

deadline requiring it to provide coverage to 70 percent of the geographic area of the licenses by June 13, 2019. Pursuant to Section 27.14(g)(1) (the “Acceleration Rule”), Bresnan’s failure to meet its interim construction deadline meant that, absent Bresnan obtaining a waiver, its final construction deadline would have been accelerated by two years, to June 13, 2017. To avoid the FCC’s application of the Acceleration Rule, Bresnan agreed to sell the subject licenses to T-Mobile and sought waiver of the Acceleration Rule to allow T-Mobile additional time to meet the final construction deadline.

Petitioners argued in their waiver petition that a waiver would serve the public interest by allowing T-Mobile to deploy service in the licensed areas and that the rural nature of these areas and the difficult geographic and weather conditions in Montana and Wyoming constitute unique circumstances. Petitioners also argued that “the underlying purpose of the Acceleration Rule – preventing spectrum warehousing and promoting service deployment – can best be served by grant of the waiver.”²

RWA filed Comments opposing grant of the requested waiver, arguing that a waiver would not serve the public interest and would promote spectrum warehousing, contrary to the underlying purpose of the Acceleration Rule, and that generalized assertions about the geographic and weather conditions in Montana and Wyoming do not constitute special circumstances that would justify a waiver.³

In its Waiver Letter, the Bureau found that “the underlying purpose of Section 27.14(g)(1) – ‘to better promote access to spectrum and the provision of service, *especially in*

² Waiver Petition at p. 4.

³ RWA Comments, WT Docket No. 16-319, filed October 26, 2016.

rural areas’ would be frustrated by the application of the rule here”⁴ and that a waiver would serve the public interest by enabling T-Mobile (not Bresnan) to quickly bring new wireless services to remote areas of Montana and Wyoming. The Bureau did *not* base its decision to grant waiver relief on “geographic and other conditions in Montana and Wyoming,”⁵ nor did it consider the fact that Bresnan had not provided any service to the public during the eight years it held the licenses, clearly acting as a spectrum warehouse in violation of the underlying purpose of the rule.

II. Question Presented for Review

The question presented to the Commission in this Application for Review is whether the Bureau impermissibly granted T-Mobile⁶ a waiver of Section 27.14(g)(1) pursuant to FCC Rule Section 1.925(b)(3) and Commission precedent. As demonstrated herein, the Bureau erred in granting the waiver because the waiver grant undermines the purpose of Section 27.14, which is to prevent spectrum warehousing, and does not serve the public interest because it allowed the licensee to sit on the spectrum for eight years instead of providing service to the public. Because the waiver request therefore failed to satisfy either prong of Section 1.925(b)(3), the waiver was granted in error and the waiver grant should be overturned by the Commission.

⁴ Waiver Letter at p. 3 (emphasis in original).

⁵ *Id.* at p. 6.

⁶ The waiver was granted to T-Mobile. However, the waiver request was made by Bresnan, the licensee, on behalf of itself and T-Mobile. The Acceleration Rule applies to the *licensee*, and that it is the licensee that needs to make the appropriate showings in order to obtain the waiver. The deadline for meeting the Acceleration Rule was December 13, 2016. T-Mobile was not the licensee on December 13, 2016.

III. Argument

A. The Waiver Letter Fails to Satisfy the Waiver Criteria of Section 1.925

Section 1.925(b)(3) provides that the Commission may grant a request for waiver if it is shown that:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, *and* that a grant of the requested waiver would be in the public interest; or
- (ii) In view of the unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.⁷

In the Waiver Letter, the Bureau made no finding of unique or unusual factual circumstances that would warrant a waiver. Its decision to grant a waiver was based solely on Subsection 1.925(b)(3)(i). Accordingly, to satisfy the requirements of that rule section, the Bureau must find both that a waiver would serve the public interest *and* that the underlying purpose of the Acceleration Rule would not be served or would be frustrated by application of the rule to the instant case. As discussed below, the Waiver Letter failed to justify a finding that grant of a waiver would serve the public interest and that the underlying purpose of the Acceleration Rule would not be served, because it ignored both the underlying purpose of the rule and an important public interest argument.

1. Grant of the Waiver of Section 27.14(g)(1) Undermines its Underlying Purpose

The Waiver Letter fails to demonstrate that the underlying purpose of the rule would not be served by application of the buildout requirements. As Petitioners recognize, the underlying

⁷ 47 C.F.R. §1.925(b)(3) (emphasis added).

purpose of the Acceleration Rule is to prevent the warehousing of spectrum.⁸ The Bureau, however, ignores this fundamental purpose behind the rule. The Waiver Letter focuses only on the promised provision of service by T-Mobile, and not on the failure of Bresnan to fulfill one of the fundamental conditions of its spectrum license: to actually utilize its spectrum to provide telecommunications service to the public. The decision fails to consider the consequences of allowing Bresnan to ignore its license obligations by its eleventh hour attempt to sell its license to a new party, with the hope that such party would then be afforded a new “shot clock” in which to fulfill its own obligations. As RWA argued in its Comments and subsequent *ex partes*, allowing Bresnan to warehouse its spectrum for eight years without penalty contravenes the underlying purpose of the rule. The Acceleration Rule is intended to incent licensees to deploy their licensed spectrum. Granting a waiver when a licensee has done *nothing* toward this end removes this incentive, resulting in harm both to the public and to all licensees who incur the cost and expense of complying with the rule by building out networks and providing service to the public. During the rulemaking proceeding resulting in adoption of the Acceleration Rule, RWA (fka Rural Telecommunications Group, Inc.) repeatedly emphasized the importance of adopting rules that would prevent spectrum warehousing.⁹ To ensure that the rule achieves its ends, the FCC must enforce it fairly. The Waiver Letter also fails to promote access to spectrum,

⁸ Waiver Petition at p. 4. In its order adopting the Acceleration Rule, the Commission stated that adopting stringent performance requirements for 700 MHz licenses accomplishes several important policy objectives, including “ensur[ing] that . . . licensees put this spectrum to use throughout the course of their license terms” and “provide service to consumers in a timely manner.” *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, et al.*; Second Report and Order, WT Docket No. 06-150, et al., rel. Aug. 10, 2007 (“Second Report and Order”) at par. 154.

⁹ See Comments of the Rural Telecommunications Group, Inc., WT Docket No. 05-160, et al., September 29, 2006, at pp. 8-9; Comments of the Rural Telecommunications Group, Inc., WT Docket No. 05-160, et al., May 23, 2007, at pp. 8-12; Reply Comments of the Rural Telecommunications Group, Inc., WT Docket No. 06-150, et al., June 4, 2007, at pp. 8-11.

by preventing other entities from obtaining Bresnan's unused spectrum and using it to provide service to the public as established by the rules. The Bureau's failure to address or even acknowledge the requested waiver's inconsistency with the underlying purpose of the Acceleration Rule is arbitrary and capricious, and constitutes an error which must be reversed by the Commission.

2. Grant of the Waiver Does Not Serve the Public Interest

In concluding that the requested waiver serves the public interest because T-Mobile would provide service where Bresnan had not, the Bureau again failed to consider or address the argument made by RWA that granting the waiver would encourage some licensees to ignore their buildout obligations and warehouse their spectrum. By allowing licensees to rely on their ability to take no steps to deploy their licensed spectrum without incurring any regulatory penalty, the Bureau becomes responsible for substantial delays in deployment. Granting a waiver here based on the belief that it will result in accelerated service to the public is shortsighted. While it *might*¹⁰ result in faster deployment of service in this instance if T-Mobile is able to timely complete the build out as promised, it is likely to result in delays in service in scores of other markets as licensees will now know that the Commission's buildout rules have no teeth. The Bureau also failed to address RWA's argument that "due to T-Mobile's historical focus on providing service to the most populated areas of its licensed territory and RWA members' avowed interest in providing service to the least densely populated areas of the subject license areas, denial of the waiver is likely to result in the most rural portions of these license

¹⁰ Allowing T-Mobile additional time to buildout may potentially lead to faster deployment in certain areas than re-licensing to other entities that are willing and able to meet their licensed buildout obligations due to the time involved in re-licensing, the length of delay would be far shorter than the eight year delay resulting from Bresnan's warehousing of its license. This latter delay can be prevented in other markets by strict enforcement of the Acceleration Rule.

areas receiving service sooner than they would if the waiver were to be granted.”¹¹ The service promised by T-Mobile is speculative at best, and such speculative promises cannot serve as the basis for a finding that the public interest will be better served by allowing T-Mobile additional time to deploy rather than holding Bresnan to its licensed buildout obligations, deterring future licensees from spectrum warehousing, and allowing interested parties (including T-Mobile) to obtain a new license to provide service in accordance with the Commission’s rules. The Bureau’s conclusion that grant of the waiver will serve the public interest because T-Mobile will bring competitive service to underserved rural areas is therefore arbitrary and capricious because it fails to consider the spectrum warehousing likely to result from grant of a waiver and the record evidence that a waiver grant may, contrary to the Bureau’s conclusion, *prevent or delay* service to these rural areas. Warehousing spectrum harms the public interest far more than any potential (and in any case, slight) delay in deployment resulting from following the rules. There is no justification for giving more weight to T-Mobile’s potential accelerated buildout in the public interest calculus, when it is entirely speculative, and is not even aimed at currently unserved areas.

B. The Bureau’s Action is in Conflict with Case Precedent and Commission Policy

In the FCC’s Second Report and Order adopting the Acceleration Rule, the Commission stated, “[W]e do not envision granting waivers or extensions of construction periods except where unavoidable circumstances beyond the licensee’s control delay construction.”¹² The Bureau in its Waiver Letter did not make a finding of unavoidable circumstances beyond the

¹¹ Letter from Caressa D. Bennet to Marlene H. Dortch, Notice of Ex Parte, WT Docket No. 16-319, Dec. 12, 2016 at p. 2.

¹² Second Report and Order at par. 153.

licensee's control. Accordingly, the waiver grant is inconsistent with the Commission's policy on construction waivers set forth in the Second Report and Order.

C. The Waiver Letter Establishes Harmful Precedent Which Should be Overturned

The Waiver Letter establishes new harmful precedent which should be overturned. The Waiver Letter sets a dangerous precedent by effectively gutting and re-writing the FCC's construction requirements and allowing speculators to obtain FCC licenses for the purpose of warehousing spectrum until they are able to profit from a sale to an entity that actually intends to use the license for its intended purpose -- to serve the public. The FCC could have adopted a rule without a buildout requirement or that allowed a licensee to buildout its license *at its discretion*, but it did not do so. The Bureau cannot now re-write the law. The Bureau's decision to allow Bresnan to be rewarded for warehousing spectrum is inconsistent with both the public interest and the underlying purpose of the buildout requirements, and should therefore be reversed.

IV. Conclusion

The Waiver Letter failed to satisfy the criteria for grant of a waiver set forth in Section 1.925. The Waiver Letter failed to make a proper finding that a waiver grant is in the public interest, and even if it had considered and properly addressed arguments demonstrating that a waiver was not in the public interest, it failed to properly find that a waiver was consistent with the underlying purpose of the rule. Because the Bureau did not make a finding under Section 1.925(b)(3)(ii) of unique or unusual factual circumstances, it needed to find that a waiver met both prongs of Section 1.925(b)(i) (i.e., a showing that enforcement of the rule was inconsistent with the underlying purpose of the rule and that the waiver was in the public interest). Since it did neither, the waiver should not have been granted. The Bureau's grant of a waiver in these

circumstances establishes dangerous precedent which eviscerates and re-writes existing law and conflicts with case precedent and Commission policy, and should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day of January 23, 2017, served a true copy of the foregoing document by electronic mail upon the following:

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