

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

In the Matter of)	
)	
Applications of Nextel Communications, Inc. and)	
Sprint Corporation)	WT Docket No. 05-63
)	
For Consent to Transfer Control of Licenses and)	
Authorizations)	
)	
File Nos. 0002031766, et al.)	

ORDER ON RECONSIDERATION

Adopted: August 4, 2006

Released: August 10, 2006

Commissioner(s) vote: Commissioner Tate abstaining.

I. INTRODUCTION

1. In this Order, we address the Petition for Reconsideration filed by NY3G Partnership (NY3G).¹ NY3G seeks reconsideration of the *Sprint Nextel Order* in which the Commission granted the applications of Nextel Communications, Inc. (Nextel) and Sprint Corporation (Sprint) to transfer of control of licenses and authorizations held by Nextel to Sprint.² NY3G requests that the Commission reevaluate the potential anticompetitive effects of the transaction. It argues that the Commission should not have approved the transfer of control of Broadband Radio Service (BRS) licenses and Educational Broadband Service (EBS) spectrum lease holdings without imposing the specific conditions NY3G had requested earlier in its Petition to Deny the applications.³ For the reasons set forth below, we deny the Petition for Reconsideration.

II. BACKGROUND

2. On February 8, 2005, Sprint and Nextel filed applications seeking the Commission’s approval to transfer to Sprint licenses and authorizations held by Nextel.⁴ NY3G, a Multichannel Multipoint Distribution Service (MMDS) licensee⁵ operating in the 2.5 GHz band in New York City, filed

¹ NY3G Petition for Reconsideration, WT Docket No. 05-63 (filed September 7, 2005).

² Applications of Nextel Communications, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 20 FCC Rcd 13967 (2005) (*Sprint Nextel Order*).

³ NY3G Petition for Reconsideration at 5-6; NY3G Partnership Petition to Deny, (Mar. 30, 2005, erratum filed Apr. 5, 2005).

⁴ Applications of Nextel Communications, Inc., and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, ULS File No. 0002031766, et al. (filed Feb. 8, 2005).

⁵ MMDS was one of the services in the 2.5 GHz band prior to revision of the band plan and service rules in 2004 to replace MMDS and Instructional Television Fixed Service (ITFS) with BRS and EBS, respectively. Amendment of Parts 1, 21, 73, 74, and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Memorandum and Order on Reconsideration*, 19 FCC Rcd 14165, 14231 ¶ 172 (2004) (*BRS/EBS R&O*).

a Petition to Deny the applications.⁶ NY3G claimed that the merged entity could use its “extensive EBS/BRS spectrum holdings in the vast majority of local markets to frustrate the efforts of carriers seeking to construct their own facilities-based nationwide EBS/BRS footprints, which would exclude efficient competitors, reduce the quantity of wireless broadband service available to the public, and increase prices to the detriment of consumers.”⁷ To address these alleged anti-competitive effects, NY3G asked, *inter alia*, that the Commission prohibit Sprint Nextel from holding more than 48 megahertz of licensed or leased BRS/EBS spectrum within any Basic Trading Area (BTA) by conditioning the grant on divestiture of holdings in excess of that amount, and that the Commission impose certain other conditions, including requiring Sprint Nextel to permit customers of other BRS/EBS carriers to roam on the merged entity’s network and allowing Sprint Nextel customers to port the phone numbers that Sprint Nextel had assigned them to other BRS/EBS carriers.⁸

3. In the *Sprint Nextel Order*, the Commission considered the arguments raised, and conditions requested, in NY3G’s Petition to Deny and rejected them.⁹ For a number of reasons, as set forth in the order, the Commission found that the harms of undue concentration alleged by NY3G (as well as by other petitioners to deny) were unlikely and/or not merger-specific and that approval of the Sprint and Nextel applications would not result in competitive harm with regard to the 2.5 GHz band.¹⁰

4. On September 7, 2005, NY3G filed its Petition for Reconsideration requesting that the Commission reevaluate the potential anticompetitive effects of the merger and the conditions that NY3G had proposed in its Petition to Deny, including requiring Sprint Nextel to divest BRS/EBS spectrum holdings in excess of 48 megahertz in any BTA.¹¹ As the basis for seeking reconsideration, NY3G challenges the discussion in one paragraph of the *Sprint Nextel Order* in which the Commission noted that requiring such divestiture would be inconsistent with its policy of enabling consolidation of spectrum holdings in this band.¹² Specifically, NY3G contends that the Commission committed material error when it based the decision, in part, on the statement that requiring divestiture of 2.5 GHz spectrum would be “inconsistent with long-standing regulatory policies regarding the 2.5 GHz, including the encouragement of consolidation of spectrum in this band, due to its historical underutilization”¹³ and when it placed “heavy” reliance upon, as support for this policy, the right of first refusal established for Multipoint Distribution Service (MDS) licensees in the 1995 *MDS Auctions Procedures Order* but rescinded later that year in its *MDS Auction Procedures Reconsideration Order*.¹⁴

⁶ NY3G Petition to Deny.

⁷ *Id.* at 9.

⁸ *Id.* at 4-8.

⁹ *Sprint-Nextel Order*, 20 FCC Rcd at 14020-29 ¶¶ 145-166.

¹⁰ *Id.* at 14020-29 ¶¶ 151, 153-166.

¹¹ NY3G Petition for Reconsideration at 1-2.

¹² NY3G Petition for Reconsideration at 1, 4-6.

¹³ *Sprint Nextel Order* at 14028 ¶ 160.

¹⁴ *Id.* at 1, 4-6 (focusing challenge on the discussion in paragraph 160 of the *Sprint Nextel Order*). See Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Report and Order, 10 FCC Rcd 9589, 9609, 9612 ¶¶ 37, 41 (1995) (*MDS Auction Procedures Order*); Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, Memorandum and Order on Reconsideration, 10 FCC Rcd 13821 (1995) (*MDS Auction Procedures Reconsideration Order*). This right of first refusal is discussed in further detail below.

5. On September 19, 2005, Sprint Nextel filed its Opposition to the Petition for Reconsideration. It argues that NY3G mischaracterizes the Commission's discussion of and reliance upon the 1995 *MDS Auction Procedures Order* as support for its decision, and that the Commission instead had rejected NY3G's proposed conditions based on a review of competitive conditions in the mobile services market.¹⁵ Sprint Nextel also asserts that the Commission's subsequent decision to eliminate the right of first refusal does not undercut the assertion about the Commission's policies permitting consolidation of spectrum in the band.¹⁶ In addition, Sprint Nextel contends that, even if it were deemed an error not to have accounted for the *MDS Auction Procedures Reconsideration Order*, such error would be harmless given that the Commission relied on its competitive analysis of the current mobile data services market when rejecting NY3G's Petition to Deny, not on its discussion of policy judgments pertaining to the right of first refusal made by the Commission in a 1995 *MDS Auction Procedures Order*.¹⁷ Finally, Sprint Nextel argues that NY3G has not established any material error or omission in the *Sprint Nextel Order*, or presented new relevant facts or arguments, that would warrant reconsideration.¹⁸ On September 29, 2005, NY3G filed its Reply to Sprint Nextel's Opposition, again arguing that the discussion of Commission policies permitting aggregation of spectrum in the band and the Commission's reliance on the right of first refusal set forth in the 1995 *MDS Auction Procedures Order* constituted material error warranting reconsideration of the potential anticompetitive effects of the merger.¹⁹

6. Section 1.106 of the Commission's rules permits parties to file petitions for reconsideration of final Commission actions.²⁰ It provides that reconsideration is appropriate when 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.²¹ It is well established that "rehearing will not be granted merely for the purpose of debating matters on which the tribunal has once deliberated and spoken."²²

III. DISCUSSION

7. We deny NY3G's Petition for Reconsideration because it raises neither a material error nor new facts that persuade us to revisit the Commission's conclusions in the *Sprint Nextel Order*. In the *Sprint Nextel Order*, the Commission fully considered and rejected the arguments NY3G had earlier set forth in its Petition to Deny. Furthermore, in its Petition for Reconsideration, NY3G mischaracterizes the Commission's reasoning for reaching its determination and misstates the Commission's reliance on the right of first refusal set forth in the 1995 *MDS Auction Procedures Order* as a basis for that determination.

¹⁵ Sprint Nextel Opposition at 3-4.

¹⁶ Sprint Nextel Opposition at 4-5.

¹⁷ Sprint Nextel Opposition at 5.

¹⁸ Sprint Nextel Opposition at 6-8.

¹⁹ NY3G Reply to Opposition at 1-5.

²⁰ 47 C.F.R. § 1.106.

²¹ Applications of AT&T Wireless, Inc., and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, *Order on Reconsideration*, 20 FCC Rcd 8660, 8663 ¶ 8 (2005).

²² WWIZ, Inc., *Memorandum Opinion and Order*, 37 FCC 685, 686 ¶ 2 (1965), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

8. In determining to permit Sprint Nextel to consolidate spectrum in the 2.5 GHz band, the Commission fully examined and rejected the conditions that NY3G had proposed in its Petition to Deny. In the *Sprint Nextel Order* the Commission provided several reasons why, based on its analysis of market conditions relating to the 2.5 GHz band at the time of the transaction, it was not persuaded by NY3G's arguments and instead concluded that approving the applications would not cause competitive harm in the band. In particular, the Commission found that Sprint's and Nextel's spectrum holdings in the 2.5 GHz band did not significantly overlap and that combining these holdings would not increase concentration of spectrum in most local markets.²³ It also examined those markets in which there was overlap and found that approving the applications would not cause any competitive harm in any specific market.²⁴ The Commission determined that following the merger substantial amounts of 2.5 GHz spectrum remained for other competitors, and concluded that Sprint Nextel would have strong, nationwide competitors with sufficient spectrum outside the 2.5 GHz band with powerful incentives to compete in all of the potentially relevant product markets.²⁵ The Commission found that new, suitable spectrum in close proximity to the 2.5 GHz band would become available in future auctions to help meet competitors' needs for any additional spectrum.²⁶ After considering all of these factors, it concluded that permitting Sprint Nextel to have a nationwide footprint in the 2.5 GHz band did not bestow a unique or excessive advantage that would cause competitive harm.²⁷ In sum, the Commission provided several grounds, based on an analysis of the market conditions in 2005, for reaching its decision to permit Sprint and Nextel to combine their spectrum holdings in the 2.5 GHz band and not to require any divestitures.

9. Although the Commission also referenced as support for this decision the Commission's policy of enabling consolidation of spectrum in the band due to its historic underutilization, we disagree with NY3G's allegations that the Commission's decision materially turned on this discussion or on the right of first refusal adopted in the Commission's 1995 *MDS Auction Procedures Order*.²⁸ NY3G has not challenged the analysis in the Commission's determination that permitting consolidation of Sprint's and Nextel's holdings would not cause competitive harm in the band, and thus has not established any material error in the *Sprint Nextel Order*. The Commission already has deliberated upon NY3G's arguments regarding the merger of Sprint's and Nextel's holdings in the 2.5 GHz band and rejected them, and we will not reconsider them here.

10. Moreover, we disagree with NY3G's contentions challenging the Commission's discussion noting that the decision to permit Sprint and Nextel to combine their holdings in the 2.5 GHz band without divestiture was consistent with policies the Commission had adopted in previous decisions

²³ *Sprint Nextel Order*, 20 FCC Rcd at 14022, 14025-26 ¶¶ 151, 158.

²⁴ *Sprint Nextel Order*, 20 FCC Rcd at 14022, 14025-26 ¶¶ 151, 158.

²⁵ *Sprint Nextel Order*, 20 FCC Rcd at 14022, 14024-14025, ¶¶ 151, 154-157.

²⁶ *Sprint Nextel Order*, 20 FCC Rcd at 14022, 14024 ¶¶ 151, 154.

²⁷ *Sprint Nextel Order*, 20 FCC Rcd at 14026-27 ¶ 159.

²⁸ Indeed, in the *Sprint Nextel Order* the Commission indicated that it had already considered all of the factors necessary for reaching its decision not to require any divestitures in the 2.5GHz band before the Commission discussed the policy of permitting consolidation in the band and referenced the right of first refusal in the 1995 *MDS Auctions Procedures Order*. Specifically, in paragraph 160, prior to commencing discussion of this policy and the right of first refusal, the Commission stated: "Based on the record before us [citing commenters contending that the merger was in the public interest and did not result in competitive harms], and in light of our conclusion that this merger will not result in competitive harm in the 2.5 GHz band, we are not persuaded that spectrum divestitures are warranted regarding [the proposed Sprint Nextel] spectrum holdings in this band." *Sprint Nextel Order*, 20 FCC Rcd at 14028 ¶ 160.

encouraging consolidation of spectrum holdings in the band. The *Sprint Nextel Order* appropriately cites the 1995 *MDS Auction Procedures Order* as an example of the Commission's adoption of policies that have encouraged consolidation of spectrum in the band due to its historical underutilization.²⁹ As the Commission discussed in the *Sprint Nextel Order*, the Commission in the *MDS Auction Procedures Order* placed no restriction either on the number of BTA service areas or the number of license authorizations that any one entity could obtain.³⁰ This was in keeping with the Commission's policy goal of enabling MDS licensees to accumulate a sufficient amount of spectrum to facilitate the development and rapid deployment of wireless cable services in the band.³¹ Consistent with this policy, the Commission also had granted MDS operators that obtained BTA authorizations at auction a right of first refusal with regard to the leasing of ITFS spectrum within their BTA.³² Although the Commission later in 1995 rescinded this right of first refusal in the *MDS Auction Procedures Reconsideration Order*, the Commission continued to maintain its policy of facilitating MDS operators' accumulation of a sufficient amount of spectrum to provide competitive wireless cable services. In the *MDS Auction Procedures Reconsideration Order*, the Commission reiterated its recognition "that wireless cable operators must aggregate as many channels as possible from the available thirteen MDS and excess capacity on the twenty ITFS channels in order to be competitive with wired cable."³³ The Commission rescinded the right of first refusal for BTA auction winners not because of any concern with spectrum consolidation in the 2.5 GHz band but because the Commission was "especially cognizant of the needs of educational institutions to enter into contracts with parties whom they feel are financially secure and able to provide technical support," and therefore wanted to give those institutions the right to deal with those other than BTA authorization holders if they so chose.³⁴ Accordingly, there is no merit to NY3G's claim that the rescission of the right of first refusal indicated that the Commission's decision in the *Sprint Nextel Order* was in error on the ground that the Commission did not have policies that have enabled consolidation of spectrum in the 2.5 GHz band to facilitate development in a band that historically has been underutilized.

²⁹ *Sprint Nextel Order*, 20 FCC Rcd at 14028 ¶ 160.

³⁰ *Id.*; *MDS Auctions Procedures Order*, 10 FCC Rcd at 9609 ¶ 37.

³¹ In the *MDS Auctions Procedures Order*, the Commission generally sought to establish policies that would facilitate the development and rapid deployment of wireless cable services that would compete effectively with wired cable and other multichannel video programming distributors. See generally *MDS Auctions Procedures Order*, 10 FCC Rcd at 9590-92 ¶¶ 1-5.

³² *MDS Auction Procedures Order*, 10 FCC Rcd at 9612 ¶ 41. At the time the 1995 *MDS Auction Procedures Order* was adopted, ITFS licensees already had the right to negotiate with any MDS licensee wishing to lease the ITFS licensee's excess channel capacity. In furtherance of the goal of enabling the MDS licensees holding BTA authorizations to accumulate a full complement of channels, the *MDS Auctions Procedures Order* provided these licensees with a right of first refusal with regard to prospective leases. Under the 1995 Order, ITFS licensees that chose to lease excess channel capacity continued to be free to negotiate with any potential lessee, but the MDS licensee holding the authorization had the right to lease the ITFS spectrum if it matched the final offer of any proposed lessee. If the MDS licensee holding the BTA authorization declined to exercise such right, then the ITFS licensee could enter into a lease arrangement with any MDS licensee it chose. *Id.*

³³ *MDS Auction Procedures Reconsideration Order*, 10 FCC Rcd at 13823 ¶ 13.

³⁴ *Id.* at 13824 ¶ 16.

IV. ORDERING CLAUSE

11. ACCORDINGLY, IT IS ORDERED that, pursuant to section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by NY3G Partnership on September 7, 2005 IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary