

Portions of the FCC's Recent Wireless License Renewal Order Take Effect Oct. 2nd, but Key Rule Sections Delayed Pending OMB Review

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At the beginning of August, the Federal Communications Commission ("FCC") took steps to reconcile a diversity of renewal requirements and permanent discontinuance conditions within its rules for many of the licensed radio services. However, although the [Second Report and Order](#) ("Second R&O") was published in the Federal Register September 1, the rules will take effect only in staggered fashion as set forth in the [notice](#) beginning on Monday, October 2, 2017, with significant portions set to take effect months later after further review or, per the FCC's decision, years in the future. In the interim, depending on the service and situation, existing rules governing renewals and discontinuance will continue to apply. Licensees will certainly want to become familiar with the parts of the *Second R&O* pertinent to their rules service, whether the licenses were issued on a geographic or site-based basis. Below, we breakdown the time frames in which the rules will take effect:

Overview

The *Second R&O* created a single uniform standard for license renewal for the wireless radio services ("WRS") which includes "[a]ll radio services authorized in [FCC Rule] parts 13, 20, 22, 24, 26, 27, 30, 74, 80, 87, 90, 95, 96, 97 and 101. So in a nutshell, with certain enumerated exemptions, this includes most commercial mobile radio services, private land mobile radio services, private and common carrier fixed microwave and millimeter wave services, and aviation services, among others. The principal exclusions of the new renewal standards are for licenses that have no construction obligations, such as services licensed by rule. The rules apply to WRS with both geographic and site-based licenses.

The new renewal standard laid out by the Commission has two flavors, one for providers of service to the public and another applying to licensees serving their own communications needs. The general standard requires "each WRS licensee [to] demonstrate that over the course of its license term, the licensee either: (1) provided and continues to provide service to the public, taking into account the periods of time the applicable service-specific rules give licensees to construct facilities and meet performance benchmarks, or (2) operated and continues to operate over the course of the license term to address the licensee's private, internal communications needs, again taking into account the periods of time the applicable service-specific rules give licensees to construct facilities and meet performance benchmarks."

In implementation of the broadly applicable renewal standard, the *Second R&O* adopted four safe

harbors for renewal applicants for (1) site-based licenses; (2) geographically-licensed wireless providers; (3) geographically-licensed private systems; and (4) partitioned or disaggregated licenses without a performance requirement. Each safe harbor requires three certifications, (a) one regarding the ongoing provision of service and/or operations tailored to the type of license, (b) a second that there has been no permanent discontinuance of operations during the term, and (c) the third that the licensee “has substantially complied with all applicable FCC rules, policies, and the Act.”

If each of these certifications under the applicable safe harbor cannot be made without qualification, the Commission will require a renewal applicant to submit and will consider a fact-based “renewal showing” to demonstrate how the licensee meets the general renewal standard. The renewal showing must include a detailed description of the applicant’s provision of service to the public or to meet its private communications needs during the entire license period and must address several factors, including the level and quality of service/operations, service commencement, interruptions and outages, as well as several others. The third certification under the safe harbors, the “substantial compliance” certification, will still be required or the circumstances making the applicant incapable of making the certification will have to be explained, and the applicant will have to make the case why renewal of its license should still occur.

The Commission will not require each party to a partitioning or disaggregation arrangement to certify that it will independently satisfy service-specific construction and performance requirements. While parties in such situations are at liberty to do so, the *Second R&O* will also allow them to share in fulfilling such requirements for the licensee as a whole, which will go into effect prospectively.

In addition to the generally applicable renewal standard, the *Second R&O* adopted a new uniform standard for the WRS defining permanent discontinuance of service as a period of 180 or 365 consecutive days consecutive days for geographic licenses and site-based licenses, respectively, during which the licensee does not operate or provide service to at least one subscriber with which it is not affiliated. The Commission provided further explanations about what would qualify as operation or providing service, for example, stating unequivocally that channel keeper operations such as test signals, tones, or color bars fail to satisfy. When discontinuance happens, the license is constructively terminated, although there are provisions for requesting extensions, under which certain limited extensions are effectively automatic following timely requests. (For services that already have applicable definitions of permanent discontinuance, the new discontinuance rule will begin to apply on the date a licensee must meet its first performance requirement benchmark.)

The *Second R&O* also eliminates legacy “comparative renewal” rules, and prohibits applicants from filing competing applications during the WRS renewal process.

Delayed Implementation of the General WRS Renewal Standard, Safe Harbors, and Renewal Showing Rules (Among Others)

Key aspects of the *Second R&O* will not go into effect on October 2, because the new rules require approval by the Office of Management and Budget (“OMB”) under the Paperwork Reduction Act (“PRA”). Indeed, the effectiveness of what some might characterize as the heart of the *Second R&O* – new rule Sections 1.949, 1.950, and 1.953 – awaits completion of OMB review. These delayed sections the new general license renewal standard, the safe harbors, the substantial compliance certification, and the renewal showing where the safe harbors are not available. (For some license types, the delay is meaningless because much of the relevant rule sub-sections take affect only in 2018 or 2023, as described below.) These new delayed rules also govern the new general and uniform standard applicable to discontinuance of service (and the resulting license termination) as

well as geographic partitioning and spectrum disaggregation.

In the interim, before these rules take effect, existing the service-specific standards and rules will apply. However, it is notable that the *Second R&O* calls for many of the existing renewal and discontinuance regulations to be removed from specific service rule parts, but the Commission apparently took care in those cases to delay the effectiveness of the rule deletions until the OMB review finished and Sections 1.949 or 1.953, as applicable, takes effect.

An OMB review of regulations involving record-keeping or reporting typically takes at least several months. There will be a future *Federal Register* notice announcing the review is complete and which will set the effective day of these three new rule sections and the aforementioned service-specific rule deletions.

Partial Implementation Begins October 2:

Despite the fact that many core aspects of the *Second R&O* still await OMB approval, a few elements of the new rules will go into effect on October 2, principally the following:

- **Construction requirements for Certain Services:** Modifications to the construction requirements (e.g. substantial service requirements) for Local Multipoint Distribution Service (“LMDS”), Multichannel Video Distribution and Data Service (“MVDDS”), 24 GHz service, and 218-219 MHz will go into effect October 2. In modifying such obligations, the FCC implemented numerous service specific reforms such as eliminating a construction requirement compliance certification for LMDS partitioning and disaggregation applicants, modifying the components of a license renewal application for MVDDS, and adjusting service status reporting requirements for 218-219 MHz licensees.
- **Part 90 Renewal Provisions Revised:** The *Second R&O* simplified the renewal rules related to Part 90, private land mobile renewals, merely retaining the two requirements that applicants must demonstrate that they have provided “substantial” service during their past license term – “service that is sound, favorable, and substantially above a level of mediocre service that just might minimally warrant renewal” and that they have “substantially complied with applicable FCC rules, policies, and the Communications Act of 1934, as amended.” This standard, requiring the substantial service showing, applies only until 2023. The remainder of Rule 90.743 was removed.
- **Remaining Comparative Renewal Rules Eliminated:** The amended procedural rules in the *Second R&O* pertaining to dismissals without prejudice, dismissals of mutually exclusive applications not granted, and dismissals for failure to prosecute or to respond to the Commission will take effect on October 2. The primary effect of these modifications (to Rule Section 1.934) is the elimination of the remaining, service specific aspects of the FCC rules pertaining to comparative renewals, which the *Second R&O* termed an “outdated vestige of licensing rules predating our current reliance on auctions in many services.” Accordingly, the *Second R&O* prohibited the filing of competing renewal applications for all WRS.

Rules Taking Effect in 2018, 2019, and 2023

Separate and apart from the delay caused by OMB review, the *Second R&O* delayed implementation of a number of the new renewal and discontinuance rules as applied to several services, as summarized below.

2018:

On October 1, 2018, the new renewal paradigm proposed for Section 1.949 will go into effect for the Common Carrier Fixed Point-to-Point Microwave Service. For all other site-based licenses in the WRS covered by the *Second R&O*, the new renewal regulations (including the renewal standard, safe harbor, renewal showing, and substantial compliance certification) will go into effect upon the effective date in the *Federal Register* notice of OMB approval of new Section 1.949.

2019:

As an equitable measure, all WRS that do not currently have an explicit definition of permanent discontinuance in their rule parts, licensees will have until January 1, 2019 to come into compliance with the *Second R&O*'s new rules regarding permanent discontinuance. (Those that do will be subject to the new rules on the date specified in the notice of OMB approval in the *Federal Register*.) If a licensee in the services without a current definition of permanent discontinuance is not providing service or is not operational on January 1, 2019, the discontinuance period in the new rules – whether 180 or 365 days – will start to run on that date.

2023:

Geographic licenses with certain exceptions must comply with Section 1.949 (including the renewal standard, safe harbor, renewal showing, and substantial compliance certification) rather than their service specific rules only beginning on January 1, 2023. However the new articulation of the renewal paradigm, including the safe harbors, will go into effect for covered geographic licenses in the 600 and 700 MHz Commercial Services, Advanced Wireless Services (AWS-3 (1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz) and AWS-4 (2000-2020 MHz and 2180-2200 MHz) only), and H Block Service after on the date specified in the notice of OMB approval of Section 1.949 in the *Federal Register*, in large part because they already are subject to the new uniform renewal standard pursuant to analogous service-specific rules (although the safe harbors may not have been available).

Certain rules concerning “substantial service” will apply through January 1, 2023. For 218-219 MHz Service licenses and 24 GHz Service licenses, until January 1, 2023, the “substantial service” assessment, which must be made as a performance demonstration within ten years after license grant, will be made at renewal pursuant to the provisions and procedures contained in § 1.949. Similarly, until January 1, 2023, all Part 90 licensees seeking renewal of their authorizations at the end of their license term must make a substantial service showing in their renewal applications. (For other services, such as for LMDS, the revised rules simply make clear that the substantial service showing must be made within ten years of grant without specifically tying it to the renewal filing.) This five-year transition comes out of the Commission’s objective in the *Second R&O* to clarify that the renewal showing is distinct from the substantial service/performance requirement demonstration.