[40]

For example, how could the Commission demonstrate that the renewal application information "is necessary for the proper performance of the functions of the agency, including that the information has practical utility,"[41] when the renewal showing criteria are so vague as to have no practical utility and when the Commission has been able to perform its license renewal functions to date without the additional information proposed in the *NPRM*? How is the proposed renewal application submission of already issued FCC orders and letter rulings and petitions to deny on file at the Commission not "unnecessarily duplicative of information otherwise reasonably accessible to the agency?"[42] How is the renewal application requirement to identify "any other factors associated with the level of service to the public"[43] written in "unambiguous terminology?"[44] How will the Commission, which expects over 430,000 renewal applications over the next ten years,[45] have the resources to allocate "for the efficient and effective management and use of the information to be collected"[46] given the vast amounts of information proposed in the *NPRM* for the renewal application? These are just some of the PRA

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[40] *See* Notice of Office of Management and Budget Action, ICR Reference Number 200802-3060-019 (Nov. 28, 2008), available at http://www.cio.noaa.gov/itmanagement/ 0581sub.pdf; *see also Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, 22 FCC Rcd 18013 (2007).

[41] 44 U.S.C. § 3506(c)(3)(A).

[42] *Id*. at § 3506(c)(3)(B).

[43] Proposed Section 1.949(c)(5).

[44] *See* 44 U.S.C. § 3506(c)(3)(D).

[45] *See NPRM* at ¶ 7.

[46] *See* 44 U.S.C. § 3506(c)(3)(H).

questions that the Commission would have to grapple with if the renewal showing currently proposed in the *NPRM* is not severely streamlined and clarified.

## III. THE FCC SHOULD NOT ADOPT THE PROPOSED RENEWAL SHOWING, BUT SHOULD INSTEAD ADOPT A STREAMLINED SERVICE CERTIFICATION AND REGULATORY COMPLIANCE DEMONSTRATION/CERTIFICATION TO PROMOTE GREATER UNIFORMITY

As discussed above, the Commission's proposed renewal showing for geographically licensed services is legally deficient, unnecessary and duplicative, excessively vague, and administratively onerous, and would impose significant new costs and other burdens on wireless licensees. Combined, these problems could stymie continued growth in the wireless ecosystem, thereby hindering the Commission's broadband goals. Thus, the Commission should retain its existing requirements and processes for wireless license renewals instead of adopting the proposed renewal showing requirements for geographically licensed services. If, however, it chooses to modify the existing renewal requirements to increase uniformity among the wireless services, the Commission should require only that licensees submit a streamlined service certification and a regulatory compliance demonstration/certification.

*Service Certification.* In the *NPRM*, the Commission seeks comment on whether it should impose a "streamlined certification process" for renewal of site-based wireless licenses, in lieu of requiring site-based wireless licensees to make a substantial service renewal showing.[47] Under the Commission's proposal, renewal applicants would be required to certify that "they are continuing to operate consistent with the applicable filed construction notification(s) (NT) or most recent authorization(s) (when no NT is required under the Commission's rules)."[48] If a

[47] *NPRM* at ¶¶ 33-35.

[48] *Id*. at ¶¶ 34.

licensee makes the certification "and demonstrates substantial compliance with the Commission's rules and policies and the Communications Act," the Commission will renew the license.[49]

Instead of imposing the proposed renewal showing requirements for geographically licensed services, the Commission should adopt the "service certification" renewal showing proposed for site-based licenses and apply that requirement to both site-based and geographically licensed wireless services. The service certification showing is far more consistent with existing renewal standards and licensees' expectations for most licensed wireless services. In addition, adopting the certification requirement would harmonize the Commission's renewal requirements by providing a clear, streamlined, and efficient process for *all* wireless licensees referenced in the *NPRM*. As the Commission recognizes, a streamlined certification process "will avoid unduly burdening renewal applicants and Commission staff" and "ensure that renewed licenses in these services are being operated as authorized."[50]

The *NPRM* also seeks comment as to whether to apply any new renewal frameworks to Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") licenses that expire on or before May 11, 2011.[51] CTIA does not oppose exempting these BRS and EBS licenses from the new requirements.

*Regulatory Compliance Demonstration/Certification.* The Commission seeks comment in the *NPRM* on a new proposed regulatory compliance demonstration, which would require all wireless renewal applicants (for both geographically and site-based licensed services) to submit:

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[49] *Id*.

[50] *Id*. at ¶ 35.

[51] *Id*. at ¶ 32.

> (1) A copy of each FCC order and letter ruling, which may or may not have been assigned a delegated authority number, finding a violation of the Communications Act or any FCC rule or policy by the applicant, an entity that owns or controls the applicant, an entity that is owned or controlled by the applicant, an entity that is under common control with the applicant, or an affiliate of the applicant (whether or not such an order or letter ruling relates specifically to the license for which renewal is sought);
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> and
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> (2) A list of any pending petitions to deny any application filed by the applicant, an entity that owns or controls the applicant, an entity that is owned or controlled by the applicant, an entity that is under common control with the applicant, or an affiliate of the applicant (whether or not the petition to deny relates specifically to the license for which renewal is sought).[52]

If there are no Commission orders finding violations of the Communications Act or any Commission rule or policy, an applicant would be required to certify the absence of any such findings as part of the renewal application.[53]

CTIA does not oppose requiring renewal applicants to certify that they have substantially complied with the Communications Act and the Commission's rules and policies or to list prior Commission orders and letter rulings finding violations or apparent violations during the last license period. However, requiring licensees to submit copies of pending petitions to deny and the Commission's own orders and letter rulings is unnecessary and duplicative. Electronic copies of the Commission's orders and letter rulings are available online, and petitions to deny must be filed with the Commission.

Furthermore, any regulatory compliance demonstration or certification should only extend to the renewal applicant and its direct ownership chain. The Commission's proposal to require renewal applicants instead to certify on behalf of all entities under common control is unreasonably burdensome, especially for business structures in which affiliates are operated by

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[52] *See id*. at ¶¶ 37-38 and Appendix A, Proposed Section 1.949(e).

[53] *See id*. at ¶ 39 and Appendix A, Proposed Section 1.949(f).

different individuals or may be in an entirely different line of business. For example, a 700 MHz renewal applicant may be under common control with affiliates that hold broadcasting licenses but have entirely separate management and operational personnel than those affiliates. Or a 700 MHz renewal applicant offering wireless service to the public could be under common control with an entity that is not in the communications business (and therefore is likely to be staffed by different individuals) but has Industrial/Business Radio Pool licenses for internal communications. The Commission will still have the opportunity to review compliance by affiliates that are not part of the renewal applicant's direct ownership chain when those affiliates (or entities for which the affiliates are part of the direct ownership chain) submit renewal applications.

The Commission rejected burdensome renewal applications decades ago in the broadcast context,[54] and on several occasions in the *NPRM,* the Commission cites to the positive impact of reforms adopted in the broadcast station renewal process.[55] Realizing that the vast majority of licensees were meeting or exceeding the Commission's guidelines, the Commission adopted a streamlined broadcast renewal application that replaced the detailed documentation that had burdened broadcasters and consumed Commission resources at renewal time without significantly improving licensee compliance.[56] Consequently, broadcasters' renewal applications now focus on licensee certifications regarding fundamental qualification and compliance

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[54] *See Radio Broadcast Services: Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees*, FCC 81-146, 49 RR 2d 740 (1981) (eliminating detailed renewal application submissions in favor of streamlined and simplified renewal applications) ("1981 Streamlining Order"), *recon. den*., 87 FCC 2d 1127 (1981), *aff'd*, *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

[55] *See, e.g., NPRM* at ¶ 40, ¶ 42, nn.115, 117, 119, 120.

[56] *See, e.g., 1981 Streamlining Order*, 49 RR 2d at ¶¶ 10-11 (the pre-reform renewal process is "costly and time consuming for both licensees and the Commission").

matters.[57] While broadcast renewal applicants are required to identify violations during the current license term, unlike the *NPRM* proposal, the question is limited to the facility subject to renewal, not broadly applicable to the licensee, or any party or any affiliate of the licensee regarding other facilities.[58] Nor, in contrast to the *NPRM* proposal, are broadcast renewal applicants required to list pending petitions to deny against either the facility being renewed or against any other application filed by the licensee, its parties or affiliates. The almost three decades of experience with streamlined broadcast renewal applications has confirmed the wisdom of the Commission's decision to alleviate the burdens on it and broadcast licensees of detailed renewal application documentation, and there is no predictable public service benefit that would outweigh the Commission turning back the clock for wireless renewals.

## IV. SHOULD THE COMMISSION ADOPT ITS PROPOSED RENEWAL SHOWING, AS A LEGAL MATTER IT MUST ONLY APPLY PROSPECTIVELY

The Commission must guard against retroactive application of any adopted rule changes, and the renewal showing proposed in this proceeding, if adopted, must only apply prospectively. There are three classes of licensees that could be subject to impermissible retroactivity: (1) those with currently pending renewal applications; (2) those whose renewal applications will be filed during the pendency of this rulemaking proceeding; and (3) those whose renewal applications will be filed after the conclusion of this proceeding, but whose license terms include a time period prior to the adoption of a Report and Order in this proceeding. In each instance, so as to not retroactively apply a newly adopted renewal standard to prior conduct, the Commission must

[57] *See* Application for Renewal of Broadcast Station License, FCC Form 303-S, *available at* http://www.fcc.gov/Forms/Form303-S/303s.pdf. For example, a broadcast renewal applicant certifies as to its alien ownership compliance, basic character qualifications, final adverse findings and identifies any FCC violations (not allegations or petitions), *see id*. at Section II, as well as certifications of compliance with key FCC obligations, such as ownership reports, equal employment opportunity, local public file, current operational status, environmental and cross-ownership restrictions, *see id*. at Section III.

[58] *Id*. at Section II, Question 4.

ensure that these renewals are judged by the existing renewal standard. CTIA and others are also addressing this retroactivity problem in a concurrently filed Petition for Reconsideration in this docket.

The Commission's action in the *Order*, conditionally granting renewals during the pendency of this proceeding subject to the rules it adopts,[59] would generate primary retroactivity as applied for the first and second licensee classes identified above (licensees with currently pending renewal applications or applications to be filed during the pendency of this rulemaking), as it would "attach[] new legal consequences to events completed before its enactment."[60] Likewise, such primary retroactivity would be generated for the third class (licensees whose license terms straddle the adoption of a new standard) if the Commission judged their pre-adoption conduct under a new renewal standard.

Moreover, for all three licensee classes identified above, the application of the proposed rules based upon licensees' past performance under the "substantial service" standard would run afoul of secondary retroactivity. 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."[61] While secondary retroactivity is subject to the "arbitrary and capricious" standard, it is hard to imagine a clearer cut case of arbitrary and capricious decision making than holding past licensee conduct to a newly created standard.

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[59] *Order* at ¶¶ 113, 126.

[60] *See Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

[61] *Mobile Relay Associates, Inc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

As the Court in *Bowen v. Georgetown University Hospital*[62] made clear, "[r]etroactivity is not favored in the law."[63] 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.[64]

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 suffice' to warrant its retroactive application."[65] 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."[66]

In *Bowen*, Justice Scalia's concurring opinion concluded that the Administrative

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[62] *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 219-20 (1988) (Scalia, J., concurring in the judgment).

[63] *Id.* at 208.

[64] *Landgraf v. USI Film Prods*., 511 U.S. at 265-66 (*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").

[65] *Landgraf,* 511 U.S. at 266 (*citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)).

[66] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-46 (D.C. Cir. 1986).

Procedure Act ("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."[67] 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.[68]

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[69] or "impose[] new duties with respect to transactions already completed"[70]) are impermissible unless specifically permitted by statute.[71] Second, agency decisions that are secondarily retroactive (*i.e*., decisions that affect the future legal consequences of past or ongoing actions[72]) are impermissible if not reasonably related to an expressed agency goal.[73] In this case, the Commission's decision in the *Order* (and any future failure to protect the third licensee class of renewal applicants whose terms "straddle" the new standard) is impermissible under both retroactivity standards.

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[67] *Bowen,* 488 U.S. at 218.

[68] *Id.* at 218-19.

[69] *See id*. at 208.

[70] *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C. Cir. 1997).

[71] *See Bowen*, 488 U.S. at 208.

[72] *See Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001).

[73] *See Bowen*, 488 U.S. at 220 (Scalia, J., concurring); *DIRECTV, Inc.*, 110 F.3d at 826.

*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. Likewise, "straddle" renewal applicants' actions before adoption of the new standard would have been governed by existing standards. This raises a clear case of primary retroactivity – *i.e.,* the Commission changes the past 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."[74] 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 legislative intent to provide such authority.[75] In this instance, the statutory authority cited by the

[74] *Bowen*, 488 U.S. at 208-09 (internal citation omitted).

[75] *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

Commission for its decision to grant conditional license renewals contains no express authorization for retroactive action.[76] Therefore, the Commission's action is invalid.

*Secondary Retroactivity*. The Commission's decision in the *Order* is also an impermissible imposition of secondary retroactivity, as would be a failure to protect subsequent renewal applicants whose license terms straddle a rule change. As stated above, secondary retroactivity occurs when an agency action changes the future legal consequences of past or ongoing actions.[77] 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."[78] Agency actions that affect the future legal consequences of past or ongoing actions are permissible only if reasonably related to a legitimate agency goal.[79] As one court previously told the Commission, "Any implication by the FCC that this court may not consider the reasonableness of the retroactive effect of a rule is clearly wrong."[80]

In this instance, conditioning license renewals or applying new renewal standards to pre-adoption license periods 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

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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.

[76] *See Order* at ¶ 126 (citing Sections 4(i), 301, 303, 308 and 309 of the Communications Act).

[77] *See Celtronix Telemetry*, 272 F.3d at 588.

[78] *Mobile Relay Assocs., Inc. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006).

[79] *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).

[80] *Nat'l Assn. of Indep. Television Producers and Distrib. v. FCC*, 502 F.2d 249, 255 (2d Cir. 1974).

in the affected services during this rulemaking."[81] Therefore, the Commission was arbitrary and capricious in its decision to condition the license renewal grants.[82] 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 on a perilous scramble 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."[83] 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 applications is arbitrary and capricious, fails to meet the judicial standards for lawful retroactive decision-making, and should therefore be rescinded. Moreover, if the Commission does adopt revised renewal showing standards, the Commission must protect subsequent renewal applicants – whose license terms include periods that precede the new standard – from retroactive consequences.

[81] *Order* at ¶ 113.

[82] *See Bowen,* 488 U.S. at 220.

[83] *Order* at ¶ 7.

## V. PROHIBITING COMPETING RENEWAL APPLICATIONS AND REQUIRING THE RETURN OF SPECTRUM ASSOCIATED WITH NON-RENEWAL LICENSES WOULD SERVE THE PUBLIC INTEREST

In the *NPRM*, the Commission tentatively concludes that it should prohibit the filing of competing (*i.e.*, mutually exclusive) applications against renewal applications for certain site-based and geographic-area licenses in the Wireless Radio Services.[84] It also tentatively concludes that if a renewal application is denied, the licensed spectrum associated with that application would be "returned automatically to the Commission for reassignment by auction or other mechanism."[85] The Commission should adopt both of these proposals because they would lessen the administrative burden on Commission staff and licensees, reduce regulatory uncertainty and streamline the wireless licensing and renewal process.

*Eliminating the Comparative Renewal Process.* As the Commission recognizes, the comparative renewal process imposes costs and burdens on both the Commission and licensees. For example, it can lead to protracted litigation "that may be unduly burdensome for an incumbent licensee and strain available Commission resources."[86] It can also drain a licensee's limited resources and divert those resources away from deploying innovative new services and improving existing services.[87] In addition, the existing process allows for "strike" applications designed to abuse the Commission's process and harass or greenmail renewal applicants.[88] To remedy these detriments, the Commission should, as it proposes, eliminate the comparative renewal process for the wireless services discussed in the *NPRM*.

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[84] *NPRM* at ¶ 40.

[85] *Id*. at 43.

[86] *Id*. at ¶ 40.

[87] *See id*.

[88] *See id*. at ¶ 42.

Such action would follow the path taken by the Commission in other areas. For example, competing renewals applications were eliminated for the 700 MHz Commercial Services Band.[89] The Commission also highlights in the *NPRM* that Congress recognized the public interest benefits of eliminating the comparative renewal process in the broadcast station context, as it would "lead to a more efficient method" of renewal and "should result in a significant cost saving to the Commission."[90] Indeed, comparative broadcast renewals were often multi-year, multi-level processes, starting with reams of testimony at a hearing conducted by an Administrative Law Judge, moving to exceptions before the Commission's Review Board, next to applications for review to the Commission, and lastly to protracted appeals in federal court. As the Commission stated in 1989, "potential incentive[s] for abuse of the FCC's license renewal process [exist where] unclear standards [are] . . . used in a comparative hearing to determine whether an incumbent licensee or a competing applicant will best serve the public interest, convenience and necessity."[91] Although a degree of established jurisprudence developed over time at great cost, broadcasters and their investors still faced a level of uncertainty as to the outcome of a comparative renewal challenge, as well as years of distraction from their core business – that of serving the public – while coordinating a defense of their licenses before the FCC and the courts. Those problems were alleviated when, pursuant to Congressional directive, the Commission abolished broadcast comparative renewals.[92]

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[89] *See id*. at ¶ 40.

[90] *See NPRM* at n.115 (*citing* H.R. Rep. No. 104-204(I) at 123 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 91) ("House Committee Report").

[91] *Formulation of Policies and Rules Relating to Broadcast Renewal Applications, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process*, First Report and Order, 4 FCC Rcd 4780 at ¶ 5 (1989).

[92] *Broadcast License Renewal Procedures*, Order, 11 FCC Rcd 6363 (1996).

The positive aspects of eliminating comparative renewals identified by Congress in the broadcast area would also flow to the benefit of wireless services and the Commission staff administering the many thousands of wireless renewal applications. Moreover, the Commission notes in the *NPRM* that Congress concluded that eliminating comparative broadcast renewals would "not jeopardize the ability of the public to participate actively in the renewal process through the use of petitions to deny and informal complaints."[93] As with the reform to the broadcast renewal system, interested third parties would continue here to have redress through the Commission's well-established petition to deny process.[94]

*Returning Spectrum from Non-Renewed Licenses*. CTIA also supports the Commission's proposal to return spectrum from non-renewed licenses automatically. Doing so would help streamline and expedite the transition of the licenses to new licensees, reduce administrative burdens, and minimize the amount of time the underlying spectrum remains unused. Establishing a transparent process for returning spectrum would also reduce regulatory uncertainty and provide interested parties with additional opportunities to obtain spectrum licenses.

The Commission also tentatively concludes in the *NPRM* to continue its established policy of reverting spectrum from non-renewed site-based licenses to the encompassing geographic area license(s).[95] CTIA supports the Commission's reversion policy and encourage the Commission to continue applying it where appropriate for the wireless services covered by the *NPRM*.

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[93] *Id. at* n.117 (*citing House Committee Report at 123*).

[94] *See NPRM* at ¶ 41.

[95] *Id*. at ¶ 44.

## VI. THE FCC'S PROPOSED DISCONTINUANCE RULES WILL CLARIFY EXISTING RULES AND PROMOTE NETWORK DEPLOYMENT AS WELL AS UNIFORMITY

In the *NPRM*, the Commission proposes to adopt uniform rules for the permanent discontinuance of operations for wireless services under Parts 22, 24, 27, 80, 90, 95, and 101 of the Commission's rules.[96] It also tentatively concludes that "for any Wireless Radio Service for which prior approval to discontinue service is not required, permanent discontinuance of service should be defined as 180 consecutive days during which a licensee does not operate or, in the case of Commercial Mobile Radio Service providers, does not provide service to at least one subscriber that is not affiliated with, controlled by, or related to the providing carrier."[97] The Commission also proposes a process for licensees to request more time, for good cause, before a particular license is considered to be permanently discontinued.[98]

CTIA generally supports the Commission's proposed discontinuance rules as set forth in new Section 1.953.[99] A uniform discontinuance framework will provide regulatory certainty and ensure that licensed spectrum is put to use. As a result, it can encourage investment and promote enhanced service deployment while providing some operational flexibility to wireless licensees. As the Commission notes in the *NPRM*, it will also serve the public interest by providing comparable regulatory treatment to similarly situated licensees.[100] In addition, the automatic termination provision will ensure further that spectrum does not lay idle for extended periods and will enable the Commission to reclaim unused spectrum more expeditiously to ameliorate the severe spectrum shortage for mobile wireless services. CTIA also strongly supports the

[96] *See, e.g.*, *id*. at ¶¶ 49-50, 53-59.

[97] *Id*. at ¶ 56.

[98] *Id*. at ¶ 58.

[99] *See id*. at Appendix A, Proposed Section 1.953.

[100] *Id*. at ¶ 53 and Appendix A, Proposed Section 1.953.

Commission's proposal to provide an express process for licensees to request more time, for good cause, before a permanent discontinuance takes effect.

Instead of a 180-day period, however, the Commission should adopt a 12-month period of non-operation (or, for CMRS providers, non-provision of service to at least one unaffiliated subscriber).[101] Adopting a 12-month permanent discontinuance period would bring the same public interest benefits as a six-month period, including providing regulatory certainty and comparable treatment among licensees, encouraging investment, ensuring that spectrum is put to use, and promoting innovative wireless services. Unlike the six-month period, however, a 12-month permanent discontinuance period would not unnecessarily penalize licensees that have built out and continue to operate in certain remote or highly seasonal areas of the country (*e.g.*, areas that may essentially be uninhabited for more than half of the year). For example, remote areas of Alaska, desert regions, mining towns (or similar single-industry areas), certain vacation destinations, and even some summer camps or schools providing niche services could all be harmed by a six-month permanent discontinuance period. The 12-month permanent discontinuance period should also commence on the date the initial construction notification is due to the Commission, to ensure uniformity and that licensees deploying services early are not unfairly penalized.

## VII. SEPARATE BUILD-OUT OBLIGATIONS SHOULD NOT APPLY TO EXISTING PARTITIONING AND DISAGGREGATION AGREEMENTS, OR TO PARTIES TO PURELY PRO FORMA PARTITIONING AND DISAGGREGATION TRANSACTIONS

The *NPRM* proposes to require that both parties to a geographic partitioning or spectrum disaggregation arrangement individually satisfy "any service-specific performance requirements

[101] The Commission should clarify expressly in the new Section 1.953(f) that in the CMRS context, providing service to roaming subscribers constitutes the provision of service and would enable a licensee to avoid having its license permanently discontinued.

(*i.e.*, construction and operation requirements)."[102] This contrasts with current rules for many services, where one party may assume the entire construction obligation applicable to the entire license area or licensed spectrum block. The *NPRM* sought comment on whether the proposed change "could in some cases discourage publicly beneficial arrangements."[103] While CTIA supports the goal of harmonizing the disparate partitioning and disaggregation rules, we are concerned that this proposal could have the unintended consequence in some cases of discouraging new market entrants and network deployment, particularly in rural areas.

As the Commission is aware, the business case for entering rural markets is often harder to make because the lower population densities, combined with longer backhaul distances, means less revenue to cover higher build-out and operating costs. Under current rules, a potential new market entrant is sometimes willing to purchase spectrum in a rural area, through a partitioning transaction, only if it knows that it will not be saddled with specific build-out requirements in that area. This arrangement imposes the same degree of obligation on the original licensee as if the license were not partitioned, so there is no reduction in the overall level of service coverage.[104] By making the partitioning of rural areas more attractive (by lowering regulatory risk), it increases the likelihood that a new entrant will invest in an area that might otherwise go unserved.[105] Under the proposed rules, however, this option would no longer exist. While the proposed rules would ensure that a prescribed level of build-out does occur in all partitioned

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[102] *NPRM* at ¶ 93.

[103] *Id*.

[104] As the *NPRM* observed, the Commission previously stated that "the goal of our construction requirements in both the partitioning and disaggregation contexts is to ensure that the spectrum is used to the same degree that would have been required had the partitioning or disaggregation transaction not taken place." *NPRM* at ¶ 95.

[105] Particularly with large license areas, the licensee is often able to satisfy its construction obligations by concentrating on areas of higher population densities where demand for service is higher.

areas, they could have the effect of decreasing the total number of partitioning transactions, thereby potentially reducing the overall level of network deployment that occurs. Partitioning transactions are especially likely to be discouraged in cases where the performance deadline is fast approaching, leaving the potential partitionee with little time to complete its build-out.[106]

Likewise, in the disaggregation context, the proposed rules could also discourage new market entrants. As the *NPRM* notes, current rules for many services do not require any minimum amount of spectrum usage.[107] By increasing regulatory risk, the proposed rules could create a disincentive for a new party to acquire a portion of the spectrum that is not being used by a licensee that has more spectrum than it can use. In CTIA's view, it would be preferable to harmonize the partitioning and disaggregation rules in a manner that maintains parties' flexibility to structure transactions in a manner designed to get spectrum into the hands of those mostly likely to put it to use.[108]

Nevertheless, if the Commission does adopt proposed Section 1.950, it should incorporate two important exceptions. First, it should "grandfather" existing partitioning and

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[106] Presumably, under proposed Section 1.950(g), a partitionee or disaggregatee would have no additional performance obligation if the transaction occurs after the original licensee has already satisfied its obligation for the entire license area, as there would no longer be any deadline to be met. This should be made explicit in the rule, to avoid any misunderstanding that could discourage partitioning/ disaggregation transactions.

[107] *See NPRM* at ¶ 94.

[108] CTIA recognizes that the proposed rules are intended to prevent parties' ability to manipulate the current rules in a way that allows them to avoid any build-out under a license, such as the scenario described in paragraph 85 of the *NPRM*. Under that scenario, a licensee "could partition off the most valuable portion of its geographic area to either an affiliate or third party, and then undertake no construction in the retained portion of the licensed area. While the original licensee would lose its license, the affiliate or third party would be able to keep, without undertaking any construction for an indefinite period, the area it received under the partitioning." CTIA believes that this most-likely rare situation could be addressed in a more targeted fashion, such as by disallowing a party from assuming the performance obligations for the entire license area or spectrum block unless it holds spectrum covering a majority of the population of the original license area (for partitioning), or a majority of the spectrum block (for disaggregation).

disaggregation agreements so as not to impose any new requirements retroactively. Parties to existing agreements have made business and investment decisions – such as agreeing on a price for the spectrum that was partitioned or disaggregated – based on the existing rules. In some cases, the parties may lack the resources to expand deployment beyond what was already contemplated in their business plans.

Second, the Commission should not apply the proposed rule to purely *pro forma* spectrum license assignments involving partitioning or disaggregation. In other words, a licensee's wholly-owned subsidiaries or commonly-controlled affiliates should be exempted from any separate or independent build-out requirements when they are parties to partitioning and disaggregation arrangements with the licensee. For reasons of operational efficiency and administrative convenience, service providers sometimes partition or disaggregate their licenses among two or more affiliated licensee entities. For example, a provider may wish to have all of its spectrum in one state or region held by one licensee subsidiary, and spectrum for another state or region held by another subsidiary. Under the proposed rules, such an innocuous partitioning could create substantive differences in the provider's performance obligations. The Commission's rules should not interfere with a provider's ability to arrange its organizational structure in the most efficient manner.

## VIII. CONCLUSION

For the reasons discussed above, the Commission should reject the misguided proposals contained in the *NPRM* that would lead to more bureaucratic complexity and confusion, combined with less certainty and, ultimately, less investment, in the wireless marketplace. While a few of the proposed rule changes are worthy of adoption, the *NPRM* overall sends exactly the wrong message to an industry that, at the moment, is focusing its efforts on ensuring the rapid expansion of mobile broadband throughout the nation. As articulated in the National Broadband Plan, the Commission should share this focus and not become distracted by proceedings that seek to add burdens and solve non-existent problems.

Respectfully submitted,

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August 6, 2010