

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of)	
)	
Amendment of Part 101 of the)	
Commission’s Rules to Facilitate the Use of)	WT Docket No. 10-153
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)	
101.141(a)(3) of the Commission’s Rules)	WT Docket No. 09-106
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)	

**COMMENTS IN SUPPORT OF
PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429(f) of the Commission’s Rules, the Fixed Wireless Communications Coalition (FWCC)¹ files these Comments in support of the Petition for

¹ The FWCC is a coalition of companies, associations, and individuals interested in the Fixed Service—i.e., in terrestrial fixed microwave communications. Our membership includes manufacturers of microwave equipment, fixed microwave engineering firms, licensees of terrestrial fixed microwave systems and their associations, and communications service providers and their associations. The membership also includes railroads, public utilities, petroleum and pipeline entities, public safety agencies, cable TV providers, backhaul providers, and/or their respective associations, communications carriers, and telecommunications attorneys and engineers. Our members build, install, and use both licensed and unlicensed point-to-point, point-to-multipoint, and other fixed wireless systems, in frequency bands from 900 MHz to 95 GHz. For more information, see www.fwcc.us.

Reconsideration in the above-captioned proceeding filed by the Wireless Communications Association International, Inc. (“WCAI”) on October 27, 2011.

WCAI essentially seeks reconsideration of this one sentence in the Commission’s August 9, 2011, release: “We see no need to modify our substantial service rules and policies.”² The sentence relates to renewal policies for 24 GHz, 39 GHz, and LMDS licensees. It turns down a request from the National Spectrum Management Association that the Commission track and credit certain activities in considering whether a licensee has used its spectrum effectively.³

WCAI argues—and we agree—that the adequacy of the Commission’s substantial service rules and policies is better considered in WT Docket No. 10-112, a proceeding launched specifically to address renewal requirements.⁴ As a policy matter, the record in that docket provides the Commission with a far better grounding for informed decision-making.

As a legal matter, moreover, the Commission is barred from ruling on substantial service in the August 9, 2011, release in the present docket because the preceding Notice of Proposed Rulemaking did not raise the issue.⁵ The Administrative Procedure Act (APA) requires an NPRM to provide “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁶ The NPRM here did neither, as to substantial service. Although

² *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 at ¶ 114 (2011).

³ *Id.* at ¶ 113.

⁴ *See 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).

⁵ *See Amendment of Part 101 of the Commission's Rules to Facilitate the Use of Microwave for Wireless Backhaul*, Notice of Proposed Rulemaking and Notice of Inquiry, 25 FCC Rcd 11246 (2010).

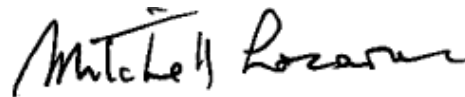
⁶ 5 U.S.C. § 553(b)(3).

the courts have construed the APA to permit a rule that is a “logical outgrowth” of the NPRM,⁷ that cannot save the challenged sentence. The test for “logical outgrowth” is whether a party reasonably should have anticipated a need to file comments on the issue.⁸ The NPRM gave no hint that the Commission might rule on substantial service, and indeed, the NPRM made no reference at all to renewal standards. The Commission’s having nonetheless ruled on the question constitutes what the D.C. Circuit prohibits as a “surprise switcheroo.”⁹

CONCLUSION

For reasons grounded in both policy and legal considerations, the Commission should withdraw its decision on “substantial service rules and policies” and leave that issue for WT Docket No. 10-112.

Respectfully submitted,



Mitchell Lazarus
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
703-812-0440
Counsel for the Fixed Wireless
Communications Coalition

December 16, 2011

⁷ *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

⁸ *Northeast Maryland Waste Disposal Authority v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004).

⁹ *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005).

CERTIFICATE OF SERVICE

I, Deborah N. Lunt, a secretary with the firm of Fletcher, Heald & Hildreth, PLC, hereby state that true copies of the foregoing Comments in support of Petition for Reconsideration were sent this 16th day of December, 2011, by first class mail, postage prepaid to the attached service list, except those listed at the FCC in Washington, DC, which are hand delivered.

A handwritten signature in black ink, appearing to read "D. Lunt", with a stylized flourish extending to the right.

Deborah N. Lunt

SERVICE LIST

Chairman Julius Genachowski
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Robert McDowell
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Rick Kaplan, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

James Schlichting, Senior Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John S. Leibovitz, Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Tom Peters, Chief Engineer
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Blaise Scinto, Chief
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

John Schauble, Deputy Chief
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Charles Oliver, Attorney Advisor
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Brian Wondrack, Attorney Advisor
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Stephen Buenzow, Deputy Chief
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
1280 Fairfield Road
Gettysburg, PA 17325

Fred B. Campbell, Jr.
President and CEO
Wireless Communications Association
International, Inc.
1333 H Street NW Suite 700 West
Washington DC 20005