

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

In the matter of
Applications to Assign Wireless
Licenses from WorldCom, Inc.
(Debtor-in-Possession) to Nextel
Spectrum Acquisition Corp.
WT Docket No. 03-203

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 2004

Released: April 2, 2004

By the Chiefs, Wireless Telecommunications Bureau, Media Bureau:

I. INTRODUCTION

1. We have before us twenty related applications filed August 15, 2003, from subsidiaries of WorldCom, Inc. (debtor-in-possession) (collectively, "WorldCom D-I-P") and Nextel Spectrum Acquisition Corp. ("Nextel" and, together with WorldCom D-I-P, the "Applicants") seeking approval for the assignment from WorldCom D-I-P to Nextel of various wireless licenses (the "Assignment Applications").

1 File Nos. 20030818AAC, 20030826AAA, 0001398518, CAR-20030902AA-08, CAR-20030903AA-08 through CAR-2003090AN-08, 0001394749, and 0001397470, filed August 15, 2003. See Commission Seeks Comment on Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., Public Notice, 18 FCC Rcd 19,313 (2003) ("Public Notice").

2 Assignment Applications at 1.

3 Petition to Deny filed by Instructional Telecommunications Foundation, Inc., WT Docket No. 03-203 (Oct. 27, 2003) ("ITF Petition"); Petition to Deny filed by Northwest Communications, Inc., WT Docket No. 03-203 (Oct. 27, 2003) ("NCI Petition"); Petition to Deny filed jointly by Red New York E Partnership and Veritas LLC, WT Docket No. 03-203 (Oct. 27, 2003) ("Red NY/Veritas Petition").

“Communications Act”), we further conclude that approval of the Assignment Applications will serve the public interest, convenience, and necessity.<sup>4</sup>

## II. BACKGROUND

### A. Assignors

2. The licenses that are subject of the Assignment Applications are held by WorldCom Broadband Solutions, Inc (“WBS”), a Delaware corporation, and the following entities, each of which is directly or indirectly controlled by WorldCom D-I-P, a Georgia corporation: CS Wireless Systems, Inc. (debtor-in-possession), a Delaware corporation, and Wireless Video Enterprises, Inc. (debtor-in-possession), a California corporation (collectively “Assignors”). The Assignors currently provide fixed wireless broadband data services to approximately 1,400 small and medium-sized business customers in 13 markets.<sup>5</sup> All of the licenses, including the MDS and MMDS licenses, are operated by the Assignors on a non-common carrier basis.

3. In July and November 2002, WorldCom, Inc. and substantially all of its active United States (“U.S.”) subsidiaries filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code to reorganize their business and financial structure. As a result of the bankruptcy filing, WorldCom filed for Commission approval, *inter alia*, of the involuntary *pro forma* assignment of the wireless licenses held by Assignors to the Assignors as debtors-in-possession in July and August of 2002. The Commission granted these applications.<sup>6</sup> In June 2003, WorldCom D-I-P and its subsidiaries (as debtors-in-possession) filed applications to the Commission seeking authorization to transfer their licenses and authorizations to the reorganized MCI, Inc. (“MCI”) in connection with its planned emergence from bankruptcy.<sup>7</sup> The Commission placed these Reorganization Applications on Public Notice on July 9, 2003,<sup>8</sup> and granted these applications in December 2003.<sup>9</sup> As of the date of this Order, the transfers to MCI contemplated in the Reorganization Applications have not been consummated.

### B. Assignee

4. Nextel Spectrum Acquisition Corp. (Assignee), a Delaware corporation, is a wholly owned subsidiary of Nextel Communications, Inc. (“Nextel”), a Delaware corporation. Nextel currently provides commercial mobile radio service (“CMRS”) in some 400 cities in the U.S. serving over eleven

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<sup>4</sup> See 47 U.S. C. § 310(d).

<sup>5</sup> Assignment Applications at 2. According to the Assignment Applications, WBS planned to terminate its broadband data service to these 1400 customers on September 30, 2003. WBS has notified these customers of this planned termination of service by letter dated July 25, 2003. WBS said it would file the appropriate notification with the Commission seven days prior to the termination of service.

<sup>6</sup> See *Public Notice*, Report No. SES-00417 (August 7, 2002); *Public Notice*, DA 02-3350 (Dec. 5, 2002); *Public Notice*, Report No. 3878 (Dec. 18, 2002).

<sup>7</sup> See, e.g., Application of WorldCom, Inc. (debtor-in-possession) d/b/a MCI and Certain of its Subsidiaries (as debtors-in-possession) for Authorization to Transfer and/or Assign Blanket Domestic Section 214 Authorization and International Section 214 Authorizations, WC Docket No. 02-215 (filed June 13, 2003) (“Reorganization Applications”).

<sup>8</sup> See *Public Notice*, DA 03-2193, WC Docket No. 02-215 (rel. July 9, 2003). The instant Assignment Applications to assign the Licenses from the Assignors (as debtors-in-possession) to the Assignee were filed during the pendency of the Reorganization Applications.

<sup>9</sup> See WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, *Memorandum Opinion and Order*, 18 FCC Rcd 26,484 (2003) (“*WorldCom Order*”).

million subscribers and is one of at least six CMRS providers with a national footprint.<sup>10</sup> Nextel states that it has invested more than \$7 billion to establish a national digital network to provide a full range of wireless communications services in competition with other CMRS providers. Nextel's digital CMRS service integrates in a single mobile handset a digital dispatch service (known as Nextel Direct Connect ) with interconnected mobile telephone service, Internet access, short messaging and mobile data service. By offering this integrated package of services, Nextel states, it has become a significant competitor to the established CMRS carriers throughout the U.S.<sup>11</sup>

### C. Proposed Transaction

5. On June 26 and 27, 2003, and pursuant to Bankruptcy Court approval, WorldCom D-I-P conducted an auction to sell certain wireless assets to the party submitting the highest and best offer.<sup>12</sup> WorldCom D-I-P would also convey to the winning bidder its interest in the underlying licenses, subject to Commission approval of the required assignment applications. Nextel submitted the highest and best offer.<sup>13</sup> On July 8, 2003, WorldCom D-I-P and Nextel entered into an Asset Purchase Agreement ("Purchase Agreement") for the sale of substantially all of the assets, including the rights in the Licenses listed in Schedule 2 of the Purchase Agreement ("the Designated Licenses"), to Nextel for \$144 million in cash and non-cash consideration consisting of a three-year extension of customer contracts between subsidiaries of WorldCom and Nextel.<sup>14</sup> Because WorldCom D-I-P is in the process of reorganizing under the protection of bankruptcy laws, the Bankruptcy Court has reviewed and approved the Purchase Agreement, as modified in certain respects.<sup>15</sup> The Assignment Applications seek Commission approval to consummate the transaction described in the Bankruptcy Court-approved Purchase Agreement.

6. The proposed transaction involves the assignment of various wireless licenses from WorldCom D-I-P to Nextel, including MDS, MMDS, ITFS, WCS, CARS, PLMR, and Fixed Microwave licenses in various markets. In response to objections raised in the bankruptcy proceeding by various ITFS and MMDS licensees ("Spectrum Lessors") who have entered into excess capacity agreements with WBS or its affiliates, WorldCom and Nextel amended the Purchase Agreement on July 22, 2003 to modify, among other things, Sections 7.26 and 7.29 of the Agreement (the "Modifications").<sup>16</sup> The Modifications expanded and clarified the access rights of certain of the Spectrum Lessors (the "ITFS Lessors") to certain equipment and towers used or useful for their operations. In exchange for WorldCom and Nextel agreeing to make the Modifications, the ITFS Lessors agreed to withdraw their objections in the Bankruptcy Court. The Bankruptcy Court denied all other objections to the Purchase Agreement.<sup>17</sup>

7. The Applicants argue that the Commission's approval of the proposed transaction is in

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<sup>10</sup> Assignment Applications at 3.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 3-4.

<sup>15</sup> *Id.* at 4. See *infra* Paragraph 6 (describing certain modifications to the Purchase Agreement).

<sup>16</sup> Assignment Applications at 7. See Appendix A to the Assignment Applications.

<sup>17</sup> *In re WorldCom, et al.*, Order Pursuant to Sections 105, 363, 365 and 1146(c) of the Bankruptcy Code and Bankruptcy Rules 6004(g) and 6006(d) (A) Approving the Terms and Conditions of Asset Purchase Agreement for the Sale of Certain Assets Utilized in the Provision of Wireless Communications Services via MMDS and Related Spectrum, (B) Authorizing the Sale of such Assets Free and Clear of Liens, Claims and Encumbrances, and (C) Authorizing and Approving Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Therewith, Bankruptcy Court S.D.N.Y., No. 02-13533 (AJG), July 22, 2003.

the public interest and creates no competitive harm.<sup>18</sup> Although Nextel is still in the process of developing specific business and technical plans for the use of the Designated Licenses, the Applicants state that the proposed assignment would provide Nextel with additional spectrum capacity and flexibility to expand its digital wireless services and 3G mobile innovations.<sup>19</sup> In addition, the Applicants contend that the proposed transaction will enhance consumers' competitive alternatives by furthering Nextel's ability to offer a greater menu of wireless services and thus further the Commission's goals of maximizing the efficient use of spectrum and promoting competition.<sup>20</sup> The Applicants also argue that the proposed license assignments raise no competitive issues because the Assignors and the Assignee currently compete in different product markets.<sup>21</sup>

### III. PETITIONS TO DENY

8. On September 25, 2003, the Wireless Telecommunications Bureau accepted the Assignment Applications for filing and released the *Public Notice* establishing the time period for interested parties to file petitions to deny.<sup>22</sup> On October 27, 2003, ITF, NCI, and Red NY/Veritas filed Petitions to Deny.<sup>23</sup> On November 12, 2003, Nextel and WorldCom D-I-P filed a Joint Opposition to Petitions to Deny.<sup>24</sup> On November 17, 2003, ITF, NCI, and Red NY/Veritas filed Replies to the Joint Opposition to Petitions to Deny.<sup>25</sup>

9. *ITF Petition to Deny* In its Petition, ITF claims that WBS refused to extend a short-term facilities agreement with ITF, forcing ITF's licensee, WHR527, to sign off the air on June 29, 2000 and discontinue its instructional service to schools in the Philadelphia area.<sup>26</sup> ITF claims that WBS's motivation in refusing to extend the short-term facilities agreement was to gain leverage over ITF in excess capacity agreement negotiations.<sup>27</sup> Since June 26, 2001, ITF has been operating WHR527 under Special Temporary Authority ("STA") at its then currently authorized tower site.<sup>28</sup> On June 18, 2002, ITF submitted an application with the Commission proposing to relocate WHR527 to a new tower located

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<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Public Notice* at 4.

<sup>23</sup> ITF Petition; NCI Petition; Red NY/Veritas Petition.

<sup>24</sup> Joint Opposition to Petitions to Deny, filed by Nextel and WorldCom, WT Docket 03-203 (Nov. 12, 2003) ("Joint Opposition").

<sup>25</sup> Reply to Joint Opposition to Petitions to Deny, filed by ITF, WT Docket 03-203 (Nov. 17, 2003) ("ITF Reply"); Reply to Joint Opposition to Petitions to Deny, filed by NCI, WT Docket 03-203 (Nov. 17, 2003) ("NCI Reply"); Reply to Joint Opposition to Petitions to Deny, filed by Red NY and Veritas, WT Docket 03-203 (Nov. 17, 2003) ("Red NY/Veritas Reply").

<sup>26</sup> ITF Petition at 2-4. ITF explains that WHR527 operated as part of the Philadelphia wireless cable system operated by CAI Wireless Systems ("CAI"). CAI was purchased by WBS. ITF and CAI had an excess capacity agreement that expired in February 1999. After a one-year hold-over period ended in 2000, ITF negotiated a short-term facilities agreement with WBS, which ITF claims that WBS refused to continue after the term ended.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 4.

nearby.<sup>29</sup> In response to ITF's Relocation Application, WorldCom and NCI filed Petitions to Deny.<sup>30</sup>

10. ITF argues that WorldCom's refusal to allow ITF to operate in accordance with its authorization, the filing of its petition to deny ITF's Relocation Application, and its alleged insistence that its excess capacity lessor NCI do likewise, amount to an abuse of process.<sup>31</sup> ITF contends that WorldCom's true purpose was to obstruct and delay ITF's ability to operate in Philadelphia in hopes of securing business advantage. ITF claims that it has been placed in an untenable position by WBS's conduct, being forced to operate under an STA with substandard facilities because WBS would not allow ITF to operate from its authorized site alongside other MDS/ITFS facilities while it also erected roadblocks to ITF's efforts to relocate to a nearby antenna in an effort to resume normal operations.<sup>32</sup> ITF also argues that WorldCom's actions are in violation of Section 21.902(b)(1).<sup>33</sup>

11. *NCI Petition to Deny* In its Petition, NCI argues that under the Purchase Agreement, while Nextel will not be leasing spectrum capacity from NCI, it clearly retains dominion over NCI's ability to operate MMDS station WHT644.<sup>34</sup> Pursuant to an agreement between NCI and WorldCom ("NCI Agreement"), WorldCom leased spectrum capacity from NCI via NCI's MMDS station WHT644 and NCI leased certain transmission equipment (the "Leased Equipment") from WorldCom.<sup>35</sup> In addition, WorldCom utilized the Paoli Tower pursuant to the Paoli Tower Lease, which allows WorldCom to have "the exclusive right to broadcast or otherwise transmit from the Tower all MDS, MMDS, ITFS, or OFS signals except that Lessor shall have the right to broadcast from the Tower MDS Channel 1" (the "Exclusivity Clause").<sup>36</sup> The Purchase Agreement between WorldCom and Nextel granted Nextel the right to elect to exclude and not acquire the NCI Agreement.<sup>37</sup> Nextel elected not to assume the NCI Agreement, and WorldCom filed a pleading with the Bankruptcy Court stating that it intends to reject the NCI Agreement.<sup>38</sup> Nextel agreed to assume the Paoli Tower Lease.<sup>39</sup> Nextel also has agreed to take assignment of the Leased Equipment.<sup>40</sup> NCI contends that restrictions on its access to the

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<sup>29</sup> *Id.* at 5-6; see Application of Instructional Telecommunications Foundation, Inc. for Authority to Make Minor Changes to Instructional Television Fixed Service Station WHR527, Philadelphia, Pennsylvania, File No. BLNPIF-20020618AAC. ("Relocation Application").

<sup>30</sup> See In the Matter of Application of Instructional Telecommunications Foundation, Inc. for Authority to Make Minor Changes to Instructional Television Fixed Service Station WHR527, Philadelphia, Pennsylvania, File No. BLNPIF-20020618AAC, Petition to Deny, filed by WorldCom Broadband Solutions, Inc. (Aug. 21, 2002); Petition to Deny, filed by Northwest Communications, Inc. (Aug. 22, 2002). On February 20, 2004, the Commission granted ITF's Relocation Application and denied Petitions to Deny filed by WorldCom and NCI. *Memorandum Opinion and Order*, DA 04-418 (rel. Feb. 20, 2004) ("*ITF Relocation Order*").

<sup>31</sup> ITF Petition at 6-8, 10.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 9. Section 21.902(b)(1) prohibits MMDS licensees from "entering into any lease or contract or otherwise taking any action that would unreasonably prohibit location of another station's transmitting antenna at any given site inside its own protected service area".

<sup>34</sup> NCI Petition at 1-4. NCI is the licensee of MMDS Station WHT644, operating on the F Group of channels in Philadelphia, Pennsylvania, authorized to transmit from the Paoli Tower at 216 Paoli Ave.

<sup>35</sup> *Id.* at 2.

<sup>36</sup> *Id.*

<sup>37</sup> See Purchase Agreement at ¶ 2.07(a).

<sup>38</sup> NCI Petition at 2-3.

<sup>39</sup> See Purchase Agreement at ¶ 2.02(i); NCI Petition at 3.

<sup>40</sup> NCI Petition at 3.

Leased Equipment amount to restrictive covenants, giving Nextel the right to manipulate NCI's business relationships.<sup>41</sup>

12. NCI argues that because the NCI Agreement and the Paoli Tower Lease operate as an integral unit, Nextel should not be permitted to acquire the Paoli Tower Lease and the Lease Equipment while excluding the NCI Agreement.<sup>42</sup> In addition, NCI claims that the Exclusivity Clause in the Paoli Tower Lease and the restrictive covenants in the Purchase Agreement are both in violation of Section 21.902(b)(1) of the Commission's rules.<sup>43</sup> NCI requests that the Commission deny the Applications or in the alternative that it should: (1) hold that the Exclusivity Clause and the restrictive covenants are in violation of Section 21.902(b)(1) of the Commission's Rules; (2) not permit Nextel to block an attempted relocation to the extent that the predicted interference caused by a move is *de minimis*; (3) require Nextel to assume the NCI Agreement along with the Leased Equipment and the Paoli Tower Lease or require it to amend the Paoli Tower Lease to delete the Exclusivity Clause and to amend the Purchase Agreement by deletion of the restrictive covenants.<sup>44</sup>

13. Red NY and Veritas Petition to Deny In their Petition, Red NY/Veritas assert that Nextel has decided not to accept the assignment of the Red NY/Veritas leases and has given no indication that it would take any steps to enable them to continue to operate at their respective sites in New York and Boston.<sup>45</sup> Red NY/Veritas claim that upon the closing of the assignment transactions, they will lose the ability to access their equipment and transmission sites, and thus to operate their stations as now authorized by the Commission.<sup>46</sup> Red NY/Veritas contend that this potentially could deprive them, and a number of other similarly situated licensees, of their licenses, and thus their ability to compete with Nextel.<sup>47</sup> Red NY/Veritas also argue that the present interference rules for MMDS and ITFS make new and changed installations virtually impossible in congested area such as New York and Boston. Red NY/Veritas request that the Commission grant the Assignment Applications only on the condition that Nextel must make possible the continued access by them, and by other MMDS licensees similarly situated, to both equipment and transmission towers or tower sites as necessary to permit them to continue to provide service from their now-licensed locations.<sup>48</sup>

14. Joint Opposition to Petitions to Deny In its Joint Opposition, Nextel and WorldCom first argue that the Petitions to Deny filed by NCI and ITF are procedurally defective and must be dismissed because NCI and ITF failed to serve Nextel with copies of their Petitions as required by Section 1.939(c) of the Commission's rules.<sup>49</sup> The Applicants also contend that all three of the Petitions should

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.* at 4-6.

<sup>44</sup> *Id.* at 7-8.

<sup>45</sup> Red NY/Veritas Petition at 1-3. Red NY is the licensee of MMDS Station WLR500 in New York, operating with facilities on the Empire State Building. In 1987, Red NY entered into a lease agreement with The Microband Companies, Inc.; that lease subsequently has been held by a subsidiary of WorldCom. Veritas is the licensee of the MMDS Station WNEK864 in Boston, operating with facilities at One Financial Center. In 1996, it entered into an MDS channel lease agreement with Atlantic Microsystems, Inc. That lease, too, subsequently was held by a subsidiary of WorldCom. The Purchase Agreement did not include the Red NY and Veritas leases among assets to be assigned to Nextel from WorldCom.

<sup>46</sup> *Id.* at 4.

<sup>47</sup> *Id.* at 5. Under Section 21.303 of the Commission's rules, a licensee's authorization may be cancelled if it does not provide service for a 12-month period.

<sup>48</sup> *Id.* at 5-6.

<sup>49</sup> Joint Opposition at 2.

be dismissed for lack of standing and for failure to make the required showing pursuant to Section 309(d)(1) of the Communications Act.<sup>50</sup> Specifically, the Applicants argue that the Petitions fail to make a *prima facie* showing that a grant of the Applications is inconsistent with the public interest, convenience, and necessity.<sup>51</sup>

15. Regarding the standing issue, the Applicants first argue that the Petitioners fail to show that they would suffer direct injury as a result of a grant of the Applications.<sup>52</sup> The Applicants note that the Petitions do not relate to any of the licenses to be assigned, but instead relate to licenses that will continue to be held by Petitioners.<sup>53</sup> Furthermore, the Applicants stress that the Petitions failed to challenge the public interest showing set forth in the Applications, as well as the qualifications of Nextel to be the licensee of these stations. Therefore, the Applicants claim that all the Petitions must be dismissed for lack of standing and for failure to satisfy the requirements of Section 309(d)(1) of the Communications Act.<sup>54</sup>

16. Replies to Joint Opposition In response to the Applicants' assertion that their Petitions should be dismissed for lack of service on Nextel, ITF and NCI argue that neither Nextel nor WorldCom suffered any prejudice as a result of the lack of service.<sup>55</sup> ITF and NCI contend that the Commission does not typically sanction parties for failure to satisfy its procedural requirements where no prejudice befalls the other party by virtue of the procedural error.<sup>56</sup> All of the Petitioners also defend their standing to challenge the proposed transactions in their Replies.<sup>57</sup> Specifically, NCI and ITF each argues that its Petition raises legitimate allegations regarding the Applicants' stewardship of their licenses in the context of an assignment application.<sup>58</sup> ITF also contends that its Petition raises issues to "vindicate the broad public interest" and that the Commission has permitted standing on that basis.<sup>59</sup>

17. Red NY/Veritas argue that they are parties in interest because they would be aggrieved and their interest would be adversely affected by the loss of the right to operate with their licensed facilities from their licensed sites.<sup>60</sup> In particular, Red NY/Veritas claim that they have standing not because their leases were terminated, but because assignment of the facilities upon which they have been relying for the operation of their stations is an "integral part" of the proposed transaction between WorldCom and Nextel, but the Purchase Agreement does not contain any provision for Red NY/Veritas to be able to continue to make use of those facilities in the operation of their stations.<sup>61</sup> Noting that WorldCom and Nextel have made provisions for ITFS licenses whose leases were rejected to continue to use equipment and tower facilities after Nextel assumes WorldCom's spectrum assets, Red NY/Veritas

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<sup>50</sup> *Id.* at 2-3.

<sup>51</sup> *Id.* at 2-6.

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 5-6.

<sup>55</sup> ITF Reply at 5; NCI Reply at 2.

<sup>56</sup> *Id.* (citing *AT&T Corporation v. Bell Atlantic*, 14 FCC Rcd 556 ¶ 105 (1998)).

<sup>57</sup> ITF Reply at 3; NCI Reply at 2-3; Red NY/Veritas Reply at 3-6.

<sup>58</sup> NCI Reply at 2-3; ITF Reply at 2.

<sup>59</sup> ITF Reply at 3.

<sup>60</sup> Red NY/Veritas Reply at 3-6.

<sup>61</sup> *Id.* at 5.

argue that although the *Turner* principle<sup>62</sup> only applies to ITFS licenses, the public interest benefit should also allow incumbent commercial licensees to continue operations after a lease is terminated due to circumstances beyond their control.<sup>63</sup>

#### IV. DISCUSSION

##### A. Service Requirement

18. Pursuant to Section 1.939(c) of the Commission's Rules, a petitioner must serve a copy of its petition to deny on the applicant and on all other interested parties.<sup>64</sup> We note that NCI and ITF failed to comply with this requirement because their Petitions to Deny were not served on Nextel, the Assignee of the proposed applications. However, we find that the error was harmless, because Nextel in fact obtained a copy of the Petitions to Deny in sufficient time to file a timely opposition and accordingly suffered no prejudice by virtue of the initial procedural defect.<sup>65</sup> As noted in the record, counsel for ITF and NCI took immediate steps to cure the defect, and in addition, counsel for WorldCom provided copies to Nextel subsequent to receiving an electronic version of the pleadings.<sup>66</sup> Because Nextel suffered no prejudice from the failure of NCI and ITF to comply with our service requirement, we decline to dismiss the NCI Petition and the ITF Petition on the basis of that procedural defect.

##### B. Standing

19. To establish standing to file a petition to deny, Petitioners are required by Section 309(d)(1) of the Communications Act<sup>67</sup> to demonstrate that each is a "party in interest."<sup>68</sup> Petitioners must make specific allegations of fact sufficient to demonstrate that grant of the challenged Assignment Applications would cause the petitioners to suffer a direct injury.<sup>69</sup> They also must establish a causal link

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<sup>62</sup> *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993) ("*Turner*"). In *Turner*, the Commission required an agreement pursuant to which an ITFS licensee leased excess spectrum to contain a provision affording the ITFS licensee access to the equipment in the event the agreement was terminated. Consistent with the *Turner* principle, the Purchase Agreement between WorldCom and Nextel provides that, after the closing, Nextel will continue to provide access to the tower sites and common equipment to ITFS licensees whose leases have been rejected. No such provision is made for MMDS licensees.

<sup>63</sup> Red NY/Veritas Reply at 5-6.

<sup>64</sup> 47 C.F.R. § 1.939(c).

<sup>65</sup> ITF Reply at 5; NCI Reply 2.

<sup>66</sup> *Id.*

<sup>67</sup> 47 U.S.C. § 309(d) (1).

<sup>68</sup> See, e.g., Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, FCC 04-26, at ¶ 21 (rel. Feb. 12, 2004) ("*Cingular-NextWave Order*"); Application of Alaska Native Wireless L.L.C., *Order*, 18 FCC Rcd 11,640, 11,644 ¶ 10 (2003) ("*Alaska Native Wireless Order*"); Minnesota PCS Limited Partnership (Assignor) K-25 Wireless, L.P. (Assignee), *Order*, 17 FCC Rcd 126, 128 ¶ 6 (CWD 2002) ("*Minnesota PCS Order*"); Applications of Airgate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, *Memorandum Opinion and Order*, 14 FCC Rcd 11,827, 11,845 ¶ 35 (CWD 1999) ("*Cricket-Airgate Order*"); Applications of Caribbean SMR, Inc., *Order*, 16 FCC Rcd 15,663, 15,663 ¶ 2 (PRB CWD 2001) ("*Caribbean SMR Order*"); Beta Communications, L.L.C., Assignor, and Leap Wireless International, Inc., Assignee, *Memorandum Opinion and Order*, 15 FCC Rcd 24,156, 24,159 ¶ 7 (PRB CWD 2000) ("*Leap-Beta Order*").

<sup>69</sup> See, e.g., *Cingular-NextWave Order*, FCC 04-26, at ¶ 21; *Alaska Native Wireless Order*, 18 FCC Rcd at 11,644 ¶ 10; *Minnesota PCS Order*, 17 FCC Rcd at 128 ¶ 6; *Cricket-Airgate Order*, 14 FCC Rcd at 11,845 ¶ 35; *Caribbean*

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by demonstrating that the injury can be traced to the grant of the Assignment Applications.<sup>70</sup> In addition, Petitioners must establish that it is likely, as opposed to merely speculative, that the alleged injury would be prevented or redressed if the Assignment Applications are denied.<sup>71</sup>

20. The Applicants contest the Petitioners' standing, claiming that the Petitioners fail to make any showing that they would suffer direct injury as a result of a grant of the Assignment Applications. Specifically, the Applicants argue that NCI and Red NY/Veritas' assertion that they have been affected by WorldCom's rejection of their spectrum leases has no merit because the rejection of these spectrum leases occurred as a result of WorldCom's bankruptcy reorganization, and their spectrum leases are not a part of the pending Assignment Applications.<sup>72</sup> Because WorldCom could have rejected these Petitioners' spectrum leases regardless of the existence or outcome of the WorldCom-Nextel transaction, the Applicants claim that the NCI and Red NY/Veritas fail to show that they would be harmed by grant of the Assignment Applications or that denying the Assignment Applications would provide relief with respect to the issues raised in their Petitions.<sup>73</sup> The Applicants also argue that ITF fails to show a nexus between the issues raised in its Petition and the proposed assignment and instead merely seeks to re-litigate issues raised in its own Relocation Application.<sup>74</sup> In response, NCI and Red NY/Veritas assert that they have standing because the Purchase Agreement fails to provide them continued access to the facilities critical to the operation of their stations.<sup>75</sup> Specifically, Red NY/Veritas claim that they would be adversely affected by the assignment of equipment and facilities leases upon which they rely, and that, they claim, are an integral part of the overall transaction described in the Assignment Applications. NCI and ITF contend that their Petitions raise legitimate allegations regarding the Applicants' stewardship of their licenses to vindicate the public interest.<sup>76</sup>

21. Based on the review of the record, we determine that Petitioners have failed to establish standing as "parties in interest," with a Section 309(d)(1) right to challenge the Applications.<sup>77</sup> ITF fails to raise any issues related to the Assignment Applications. ITF contends that WorldCom's refusal to permit ITF to operate station WHR527 in accordance with its authorization or to relocate is in violation of Section 21.902(b)(1) of the Commission's rules.<sup>78</sup> However, ITF fails to show a nexus between the

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*SMR Order*, 16 FCC Rcd at 15,663-64 ¶ 2; *Leap-Beta Order*, 15 FCC Rcd at 24,159 ¶ 7. See also *High Plains Wireless, L.P. v. FCC*, 276 F.3d 599, 605 (D.C. Cir. 2002) (citing *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 231-32 (D.C. Cir. 2000)) (stating the "irreducible constitutional minimum" that must be demonstrated for standing); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (stating the "irreducible constitutional minimum" of standing).

<sup>70</sup> See, e.g., *Cingular-NextWave Order*, FCC 04-26, at ¶ 21; *Alaska Native Wireless Order*, 18 FCC Rcd at 11,644 ¶ 10; *Minnesota PCS Order*, 17 FCC Rcd at 128 ¶ 6; *Cricket-Airgate Order*, 14 FCC Rcd at 11,845 ¶ 35; *Caribbean SMR Order*, 16 FCC Rcd at 15,664 ¶ 2; *Leap-Beta Order*, 15 FCC Rcd at 24,159 ¶ 7. See also *High Plains Wireless*, 276 F.3d at 605 (citing *U.S. Airwaves*, 232 F.3d at 231-32); *Lujan*, 504 U.S. at 560.

<sup>71</sup> See, e.g., *Cingular-NextWave Order*, FCC 04-26, at ¶ 21; *Alaska Native Wireless Order*, 18 FCC Rcd at 11,644 ¶ 10; *Caribbean SMR Order*, 16 FCC Rcd at 15,664 ¶ 2; *Leap-Beta Order*, 15 FCC Rcd at 24,159 ¶ 7. See also *High Plains Wireless*, 276 F.3d at 605 (citing *U.S. Airwaves*, 232 F.3d at 231-32); *Lujan*, 504 U.S. at 561.

<sup>72</sup> Joint Opposition at 4-5.

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

<sup>74</sup> *Id.* at 5.

<sup>75</sup> Red NY/Veritas Reply at 5.

<sup>76</sup> NCI Reply at 2-3; ITF Reply at 3.

<sup>77</sup> 47 U.S.C. § 309(d)(1).

<sup>78</sup> See 47 C.F.R. § 21.902(b)(1); ITF Petition at 9.

alleged violation of Section 21.902 and the proposed Assignment Applications. Additionally, ITF fails to provide sufficient facts establishing that grant of the Assignment Applications would cause it direct injury. As noted above, the Commission already considered and granted ITF's Relocation Application in a separate proceeding, resolving the issues raised in the ITF Petition.<sup>79</sup> Furthermore, Since ITF is now permitted to relocate to a nearby tower as requested in its Relocation Application, we do not need to address its allegation that WorldCom is in violation of Section 21.902(b)(1). We find no reason to revisit the actions taken in the *ITF Relocation Order*, and we accordingly find that the issues raised in the ITF Petition in this proceeding to be moot. We therefore dismiss the ITF Petition for lack of standing and mootness. Even if we were to address the ITF Petition on the merits, as discussed below, we would deny it.

22. NCI and Red NY/Veritas argue that the assignment of certain equipment and site leases will adversely affect them. It is important to note, however, that only the assignment of certain spectrum licenses is before the Commission in the Assignment Applications. Equipment and site leases are not part of the Assignment Applications and are not subject to Commission approval. Furthermore, as noted above, none of the spectrum leases to which Petitioners are parties is a part of the Assignment Applications. WorldCom's rejection of Petitioners' spectrum leases was approved by the Bankruptcy Court. The Bankruptcy Court has also approved WorldCom's assignment to Nextel of the relevant equipment and facilities leases. The Commission will not revisit the terms of the transactions already reviewed and approved by the Bankruptcy Court in the absence of a showing that Petitioners will be harmed by approval of the license assignments under consideration. Thus, we find that NCI and Red NY/Veritas have failed to show that they would be directly harmed by the grant of the Assignment Applications or that denying the Applications would provide relief with respect to the issues raised in their Petitions. We therefore dismiss the NCI and Red NY/Veritas Petitions for lack of standing. Even if we were to address them on the merits, as discussed below, we would deny them.

### C. Public Interest Determination in Accordance with Section 310(d)

23. In considering the Assignment Applications, the Commission must determine, pursuant to Section 310(d) of the Communications Act, whether the proposed assignment of licenses will serve the public interest, convenience, and necessity.<sup>80</sup> The legal standards that govern our public interest analysis require that we weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.<sup>81</sup> In applying our public interest test, we must assess whether the proposed transaction complies with the specific provisions of the Communications Act, the Commission's rules, and federal communications policy.<sup>82</sup> Our public interest analysis considers the likely competitive effects of the proposed transaction and whether such assignments raise significant anti-competitive concern.<sup>83</sup> In addition, we consider the

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<sup>79</sup> See *ITF Relocation Order*.

<sup>80</sup> 47 U.S.C. § 310(d).

<sup>81</sup> See, e.g., General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, *Memorandum Opinion and Order*, FCC 03-330, at ¶ 15 (rel. Jan. 14, 2004) ("*GM-News Corp. Order*"); *WorldCom Order*, 18 FCC Rcd at 26,492 ¶ 12; EchoStar Communications Corporation, General Motors Corporations, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (Transferee), *Hearing Designation Order*, 17 FCC Rcd 20,559, 20,574t ¶ 25 (2002) ("*EchoStar-DirectTV HDO*"); Global Crossing LTD. (Debtor-in-Possession), Transferor, and GC Acquisition Ltd., Transferee, *Order and Authorization*, DA 03-3121, 18 FCC Rcd 20,301, 20,315 ¶ 17 (2003) ("*Global Crossing Order*").

<sup>82</sup> See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 16; *EchoStar-DirectTV HDO*, 17 FCC Rcd at 20,574 ¶ 25; Applications of TeleCorp. Inc., Tritel, Inc., and Indus, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3721-22 ¶ 12 (2000) ("*TeleCorp-Tritel Order*").

<sup>83</sup> See, e.g., *WorldCom Order*, 18 FCC Rcd at 26,492 ¶ 12; *Global Crossing Order*, 18 FCC Rcd at 20,315 ¶ 17.

efficiencies and other public interest benefits that are likely to result from the proposed assignments of the licenses.<sup>84</sup>

24. As a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and assign licenses under Section 310(d) of the Act and the Commission's rules.<sup>85</sup> As a general rule, the Commission does not re-evaluate the qualifications of assignors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.<sup>86</sup> On the other hand, Section 310(d) requires the Commission to consider whether the proposed assignee is qualified to hold Commission licenses.<sup>87</sup>

25. Based on the review of the record, we find that the Petitioners fail to raise issues with respect to the basic qualifications of WorldCom D-I-P and its subsidiaries as Assignors. ITF challenges WorldCom's qualifications by claiming that WorldCom's refusal to allow ITF to operate from its authorized site after the termination of the parties' lease and filing of its petition to deny ITF's application to relocate amount to an abuse of process.<sup>88</sup> In particular, ITF states that WorldCom's opposition to ITF's Relocation Application was filed in bad faith to obstruct and delay ITF's ability to operate.<sup>89</sup> We find nothing to suggest that WorldCom's pleading violated the Commission's general practice rules governing pleadings filed in opposition to a pending application.<sup>90</sup> In the absence of a demonstrable showing of abuse of the Commission's process,<sup>91</sup> we are not persuaded by ITF's allegation on this issue.

26. We also find that Nextel has the requisite character qualifications to take assignment of the Designated Licenses. When determining whether an assignee has the requisite character qualifications to be a Commission licensee, the Commission will review allegations of misconduct

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<sup>84</sup> *Id.*

<sup>85</sup> See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 15; *WorldCom Order*, 18 FCC Rcd at 26,493 ¶ 13; *Global Crossing Order*, 18 FCC Rcd at 20,316 ¶ 18.

<sup>86</sup> See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 18; *WorldCom Order*, 18 FCC Rcd at 26,493 ¶ 13.

<sup>87</sup> See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 23; *WorldCom Order*, 18 FCC Rcd at 26,493 ¶ 13; *EchoStar DirecTV HDO*, 17 FCC Rcd at 20,574, 20,576 ¶¶ 25, 28.

<sup>88</sup> ITF Petition at 8; ITF Reply at 2.

<sup>89</sup> ITF Petition at 8.

<sup>90</sup> In the *ITF Relocation Order*, the Commission considered WorldCom's filing as informal objection, noting that ITF's application only sought to make minor changes to Station WHR527. See *ITF Relocation Order*, DA 04-418, at ¶ 5. The Commission's rules do not authorize the filing of petitions to deny against applications to make minor changes to ITFS stations. See 47 C.F.R. §§ 74.910, 74.912.

<sup>91</sup> The term "abuse of process" has been defined as "the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." Formulation of Policies and Rules Relating to Broadcast Renewal Applications, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process, *First Report and Order*, 4 FCC Rcd 4780, 4793 n.3 (1989); see *Silver Star Communications-Albany, Inc., Order*, 3 FCC Rcd 6342,6352 ¶ 41 (1988); Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Policy Regarding Character Qualifications In Broadcast Licensing, Report, *Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (strike pleadings, harassment of opposing parties, and violation of *ex parte* rules constitute abuse of process).

directly before it, as well as conduct that takes place outside our jurisdiction.<sup>92</sup> Because the Wireless Telecommunications Bureau has found Nextel to be qualified to acquire licenses in prior proceedings,<sup>93</sup> and the Petitioners provide no evidence that Nextel has made any misrepresentations or acted with a lack of candor in any of its proceedings before the Commission, or has a pattern of willful violations of the Communications Act or the Commission's rules,<sup>94</sup> we find no reason to conclude otherwise here.

27. We note that the Petitioners implicitly challenge Nextel's qualifications by questioning Nextel's motives and intentions behind the rejection of certain lease agreements with the Petitioners. In its Petition, for example, NCI claims that certain terms of the proposed Purchase Agreement are in violation of Section 21.902(b)(1) because they may restrict NCI's access to equipment and the broadcast location in order to give Nextel leverage in its negotiations with NCI.<sup>95</sup> We believe that this allegation is speculative at this point. NCI has not established that it is unable to reach an agreement with Nextel regarding access to the leased equipment and the tower site. In addition, were we to address the NCI Petition on the merits, we would find that NCI's argument that the harmful interference rules under Section 74.903(a)(2)(i) would prevent NCI from finding any relocation site without violating the rules to be premature and speculative.<sup>96</sup>

28. Similarly, we would conclude that allegations raised in the Red NY/Veritas Petitions do not warrant designation of a hearing or denial of the Assignment Applications. In their Petitions, Red NY/Veritas claim that WorldCom's rejection of the spectrum leases might harm their own private interests, because they will be unable to operate without access to the equipment being sold to Nextel and the tower site lease being assigned to Nextel.<sup>97</sup> However, as stated above, these private contractual disputes have already been reviewed by the Bankruptcy Court, and we will not be reconsider these disputes in this proceeding for the reasons given above. Moreover, we also would find that the allegations of harm made by Red NY/Veritas are premature and speculative at this time. Petitioners have not presented evidence that they have tried and failed to secure co-located tower space or another site in accordance with the interference rules under Section 21.303.<sup>98</sup> Red NY/Veritas also urge the Commission to condition the Assignment Applications by requiring Nextel to allow them, and other MMDS licensees similarly situated, continued access to the equipment and tower sites necessary to provide service from their currently licensed locations. These Petitioners claim that the protections given to ITFS licensees under *Turner* should be extended to commercial MMDS licensees.<sup>99</sup> However, on its face *Turner* applies

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<sup>92</sup> See, e.g., *GM-News Corp. Order*, FCC 03-330, at ¶ 23; *WorldCom Order*, 18 FCC Rcd at 26,493 ¶ 13; *EchoStar DirecTV HDO*, 17 FCC Rcd at 20,576 ¶ 28.

<sup>93</sup> See, e.g., Wireless Telecommunications Bureau Grants Consent for the Transfer of Control of 900 MHz SMR Licenses from Neoworld License Holdings, Inc., to FCI 900, Inc., *Public Notice*, 17 FCC Rcd 7051 (2002); Applications of Chamore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc., *Memorandum Opinion and Order*, 16 FCC Rcd 21,105 (2001); Motorola SMR, Inc.; and Motorola Communications and Electronics, Inc. Assignors; and FCI 900, Inc. Assignee., *Order*, 16 FCC Rcd 8451 (2001).

<sup>94</sup> See Joint Opposition at 5-6.

<sup>95</sup> NCI Petition at 4-6; see 47 C.F.R. § 21.902(b)(1).

<sup>96</sup> NCI Petition at 5-6; see 47 C.F.R. § 74.903(a)(2)(i). We note in that regard our recent grant of the relocation proposed by ITF. See *ITF Relocation Order*, DA 04-418.

<sup>97</sup> Red NY/Veritas Petition at 4-5.

<sup>98</sup> 47 C.F.R. § 21.303. See Joint Opposition at 7.

<sup>99</sup> Red NY/Veritas Petition at 3, 5-6; Joint Opposition at 7-8; Red NY/Veritas Reply at 5-6. As noted above, see *supra* note 62, in *Turner*, the Commission required that an agreement pursuant to which an ITFS licensee leased excess spectrum contain a provision affording the ITFS licensee access to the equipment in the event that the agreement was terminated. The Purchase Agreement between WorldCom and Nextel provides that Nextel will

(continued...)

only to ITFS licensees and has the clear goal of providing additional protection to non-commercial instructional licensees. We are not persuaded that this protection should be extended to commercial licensees. As commercial licensees, Red NY/Veritas must be prepared to spend the time and resources necessary to fulfill their regulatory obligations in compliance with the Commission's rules, including obtaining sites for their licensed transmitters. Based on the record before us, we find that Nextel is legally, financially, technically, and otherwise qualified to hold the Designated Licenses.

29. Finally, when evaluating the likely competitive effects and public interest benefits of a proposed transaction, the Commission performs a case-by-case review of the transaction in order to fulfill the Commission's statutory mandate to preserve and enhance competition in relevant market, ensure diversity of license holdings, accelerate private sector deployment of advanced services, and manage the spectrum in the public interest.<sup>100</sup> The Applicants allege that this transaction is in the public interest because it will allow underutilized spectrum to be put into service and will "enhance consumers' competitive alternatives by furthering Nextel's ability to offer a greater menu of the wireless services consumers are demanding in today's marketplace."<sup>101</sup> The applicants also state that this transaction will provide Nextel with the "spectrum capacity and flexibility to expand its digital wireless services and 3G mobile innovations."<sup>102</sup> Furthermore, Petitioners did not dispute these proffered public interest benefits. Neither the record nor our own analysis leads to the conclusion that there is likely to be substantial competitive harm as a result of this transaction.<sup>103</sup> Therefore, we find that the potential benefits outweigh any potential harm and that the proposed transaction is in the public interest.

## V. CONCLUSION

30. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 309(d)(1), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(d)(1), 309(j) and Sections 0.331 and 1.2108 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.2108, the Assignment Applications, dated August 15, 2003, the respective Petitions to Deny filed on October 27, 2003 by Instructional Telecommunications Foundation, Inc., Northwest Communications, Inc., and, jointly, Red New York E Partnership and Veritas LLC are DENIED.

31. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 309(j), and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309(j), 310(d), the Assignment Applications, dated August 15, 2003, seeking approval for the assignment of certain wireless licenses from WorldCom D-I-P to Nextel are GRANTED.

32. These actions are taken under delegated authority pursuant to Sections 0.61, 0.131, 0.283,

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continue to provide access to the tower sites and to the common equipment to ITFS licensees whose leases have been rejected.

<sup>100</sup> See *GM-News Corp Order*, FCC 03-330, at ¶ 16; *EchoStar Direct TV HDO*, 17 FCC Rcd at 20,574 ¶ 26 ; 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22,668, 22,696 ¶ 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)).

<sup>101</sup> See Assignment Applications at 4-5.

<sup>102</sup> *Id.* at 4. Although Nextel will be eligible to hold the CARS licenses as an MDS/MMDS operator, we note that CARS is primarily a video transmission service. Thus, should Nextel cease to use the CARS licenses for video transmission or significantly reduce its use for this purpose, we would expect those licenses to be surrendered because of the permissible use restrictions under Section 78.13(b) of the Commission's Rules. See C.F.R. § 78.13(b); see also Amendment of Eligibility Requirements in Part 78 Regarding 12 GHz Cable Television Relay Service, *Report and Order*, 17 FCC Rcd 9,930, 9,945, at ¶¶ 38-39 (2002).

<sup>103</sup> Petitioners do not challenge the Assignment Applications on the ground that they would cause competitive harm.

and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.61, 0.131, 0.283, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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