

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Part 101 of the)	WT Docket No. 10-153
Commission's Rules to Facilitate the Use of)	
Microwave for Wireless Backhaul and)	
Other Uses and to Provide Additional)	
Flexibility to Broadcast Auxiliary Service)	
and Operational Fixed Microwave)	
Licensees)	
)	
Request for Interpretation of Section)	WT Docket No. 09-106
101.141(a)(3) of the Commission's Rules)	
Filed by Alcatel-Lucent, Inc., <i>et al.</i>)	
)	
Petition for Declaratory Ruling Filed by)	WT Docket No. 07-121
Wireless Strategies, Inc.)	
)	
Request for Temporary Waiver of Section)	
101.141(a)(3) of the Commission's Rules)	
Filed by Fixed Wireless Communications)	
Coalition)	
)	

PETITION FOR RECONSIDERATION

October 27, 2011

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Pursuant to Section 1.429 of the Commission's Rules, the Wireless Communications Association International, Inc. ("WCAI"), the trade association of the wireless broadband industry, submits this Petition for Reconsideration in these proceedings (the "backhaul proceeding").¹

II. DISCUSSION

This Petition for Reconsideration is limited to one issue: The Commission's decision to address "substantial service rules and policies" in the backhaul proceeding.² As an initial matter, this issue was not raised in the Commission's Notice of Proposed Rulemaking for this proceeding, and thus the Commission's consideration of the issue in the Memorandum Opinion and Order violates the notice-and-comment requirements of the Administrative Procedure Act.³ Moreover, while WCAI understands the Commission's desire to address all matters raised in a particular docket, this proceeding was not the best place to consider substantial service rules and policies relating to wireless backhaul. Although the National Spectrum Management Association (NSMA) raised the issue in these dockets, substantial service rules and policies are already the subject of *another* rulemaking proceeding intended to address these issues comprehensively (the "license renewal proceeding").⁴ The public interest would be better served if the Commission addressed these issues in its comprehensive license

¹ *Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul*, Report and Order, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 26 FCC Rcd 11614 (2011) ("MO&O").

² *Id.* at 11661.

³ 5 U.S.C. §553(b).

⁴ *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 et al.*, Notice of Proposed Rulemaking and Order, 25 FCC Rcd 6996 (2010) ("License Renewal NPRM").

renewal proceeding rather than on a piecemeal basis in other proceedings with a much narrower scope. Accordingly, WCAI respectfully requests that the Commission reconsider its decision to address NSMA's comments in the backhaul proceeding and defer to the license renewal proceeding any decision regarding substantial service rules and policies relating to backhaul.

In its comments in the license renewal proceeding, WCAI observed that “the differences between [wireless operators] may be substantial depending on the spectrum they use, the services they provide and the markets they serve.”⁵ WCAI opined “that what might qualify as substantial service for one type of wireless licensee may be irrelevant to another.”⁶ In an *ex parte*, WCAI expanded upon this point. Specifically, WCAI noted that the Commission’s current “build it and they will come” approach to the substantial service safe harbor “is inapplicable to the carrier’s carrier backhaul model in the area-licensed millimeter wave bands.”⁷ “[U]sing spectrum solely for the purpose of meeting an arbitrary safe harbor provision would serve no one.”⁸ For this reason, WCAI urged the Commission to adopt a safe harbor for the carrier’s carrier backhaul model “focused on the offering of a viable, competitive backhaul option available to commercial service providers and government users rather than a particular number of fixed links per population.”⁹

In the above-captioned proceedings, NSMA asked the Commission to “track and

⁵ Comments of WCAI, WT Docket No. 10-112, at 7-8 (filed Aug. 6, 2010).

⁶ *Id.* at 8.

⁷ *Ex Parte* Comments of WCAI, WT Docket No. 10-112, at 1 (filed May 9, 2011) (“May 9 *Ex Parte*”).

⁸ *Id.* at 3.

⁹ *Id.* at 1.

credit” certain steps that may lead to utilization of spectrum in the 24 GHz, 39 GHz, and LMDS bands.¹⁰ Although the approach is not identical, the steps suggested by NSMA bear some similarity to those submitted by WCAI in the license renewal proceeding. The Commission’s decision in the backhaul proceeding regarding substantial service could thus be misinterpreted as precedent in the license renewal proceeding.

A statement in the Report and Order that appears to contradict the purpose of the license renewal proceeding also presents the potential for confusion. In the license renewal proceeding, the Commission “propose[d] to create consistent requirements for renewal of licenses,” including substantial service requirements.¹¹ Yet, in the Report and Order in the backhaul proceeding, the Commission said there is “no need to modify our substantial service rules and policies.” The Commission should resolve this contradiction by reconsidering its decision in the Report and Order and deferring to the license renewal proceeding any decision regarding substantial service rules and policies relating to backhaul.

Considering substantial service issues comprehensively would aid the Commission in adapting its performance requirements to relevant differences among wireless business models – differences that may not be fully explained in an unrelated proceeding. For example, as WCAI noted in the license renewal proceeding, the Commission’s current renewal expectancy for LMDS is based on renewal expectancy rules the Commission adopted for cellular service because the Commission expected

¹⁰ See MO&O, 26 FCC Rcd at 11660.

¹¹ License Renewal NPRM, 25 FCC Rcd at 6997.

licensees to offer point-to-multipoint (“P2MP”) service.¹² But the market and technologies for P2MP services did not develop as the Commission anticipated. Rather than offer P2MP services, licensees in the area-licensed millimeter wave bands are offering fixed point-to-point (“FP2P”) services. As a result, in the backhaul proceeding, the Commission applied substantial services policies intended for P2MP services to FP2P services.

When the differences between P2MP and FP2P business models are comprehensively considered, it is apparent that substantial service rules that promote service to the public when applied to P2MP services have the *opposite* effect when applied to FP2P services. Current substantial service safe harbors applicable to P2MP services are aimed at the *offering* of service to the public at retail. A mobile service provider may demonstrate substantial service by building a base station and offering service to consumers even if the mobile service provider does not have a single subscriber. Service is not *provided* until a consumer actually buys a mobile device and agrees to take service. But current safe harbors for retail P2MP services do not require a particular take-rate, i.e., the safe harbors do not require a particular number of consumers to actually take the service offered. Rather than achieve a specific subscribership, it is enough for a mobile service provider merely to offer retail service to the public by covering particular percentages of geography or population.

The current safe harbors for FP2P services, however, effectively require a particular take-rate. Unlike most P2MP services, FP2P services in the area-licensed millimeter wave bands are not offered at retail, i.e., they are not offered to consumers for

¹² May 9 Ex Parte at 2.

direct consumption. Because FP2P backhaul services are not offered at retail, a FP2P service provider need not construct facilities to begin offering service to a network operator. FP2P service is *offered* when the FP2P service provider offers to construct facilities on behalf of a network operator (whether mobile, fixed, commercial or government). FP2P service is *provided* only when the offered facilities are constructed pursuant to the request of the network operator. But the population-based coverage requirement for FP2P offerings in the area licensed millimeter wave bands – 4 fixed point-to-point links per 1 million population – is typically met only when a network operator actually takes backhaul service at the specified level. The current rules thus apply a take-rate approach to FP2P backhaul services, but not to P2MP mobile services.

Although well-intentioned, the take-rate approach to FP2P safe harbors does not further the Commission’s goal of promoting service to the public. If network operators do not request the construction of 4 links per 1 million population from an area-licensed FP2P backhaul service provider, the FP2P service provider’s options are to relinquish its spectrum or build “links to nowhere.” Relinquishing the license would result in delay during the relicensing process with no assurance that the actual take rates for the new licensee’s service would be any better than the previous licensee’s service. And building “links to nowhere” would merely drain precious capital that could have been used to build or develop services that network operators actually need.

The potential for such absurd results becomes a self-fulfilling prophecy by creating substantial investor uncertainty about the amount of capital required to preserve a license in the millimeter wave bands. The offer-based safe harbors applicable to retail mobile services provide investors with certainty that access to spectrum (a

business prerequisite) will be preserved with a given amount of investment, irrespective of actual consumer take rates or a particular level of profitability. Investors subject to the take-rate approach applicable to FP2P services have no certainty that a prerequisite to recouping their investment – a spectrum license – will be preserved. To meet the FP2P safe harbor, the business must be more than merely profitable – it must meet a predefined level of business success or forfeit the entire enterprise. Even worse, a FP2P provider may confirm the validity of its business model by meeting the applicable safe harbor in some areas, yet still lose licenses due to a lack of demand for FP2P services in particular geographic areas during the license period.

A lack of customer demand for FP2P service at arbitrary, predetermined levels should not preclude license renewal in the area licensed millimeter wave bands, but that is a likely result if the Commission maintains its take-rate based approach to substantial service of 4 links per 1 million population. An offer-based safe harbor would require only that an area-wide millimeter wave band licensee offer FP2P service or spectrum leases on commercially reasonable terms and conditions to commercial or government fixed or mobile telephony/broadband service providers or to the licensee's internal network planners. There is sufficient evidence that a FP2P provider is offering service on commercially reasonable terms and conditions if the licensee certifies that it is (1) continuously marketing its services or leasing opportunities and (2) at least one customer has taken the service offered or leased spectrum in at least one license area. Such a standard would serve the Commission's goal of promoting service to the public by promoting investor certainty while requiring that FP2P service providers uphold their public interest obligation to offer service.

As the above discussion illustrates, there *is* a need for the Commission to modify its substantial service rules and policies. WCAI therefore asks that the Commission vacate paragraphs 113 and 114 of the Report and Order. The Commission need not – and should not – make any substantive decisions regarding substantial service in the backhaul proceeding. It should instead consider these issues more comprehensively in the license renewal proceeding.

IV. CONCLUSION

WCAI respectfully requests that the Commission reconsider its Report and Order in these proceedings by vacating paragraphs 113 and 114 of the Report and Order and considering in the license renewal proceeding certain modifications to performance requirements for backhaul services in the area-licensed millimeter wave bands.

Respectfully submitted,

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