

In re: NTCH, Inc., ) No. 18-1122  
)  
)

The Federal Communications Commission opposes the above-referenced petition for issuance of a writ of mandamus filed by NTCH, Inc.<sup>1</sup>

<sup>1</sup> NTCH filed another petition for mandamus on the same day as this petition, which has been docketed as No. 18-1121. Although the Commission earlier filed a single motion in both dockets seeking an extension of time to respond to the petitions, we are filing separate responses to each petition because we have determined that the two petitions are unrelated.

<sup>3</sup> Petition for Reconsideration at 1 (July 2, 2012).

Bureau released an order addressing NTCH's petition for reconsideration.<sup>4</sup>

NTCH's mandamus petition therefore should be dismissed as moot.

Insofar as NTCH asks this Court to direct "the full Commission" to issue an order that "can be presented to the Court for review on the merits,"<sup>5</sup> that is not the relief that NTCH asked for in its petition for reconsideration; it asked for the Bureau to reconsider its own prior order. To the extent NTCH seeks a ruling from the full Commission, it must seek that *from the Commission* through ordinary administrative processes, not from this Court via mandamus. The filing of an application for review by the Commission of the Bureau's order on reconsideration is "a condition precedent to judicial review."<sup>6</sup> "[T]he full FCC must have the opportunity to review all cases and all aspects of those cases before parties may exercise their statutory right to appeal to this Court under 47 U.S.C. § 402(b)."<sup>7</sup>

Respectfully submitted,

Thomas M. Johnson, Jr.  
General Counsel

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<sup>4</sup> *Commnet Supply, LLC, Crossroads License Holding Sub A, and Their Successors in Interest*, DA 18-820, rel. Aug. 7, 2018 (Wireless Telecom. Bur.) (attached as Ex. A).

<sup>5</sup> Petition for Reconsideration at 10.

<sup>6</sup> 47 U.S.C. § 155(c)(7); 47 C.F.R. § 1.115(k).

<sup>7</sup> *NTCH, Inc. v. FCC*, 877 F.3d 408, 414 (D.C. Cir. 2017), quoting *Environmental, LLC v. FCC*, 661 F.3d 80, 84 (D.C. Cir. 2011).

David M. Gossett  
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s/ William J. Scher

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August 9, 2018

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*/s/ William J. Scher*

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## **CERTIFICATE OF FILING AND SERVICE**

I, William J. Scher, hereby certify that on August 9, 2018, I filed the Opposition of the Federal Communications Commission to Petition for A Writ of Mandamus with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system. The participants in the case, listed below, who are registered CM/ECF users will be served electronically by the CM/ECF system.

*s/ William J. Scher*

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# Exhibit A

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

|   |   |                          |
|---|---|--------------------------|
| In the matter of                        | ) |                          |
|   | ) |                          |
| COMMNET SUPPLY, LLC, CROSSROADS         | ) | Call Sign WQGH652        |
| LICENSE HOLDING SUB A, and their        | ) | ULS File Nos. 0003818184 |
| successors in interest                  | ) | 0003805569               |
|   | ) |                          |
| Request for Waiver and Extension of PCS | ) |                          |
| Construction Requirements               | ) |                          |
|   | ) |                          |
| Request for Renewal of PCS License      | ) |                          |

**ORDER**

**Adopted: August 7, 2018**

**Released: August 7, 2018**

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. Crossroads Wireless Liquidating Trust (Crossroads Trustee) and NTCH, Inc. (NTCH) (together, Petitioners)<sup>1</sup> filed a Petition for Reconsideration (Petition) of a Mobility Division (Division) order.<sup>2</sup> In the Denial Order, the Division denied a request for waiver and extension of time for construction of the Jefferson City, MO Basic Trading Area (BTA) PCS C-Block License (Call Sign WQGH652) (License) and dismissed the related Renewal Request.<sup>3</sup> Those requests were filed by Commnet Supply, LLC (Commnet) and its wholly owned subsidiary, Crossroads License Holding Sub A Inc. (Crossroads Sub).<sup>4</sup> As discussed below, we deny the Petition and affirm that the License automatically terminated on June 30, 2009.

<sup>1</sup> Crossroads Wireless Liquidating Trust and NTCH, Inc., Petition For Reconsideration of the Request for Waiver and Extension of PCS Construction Requirements and Request for Renewal of PCS License, filed July 2, 2012 (Petition).

<sup>2</sup> See Commnet Supply, LLC, Crossroads License Holding Sub A, and their successors in interest, Request for Waiver and Extension of PCS Construction Requirements, Request for Renewal of PCS License, Order, 27 FCC Rcd 5832 (2012) (Denial Order).

<sup>3</sup> Crossroads Wireless, Inc., Debtor-in-Possession, Application for Renewal of Call Sign WQGH652, ULS File No. 0003805569 (filed April 13, 2009; updated May 17, 2010) (Renewal Request).

<sup>4</sup> Crossroads License Holding Sub A Inc., Request for Extension of Time to Satisfy 10-year Construction Threshold for Call Sign WQGH652, Universal Licensing System (ULS) File No. 0003818184 (filed April 24, 2009; updated and amended May 18, 2009, July 8, 2009, and May 5, 2010) (Waiver Request). Commnet, Crossroads Sub, and its successor in interest, Crossroads Wireless, Inc. Debtor-in-Possession (Crossroads DIP) filed three separate supplements to the original waiver request. We refer to these filings cumulatively as the Waiver Request unless otherwise noted. Where reference to a specific supplemental filing is necessary, we refer to them as the “Original Waiver Request,” “First Supplement,” “Second Supplement,” and “Third Supplement” consistent with the filing dates.

## II. BACKGROUND

2. The License was created on October 21, 2006 by a disaggregation of 10 megahertz of spectrum from call sign WPOJ715, a 30 megahertz PCS license held by Chariton Valley Communications Corp. (Chariton), the original licensee in the market.<sup>5</sup> At the time of the disaggregation, Chariton was in compliance with its first five-year construction requirement under Section 24.203(a)<sup>6</sup> of the Commission's rules.<sup>7</sup> On April 27, 2007, the License was acquired by Crossroads Wireless, Inc. (Crossroads Wireless).<sup>8</sup> Pursuant to Section 24.203(a) of the Commission's rules, the License's second construction deadline was June 30, 2009, by which time the licensee would have had to demonstrate that it was providing "adequate service" to at least two-thirds of the population in its license area.<sup>9</sup>

3. On August 6, 2008, Crossroads Wireless filed a pro forma notification to advise the Commission that it had assigned the License, along with certain other wireless licenses, to a newly formed, wholly owned subsidiary, Crossroads Sub.<sup>10</sup> At the same time, Crossroads Wireless pledged all of the equity in Crossroads Sub as collateral for debts owed to Commnet.<sup>11</sup> On November 18, 2008, Crossroads Wireless and Commnet filed an application for consent to transfer control of Crossroads Sub to Commnet in partial satisfaction of that debt.<sup>12</sup> At the time of the transfer, the License was operational, with a single cell site providing roam-only service to an area covering more than one-third of the BTA population.<sup>13</sup> Subsequently, the site ceased providing service.<sup>14</sup>

4. In February 2009, several of Crossroad Wireless' creditors filed an involuntary petition under Chapter 7 of the Bankruptcy Code to force its operating subsidiary into bankruptcy.<sup>15</sup> On February 20, 2009, Crossroads Wireless filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code, and its operating subsidiary converted its Chapter 7 case into one under Chapter 11. Subsequently, the cases were consolidated under the jurisdiction of the Bankruptcy Court.<sup>16</sup> The Bankruptcy Court later authorized the bankruptcy estate to sell substantially all of the assets of Crossroads Wireless, including its wireless licenses, to satisfy its debts.<sup>17</sup>

5. According to Commnet and Crossroads Sub, immediately after the bankruptcy petitions were

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<sup>5</sup> Chariton Valley disaggregated the 10 megahertz of spectrum to Chickasaw Wireless, Inc. See ULS File No. 0002779737.

<sup>6</sup> 47 CFR § 24.203(a).

<sup>7</sup> See generally, administrative details in ULS for call sign WPOJ715. Chariton met the first construction requirement of operating facilities that transmit with a signal level sufficient to provide adequate service to at least one-third of the population in its licensed area in 2004.

<sup>8</sup> Crossroads Wireless acquired the License from Chickasaw Wireless, Inc. See ULS File No. 0002938946.

<sup>9</sup> See 47 CFR §24.203(a). In the alternative, licensees may choose to provide "substantial service" in the license area within the appropriate five- and ten-year benchmarks.

<sup>10</sup> See Crossroads Wireless Inc. Notification of Pro Forma Assignment, ULS File No. 0003535532 (filed August 6, 2008); Original Waiver Request at 1.

<sup>11</sup> Original Waiver Request at 1-2.

<sup>12</sup> *Id.* at 2; Third Supplement at 2.

<sup>13</sup> Original Waiver Request at 2.

<sup>14</sup> *Id.*

<sup>15</sup> See Third Supplement at 1-2.

<sup>16</sup> Original Waiver Request at 2; Third Supplement at 1-2.

<sup>17</sup> Third Supplement at 2.



filed, the question arose as to whether the transfer of control to Commnet was “avoidable as a preference” and, as such, whether the transfer should be invalidated, and the License included in the bankruptcy estate with the remainder of Crossroads Wireless’ assets.<sup>18</sup> In response to this threatened “avoidance action,” Commnet and Crossroads Sub filed the Original Waiver Request on April 24, 2009. In the Request, Commnet and Crossroads Sub requested a waiver of Section 24.203<sup>19</sup> of the Commission’s rules and an extension of time to complete construction to six months following resolution of the threatened avoidance action.<sup>20</sup> According to Commnet and Crossroads Sub, the threatened avoidance action placed “a substantial cloud” over the ownership of the License, which would not be resolved until August 2009 at the earliest. Accordingly, Commnet and Crossroads Sub argued that it would be unreasonable to require either Commnet or Crossroads Sub to complete construction by the June 30, 2009 deadline.<sup>21</sup>

6. In the First Supplement, filed on May 18, 2009, Commnet and Crossroads Sub stated that they had “agreed in principle to allow the broker retained by the Creditors’ Committee in the ‘Crossroads’ bankruptcy cases to include Applicant’s [Crossroads Sub] licenses as being offered for sale together with the licenses held by Crossroads DIP,<sup>22</sup> so as to increase the number of licenses to be offered and therefore increase outside bidding interest.”<sup>23</sup> They claimed that any such sale would be without prejudice to any avoidance action filed by Crossroads DIP. They also amended their request to extend the construction deadline to January 23, 2010 while reserving the option to request a further extension if the alleged disputed ownership of the License was not resolved by July 23, 2009.<sup>24</sup>

7. On July 8, 2009, Commnet and Crossroads Sub filed the Second Supplement, which they asserted was responsive to concerns raised by Commission staff in informal meetings with the parties. In the Second Supplement, the parties stated that the avoidance action “remains threatened but as yet unfiled in the bankruptcy court.”<sup>25</sup> The parties also proposed that the Commission adopt a written policy that they claim would provide relief for licensees facing construction deadlines for licenses whose ownership is under a cloud of uncertainty due to a threatened or pending avoidance action. Under this proposed policy, the License would have to be constructed within four months of the final resolution of its ownership status.<sup>26</sup>

8. In December 2009, the bankruptcy court approved a settlement requiring the assignment of the License to Crossroads DIP.<sup>27</sup> This assignment was consummated on January 19, 2010.<sup>28</sup> On February 18, 2010, the bankruptcy court approved a joint plan of action allowing assignment of the Licenses held by Crossroads DIP to a liquidating trustee.<sup>29</sup> On March 19, 2010, the Commission approved a transfer of

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<sup>18</sup> *Id.* at 2-3.

<sup>19</sup> 47 CFR § 24.203.

<sup>20</sup> Original Waiver Request at 3.

<sup>21</sup> *Id.*

<sup>22</sup> After filing for Chapter 11, Crossroads Wireless assigned its wireless licenses to itself as debtor-in-possession (Crossroads DIP). *See* ULS File No. 0003781303 (filed March 23, 2009).

<sup>23</sup> First Supplement at 1.

<sup>24</sup> First Supplement at 1-2.

<sup>25</sup> Second Supplement at 1.

<sup>26</sup> *Id.* at 2-3.

<sup>27</sup> Third Supplement at 3.

<sup>28</sup> *See* ULS File No. 0004088784.

<sup>29</sup> *See* ULS File No. 0004142962, Exhibits 1 and 2.

control of the License from Crossroads DIP to the liquidating trustee.<sup>30</sup> The liquidating trustee then sought to secure a buyer that would be willing and able to complete construction of the License in accordance with Section 24.203 of the Commission's rules.

9. The liquidating trustee subsequently reached an agreement with NTCH to transfer the License to its control, contingent upon the Commission's approval of the Waiver Request.<sup>31</sup> The Commission consented to the transfer of control on April 3, 2010.<sup>32</sup> On May 5, 2010, Crossroads DIP filed the Third Supplement, in which it described its agreement with NTCH and further supplemented its requests for waiver and extension of the construction deadline.<sup>33</sup> Specifically, Crossroads DIP stated that, "[i]f the Commission grants the Extension Request [Waiver Request], NTCH and Crossroads DIP will immediately enter into a short term lease arrangement under which NTCH will, on an expedited basis, construct sufficient cell sites to provide at least the requisite two-thirds coverage of the Jefferson City BTA, and will install the associated infrastructure for these cells. Upon the timely completion of the build out...the parties will consummate the assignment of Station WQGH652 to NTCH...."<sup>34</sup>

10. The Denial Order. On May 31, 2012, the Division issued an order denying the request for waiver and extension of time, finding that an extension of time to meet the June 30, 2009 ten-year construction milestone in Section 24.203 of the Commission's rules was not warranted.<sup>35</sup> The Division noted that the petitioners' arguments rested "almost entirely" on the claimed cloud of uncertainty surrounding the ownership of the License between February 2009 and December 2009 that, Petitioners claimed, was caused by factors beyond their control, specifically, the threatened avoidance action associated with the bankruptcy action.<sup>36</sup> The Division rejected these claims and found that the ownership of the License during that period of time was certain and that the decision not to meet the performance requirement "was a voluntary business decision completely within Commnet's control."<sup>37</sup> The Division proceeded to list the following voluntary business decisions that influenced Commnet's failure to meet the construction deadline: (1) entering into the original agreement with Crossroads Wireless to use Crossroads Sub (and the License) as security for Crossroads Wireless's debt; (2) acceptance of the subsequent transfer of Crossroads Sub (and the License) from Crossroads Wireless; and (3) its decision not to construct a compliant PCS system prior to June 30, 2009 when, by its own admission, it could have completed the construction in a timely manner.<sup>38</sup>

11. The Division found that the petitioners not only failed to show that an extension of time to construct was warranted pursuant to Section 1.946 of the Commission's rules,<sup>39</sup> but also that they failed to satisfy the waiver standard set forth in Section 1.925 of the Commission's rules.<sup>40</sup> Because the licensed spectrum had gone unused through its second construction deadline due to the voluntary business decisions of the licensee, the Division found that the underlying purpose of the rules would not be

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<sup>30</sup> See ULS File No. 0004142962.

<sup>31</sup> Third Supplement at 3.

<sup>32</sup> Third Supplement at 3; ULS File No. 0004195749.

<sup>33</sup> See Third Supplement at 1.

<sup>34</sup> Third Supplement at 4.

<sup>35</sup> See 47 CFR § 24.203(a).

<sup>36</sup> Denial Order, 27 FCC Rcd at 5837, para. 15.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 5837, para. 16.

<sup>39</sup> 47 CFR § 1.946.

<sup>40</sup> 47 CFR § 1.925.

furthered by granting the Waiver Request.<sup>41</sup> Further, the Division found that granting the extension would be contrary to the public interest because it could encourage speculators to obtain licenses in areas where they had no intention of providing service.<sup>42</sup>

12. The Petition for Reconsideration. The Petitioners seek reconsideration of the Denial Order on two grounds.<sup>43</sup> First, the Petitioners claim that the original licensee, Chariton, unknowingly met the ten-year substantial service benchmark for the License (due in 2009) in its five-year build-out showing (filed in 2004). Basing their claim, in part, on application of the Commission's rural substantial service criteria adopted in the *Rural Services Order*,<sup>44</sup> the Petitioners contend that the Commission should accept the five-year build-out showing as satisfying the ten-year substantial service milestone such that no extension would be required and the License could now be renewed.<sup>45</sup> Second, the Petitioners suggest that the Division erred when it found that the ownership of the License during the time period at issue was certain and that Commnet made voluntary business decisions that contributed to its failure to meet the ten-year build-out deadline.<sup>46</sup> The Petitioners argue again that an extension of time to build was warranted because there was doubt as to the ownership of the License caused by the avoidance challenge that was a circumstance beyond Commnet's control.<sup>47</sup>

### III. DISCUSSION

13. Waiver Request Denial. We first address Petitioners' argument that the Division erred when it found that there was no uncertainty as to the ownership of the License. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.<sup>48</sup> We find that the Petitioners have not shown material error on the part of the Division nor raised any new issues or evidence that would warrant reconsideration of the Denial Order.

14. Petitioners claim that the Division erred when it concluded that the ownership of the License was certain and that, therefore, the failure to meet the build-out requirement was a business decision within Commnet's control.<sup>49</sup> After repeating the sequence of events surrounding the failure to meet the ten-year construction milestone, the Petitioners argue again that Commnet was "legally paralyzed" in its ability to do anything with the License during the relevant period and that the Division "ignored" those circumstances entirely.<sup>50</sup> The Petitioners contend that, but for the "cloud" on the License's title,

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<sup>41</sup> Denial Order, 27 FCC Rcd at 5838-39, para. 18.

<sup>42</sup> *Id.* at 5839, para. 19.

<sup>43</sup> Petition at 2.

<sup>44</sup> *Id.* at 2-6; see *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 19078, 19124, para. 80 (2004) (*Rural Services Order*).

<sup>45</sup> Petition at 2-6.

<sup>46</sup> *Id.* at 6-10.

<sup>47</sup> *Id.*

<sup>48</sup> See *Complaint of Lankenau Small Media Network, Inc. Against Ohio Cablevision Network, Inc. d/b/a TCI Cablevision of Ohio, CSR 5030-M, Request for Carriage of WDFM-LP, Defiance, Ohio*, Memorandum Opinion and Order, 13 FCC Rcd 4497 (Cable Bur. 1998); 47 CFR § 1.106(c)(1).

<sup>49</sup> Petition at 6.

<sup>50</sup> *Id.* at 7-8.

Commnet “could have easily completed any necessary build-out in time.”<sup>51</sup>

15. We find no reason to reconsider the Petitioners’ previous argument regarding the ownership status of the License as they have provided no new information regarding this issue nor shown that the Division made a material legal error. To the contrary, the Petitioners reiterate arguments that the Division already considered and rejected. In their 2009 Waiver Request, the petitioners argued that an extension of time was warranted under Section 1.946(e) of the Commission’s rules<sup>52</sup> because the uncertainty surrounding the ownership of the License was caused by circumstances beyond the licensee’s control.<sup>53</sup> Citing the *Nextwave/Urbancomm*<sup>54</sup> line of cases, the *Rainbow Broadcasting*<sup>55</sup> case, and other Commission precedent to support their assertions,<sup>56</sup> the petitioners claimed that the conflict between Commnet and the bankruptcy estate over ownership of the License constituted a circumstance beyond the licensee’s control and “froze the station in limbo.”<sup>57</sup>

16. In the Denial Order, the Division rejected petitioners’ arguments and found that the ownership of the License was certain and that the decision not to meet the final construction milestone was a voluntary business decision completely within Commnet’s control.<sup>58</sup> In their Petition for Reconsideration, the Petitioners raise no new arguments in this regard, although they do dispute the Division’s use and interpretation of the case law included to support its decisions. First, Petitioners seem to contend that the Division’s reliance on the *ComScape* case is misplaced.<sup>59</sup> We disagree. As the Division clearly stated, although Commnet was not directly involved in the filing of the bankruptcy action, it did voluntarily accept the License and take over its construction obligations. The fact remains that, both in the Waiver Request<sup>60</sup> and in the Petition for Reconsideration,<sup>61</sup> Petitioners acknowledged that Commnet made a business decision not to complete the required construction in time despite having the means to accomplish the build-out.

17. Second, the Petitioners incorrectly claim that the Division “never explained in any way” why the *Nextwave/Urbancomm* line of cases, originally cited in the Waiver Request, are not directly applicable to the instant case.<sup>62</sup> In the Denial Order, the Division specifically explained that the *Nextwave/Urbancomm* cases are not persuasive because, in those cases, there was a “cloud” over the licenses, which was directly caused by the Commission’s cancellation of the subject licenses for non-

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<sup>51</sup> *Id.* at 8-9.

<sup>52</sup> 47 CFR § 1.946(e).

<sup>53</sup> Original Waiver Request at 4.

<sup>54</sup> See *Federal Communications Commission v. NextWave Personal Communications Inc.*, 537 U.S. 293 (January 2003); *NextWave Personal Communications Inc. and NextWave Power Partners Inc.*, Order, 18 FCC Rcd 3235 (WTB 2003); *Urban Comm-North Carolina, Inc.*, Order, 20 FCC Rcd 993 (WTB 2005); *Urban Comm-North Carolina, Inc.*, Order, 21 FCC Rcd 10824 (WTB 2006) (collectively, *Nextwave/Urbancomm*).

<sup>55</sup> *Rainbow Broadcasting Company, Decision*, 13 FCC Rcd 21000 (1998) (*Rainbow Broadcasting*).

<sup>56</sup> Original Waiver Request at 4-7.

<sup>57</sup> Third Supplement at 5.

<sup>58</sup> Denial Order, 27 FCC Rcd at 5837, para. 15.

<sup>59</sup> Petition at 8-9. See *ComScape Communications, Inc.*, Order, 26 FCC Rcd 8831 (WTB-Mobility Division 2011) (*ComScape*) (finding that internecine litigation as well as the subsequent petition for voluntary bankruptcy were both circumstances well within ComScape’s control and thus insufficient grounds for grant of an extension).

<sup>60</sup> See Original Waiver Request at 9-10.

<sup>61</sup> Petition at 9.

<sup>62</sup> *Id.*

payment of debts owed to the Commission and the ensuing litigation over that decision.<sup>63</sup> Here, on the other hand, as the Division noted, the Commission had taken no prior action to cancel the License, and it is undisputed that, until June 30, 2009, the License was active.<sup>64</sup> The ownership of the License was certain during the August 2008-June 2009 period that Commnet/Crossroads Sub A held the License.

18. Accordingly, with regard to the Petitioners' claim that the Division erred in finding that Commnet's failure to complete construction was a voluntary business decision within its control, we find that the Petitioners have merely reiterated the same arguments that were raised in the 2009 Waiver Request that the Division has considered and rejected in the Denial Order.<sup>65</sup> Furthermore, the Petitioners have not shown that a material legal error was made in the Division's decisions in the Denial Order.

19. *Original Market Construction.* Petitioners also argue, for the first time, that the original licensee, Chariton, actually met the ten-year construction requirement in its original five-year build-out showing filed with the Commission in 2004.<sup>66</sup> Therefore, Petitioners reason, the Commission should accept the notification filed at the five-year benchmark as also satisfying the ten-year milestone. Under this theory, no extension period would be required, but rather, the Commission should renew the License "without further ado."<sup>67</sup> The Petitioners contend in their Petition for Reconsideration that these "new facts" should be considered as required in the "public interest" pursuant to Section 1.106(c)(2) of the Commission's rules.<sup>68</sup> As explained below, we disagree.

20. As an initial matter, we find that Petitioners' request that we now accept the five-year build-out showing as satisfying the final construction requirement is procedurally defective as this issue should have been raised in the earlier request for waiver, and Petitioner has provided no public interest basis to justify our consideration of this new argument now. Pursuant to Section 1.106(c) of the Commission's rules, a petition for reconsideration that relies on facts or arguments not previously presented to the Commission may be granted only if those facts or arguments: (1) relate to events that have occurred or circumstances that have changed since the petitioner's last opportunity to present such matters to the Commission;<sup>69</sup> (2) were unknown to the petitioners until after the last opportunity to present them to the Commission, and they could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity;<sup>70</sup> or, as Petitioners point out, (3) the Commission or its designee determines that consideration of the facts or arguments relied on is required in the public interest.<sup>71</sup> Here, Petitioners assert that because "the focus of the case to date has been on whether or not an extension of the build-out period is warranted, no one has focused on whether an extension of the build-out period was even required."<sup>72</sup> Petitioners argue that it is the public interest to consider the "new" facts.<sup>73</sup>

21. We find that Petitioners have presented no argument that would justify its failure to raise the

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<sup>63</sup> Denial Order, 27 FCC Rcd at 5839, para. 20; *see generally*, *NextWave/Urbancomm*.

<sup>64</sup> *Id.*

<sup>65</sup> *See* 47 CFR § 1.106(p)(3).

<sup>66</sup> Petition at 2-6.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> 47 CFR § 1.106(c)(2).

<sup>69</sup> 47 CFR § 1.106(c)(1).

<sup>70</sup> 47 CFR § 1.106(c)(1).

<sup>71</sup> 47 CFR 106(c)(2).

<sup>72</sup> Petition at 3.

<sup>73</sup> *Id.*

construction argument in the Waiver Request. First, given that the core issue in this matter was the licensee's obligation to comply with the Commission's construction requirements, it is implausible that Commnet and Crossroads Sub would not have considered whether that obligation had already been met and would not have known about or sought information regarding the previous level of construction associated with this license and market. Further, to the extent that they did not know this information, a routine search of the license record in the Commission's Universal Licensing System (ULS) would have revealed the construction notification and supporting documents filed by Chariton with respect to the Jefferson County, MO BTA. Indeed, the information that Petitioners rely on now was equally available in April 2009 when the Original Waiver Request was filed. Accordingly, issues regarding the status or extent of construction associated with this license should have been presented as part of the underlying Waiver Request and cannot be considered new information.

22. Further, we find that Petitioners have failed to present a public interest rationale that requires us to consider this argument pursuant to Section 1.106(c)(2). The Petition itself does not identify the public interest that would be advanced; Petitioners merely assert that consideration of the "new facts" is "required in the public interest." We note that the underlying purpose of the construction requirements at the core of this matter is to ensure the efficient and effective use of spectrum. To be sure, 47 U.S.C. § 309(j) makes it clear that the purpose of performance requirements, including construction timetables, is to "ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and service."<sup>74</sup> In this case, Commnet/Crossroads Sub indicated in the underlying waiver request that the remaining site had not been in use since shortly after the license was assigned to Crossroads Sub in 2008, "such that there are no operations under the PCS License at this time, and there will not be any unless Commnet infuses capital to construct."<sup>75</sup> Where licensed spectrum went unused due to the voluntary business decisions of the licensee, it is not in the public interest to entertain a belated construction argument that would, if accepted, reinstate the previous status quo of no service coverage in the licensed market.

23. Even if the Petition were not procedurally defective, and we were to consider such additional facts and arguments, Petitioners cannot prevail on the merits. Petitioners state that they conducted an engineering review of the original showing to determine that Chariton unknowingly met its required ten-year construction requirement.<sup>76</sup> The Petitioners note that the original 2004 filing showed two sites serving the Jefferson City BTA—one in Cole County and one in Callaway County—using a signal strength level of -102 dBm.<sup>77</sup> Based on this assumption, Chariton calculated that it covered 60.3 percent of the BTA population.<sup>78</sup> This percentage surpasses the five-year coverage requirement of one-third of the population, and approaches the ten-year coverage requirement of two-thirds which would be 66.67 percent of the BTA population.<sup>79</sup> The Petitioners now suggest that this service coverage data from the original filing shows that Chariton actually met the ten-year construction benchmark in 2004 using either the required two-thirds population coverage benchmark when applying a different signal level strength of

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<sup>74</sup> 47 U.S.C. § 309(j)(4)(B).

<sup>75</sup> Original Waiver Request at 2.

<sup>76</sup> Petition at 3.

<sup>77</sup> *Id.*, citing FCC File No. 0001786584.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Section 24.203(a) of the Commission's rules requires Broadband PCS licensees to meet construction requirements by operating facilities that transmit with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within ten years of being licensed. 47 CFR § 24.203(a).

-105 dBm, or a rural substantial service area analysis.<sup>80</sup>

24. We first address Petitioners' application of what they assert is a "more realistic reliable service" signal strength of -105 dBm to support their claim that Chariton met the population-based benchmark of Section 24.203(a).<sup>81</sup> In the Petition, the Petitioners assert that -105 dBm is a "perfectly valid measure of reliable service" and is an acceptable metric to apply to Chariton's original service.<sup>82</sup> Using this new metric to calculate the extent of coverage of the original cell sites, Petitioners state that Chariton served 85.99 percent of the areas of Callaway County and more than 73 percent of the BTA population.<sup>83</sup> Accordingly, Petitioners claim, Chariton actually met its ten-year population coverage requirement.<sup>84</sup>

25. We find, however, that the coverage Chariton was providing in 2004 cannot reasonably be re-interpreted now to show that Chariton met the two-thirds population coverage benchmark. Chariton's construction showing in 2004 specifically states: "Since Chariton Valley is deploying a GSM network in the Jefferson City, MO BTA, Chariton Valley defines adequate coverage as a signal strength of -102 dBm. *This is the lowest signal level for which a typical GSM handset can maintain a call.*"<sup>85</sup> Here, the construction showing filed by the original licensee plainly defined -102 dBm as the signal level by which it calculated the extent of adequate service being provided by its GSM network; Chariton's own filing indicated that it did not consider a signal level below -102 dBm (e.g. -105 dBm) to be sufficient to provide adequate service with respect to the system it deployed and operated. Despite this unambiguous statement by Chariton, the Petitioners nevertheless claim that -105 dBm is reliable, and they include a Declaration suggesting that the Commission has "in many cases" accepted -105 dBm as a metric of reliable service.<sup>86</sup> Petitioners, however, do not identify any specific instances, include any other supporting documentation showing that -105 dBm is an acceptable level for the specific network that Chariton was operating, nor specify in what circumstances a -105 dBm signal level may be defined as "adequate."<sup>87</sup>

26. Whether a particular signal level is sufficient to provide adequate or reliable coverage may be affected by factors such as the technology and spectrum being used as well as a provider's specific network (e.g., the configuration and equipment, including handsets, being used) and operations. Here, while Petitioners allege broadly that -105 dBm is adequate coverage, they do not state that -105 dBm was a signal level sufficient to provide adequate service to GSM users based on Chariton's actual 1900 MHz GSM network and how it was operating at the time of its 2004 construction notification. We cannot now substitute the Petitioners' broad claim for Chariton's construction demonstration—which was derived using actual knowledge of its own network and coverage—that specified that the area in which Chariton was providing adequate service was defined using a -102 dBm signal level. We therefore find that the 2004 construction notification did not demonstrate that Chariton had met the two-thirds population construction requirement.

27. We also find unpersuasive Petitioners' argument that Chariton unknowingly met the

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<sup>80</sup> Petition at 3-6.

<sup>81</sup> *Id.* at 6.

<sup>82</sup> *Id.* at 5.

<sup>83</sup> *Id.* at 6.

<sup>84</sup> *Id.*; 47 CFR § 24.203(a).

<sup>85</sup> Petition, Exhibit A (emphasis added).

<sup>86</sup> *Id.*, Exhibit B.

<sup>87</sup> *Id.*

substantial service standard in its original 2004 five-year showing based on its provision of service in rural areas.<sup>88</sup> The Commission's rules permit licensees, as an alternative to meeting the population benchmarks, to provide substantial service within their license areas prior to the appropriate five- and ten-year deadlines.<sup>89</sup> In September 2004, the Commission issued the *Rural Services Order*, in which it adopted criteria for determining substantial service in rural areas and established a safe harbor for licensees providing service in rural areas to satisfy substantial service. Pursuant to that safe harbor, a licensee will be deemed to have met substantial service if it provides coverage of at least 75 percent of the geographic area of at least 20 percent of the rural areas within the licensed area.<sup>90</sup>

28. As an alternative to the safe harbor, the Commission set out other criteria as relevant considerations in a rural substantial service analysis: (1) coverage of counties or geographic areas where population density is less than or equal to 100 persons per square mile; (2) significant geographic coverage; (3) coverage of unique or isolated communities or business parks; and (4) expanding the provision of E911 services into areas that have limited or no access to such services.<sup>91</sup> Extrapolating from the coverage in the original 2004 showing, Petitioners argue that Chariton met the rural substantial service benchmark because of its coverage of a "significant portion" of rural Callaway County's geographic area and "significant coverage into Osage County, which is among the most rural in the United States."<sup>92</sup>

29. Chariton however, could not have demonstrated rural substantial service in its original 2004 five-year construction showing because the rules adopted in the *Rural Services Order* were not in effect at the time of the filing. Specifically, the Commission received Chariton's five-year construction notification on June 28, 2004.<sup>93</sup> Approximately three months later, in September 2004, the Commission released the *Rural Services Order* adopting the rural safe harbor and rural substantial service criteria. The effective date of the construction rules adopted in that order was February 14, 2005.<sup>94</sup> Thus, while the coverage map filed with the Commission shows some rural service coverage, Chariton could not have inadvertently met rural substantial service in June 2004 given that the applicable rules did not go into effect until almost eight months later. The Petitioners cannot now argue that the 2004 construction met rural substantial service by relying on substantial service criteria that were not in effect at the time of Chariton's five-year construction filing.

#### IV. CONCLUSION

30. For the reasons set forth above, we deny the Petition for Reconsideration and, as a result, affirm that the License automatically terminated on June 30, 2009.

#### V. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to Section 4(i), 4(j), and 405(a) of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 405(a), and Section 1.106 of the Commission's rules, 47 CFR §§ 1.106), the Petition for Reconsideration of the Request for Waiver and Extension of PCS Construction Requirements and Request for Renewal of PCS License regarding Call Sign WQGH652 filed by Crossroads Wireless Liquidating Trust and NTCH, Inc. on July 2, 2012 IS

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<sup>88</sup> *Id.* at 3-5.

<sup>89</sup> 47 CFR § 24.203(a).

<sup>90</sup> Petition at 4; see *Rural Services Order*, 19 FCC Rcd at 19123, para. 79. In the construction context, the *Rural Services Order* defined rural areas as areas with population densities of less than 100 persons per square mile.

<sup>91</sup> *Id.* at 19124, para. 80.

<sup>92</sup> Petition at 5.

<sup>93</sup> See ULS administrative details for call sign WPOJ715.

<sup>94</sup> See 69 Fed. Reg. 75144 (2004).



HEREBY DENIED. Accordingly, PCS License WQGH652 TERMINATED AUTOMATICALLY ON JUNE 30, 2009.

32. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's rules, 47 CFR §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel  
Chief, Mobility Division  
Wireless Telecommunications Bureau