

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

In the Matter of	)	
	)	
SPRINT NEXTEL CORPORATION AND	)	WT Docket No. 08-94
CLEARWIRE CORPORATION	)	
	)	File Nos. 0003462540 <i>et al.</i>
Applications For Consent to Transfer Control of	)	
Licenses, Leases, and Authorizations	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 4, 2008**

**Released: November 7, 2008**

By the Commission: Chairman Martin and Commissioners Copps, Adelstein and Tate issuing separate statements; Commissioner McDowell approving in part, concurring in part and issuing a statement.

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## APPENDIX – COMMENTING PARTIES AND PETITIONERS

### I. INTRODUCTION

1. In this order, we consider applications filed by Sprint Nextel Corporation (“Sprint Nextel”) and Clearwire Corporation (“Clearwire”). In these applications, Sprint Nextel, Clearwire and certain of their subsidiaries (all together “the Applicants”) seek Commission approval of the transfer of control of licenses, authorizations and *de facto* transfer spectrum leases in the 2.5 GHz Band and certain associated bands to New Clearwire Corporation, a new corporation.<sup>1</sup> Under the proposed merger, all of Clearwire’s current Commission-authorized license and lease holding subsidiaries will become directly held by Clearwire MergerSub LLC (“Clearwire MergerSub”) and indirectly held by Clearwire Venture LLC, a direct wholly-owned subsidiary of New Clearwire.<sup>2</sup> The surviving Clearwire company, New Clearwire, will continue to own the stock of its subsidiaries, and its subsidiaries will continue to hold all of the FCC authorizations and spectrum leases that they held prior to the merger.<sup>3</sup> Sprint Nextel will transfer control

<sup>1</sup> See Clearwire Corporation, Form 603, File No. 0003462540 (amended Jun. 24, 2008) (Application). For a complete list of applications involved in this transaction, see Sprint Nextel Corporation and Clearwire Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 08-94, *Public Notice*, 23 FCC Rcd 9988 (WTB rel. June 24, 2008) (“Comment Public Notice”). File No. 0003462540 has been designated the lead application. The other applications contain an exhibit referring to the exhibits attached to File No. 0003462540. Thus, for convenience, when referring to these applications, we only cite to the lead Application.

<sup>2</sup> See Application, Description of the Transaction and Public Interest Statement (filed Jun. 24, 2008) (Public Interest Statement) at 7-8.

<sup>3</sup> See *Id.*

of its wholly-owned subsidiaries that hold all of Sprint Nextel's respective 2.5 GHz related assets to Clearwire Venture LLC, the direct wholly-owned subsidiary of New Clearwire.<sup>4</sup> Upon this transfer, Sprint Nextel will receive shares of New Clearwire amounting to an approximate 51 percent ownership, resulting in Sprint Nextel obtaining majority ownership of New Clearwire at the closing.<sup>5</sup>

2. These transfer of control applications pertain specifically to the Applicants' licenses and spectrum leases in the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") in the 2.5 GHz Band, point-to-point microwave and Local Multipoint Distribution Service ("LMDS") stations licensed under Part 101 of the Commission's Rules, and Cable Television Relay Service ("CARS") licenses issued under Part 78 of the Commission's Rules. Not included as part of this proposed transaction are Sprint Nextel's various other wireless radio licenses and spectrum leasing arrangements in the 800 MHz, 900 MHz, 1.9 GHz broadband Personal Communications Service ("PCS"), and 2.3 GHz Wireless Radio Service bands.

3. Pursuant to Section 310(d) of the Communications Act of 1934, as amended ("Communications Act"),<sup>6</sup> we must determine whether the Applicants have demonstrated that the proposed merger of Sprint Nextel and Clearwire, as discussed above, would serve the public interest, convenience, and necessity. Based on the record before us, we find that the Applicants have met that burden. We find that competitive harm is unlikely in any market, primarily because multiple other service providers in these markets would be an effective competitive constraint on the behavior of the merged entity. We also conclude that the transaction will result in major public interest benefits by facilitating the provision of a nationwide WiMAX-based network that will lead to increased competition, greater consumer choice, and new services. We also adopt a series of conditions designed to ensure that the benefits that can result from this transaction are in fact realized.

## II. BACKGROUND

### A. Description of Applicants

#### 1. Sprint Nextel Corporation

4. Sprint Nextel is a communications holding company incorporated in the State of Kansas with its principal offices in Overland Park, Kansas.<sup>7</sup> Through its subsidiaries and affiliates, Sprint Nextel is a provider of a comprehensive range of wireless and wireline communications services, including wireless mobile voice and data services, mobile and fixed data/broadband services and high-speed Internet access, Wi-Fi, and IP-based communications services to businesses.<sup>8</sup> Sprint Nextel holds wireless licenses and spectrum leases in various spectrum bands, including 800/900 MHz Specialized Mobile Radio ("SMR"), 1.9 GHz broadband Personal Communications Service ("PCS"), 2.3 GHz band, and BRS and EBS in the 2.5 GHz band.

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<sup>4</sup> *See Id.*

<sup>5</sup> *See Id.* at 8.

<sup>6</sup> 47 U.S.C. § 310(d).

<sup>7</sup> Sprint Nextel Corporation Form 10-K, at 1, 28 (February 29, 2008) ("Sprint Form 10-K"), available at <http://www.sec.gov/Archives/edgar/data/101830/000119312508043559/d10k.htm> (last visited Sep. 9, 2008). Also see Sprint Nextel Corporation, Form 602 (filed Jun. 5, 2008).

<sup>8</sup> *See* Sprint Form 10-K at 5.

5. With regard to its wireless mobile service offerings, Sprint Nextel provides commercial mobile radio services primarily over its 1.9 GHz broadband PCS and its 800 and 900 MHz SMR spectrum. Specifically it provides these services over its Code Division Multiple Access (“CDMA”) network in 360 metropolitan markets (including 341 of the 349 largest markets), operating on its broadband PCS spectrum and over its iDEN<sup>®</sup> network in 355 metropolitan markets (including 336 of the top 349 U.S. markets where approximately 266 million people live or work.<sup>9</sup> In addition, Sprint Nextel offers wireless services that focus on the youth market, including its Boost Mobile<sup>®</sup> prepaid wireless service on its iDEN<sup>®</sup> network and Boost Unlimited, a local calling prepaid service on Sprint Nextel’s CDMA network.<sup>10</sup> Sprint Nextel also currently provides very limited fixed and mobile services using its 2.5 GHz BRS and EBS licenses and spectrum lease holdings. Specifically, Sprint Nextel offers a first-generation (pre-WiMAX) fixed wireless broadband service to a relatively small number of subscribers, but will be discontinuing this service by the Fall of 2008. Sprint Nextel recently has begun deploying a mobile broadband WiMAX network in selected metropolitan markets. In September 2008, it launched this WiMAX service in Baltimore, Maryland, and plans to launch service in Washington, D.C., and Chicago, Illinois in the fourth quarter of 2008.

6. In addition, Sprint Nextel provides Voice over Internet Protocol (“VoIP”) services.<sup>11</sup> Sprint Nextel is also one of the largest providers of wireline-based long distance services and operates a nationwide high-capacity fiber optic network and “Tier 1 Internet Protocol network.”<sup>12</sup> Sprint Nextel provides its customers the ability to make calls in multiple countries using internationally-enabled phones, with wireless portable data roaming for laptops, hand-held devices, and other data services.

## 2. Clearwire Corporation

7. Clearwire Corporation, which was incorporated in October 2003,<sup>13</sup> currently provides fixed and portable wireless broadband internet services operating on licensed BRS and leased EBS spectrum in the 2.5 GHz Band. It currently provides this service to 394,000 subscribers in 46 markets in suburban and rural communities in the United States that include an estimated 13.6 million people.<sup>14</sup> Clearwire launched its first market in August 2004 and currently offers its services to more than 16.3 million people in the United States and Europe.<sup>15</sup> For this fixed broadband service, which was first launched in August 2004, Clearwire uses network infrastructure equipment that is based on non-line-of-sight (NLOS) Orthogonal Frequency Division Multiplexing (OFDM) Expedience technologies acquired from Motorola,

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<sup>9</sup> *See Id.* Sprint Nextel offers these mobile wireless services in all 50 states, Puerto Rico and the U.S. Virgin Islands under the Sprint<sup>®</sup> brand name utilizing CDMA technology. *See id.* at 5. Sprint Nextel also provides service via third party affiliates. *See id.* at 1. Through commercial arrangements with Sprint Nextel, those affiliates provide wireless services mainly in and around smaller U.S. metropolitan areas on CDMA-based wireless networks built and operated at their expense, in most instances using spectrum licensed to and controlled by Sprint Nextel. *Id.* Sprint Nextel also offers these wireless services under the Nextel<sup>®</sup> brand name using integrated Digital Enhanced Network, or iDEN<sup>®</sup>, technology.

<sup>10</sup> *See Id.*

<sup>11</sup> *See Id.* at 15.

<sup>12</sup> *See Id.* at 8.

<sup>13</sup> Clearwire Corporation, Form 10-K, at 3 (Aug. 13, 2008) (“Clearwire Form 10-K”), available at <http://www.sec.gov/Archives/edgar/data/1285551/000089102008000056/v37333e10vk.htm> (last visited Sep. 9, 2008). Also see Clearwire Corporation Form 602 (filed Jun. 5, 2008).

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

<sup>15</sup> *See Id.*

Inc.<sup>16</sup> Clearwire is also offering wireless broadband services in Ghent and Brussels, Belgium, Dublin, Ireland and Seville, Spain, where Clearwire's network covers approximately 2.7 million additional people.<sup>17</sup> Clearwire further offers VoIP service in 41 U.S. markets and additional markets internationally through its subsidiaries in Belgium, Ireland and Spain.<sup>18</sup>

8. Recent reports indicate that Clearwire is planning to upgrade its existing fixed wireless network in the United States by deploying a mobile WiMAX network. In Portland, Oregon, Clearwire is in a beta trial to deploy this mobile network upgrade, which reportedly has gone well.<sup>19</sup> Clearwire plans to accelerate the upgrading of its current fixed network to a mobile network in Atlanta, Georgia, Grand Rapids, Michigan and Las Vegas, Nevada.<sup>20</sup> It plans a commercial launch of the Portland WiMAX network in the fourth quarter of 2008, and indicates that the other three WiMAX markets also could be launched by the end of the fourth quarter.<sup>21</sup>

## **B. Description of Transaction**

9. On May 7, 2008, Clearwire, Sprint Nextel, Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("Time Warner"), Bright House Networks, LLC ("BHN"), Google, Inc. ("Google"), and Intel Corporation ("Intel") (Comcast, Time Warner, BHN, Google and Intel together, the "Investors") entered into the definitive agreement ("the Agreement") at the heart of this transaction.<sup>22</sup> Pursuant to the Agreement, Sprint Nextel and Clearwire will combine their 2.5 GHz 4G wireless broadband businesses, including associated spectrum licenses, to form a new wireless communications company.<sup>23</sup> As proposed, Sprint Nextel will transfer control of its wholly-owned subsidiaries that hold all of Sprint Nextel's respective 2.5 GHz-related assets to Clearwire Venture, LLC, the direct wholly-owned subsidiary of New Clearwire.<sup>24</sup> Upon this transfer, Sprint Nextel will receive shares of New Clearwire amounting to an approximate 51 percent ownership, resulting in Sprint Nextel obtaining majority ownership of New Clearwire at the closing.<sup>25</sup> Under the terms of the Agreement, Clearwire will merge into the newly created Clearwire Merger Sub, LLC an indirect subsidiary of the New Clearwire.<sup>26</sup> Each share of Clearwire's Class A common stock, options and warrants to purchase Clearwire stock will be converted into an equivalent number of new shares, options or warrants in New Clearwire.<sup>27</sup> In addition, Clearwire Class B common stock will be converted to Class A stock prior to the merger.<sup>28</sup> Immediately following

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<sup>16</sup> See *Id.*

<sup>17</sup> See *Id.*

<sup>18</sup> See *Id.* at 4.

<sup>19</sup> See Clearwire sees Portland WiMAX, Sprint venture on target, Matt Hamblen, *Computerworld*, August 8, 2008.

<sup>20</sup> See Clearwire Corporation at Jefferies & Co. Communications Conference – Final FD (Fair Disclosure) Wire, September 9, 2008.

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

<sup>22</sup> See Public Interest Statement at 3.

<sup>23</sup> See *Id.*

<sup>24</sup> See *Id.* at 8.

<sup>25</sup> See *Id.* at 8 & n.4. This equity share is subject to a possible post-closing adjustment. *Id.* at 3-4 & n.4.

<sup>26</sup> See *Id.* at 4.

<sup>27</sup> See *Id.*

<sup>28</sup> See *Id.*

the consummation of the merger of Sprint Nextel's assets, Intel Corporation, Google, Inc., Comcast Corporation, Time Warner Cable, Inc. and Bright House Networks will provide an aggregate \$3.2 billion investment in New Clearwire.<sup>29</sup> The total value of the deal is approximately \$14.5 billion in cash.<sup>30</sup> At closing, the separate corporate existence of Clearwire Merger Sub will cease, and New Clearwire, the new publicly traded corporation will continue as the surviving corporation.<sup>31</sup>

10. As proposed in the application, New Clearwire's Board of Directors initially will be comprised of thirteen members: (1) seven of the directors will be named by Sprint Nextel; (2) four will be named by the "strategic investors," which include Intel Corporation ("Intel"), Comcast Corporation ("Comcast"), Time Warner Cable ("Time Warner"), Bright House Networks, and Trilogy Equity Partners; (3) one director will be named by Eagle River, the private investment company controlled by wireless pioneer Craig O. McCaw (an existing Clearwire investor); and (4) one independent member will be nominated by the new company's nominating board.<sup>32</sup> Of the strategic investors, only Intel, with its existing ownership of Clearwire, will hold a ten percent or greater ownership interest in New Clearwire.<sup>33</sup>

### C. Application Review Process

#### 1. Commission Review

11. On June 6, 2008, and amended on June 24, 2008, pursuant to Section 310(d) of the Communications Act,<sup>34</sup> the Applicants filed applications seeking consent to the proposed transfer of control of licenses held by subsidiaries of Clearwire and Sprint Nextel to New Clearwire.<sup>35</sup> On June 24, 2008, the Commission released a public notice seeking public comment on the proposed transaction.<sup>36</sup> In response, the Commission received two petitions to deny the applications, filed by the Rural Cellular Association ("RCA") and AT&T, Inc. ("AT&T"),<sup>37</sup> as well as comments filed by Vonage Holdings Corporation ("Vonage"), the Public Interest Spectrum Coalition ("PISC"), SouthernLINC Wireless ("SouthernLINC"), the National EBS Association ("NEBSA"), Catholic Television Network ("CTN"), as well as approximately 100 other entities that filed brief supportive comments.<sup>38</sup> The Applicants filed a

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<sup>29</sup> See *Id.*

<sup>30</sup> See *Id.*

<sup>31</sup> See *Id.*

<sup>32</sup> See *Id.* at 1, 4. We also note that the October 2008 proxy statement filed by Clearwire with the Securities and Exchange Commission provides more specific information regarding New Clearwire's proposed 13-member board of directors. For instance, at least one of Sprint Nextel's nominees must qualify as an independent director and for service on New Clearwire's Audit Committee under NASDAQ rules and federal securities laws. See Clearwire Proxy Statement, Schedule 14A, filed by Clearwire Corporation (dated Oct. 9, 2008), at 114.

<sup>33</sup> Public Interest Statement at 12.

<sup>34</sup> 47 U.S.C. § 310(d).

<sup>35</sup> See *supra* note 1 and accompanying text.

<sup>36</sup> See Comment Public Notice at 1. The Comment Public Notice set due dates of July 24, 2008 for Petitions to Deny, August 4, 2008 for Oppositions, and August 11, 2008 for Replies. See *id.*

<sup>37</sup> See Petition to Deny, Rural Cellular Association (filed Jul. 24, 2008) ("RCA Petition to Deny"); Petition to Deny of AT&T, Inc. (filed Jul. 24, 2008) ("AT&T Petition to Deny"). All pleadings and comments are available on the Commission's Electronic Comment Filing System ("ECFS") at [www.fcc.gov/cgb/ecfs/](http://www.fcc.gov/cgb/ecfs/).

<sup>38</sup> See Comments of SouthernLINC Wireless (filed Jul. 24, 2008) ("SouthernLINC Comments"); Comments of Vonage Holdings Corporation (filed Jul. 24, 2008) ("Vonage Comments") (seeking conditions on the approval of the proposed transaction); *Ex Parte* Comments of the Public Interest Spectrum Coalition (filed Sep. 18, 2008) ("PISC Comments"); Letter from Lynn Rejniak, Chair, National EBS Association to Marlene H. Dortch, Secretary, (continued....)

Joint Opposition on August 4, 2008,<sup>39</sup> to which Rural Cellular Association, Wireless Communications Association International, Inc. (“WCA”) and Motorola, Inc. (“Motorola”) each filed a reply on August 11, 2008.<sup>40</sup> Oppositions to the RCA and AT&T petitions were also filed by Google,<sup>41</sup> Intel,<sup>42</sup> The Source for Learning and the Indiana Higher Education Telecommunication System,<sup>43</sup> NEBSA,<sup>44</sup> the Hispanic Information and Telecommunications Network, Inc. (“HITN”)<sup>45</sup> as well as further comments of CTN.<sup>46</sup>

12. On July 11, 2008, the Bureau issued a Protective Order to ensure that any confidential or proprietary documents submitted to the Commission would be adequately protected from public disclosure.<sup>47</sup> The Bureau received no requests to review the proprietary or confidential information that is in the record. Also on October 10, 2008, the Bureau released a public notice announcing that Numbering Resource Utilization and Forecast (“NRUF”) reports and local number portability (“LNP”) data for all wireless telecommunications carriers as of December 31, 2006, June 30, 2007, and December 31, 2007 would be placed into the record and adopted a protective order pursuant to which the Applicants and third parties would be allowed to review the specific NRUF reports and LNP data placed into the record.<sup>48</sup>

## 2. Petitions to Deny and Comments Received

13. In its petition to deny, RCA argues that should the proposed transaction be approved, the transaction would occur simultaneously with the “elimination of the near-nationwide wireless network operated by Alltel upon its acquisition by what will become the nation’s largest wireless carrier, Verizon Wireless.”<sup>49</sup> RCA expresses its concern that such a consolidation of carriers in the 2.5 GHz service would

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Federal Communications Commission (filed Jul. 24, 2008); Letter from Monsignor Michael J. Dempsey, President, Catholic Television Network to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

<sup>39</sup> See Joint Opposition to Petitions to Deny and Reply to Comments, Sprint Nextel Corporation and Clearwire Corporation (filed Aug. 4, 2008) (“Sprint Clearwire Joint Opposition”).

<sup>40</sup> See Reply to Oppositions, Rural Cellular Association (filed Aug. 11, 2008) (“RCA Reply”); Reply of the Wireless Communications Association International, Inc. (filed Aug. 11, 2008) (“WCA Reply”); Reply Comments of Motorola, Inc. (filed Aug. 11, 2008) (“Motorola Reply”).

<sup>41</sup> See Opposition of Google, Inc. (filed Aug. 4, 2008).

<sup>42</sup> See Opposition to Petitions to Deny and Reply Comments, Intel Corporation (filed Aug. 4, 2008).

<sup>43</sup> See Joint Opposition to Petition to Deny of AT&T, Inc. of The Source for Learning, Inc. and Indiana Higher Education Telecommunication System (filed Aug. 4, 2008) (Source for Learning Opposition).

<sup>44</sup> See Opposition of National EBS Association (filed Aug. 4, 2008) (NEBSA Opposition).

<sup>45</sup> See Consolidated Opposition to Petitions to Deny of Hispanic Information and Telecommunications Network, Inc. (filed Aug. 4, 2008) (HITN Opposition).

<sup>46</sup> See Comments of Catholic Television Network (filed Aug. 4, 2008) (CTN Comments).

<sup>47</sup> Applications of Sprint Nextel Corporation Clearwire For Approval to Transfer Control, WT Docket No. 08-94, *Protective Order*, 23 FCC Rcd 10635 (WTB 2008).

<sup>48</sup> Applications of Sprint Nextel Corporation and Clearwire Corporation For Approval to Transfer Control Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports Placed into the Record, Subject to Protective Order, WT Docket No. 08-94, CC Docket No. 99-200, *Public Notice*, DA 08-2266 (WTB rel. Oct. 10, 2008); Applications of Sprint Nextel Corporation and Clearwire Corporation For Approval to Transfer Control, WT Docket No. 08-94, CC Docket No. 99-200, *Protective Order*, DA 08-2265 (WTB rel. Oct. 10, 2008).

<sup>49</sup> See RCA Petition to Deny at (i).

create a near-national service that “cannot be duplicated in the foreseeable future by any new entrant to the telecommunication industry.”<sup>50</sup> RCA argues that exclusive handset agreements with suppliers must be prohibited, stating that “the proposed Sprint Nextel-Clearwire transaction and the contemporaneous Alltel-Verizon merger proposal bring to the forefront an urgent need for the Commission to act promptly so that millions of consumers are not denied the benefits of latest innovations in handset technology.”<sup>51</sup> AT&T’s petition to deny states that it does not fundamentally object to the transaction,<sup>52</sup> but instead seeks to ensure that the transaction does not go forward without proper competitive analysis, including the use of a revised and expanded spectrum aggregation screen, when attributing spectrum assets to New Clearwire.<sup>53</sup>

14. SouthernLINC and Vonage both filed comments seeking conditions be placed on the approval of the Sprint Nextel-Clearwire transaction. Specifically, SouthernLINC says it would like greater clarity, before the Commission approves the transaction, regarding the actual extent of the Applicants’ commitments to make the New Clearwire network an “open” network.<sup>54</sup> Vonage’s concerns regarding the Applicants’ commitment to open access are shared by Bella Mia, Inc. and Prime Directive Quick Link (“PDQLink”).<sup>55</sup> SouthernLINC, which states that it took multiple years of negotiation before Sprint Nextel agreed to provide automatic roaming services, would like the Commission to put mandatory data roaming obligations on New Clearwire to address market concentration concerns in the wireless sector.<sup>56</sup>

15. Vonage, which also does not oppose the Applications, submits that the Commission should condition any grant of the Applications to ensure that the “open” network proposals are made enforceable through adoption as a merger commitment.<sup>57</sup> Specifically, Vonage wants the Commission to require the Applicants to commit that: (1) New Clearwire will comply with the Commission’s *Internet Policy Statement*, and (2) New Clearwire will offer its new WiMAX service to other entities on an unbundled basis, not tied to Clearwire voice service.<sup>58</sup>

16. In addition, there were over 100 other commenters who filed in full support of the Applications.<sup>59</sup> Those comments were primarily from BRS and EBS licensees that anticipate that the merger of Sprint Nextel’s and Clearwire’s 2.5 GHz assets will provide EBS licensees the financial

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<sup>50</sup> See *Id.* at 6.

<sup>51</sup> See RCA Petition to Deny at 10-11.

<sup>52</sup> See AT&T Petition to Deny at 15.

<sup>53</sup> See *Id.* at 1-2.

<sup>54</sup> See SouthernLINC Comments at 3-4.

<sup>55</sup> See Bella Mia, Inc. *Ex Parte* Request to Deny at 11 (filed October 8, 2008) and Prime Directive Quick Link *Ex Parte* Request to Deny at 12 (filed September 30, 2008) (“PDQLink *Ex Parte* Request to Deny”).

<sup>56</sup> See SouthernLINC Comments at 5-6.

<sup>57</sup> See Vonage Comments at 5.

<sup>58</sup> See *Id.*, citing Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, *et al.*, *Policy Statement*, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

<sup>59</sup> The entities that filed pleadings in this proceeding are listed in the Appendix. In addition, we have received informal comments through ex parte submissions. See Appendix.



freedom to offer more quality programming in local communities.<sup>60</sup> They express the view that the creation of New Clearwire will accelerate the deployment of the first nationwide mobile WiMAX broadband network, which will provide the opportunity to deliver new broadband products and services that combine mobility and speed in the 2.5 GHz band thereby enhancing the way the EBS community can access the Internet. These commenters regard the transaction as a means to provide New Clearwire the capacity, scale and money necessary to unleash the promise of the historically underutilized 2.5 GHz band to the benefit of the educational community, consumers and businesses.<sup>61</sup>

17. In their Joint Opposition, Sprint Nextel and Clearwire point to the more than 100 commenters that unconditionally support the proposed transaction. Sprint Nextel and Clearwire repeat their argument that the transaction will provide significant benefits to existing EBS licensees by stimulating the deployment of 2.5 GHz broadband services. They assert that any claims against the Applications lack merit and provide no basis for denying, delaying, or imposing conditions on the approval of the New Clearwire license transfers.<sup>62</sup> Sprint Nextel and Clearwire argue that Vonage has failed to demonstrate any harm that would arise as a result of the proposed transaction, rendering its proposed network access condition unwarranted and unnecessary.<sup>63</sup> With respect to RCA's argument regarding "interoperability," Sprint Nextel and Clearwire point out that the issue is already being examined in an ongoing rulemaking proceeding regarding wireless broadband roaming and argue that, absent any merger specific harm, that issue should be dealt with in that proceeding.<sup>64</sup> They also argue that RCA's requested prohibition on exclusive handset agreements between wireless operators and equipment manufacturers would be better addressed in connection with the petition for rulemaking that RCA filed with the Commission on exclusive handset agreements in May 2008.<sup>65</sup> In opposing AT&T's petition, Sprint Nextel and Clearwire argue that contrary to AT&T's claims, they have demonstrated that combining their 2.5 GHz holdings will promote competition.<sup>66</sup>

### 3. Department of Justice Review

18. The Antitrust Division of the Department of Justice ("DOJ") reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition.<sup>67</sup> The Antitrust Division's review is limited solely to an examination of the competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. The Antitrust Division has determined that it will not take enforcement action in connection with this transaction.

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<sup>60</sup> See, e.g., Letter from William P. Rowland, President and CEO, Colorado Public Television, KBDI/Channel 12 (filed Jul. 23, 2008) at 1.

<sup>61</sup> See Comments of Wireless Communications Association International, Inc., WT Docket 08-94, (filed Jul. 24, 2008) (WCA Comments) at 5-6.

<sup>62</sup> See Sprint Clearwire Joint Opposition at 4-10.

<sup>63</sup> See *Id.* at 10-14, citing Vonage Comments at 3-4.

<sup>64</sup> See *Id.* at 17, referencing the Re-examination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15846 ¶ 79 (2007).

<sup>65</sup> See Sprint Clearwire Opposition at 18.

<sup>66</sup> See *Id.* at 19-21.

<sup>67</sup> 15 U.S.C. § 18. In addition, DOJ does not review mergers below certain statutorily mandated dollar thresholds, which are currently between \$50 and \$200 million. 15 U.S.C. § 18(a).

### III. STANDARD OF REVIEW

19. Pursuant to Sections 214(a) and 310(d) of the Communications Act, we must determine whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity.<sup>68</sup> In making this assessment, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,<sup>69</sup> other applicable statutes, and the Commission's rules.<sup>70</sup> If the transaction does not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.<sup>71</sup> We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.<sup>72</sup> The Applicants bear the burden of

<sup>68</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>69</sup> Section 310(d), 47 U.S.C. § 310(d), requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See, e.g.*, Applications for Consent to the Transfer Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57, *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12363 ¶ 30 (2008) (“*XM-Sirius Order*”); Applications of Celco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, WT Docket No. 07-208, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463, 12476-12477 ¶ 26 (2008) (“*Verizon-RCC Order*”); Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc. For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-237, *Memorandum Opinion and Order*, 23 FCC Rcd 2515, 2519 ¶ 9 (2008) (“*T-Mobile-SunCom Order*”); Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20301 ¶ 10 (2007) (“*AT&T-Dobson Order*”); Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee, For Consent To Transfer Control of Licenses, Leases and Authorizations, WT Docket No. 07-128, *Memorandum Opinion and Order*, 22 FCC Rcd 19517, 19519-20 ¶ 7 (2007) (“*ALLTEL-Atlantis Order*”); AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, *Memorandum Opinion and Order*, 22 FCC Rcd 5662, 5672 ¶ 17 (2007) (“*AT&T-BellSouth Order*”); Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., WT Docket No. 05-339, *Memorandum Opinion and Order*, 21 FCC Rcd 11526, 11535 ¶ 16 (2006) (“*ALLTEL-Midwest Wireless Order*”); SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) (“*SBC-AT&T Order*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) (“*Sprint-Nextel Merger Order*”); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13062 ¶ 17 (2005) (“*ALLTEL-Western Wireless Order*”); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21542 ¶ 40 (2004) (“*Cingular-AT&T Wireless Order*”).

<sup>70</sup> *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10; *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19519-20 ¶ 7; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-43 ¶ 40.

<sup>71</sup> *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

<sup>72</sup> *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; (continued....)

proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.<sup>73</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the application for hearing under section 309(e) of the Communications Act.<sup>74</sup>

20. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.<sup>75</sup> Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.<sup>76</sup> In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>77</sup>

21. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.<sup>78</sup> The Commission and DOJ each have independent authority to examine the competitive impacts of proposed communications mergers and

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*SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062-63 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

<sup>73</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

<sup>74</sup> 47 U.S.C. § 309(e). See also *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672-73 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543-44 ¶ 40. Section 309(e)’s requirement applies only to those applications to which Title III of the Act applies, i.e., radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, see *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

<sup>75</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12364 ¶ 31; *Verizon-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20303 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>76</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12364 ¶ 31; *Verizon-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20303-04 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064-65 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>77</sup> See, e.g., *XM-Sirius Order* 23 FCC Rcd 12348, 12364 ¶ 31; *Verizon-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20304 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>78</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12365 ¶ 32; *Verizon-RCC Order*, 23 FCC Rcd at 12479-1480 ¶ 29; *AT&T-Dobson Order*, 22 FCC Rcd at 20304 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13977-78 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42.

transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by DOJ.<sup>79</sup> Like DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The Antitrust Division of DOJ, however, reviews telecommunications mergers pursuant to section 7 of the Clayton Act, and if it wishes to block a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly.<sup>80</sup> Under the Commission's review, the Applicants must show that the transaction will serve the public interest; otherwise the application is set for hearing. The Antitrust Division's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations. The Commission's competitive analysis under the public interest standard is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market.<sup>81</sup>

22. Our analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.<sup>82</sup> For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.<sup>83</sup> Our public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.<sup>84</sup> Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent

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<sup>79</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12365 ¶ 32; *Verizon-RCC Order*, 23 FCC Rcd at 12479-1480 ¶ 29; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; Rainbow DBS Company LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and Related Special Temporary Authorization, IB Docket No. 05-72, *Memorandum Opinion and Order*, 20 FCC Rcd 16868, 16874 ¶ 12 (2005); *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42.

<sup>80</sup> See 15 U.S.C. § 18.

<sup>81</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12365 ¶ 32; *Verizon-RCC Order*, 23 FCC Rcd at 12479-12480 ¶ 29; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd 11538 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>82</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>83</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>84</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 14; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 22; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43 (conditioning approval on the divestiture of operating units in select markets).

with law that may be necessary to carry out the provisions of the Act.<sup>85</sup> Similarly, Section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”<sup>86</sup> Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.<sup>87</sup> Despite this broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes.<sup>88</sup> Thus, we generally will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.<sup>89</sup>

#### IV. QUALIFICATIONS OF APPLICANTS

23. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”<sup>90</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission’s rules.<sup>91</sup> In making this determination, the Commission does not, as a general rule, re-evaluate the qualifications of transferors unless issues related to basic

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<sup>85</sup> 47 U.S.C. § 303(r). *See also*, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13978-79 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

<sup>86</sup> 47 U.S.C. § 214(c). *See also*, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305-06 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

<sup>87</sup> *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 22; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538-39 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43. *See also* *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7<sup>th</sup> Cir. 1992) (discussing Commission’s authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

<sup>88</sup> *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674-75 ¶ 22; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11539 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

<sup>89</sup> *See, e.g.*, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11539 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

<sup>90</sup> 47 U.S.C. §§ 308, 310(d). *See also* *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

<sup>91</sup> *See* 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; *see also* *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant designation for hearing.<sup>92</sup> Conversely, Section 310(d) obligates the Commission to consider whether the proposed transferee is qualified to hold Commission licenses.<sup>93</sup> When evaluating the qualifications of a potential licensee, the Commission previously has stated that it will review allegations of misconduct directly before it,<sup>94</sup> as well as conduct that takes place outside of the Commission.<sup>95</sup> In this proceeding, no issues have been raised with respect to the basic qualifications of Sprint Nextel and Clearwire, both of which previously have been found qualified to hold Commission licenses.<sup>96</sup> Thus, we find that, at this time, there is no reason to re-evaluate the qualifications of these entities.

## V. COMPETITIVE ANALYSIS

24. Consistent with our practice when reviewing proposed wireless transactions, we next consider the potential competitive effects that might result from the proposed Sprint Nextel-Clearwire transaction. Horizontal transactions raise competitive concerns when they reduce the availability of choices to the point that the resulting firm has the incentive and the ability, either by itself or in coordination with other firms, to raise prices. A fundamental tenet of the Commission's public interest

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<sup>92</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063-64 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44. See also Stephen F. Sewell, Assignment and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934, 43 FED. COMM. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See *id.*

<sup>93</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302-03 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

<sup>94</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20303 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission will consider any violation of any provision of the Act, or of the Commission's rules or policies, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47; Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees, Gen. Docket No. 81-500, *Report and Order and Policy Statement*, 100 F.C.C. 2d 1179, 1209-10 ¶ 57 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992).

<sup>95</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20303 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission previously has determined that in its review of character issues, it will consider forms of adjudicated, non-Commission related misconduct that include: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. See, e.g., *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.86; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47.

<sup>96</sup> See, e.g., *Sprint Nextel Order*, 20 FCC Rcd 13967 (2005); Applications of Clearwire Spectrum Holdings, LLC for transfer of control of licenses held by BellSouth Wireless Cable, Inc. and South Florida Television, Inc., File Nos. 0002912776 and 0002916780 (Consented to Jul. 5, 2007).

review is that, absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest.<sup>97</sup>

25. We begin our competitive analysis by determining the appropriate market definitions for this transaction.<sup>98</sup> This includes determination of the relevant product and geographic markets, as well as the identification of the market participants.

26. Because of the substantial ongoing developments in the evolution of the provision of wireless services, especially the increasing prominence of mobile broadband services in the wireless services being offered to consumers, we here revisit the product market definitions that the Commission has employed in the past. In particular, we analyze this transaction using two product markets: (1) a combined market for “mobile telephony/broadband” services (as defined and explained below) – comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services); and (2) the fixed broadband services market.

27. As discussed more fully below, we review the proposed Sprint Nextel-Clearwire transaction for potential competitive effects with regard to these product markets. Both Sprint Nextel and Clearwire are beginning the process of deploying next-generation technology networks based on WiMAX standards. These developments promise to further accelerate the increasing importance of mobile broadband services that we have seen in recent years with the extensive deployment of so-called 3G mobile wireless technologies. According to the Applicants, such WiMAX systems that they are beginning to deploy can deliver broadband speeds of up to 6 Mbps downlink and up to 3 Mbps uplink.<sup>99</sup> Sprint Nextel has just launched its commercial WiMAX network in one market, with services and prices intended to compete with mobile 3G services and with fixed broadband services, and has commercial rollouts of its WiMAX-based services planned in three other markets by year’s end.<sup>100</sup> Meanwhile Clearwire’s first WiMAX network is in the process of being built in another market, with plans announced for commercial rollout in four markets by the end of this year.<sup>101</sup>

28. In reviewing these developments, we conclude that the proposed Sprint Nextel-Clearwire transaction would not increase market concentration in a combined mobile telephony/broadband services market or in the fixed broadband services market, and that therefore no competitive harm would result with regard to market concentration in these product markets. In addition, as discussed more fully below, although significant uncertainties necessarily remain, we find potentially significant pro-competitive public interest benefits from this transaction.

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<sup>97</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10; *ALLTEL-Midwest Order*, 21 FCC Rcd at 11540 ¶ 22; *Sprint-Nextel Order*, 20 FCC Rcd at 13981 ¶ 30; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68; *DOJ/FTC Merger Guidelines* § 0.1, n.6. The ability to raise prices above competitive levels is generally referred to as “market power.” Market power may also enable sellers to reduce competition on dimensions other than price, including innovation and service quality.

<sup>98</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20307 ¶ 17; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11541 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 28; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

<sup>99</sup> Public Interest Statement at 3, 17 n.34.

<sup>100</sup> Public Interest Statement at 17 n.34.

<sup>101</sup> Public Interest Statement at 17 n.34.

29. Since these recent developments and deployments establish that the 2.5 GHz Band may be used, and are being used, for the provision of mobile telephony/broadband services as well as fixed broadband services, which have traditionally been provided using this spectrum, we also examine the input market for spectrum in order to evaluate whether the proposed transaction raises any spectrum aggregation concerns that might harm competition. Given these changes, we determine in this proceeding to revise the Commission's initial spectrum aggregation screen to include the BRS and AWS-1 bands in those markets where spectrum in those bands is available for use in the provision of mobile telephony/broadband services. Thus, we are modifying the screen to apply it on a market-by-market basis, rather than on a nationwide basis. Unlike the 95-megahertz initial screen we adopted in the *AT&T/Dobson Order*, application of the screen and any necessary case-by-case review of individual markets will consider the same spectrum bands.<sup>102</sup>

30. We then apply the Commission's new market-specific spectrum screen to each market involved in this transaction. As described below, through this process, we identify those markets that we subject to further case-by-case review while eliminating from further review those markets in which the level of spectrum aggregation resulting from the transaction does not raise competitive concerns. Then, we examine the markets identified by our initial screen by undertaking a granular market-by-market analysis. In this transaction, we identify 43 particular local markets identified by the screen and, after our additional analysis determine that in none of those markets does the level of spectrum aggregation resulting from the transaction raise competitive concerns.

31. Next, we address other concerns raised by the petitioners in response to this transaction, including the potential adverse impact of the transaction with regard to the provision of roaming services. Finally, we examine the public interest benefits of the proposed transaction and conclude that the transaction, subject to the conditions we impose, is likely to result in transaction-specific public interest benefits.

#### **A. Market Definitions**

32. We establish at the outset the appropriate market definitions for our evaluation of this proposed transaction. This includes establishing the product and geographic market definitions that we will apply. We also determine the appropriate input market for spectrum that we will examine in this proposed transaction. Finally, we identify the market participants.

##### **1. Product Markets**

33. We must assess the potential competitive effects of the proposed combination of Sprint Nextel's and Clearwire's respective spectrum holdings in the 2.5 GHz Band in New Clearwire in the product markets where this spectrum is most likely to be used. As described elsewhere, the substantial ongoing developments in the evolution of the provision of wireless services, especially the increasing prominence of mobile broadband services, lead us here to revisit the product market definitions that we have employed in the past. We evaluate the proposed Sprint Nextel-Clearwire transaction for the potential for competitive harm in the following product markets: (1) a combined market for mobile telephony/broadband services (as defined herein); and (2) the fixed broadband services market. We find that the proposed Sprint Nextel-Clearwire transaction would not increase market concentration in these product markets, and therefore no competitive harm would result due to market concentration.

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<sup>102</sup> Even though the proposed transaction only involves combining spectrum holdings and related assets associated with BRS and EBS spectrum in the 2.5 GHz Band, we employ our standard attribution procedures to combine these 2.5GHz spectrum holdings with relevant spectrum holdings of Sprint Nextel and Clearwire in other relevant bands for purposes of the Commission's competitive review process.



34. At the outset of our analysis, we note that Sprint Nextel currently is an established provider of mobile voice and broadband services, with significant network buildout and customers, while Clearwire is an emerging entrant in these markets that does not currently provide mobile voice services and has built out networks only in selected markets. This proposed transaction does not involve a merger of two well-established competitors, but instead generally involves the combining of an established provider with another entity that brings important resources, particularly the additional spectrum input, to the proposed new entity. Accordingly, in terms of the potential for competitive harm in this transaction, the proposed Sprint Nextel-Clearwire transaction differs in many respects from other wireless transactions in which two established providers with substantial spectrum holdings and facilities-based operations are merging.

35. Although the two companies do not appear to compete in the provision of current generation wireless services,<sup>103</sup> both are well along in the process of deploying next-generation technology networks based on WiMAX standards that promise to further accelerate the increasing importance of mobile broadband services that we have seen with the extensive deployment of so-called 3G mobile wireless technologies. Both Sprint Nextel and Clearwire have already constructed, or started to construct, mobile WiMAX networks and plan to provide mobile voice as well as high-speed mobile data services over these networks.<sup>104</sup> Sprint Nextel has recently launched commercial service based on a WiMAX network in Baltimore, Maryland, and has commercial rollouts planned in Chicago, Illinois and Washington, D.C., by year end.<sup>105</sup> Clearwire is developing mobile WiMAX markets in Atlanta, Georgia, Grand Rapids, Michigan, and Las Vegas, Nevada, and has indicated that the other three WiMAX markets could be launched by the end of the fourth quarter.

36. Given the nascent, although real, implementation of WiMAX networks by Sprint and Clearwire and absence of geographic overlap in those efforts, we find that the proposed Sprint Nextel-Clearwire transaction does not increase market concentration in markets for mobile telephony/broadband or fixed broadband services, and therefore no competitive harm would result due to concentration in these product markets. Indeed, as discussed elsewhere, we conclude that the transaction is likely to result in significant public interest benefits as the New Clearwire is likely to be a significant potential source for the provision of additional effective competition to the mobile broadband “3G” services already being offered by AT&T and Verizon Wireless, among other service providers, and to various fixed wireline and wireless broadband offerings.

37. Nevertheless, recognizing that mobile broadband data services is a rapidly evolving market, out of an abundance of caution we will analyze the markets for mobile telephony services and mobile broadband services as a combined market, similar to what we have done when evaluating other proposed wireless mergers. In transactions such as this one, we conclude that there are risks associated with defining product markets too narrowly, since doing so may thwart this and future pro-competitive deals that take place in the context of rapidly evolving markets and services. Furthermore, we assess the input market for spectrum available for the provision of mobile telephony/broadband services because of potential competitive concerns raised by the level of spectrum aggregation resulting from the transaction. Below we discuss these product markets in greater detail as they apply to this transaction.

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<sup>103</sup> There is no significant geographic overlap between Sprint Nextel’s first-generation fixed wireless broadband service and Clearwire’s fixed broadband service, while Clearwire provides no mobile telephony services. Public Interest Statement at 4, 59-60; Clearwire Form 10-K at 3.

<sup>104</sup> Public Interest Statement 17 n.34.

<sup>105</sup> Public Interest Statement 17 n.34.

38. *Mobile Telephony/Broadband Services.* We analyze the markets for mobile voice services and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services), under a combined product market for mobile telephony/broadband services, as set forth herein.<sup>106</sup> Because of the substantial ongoing developments in the evolution of the provision of wireless services, especially the increasing prominence of mobile broadband services, we revisit the product market definition that we have employed in the past. Our combined product market for “mobile telephony/broadband services” encompasses the combined product market for “mobile telephony services” that we used in previous wireless transactions, while it also appropriately emphasizes the recent significant mobile broadband advances to better reflect this component of emerging, next-generation wireless services.

39. Specifically, we delineate the scope of a combined market for mobile telephony/broadband services broadly to include mobile voice and data services provided over wireless broadband networks (mobile broadband services), as well as mobile voice and data services provided over less advanced, earlier generation (e.g., 2G, 2.5G) legacy wireless networks. In addition, the market includes a wide array of mobile data services, ranging from handset-based mobile data services marketed primarily as an add-on to mobile voice services to standalone mobile Internet access services for laptop users. We find that analyzing the various older voice and data services as well as the emerging mobile broadband product markets under a combined market for mobile telephony/broadband services is appropriate in order to ensure a reasonable assessment of any potential competitive harm resulting from the proposed transaction under review. As we noted above, we conclude that there are risks associated with defining product markets too narrowly in the context of rapidly evolving markets and services such as those for mobile broadband services.

40. We treat the provision of mobile broadband services using more recent and advanced networks (e.g., 3G, 4G) and the provision of mobile voice and data services over earlier generations of wireless networks as part of a combined mobile telephony/broadband services market, rather than separate markets, based on consideration of various factors, including the nature of these services and their relationship with each other, and our finding that this approach provides a reasonable assessment of any potential competitive harm resulting from the mobile wireless transactions under review. This approach also recognizes that the mobile telecommunications industry is in the process of transitioning from the provision of interconnected mobile voice and add-on mobile data services over legacy wireless networks to the provision of mobile voice and data services over wireless broadband networks (e.g., EVDO, WCDMA/HSDPA, mobile WiMAX, and Long Term Evolution (LTE) networks).

41. Sprint Nextel currently provides mobile telephony/broadband services using its broadband PCS and SMR licenses.<sup>107</sup> Clearwire currently does not provide mobile broadband services over its existing networks, but has already constructed, or started to construct, mobile WiMAX networks in selected markets and plans to provide mobile voice as well as high-speed mobile broadband data services over these networks.<sup>108</sup> In its analysis of recent wireless transactions involving mobile telephony

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<sup>106</sup> Previously, the Commission found that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services. It nevertheless analyzed all of these product markets under the combined market for “mobile telephony service.” See *Verizon-RCC Order*, FCC 08-181, at ¶ 37; *AT&T-Dobson Order*, 22 FCC Rcd at 20308 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11541 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 29; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

<sup>107</sup> See Sprint Form 10-K at 3-4.

<sup>108</sup> See Clearwire Form 10-K at 2-3; Public Interest Statement at 16 n.33; Clearwire Corporation at Jefferies & Co. Communications Conference – Final FD (Fair Disclosure) Wire, September 9, 2008.

services, the Commission has excluded providers of fixed broadband services, such as Clearwire, from its list of market participants in mobile telephony services market for the purpose of computing initial measures of market concentration.<sup>109</sup> The Commission's competitive analysis of previous wireless transactions involving mobile telephony services has proceeded from the premise that Sprint Nextel and Clearwire are not, and never have been, competitors in the provision of mobile telephony services. However, since recent developments and deployments establish that the 2.5 GHz band may be used for the provision of both fixed and mobile broadband services, we examine the mobile broadband segment of mobile telephony/broadband services to determine whether any service overlap arises to determine whether any further competitive review for a combined market for mobile telephony/broadband services is necessary.

42. The Applicants claim that the New Clearwire is planning to deploy a nationwide mobile WiMAX network that would offer broadband services at speeds up to 6 Mbps.<sup>110</sup> The Applicants state that Sprint has already constructed WiMAX networks in Baltimore, Maryland, Washington, D.C. and Chicago Illinois, and that Clearwire's first WiMAX network is in the process of being built in Portland, Oregon.<sup>111</sup> In late September 2008, Sprint Nextel announced it had officially launched XOHM™ mobile broadband commercial WiMAX service in Baltimore.<sup>112</sup> In addition, Sprint is currently building out WiMAX infrastructure in five other markets, with launches in Chicago and Washington, D.C. planned later in the fourth quarter of 2008.<sup>113</sup> In addition to the mobile WiMAX market in Portland, Oregon, Clearwire is developing mobile WiMAX markets in Atlanta, Grand Rapids, Michigan, and Las Vegas.<sup>114</sup>

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<sup>109</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 38-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is, at present, significantly higher than for services offered by cellular, PCS, or SMR providers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony. See Global Com, Iridium Satellite Phone Service Plans, at [http://www.globalcomsatphone.com/satellite/services/iridium\\_service\\_plans.html](http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html) (last visited June 26, 2008); GlobalStar, Airtime Pricing, Voice Pricing, at <http://www.globalcomsatphone.com/satellite/services/globalstar.html> (last visited June 26, 2008). See also *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. We also do not consider wireless VoIP providers as providing the same functionality as mobile telephony providers because the service they provide now is nomadic rather than mobile. See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. Wireless VoIP services are nomadic in the sense that one can use them from a number of different locations (for example, by using a laptop at different internet cafes all over a town). See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544-45 n.134; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 n.151.

<sup>110</sup> See Public Interest Statement at 3, 15.

<sup>111</sup> See Public Interest Statement at 16 n.33.

<sup>112</sup> See *XOHM WiMAX Broadband Service Debuts in Baltimore*, Press Release, Sprint, Sep. 29, 2008.

<sup>113</sup> See "The Sidecut Interview: Xohm President Barry West," at [www.wimax.com/commentary/blog/blog-2008/september/The-Sidecut-Interview-Xohm-President-Barry-West-0909](http://www.wimax.com/commentary/blog/blog-2008/september/The-Sidecut-Interview-Xohm-President-Barry-West-0909), accessed 9/24/08); see also, Sprint lines up partners for WiMAX, *Baltimore Business Journal*, August 28, 2008.

<sup>114</sup> See Clearwire Corporation at Jefferies & Co. Communications Conference – Final FD (Fair Disclosure) Wire, September 9, 2008.

Clearwire plans a commercial launch of the Portland WiMAX network in the fourth quarter of 2008, and indicates that the other three WiMAX markets could be launched by the end of the fourth quarter.<sup>115</sup>

43. The Applicants argue that the New Clearwire would compete directly with Verizon Wireless's and AT&T's soon-to-be-launched mobile broadband 4G services.<sup>116</sup> Intel claims that the New Clearwire will compete with wireless broadband service offerings in the 700 MHz, AWS, WCS, PCS, MSS (where ATC is allowed), and other bands.<sup>117</sup> In addition, Clearwire states on its web site that it anticipates being able to offer mobile voice services over its WiMAX network in the future.<sup>118</sup> Meanwhile, Sprint announced that it will be offering customers a dual-mode device, expected to launch in the fourth quarter of 2008, that will operate on Sprint Nextel's existing 3G mobile broadband cellular network as well as the new WiMAX network in Baltimore and other markets as WiMAX service becomes available.<sup>119</sup> Further, Clearwire stated on its web site that New Clearwire will be able to offer mobile voice and data services to its customers over the Sprint 3G network.<sup>120</sup>

44. Similarly, AT&T claims that New Clearwire's launch of the WiMAX network would compete with traditional mobile services,<sup>121</sup> and RCA notes that one of its members, Cellular South, will compete directly with the New Clearwire in data and mobile services.<sup>122</sup> At this time, however, only Sprint currently is marketing a mobile WiMAX service, and this is limited to a single local market. Although Clearwire is currently not providing mobile broadband services, the WiMAX network that Clearwire is building in Portland, Oregon, would make Clearwire a potential competitor to Sprint Nextel in this market, and this would also be true of any other local market in which Clearwire has already started building a WiMAX network. In addition, Clearwire is a potential entrant into a combined market for mobile telephony/broadband services in all geographic markets where it has sufficient spectrum holdings to deploy a mobile WiMAX network. Similarly, although the New Clearwire intends to bundle mobile voice services initially using Sprint Nextel's 3G network, it is not certain when it would be able to provide facilities-based mobile voice service over its WiMAX network.

45. For all of these reasons, we conclude that the proposed transaction would not increase concentration in mobile telephony/broadband services market, and therefore no competitive harm would

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<sup>115</sup> See *Id.*

<sup>116</sup> See Public Interest Statement at 16.

<sup>117</sup> See Intel Opposition to Petitions to Deny and Reply Comments at 3 (stating "[t]his new broadband platform will compete with incumbents' robust wireline and cable broadband networks, as well as advanced wireless broadband networks in the 700 MHz, advanced wireless service ("AWS"), personal communications service ("PCS"), Wireless Communications Service ("WCS"), Mobile Satellite Service/Ancillary Terrestrial Components ("MSS/ATC"), and other bands).

<sup>118</sup> See Clearwire, "Customers Frequently Asked Questions," available at <http://www.clearwireconnections.com/pr/customers/index.html> (stating that in the years to come, Clearwire will be able to offer mobile voice services over its WiMAX network).

<sup>119</sup> See *XOHM WiMAX Broadband Service Debuts in Baltimore*, Press Release, Sprint, Sep. 29, 2008.

<sup>120</sup> See Clearwire, "Customers Frequently Asked Questions," available at <http://www.clearwireconnections.com/pr/customers/index.html> (stating that "after the transaction is completed, Clearwire will be able to offer mobile voice and data services to its customers over the Sprint 3G network. Clearwire's customers will also benefit from expanded 4G services as Clearwire launches new markets and converts existing markets to mobile WiMAX. We expect existing markets to be transitioned in 2009 and 2010").

<sup>121</sup> See AT&T Petition to Deny at 2, 6, 12-13.

<sup>122</sup> See RCA Petition to Deny at 3.

result due to concentration in this product market. As we discuss more fully below, however, the level of spectrum aggregation resulting from the proposed transaction raises potential competitive concerns. Therefore, we will continue our competitive analysis below to examine spectrum aggregation issues that arise with respect to this product market.

46. *Fixed Broadband Services.* In examining the proposed transaction for potential competitive harm in the provision of fixed broadband services, we generally apply the same product market definition for fixed broadband services as applied by the Commission in recent merger orders.<sup>123</sup> The Commission has defined the fixed broadband services market as the market for fixed advanced telecommunications capability, *i.e.*, “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications capability using any technology.”<sup>124</sup>

47. The Applicants assert that New Clearwire will enhance competition in fixed broadband services through the combination and more effective utilization of the 2.5 GHz spectrum.<sup>125</sup> Sprint Nextel and Clearwire assert that neither company has market power in the provision of fixed broadband services.<sup>126</sup> Sprint Nextel in fact has recently begun to discontinue its fixed wireless internet service to 12,000 subscribers in fourteen areas, and the company will no longer offer its first-generation broadband service by the fall of 2008.<sup>127</sup> Clearwire provides fixed wireless broadband service to approximately 443,000 subscribers using pre-WiMAX technology, which it contends must be upgraded to a mobile WiMAX platform in order for it to compete effectively.<sup>128</sup> The Applicants state that New Clearwire will continue to provide fixed broadband service. They assert, however, the company lacks the ability to acquire a dominant position in that market because of a wide variety of technologies that are available to provide broadband services to consumers and businesses, including fiber, broadband over powerline, and satellite technologies.<sup>129</sup>

48. The Applicants state that New Clearwire’s development of WiMAX as a new alternative broadband platform would enable it to compete head-to-head with the fixed broadband services offered by incumbent wireline broadband operators.<sup>130</sup> The Applicants contend that WiMAX will provide unparalleled flexibility to consumers who seek broadband services. Moreover, they state, New Clearwire’s broadband services would have the beneficial attributes of both portability and mobility, supported by the development of innovative devices.<sup>131</sup> Accordingly, Applicants assert that New Clearwire’s service offerings will enhance competition in the provision of these services, thus greatly benefiting consumers.<sup>132</sup>

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<sup>123</sup> See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5749-5750 ¶ 179; *Sprint-Nextel Order*, 20 FCC Rcd at 14029 ¶ 167.

<sup>124</sup> See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5749-5750 ¶ 179.

<sup>125</sup> See Public Interest Statement at 37.

<sup>126</sup> See *Id.* at 59.

<sup>127</sup> See *Id.* at 59-60.

<sup>128</sup> See *Id.*

<sup>129</sup> See *Id.* at 39.

<sup>130</sup> See *Id.* at 37-38.

<sup>131</sup> See *Id.* at 38.

<sup>132</sup> *Id.* at 37-40.

49. At this time, neither Sprint Nextel nor Clearwire is offering significant fixed broadband services in either the 2.5 GHz Band or other bands. In addition, the implementation by Sprint and Clearwire of WiMAX networks, which allow the provision of fixed wireless broadband services, is just beginning. Thus, neither is a dominant provider in the fixed broadband services market. We also note that there is little to no overlap in the fixed broadband services that Sprint Nextel and Clearwire provide. Thus, the proposed Sprint Nextel-Clearwire transaction would not substantially increase the level of market concentration in the fixed broadband services product market. Additionally, a wide variety of other technologies are available to provide broadband services to consumers and businesses, including fiber, broadband over power line, unlicensed wireless technologies, and satellite.<sup>133</sup> To the extent that the 2.5 GHz Band continues to evolve, and there is more extensive use of this band in the provision of a fixed broadband service, it will be just one of several broadband services.<sup>134</sup> Accordingly, we conclude that no competitive harm is likely to result from the proposed transaction with regard to this product market.

## 2. Geographic Market

50. Since we have determined that further competitive review is not necessary for the fixed broadband market, we will define a geographic market for mobile telephony/broadband services only in order to evaluate potential spectrum aggregation concerns.

51. In its recent wireless transaction orders, the Commission applied the “hypothetical monopolist test” and found that the relevant geographic markets are local, larger than counties, may encompass multiple counties, and, depending on the consumer’s location, may even include parts of more than one state.<sup>135</sup> The Commission in these orders identified two sets of geographic areas that effectively may be used to define local markets – CEAs and CMAs.<sup>136</sup> Because these two sets of geographic areas come from different sides of the equation – demand in one case, supply in the other – the Commission

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<sup>133</sup> See *Sprint Nextel Order*, 20 FCC Rcd at 14029 ¶ 167; Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, *Fifth Report*, 23 FCC Rcd 9615 (2008).

<sup>134</sup> See *Sprint Nextel Order*, 20 FCC Rcd at 14029 ¶ 167.

<sup>135</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542-43 ¶¶ 29-30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21562-63 ¶¶ 89-90.

<sup>136</sup> We have chosen CEAs and CMAs for our data analysis because both are consistent in order of magnitude with the local market definition we have adopted and because each brings a different consideration to the analysis. CEAs are designed to represent consumers’ patterns of normal travel for personal and employment reasons and may therefore capture areas within which groups of consumers would be expected to shop for wireless service. See Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURVEY OF CURRENT BUSINESS, February 1995, at 75. In addition, CEAs should be areas within which any service providers present would have an incentive to market – and actually provide – service relatively ubiquitously. Conversely, CMAs are the areas in which the Commission initially granted licenses for the cellular service. Although partitioning has altered this structure in many license areas, CMAs represent the fact that the Commission’s licensing programs have to a certain degree shaped this market by defining the initial areas in which wireless providers had spectrum on which to base service offerings, and they may therefore serve as a reasonable proxy for where consumers face the same competitors. See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567-68 ¶ 105; see also *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542 ¶ 29; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 57; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072-73 ¶¶ 44-45.

found them to be useful cross-checks on each other and, together, they help ensure that the Commission's analysis does not overlook local areas that require more detailed analysis.<sup>137</sup>

52. For the proposed transaction at issue here, we determine that the geographic market is the area within which a consumer is most likely to shop for mobile telephony/broadband services.<sup>138</sup> For most individuals, this will be a local area, as opposed to a larger regional or nationwide area.<sup>139</sup> This is because "in response to a small but not insignificant price increase by providers" that offer service where consumers live, work or travel, most consumers are unlikely to switch to alternative carriers that operate only outside of such a locality.<sup>140</sup>

### 3. Input Market

53. In evaluating this transaction, we consider the aggregation of spectrum by New Clearwire. In previous Commission orders, the Commission made a determination to include, in its evaluation of potential competitive harm, spectrum in particular bands that is suitable for the provision of mobile telephony services. In connection with these transactions, consistent with our determination to evaluate a broader combined product market for mobile telephony/broadband services, we will include spectrum suitable for the provision of wireless broadband over broadband networks, in addition to spectrum suitable for mobile voice and data services. As previously explained by the Commission, suitability is determined by whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony/broadband services.<sup>141</sup> For the purposes of evaluating spectrum aggregation issues associated with this transaction we include in both our updated market-specific spectrum screen as well as our market-by-market analysis those spectrum bands designated for cellular, PCS, SMR, and 700 MHz services, as well as AWS-1 and BRS spectrum where available.

#### a. Background.

54. In the *AT&T-Dobson Order*, we applied a 95 megahertz initial nationwide spectrum aggregation screen prior to our market-by-market review of the proposed transaction.<sup>142</sup> In the *AT&T-Dobson Order*, adopted in November of 2007, the Commission found that, in light of recent developments, spectrum "suitable" for the provision of mobile telephony services includes not only

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<sup>137</sup> See, e.g., *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11546 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567-68 ¶ 105.

<sup>138</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23. See also *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542 ¶ 30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 89.

<sup>139</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20310-11 ¶ 25; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542 ¶ 30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 89. See also *Twelfth Competition Report*, 23 FCC Rcd at 2331-2332 ¶ 174 (indicating that the average person shops for mobile telephony services in markets that include place of work, place of residence, and surrounding areas that are economically related; such areas generally are larger than counties).

<sup>140</sup> See *DOJ/FTC Merger Guidelines* §§ 1.11, 1.12.

<sup>141</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶ 27.

<sup>142</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶¶ 27-30.

approximately 200 megahertz of cellular, broadband PCS, and Specialized Mobile Radio (“SMR”) spectrum, but also an additional 80 megahertz of 700 MHz band spectrum (in the 698-806 MHz band) throughout the nation, bringing the total amount of spectrum suitable for mobile telephony services on a nationwide basis to approximately 280 megahertz.<sup>143</sup> Applying the Commission’s previous determination that a spectrum aggregation screen should be based approximately on one-third of the total bandwidth available for mobile telephony services, we revised the spectrum aggregation screen from 70 megahertz to 95 megahertz, approximately one-third of the 280 megahertz of the spectrum designated as being available for services.

55. At the time of the *AT&T-Dobson Order*, we did not find it appropriate to include certain other spectrum bands – particularly AWS-1 and BRS spectrum – in the initial spectrum screen.<sup>144</sup> We noted, however, that AWS-1 and BRS spectrum is capable of supporting mobile telephony services given its physical properties and the state of equipment technology, and the spectrum is licensed with allocation and service rules that allow mobile uses.<sup>145</sup> However, the Commission did consider the extent to which AWS-1 or BRS licenses were in fact available in specific markets, and included them in the local spectrum input market, in our detailed, case-by-case analysis of markets caught by the initial screen.<sup>146</sup>

#### **b. Spectrum to be Included in Screen**

56. *Arguments against subjecting 2.5 GHz spectrum to a spectrum screen analysis.* Sprint Nextel, Clearwire, and supporting commenters argue, for purposes of this transaction, that 2.5 GHz spectrum should not be subject to a spectrum screen.<sup>147</sup> First, they argue that the Commission has not previously included 2.5 GHz in a spectrum screen and it has applied a spectrum screen only to the mobile telephony services market, and the screen it has used previously should not be applied to this transaction.<sup>148</sup> In that connection, they argue that including BRS and EBS in the spectrum screen would be inconsistent with the Commission’s determination in the *Sprint-Nextel Merger Order*.<sup>149</sup> HITN and WCA also cite the fact that BRS spectrum was not included in the spectrum screen in the *Verizon-RCC Order*.<sup>150</sup> Second, they contend 2.5 GHz spectrum is different from other spectrum and there is sufficient spectrum for the provision of mobile broadband services. In that regard, they cite the band’s less favorable propagation characteristics as opposed to the 700 MHz band<sup>151</sup> and their claim that BRS spectrum “trades at prices that are a fraction of CMRS and 700 MHz spectrum.”<sup>152</sup> Finally, the

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<sup>143</sup> *See Id.*

<sup>144</sup> *See Id.*, 22 FCC Rcd at 20314-20315 ¶¶ 33-34.

<sup>145</sup> *See Id.*, 22 FCC Rcd at 20314 ¶ 32.

<sup>146</sup> *Id.*, 22 FCC Rcd at 20315 ¶ 35.

<sup>147</sup> *See* Sprint Nextel Clearwire Joint Opposition at 21-35.

<sup>148</sup> *See* Sprint Nextel Clearwire Joint Opposition at 22-23 (*citing AT&T-Dobson Order* ¶32 and *Verizon-RCC Order* ¶¶44-47); Google Opposition at 3-5; Source for Learning Opposition at 2-3; HITN Opposition at 8-10; WCA Reply at 7-9.

<sup>149</sup> *See* Sprint Nextel-Clearwire Joint Opposition at 31-32.

<sup>150</sup> *See* HITN Opposition at 6; WCA Reply at 6.

<sup>151</sup> *See* Sprint Nextel-Clearwire Joint Opposition at 23; HITN Opposition at 8-10; Source for Learning Opposition at 3; PISC Opposition to AT&T’s Petition to Deny at 3; George Mason University Instructional Foundation Reply Comments at 2.

<sup>152</sup> *See* Sprint Nextel-Clearwire Joint Opposition at 24; Intel Opposition at 4; Motorola Reply Comments at 1-2.



Applicants and supporting commenters claim that there are limitations to the 2.5 GHz band that further justify not applying a screen. The limitations they cite include the complicated nature of licensing in the band, which often includes irregular geographic areas with different areas in different channels,<sup>153</sup> and complicated interference protection rules.<sup>154</sup> Finally, they note that while applicants have made substantial progress in transitioning the 2.5 GHz band to a new band plan that facilitates the provision of broadband services,<sup>155</sup> they note that the transition is not complete.<sup>156</sup> Applicants also argue that counting BRS and EBS in the spectrum screen would distort the FCC's public interest analysis and would lead to "absurd results" and an "underinclusive and overinclusive" spectrum screen.<sup>157</sup> If a spectrum screen is used, Applicants argue that the screen should include Mobile Satellite Service (MSS) Auxiliary Terrestrial Component (ATC) spectrum.<sup>158</sup>

57. *Arguments for adding BRS, EBS, AWS-1, and/or other spectrum to the screen.* In its Petition to Deny in the Sprint Nextel-Clearwire transaction, AT&T argues that the Commission should apply a revised spectrum screen to this proposed transaction that includes BRS and EBS spectrum.<sup>159</sup> AT&T says that the Commission has focused its competitive analysis by applying an initial spectrum screen to all markets affected by the transaction.<sup>160</sup> AT&T argues that BRS spectrum should be included in the screen in this transaction because they believe it is clear from the Application that New Clearwire intends to compete with mobile voice services using this spectrum.<sup>161</sup> AT&T points out that now there have been substantial changes in the services in the 2.5 GHz band that warrant a change in this regard. Specifically, AT&T argues that this proposed merger will create a "near monopoly"<sup>162</sup> and New Clearwire's spectrum position in the 2.5 GHz band will be so large it negates the previous argument that, "the availability of BRS spectrum for new mobile uses depends upon the ongoing transition process," but now the transition process is nearly complete.<sup>163</sup> AT&T says that such treatment would be "flatly inconsistent with the Commission's treatment of other spectrum bands."<sup>164</sup> With respect to the limitations of the 2.5 GHz band that Applicants cite, AT&T claims that their arguments are inconsistent with their claims that the transaction will serve the public interest because it will allow Applicants to overcome those limitations.<sup>165</sup>

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<sup>153</sup> See Sprint Nextel-Clearwire Joint Opposition at 29-30; Intel Opposition at 3-4.

<sup>154</sup> See *Id.* at 30. In particular, Sprint Nextel and Clearwire cite 47 C.F.R. § 27.1221, the "height benchmarking" rule.

<sup>155</sup> See Sprint Nextel-Clearwire Applications, Public Interest Statement at 29-30.

<sup>156</sup> See Sprint Nextel-Clearwire Joint Opposition at 22-23.

<sup>157</sup> See *Id.* at 39.

<sup>158</sup> See Sprint Nextel-Clearwire Applications, Public Interest Statement at 57-58.

<sup>159</sup> See AT&T Petition to Deny at 4.

<sup>160</sup> See *Id.* at 1-2.

<sup>161</sup> See *Id.* at 2.

<sup>162</sup> See *Id.* at 5.

<sup>163</sup> See *Id.* at 6, citing *AT&T Dobson Order*, 22 FCC Rcd at 20315 ¶ 34 and 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, 21 FCC Rcd 5606 (2006).

<sup>164</sup> See AT&T Petition to Deny at 7.

<sup>165</sup> See AT&T Reply at 18.

PDQLink contends that BRS, EBS, and AWS spectrum should be included in the spectrum screen, although it states that EBS is different from the other bands.<sup>166</sup> AT&T also suggests that AWS-1 and MSS spectrum that can be used to provide ATC should be included.<sup>167</sup>

58. *Arguments against adding BRS, EBS, AWS-1, and/or other spectrum to the screen.* With respect to EBS spectrum, Sprint Nextel and Clearwire argue that all EBS spectrum should not be included in any analysis. Sprint Nextel and Clearwire argue that EBS leases are materially different from other commercial mobile leases because of the 30 year limit with mandatory lessor “right of review” at 15 years and the fact that EBS leases are subject to educational programming requirements.<sup>168</sup> In addition, other obligations and restrictions affect the operational usability of this spectrum which AT&T’s predecessor BellSouth acknowledged when it noted that allowing EBS licensees the right to recapture additional capacity for educational use during a lease lifetime would make EBS leases “inherently less valuable to the [commercial] operator than unencumbered capacity.”<sup>169</sup> EBS commenters that uniformly support the transaction are nonetheless especially concerned about EBS spectrum being included in the screen because the spectrum involved includes non-commercial leases between BRS and EBS licensees which are crafted to ensure that EBS licensees can use their 2.5 GHz spectrum to further their educational mission.<sup>170</sup> They contend that EBS is primarily an educational service and that it would be inappropriate to include EBS in a screen designed to capture commercial spectrum.<sup>171</sup> They also cite special restrictions on EBS spectrum leasing and the requirement that the EBS licensee reserve a certain amount of capacity for its educational purposes.<sup>172</sup> EBS licensees express concern that including EBS in a spectrum cap would lead New Clearwire to terminate leases, which would harm educational licensees.<sup>173</sup> WCA explains that not all EBS licensees lease their spectrum to commercial 2.5 GHz operators, every EBS licensee must preserve capacity for education uses, and lease agreements provide EBS licensees with the right to recapture capacity during the course of the lease.<sup>174</sup>

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<sup>166</sup> See PDQLink *Ex Parte* Request to Deny at 6-7.

<sup>167</sup> AT&T Reply at 4 (suggesting that certain AWS and MSS band holdings should be attributed when evaluating spectrum aggregation in this proposed transaction).

<sup>168</sup> See Sprint Nextel-Clearwire Joint Opposition at 25.

<sup>169</sup> See *Id.* at 26, citing Reply Comments of BellSouth Corp., et al., WT Docket No. 03-66, at 26 (Oct. 23, 2003) (quoting Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112, 19158 ¶ 88 (1998), which quoted BellSouth’s 1997 Reply Comments in MM Docket No. 99-217).

<sup>170</sup> See Letter from Leigh Spellman, Gryphon Wireless to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 11, 2008) at 1; CTN Comments at 2-3; Letter from Edwin N. Lavergne, Esq., Counsel for Catholic Television Network to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 27, 2008) (“CTN *ex parte*”); Letter from Todd D. Gary, Esq., Counsel for National EBS Association to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 27, 2008) (“NEBSA *ex parte*”).

<sup>171</sup> See NEBSA Opposition at 6-7.

<sup>172</sup> See NEBSA Opposition at 3-5; CTN Comments at 2-3; The Source for Learning and the Indiana Higher Education Telecommunication System Opposition at 3 (“Source for Learning Opposition”).

<sup>173</sup> See NEBSA Opposition at 7-9; CTN Comments at 3; Source for Learning Opposition at 4.

<sup>174</sup> See WCA Reply at 10.

59. Sprint Nextel and Clearwire also argue that the Middle Band Segment (MBS)<sup>175</sup> of BRS spectrum should be excluded because those channels “are not compatible for use in the radio access network of cellularized mobile broadband operators in the presence of high-site facilities.”<sup>176</sup> Finally, they argue that BRS Channel 1 (2496-2502 MHz) should be excluded from any spectrum screen because it is “an interference-prone, non-contiguous six megahertz channel so heavily encumbered by three other co-primary uses that wide-area cellularized broadband operations will prove difficult, if not impossible, to deploy on those frequencies.”<sup>177</sup>

60. AT&T contends that the amount of BRS and EBS spectrum attributed to New Clearwire should not be decreased based upon various arguments made by Sprint Nextel and Clearwire.<sup>178</sup> AT&T contends that there is no material difference between operations on leased versus non-leased spectrum.<sup>179</sup> With respect to the MBS, it believes Sprint Nextel and Clearwire will control much of this spectrum across the country empowering the companies to ensure compatibility with adjacent spectrum.<sup>180</sup> AT&T argues that the guard band spectrum is fully available to New Clearwire for broadband deployment.<sup>181</sup> Finally, AT&T states that the Commission has already held that the other three co-primary users in BRS Channel 1 will not noticeably interfere with New Clearwire’s operations.<sup>182</sup>

### c. Discussion

61. In light of recent developments and our determination to evaluate the broader combined market for mobile telephony/broadband services in our competitive analysis, we decide to include AWS-1 and certain BRS spectrum in an updated, market-specific initial spectrum screen in those markets where that spectrum is available. The Commission has previously said with respect to mobile telephony that suitability for provision of these services “is determined by the physical properties of the spectrum, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony.”<sup>183</sup> We apply the same factors to mobile telephony/broadband

<sup>175</sup> The Middle Band Segment, 2572-2614 MHz, has different post-transition technical rules designed to accommodate high-power, high-site video operations after the transition. *See* 47 C.F.R. §§ 27.5(i)(2), 27.50(h)(1), 27.53(l)(1), 27.55(a)(4)(iii).

<sup>176</sup> *See* Sprint Nextel-Clearwire Application, Public Interest Statement at 41.

<sup>177</sup> *See Id.*

<sup>178</sup> *See* AT&T Petition to Deny at 8-13.

<sup>179</sup> *See Id.* at 9.

<sup>180</sup> *See Id.* at 9-10. AT&T claims that Applicants will control all available MBS spectrum in at least 284 counties. *Id.* at 10 n.27. It claims that in another 1,799 counties, Applicants will control all available BRS MBS spectrum. *Id.* It claims that in an indeterminate number of counties, Applicants will also control the available EBS MBS spectrum, but AT&T cannot determine how many such additional counties exist because it does not know how much EBS spectrum is licensed in a given county. *Id.*

<sup>181</sup> *See Id.* at 10-11.

<sup>182</sup> *See Id.* at 10, *citing* 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, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14179 ¶ 27 (2004).

<sup>183</sup> *See Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21560-21561 ¶ 81; *see also Verizon-RCC Order*, 23 FCC Rcd at 12486 ¶ 43; *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶ 26; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 12486 ¶ 43; *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶ 26; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 12486 ¶ 43 (continued....)

services. With respect to spectrum that may become suitable for mobile telephony/broadband services in the near future, we consider that spectrum to be a relevant input if it will meet the criteria for suitable spectrum within two years.<sup>184</sup> We also revise our initial spectrum screen so that it applies on a market-by-market basis, rather than on a nationwide basis. This revised, market-specific screen allows us to apply the screen so as to reflect more accurately the availability of spectrum in particular markets when considering possible spectrum aggregation issues, and results in our considering the same spectrum bands when applying our initial screen and conducting any subsequent, more detailed market-by-market analysis.<sup>185</sup>

62. *Subjecting BRS and EBS spectrum to the spectrum screen.* We reject the arguments of Sprint Nextel and Clearwire that no 2.5 GHz spectrum associated with this transaction should be reviewed under a spectrum screen. Based on our analysis of this transaction, and the current state of the market for mobile telephony/broadband services, we find it appropriate to include certain BRS spectrum in a market-specific initial spectrum screen, while we exclude EBS spectrum from the spectrum screen, as discussed more fully below.

63. New Clearwire will be using 2.5 GHz spectrum when offering nationwide mobile WiMAX service offerings that will be competing with other existing and planned service offerings from other wireless carriers. While Sprint Nextel and Clearwire argue that there are distinctions between the 2.5 GHz band (both BRS and EBS) and other bands used to provide mobile broadband service, they do not provide a persuasive basis for excluding all BRS spectrum from inclusion in the spectrum screen. They clearly consider most of the BRS spectrum (in combination with certain available EBS spectrum) as suitable for the provision of mobile telephony/broadband services. Given this suitability, they fail to show that aggregation of that spectrum could not potentially lead to the sort of competitive concerns that would trigger the Commission's competitive review. Furthermore, ever since the Commission first determined to evaluate potential spectrum aggregation of 800 MHz cellular spectrum, 800/900 MHz SMR, and 1.9 GHz broadband PCS spectrum for purposes of competitive review, it has not differentiated among bands based on specific propagation characteristics or purported distinctions in trading value. Nor did we do so last year when we recently expanded the initial spectrum aggregation screen to include 700 MHz band spectrum. We decline to do so here with respect to the particular BRS spectrum that we find, below, suitable for mobile telephony/broadband services.<sup>186</sup> This initial spectrum screen is designed to be a trigger for further competitive analysis, in which we examine each of the identified markets to ensure that no competitive harm would result from the proposed transaction.

64. Sprint Nextel's and Clearwire's reliance on the *Sprint-Nextel Merger Order* and the *AT&T-Dobson Order* for the proposition that transactions involving the 2.5 GHz band will not be subject to the spectrum screen is misplaced. As mentioned above, we are revising the initial spectrum screen on a market-specific, rather than a nationwide, basis. This revised, market-specific screen will reflect more

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Rcd at 11543 ¶ 31; *Sprint-Nextel Order*, 20 FCC Rcd at 13992 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 41.

<sup>184</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20313 ¶ 30. That time frame is consistent with the DOJ/FTC Merger Guidelines, which "state that a significant market impact from entry must result within two years for the entry to be considered 'timely.'" *Id.* at 20313 n.117, citing *DOJ/FTC Merger Guidelines* §3.2.

<sup>185</sup> Compare *AT&T-Dobson Order*, 22 FCC Rcd at 20315 ¶ 35 (stating that, although AWS-1 and BRS was not included in the initial spectrum screen, we considered this spectrum, to the extent that this spectrum was locally available, in our case-by-case analysis of those markets identified by the initial screen).

<sup>186</sup> We note that no party or commenter has made a specific proposal regarding a specific discounted value for 2.5 GHz spectrum. As discussed below, we also do not differentiate the AWS-1 spectrum in the 1.7/2.1 GHz band that we also determine, in this *Memorandum Opinion and Order*, to include in the Commission's initial spectrum screen.

accurately the availability of spectrum in particular markets when considering possible spectrum aggregation issues, and will result in the Commission's consideration of the same spectrum bands when applying the initial screen and conducting any subsequent, more detailed market-by-market analyses.

65. Circumstances have changed substantially since the *Sprint-Nextel Merger Order* was adopted in 2005. At the time of the *Sprint-Nextel Merger Order*, the Commission held that it was "premature" and "imprudent" to consider the 2.5 GHz band as part of the spectrum market for mobile telephony services because the new service rules that allowed for mobile services had just been adopted.<sup>187</sup> As Sprint Nextel and Clearwire recognize, they have made great progress in the last three years since release of the *Sprint-Nextel Merger Order* in terms of transitioning to the new band plan, finalizing the WiMAX standards, developing equipment, and formulating their plans for using the 2.5 GHz band to provide service.

66. More recently, in the *AT&T-Dobson Order* adopted last year, we examined the availability of BRS spectrum in particular. We noted that the availability of BRS spectrum for mobile uses was dependent on the process of transitioning to the new band plan. We determined, in the context of a uniform nationwide initial spectrum screen, that we could not yet conclude that sufficient BRS spectrum would be available nationwide soon enough to affect current behavior,<sup>188</sup> and therefore decided not to include BRS spectrum as part of the initial spectrum screen. We did, however, include BRS spectrum as part of our market-specific analysis of competitive harm that might result through spectrum aggregation when BRS spectrum was in fact available in a particular market.<sup>189</sup> Furthermore, in the time since release of the *AT&T-Dobson Order*, significant additional progress has been made in completing the transition of BRS spectrum to the new band plan. Currently, the transition has been completed in 337 out of 493 Basic Trading Areas (BTAs).<sup>190</sup> Indeed, all BRS licensees must be operating and be able to demonstrate substantial service by May 1, 2011 or lose their licenses,<sup>191</sup> a requirement that should further accelerate completion of the transition.

67. We do agree, however, with Sprint Nextel and Clearwire that the MBS channels should not be included in our spectrum screen because of specific features associated with this spectrum. While nothing in our service rules precludes the potential use of the MBS channels for mobile telephony/broadband services, the Applicants are correct that low-power, cellularized operations in the MBS could be subject to interference from legacy high-power video operations. At this time, we lack a sufficient record to determine the extent to which MBS is in fact available for mobile telephony/broadband services. We also agree with Sprint Nextel and Clearwire that the J and K guard bands should not be included in as part of our spectrum screen. Operations in the J and K guard bands are secondary to adjacent-channel operations.<sup>192</sup> Moreover, channels in those bands are only 1/3 megahertz

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<sup>187</sup> See *Sprint-Nextel Merger Order*, 20 FCC Rcd at 14022 n.338.

<sup>188</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20315 ¶ 34.

<sup>189</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20347 Appendix A (Market-Specific Analysis of Markets Involving Divestiture), Texas 10-Navarro. Although we also did not include AWS-1 spectrum as part of the initial spectrum screen in these orders, when AWS-1 spectrum was in fact available in a particular market, we similarly found it appropriate to include AWS-1 spectrum as part of our analysis of potential competitive harm that might result through spectrum aggregation. See *AT&T-Dobson Order*, 22 FCC Rcd at 20347 Appendix A (Market-Specific Analysis of Markets Involving Divestiture), Texas 10-Navarro; see also *Verizon-RCC Order*, 23 FCC Rcd at 12541 (Appendix B Market-Specific Analysis of Markets Involving Divestiture), Vermont 1-Franklin.

<sup>190</sup> At the time of the *AT&T-Dobson Order*, the transition had been completed in only 113 BTAs. *Id.* at n.128.

<sup>191</sup> See 47 C.F.R. § 27.14(o).

<sup>192</sup> See 47 C.F.R. § 27.1222.

wide, and we find that it would be highly improbable that those channels could be used unless an operator aggregated all of the channels in a market.

68. With respect to BRS Channel 1, we note that the Commission previously rejected Sprint Nextel's arguments that spectrum in the 2495-2500 MHz band is not suitable replacement spectrum for old BRS Channel 1,<sup>193</sup> but that Sprint Nextel has appealed that ruling.<sup>194</sup> We note, however, that BRS Channel 1 (2496-2502 MHz) is not contiguous to any other BRS channels. Instead, it is adjacent to EBS Channel A1, which is not part of the spectrum screen. Furthermore, at this time many WiMAX deployments require 10 megahertz channels, and there does not appear to be a role for BRS Channel 1 in the WiMAX deployments contemplated by Applicants. Accordingly, we will not include BRS Channel 1 in the spectrum screen at this time. We emphasize our determination to exclude BRS Channel 1 spectrum does not prejudice in any way the Commission's conclusions that spectrum sharing between BRS and MSS operations is feasible and that 2496-2502 MHz comprises suitable replacement spectrum for the provision of comparable facilities to accommodate BRS operations that currently operate in the 2150-2160/62 MHz band.<sup>195</sup>

69. Finally, we agree with Sprint Nextel and Clearwire that the J and K guard bands should not be included in as part of our spectrum screen. Operations in the J and K guard bands are secondary to adjacent-channel operations.<sup>196</sup> Moreover, channels in those bands are only 1/3 megahertz wide, and we find that it would be highly improbable that those channels could be used unless an operator aggregated all of the channels in a market.

70. We conclude that 55.5 megahertz of BRS spectrum (*i.e.*, all BRS spectrum except the MBS channels, BRS Channel 1, and the J and K guard bands) should be considered both suitable and available, in the markets where the transition has been completed, for purposes of our revised spectrum screen. As noted above, historically, the availability of BRS spectrum for mobile uses is dependent on the process of transitioning to the new band plan.<sup>197</sup> For purposes of this transaction, we will apply that test and consider 55.5 megahertz of BRS as available for mobile telephony/broadband services where the transition has been completed.

71. We decline, however, to include EBS in the revised spectrum screen. The primary purpose of EBS is to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students through video, data, or voice transmissions.<sup>198</sup> While licensees are allowed to lease their excess capacity to commercial operators, leasing is subject to various special requirements designed to maintain the primary educational character of services provided using EBS.<sup>199</sup> In addition, other elements of the EBS licensing regime,

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<sup>193</sup> See 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, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order*, WT Docket No. 03-66, 21 FCC Rcd 5606, 5619-5621 ¶¶ 23-26 (2006).

<sup>194</sup> *Sprint Nextel Corporation v. Federal Communications Commission and United States of America*, Case Nos. 08-1233, 06-1278 (D.C. Cir.)

<sup>195</sup> See *BRS/EBS 3<sup>rd</sup> MO&O*, 21 FCC Rcd at 5623 ¶ 29.

<sup>196</sup> See 47 C.F.R. § 27.1222.

<sup>197</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20315 ¶34.

<sup>198</sup> See 47 C.F.R. § 27.1203(b).

<sup>199</sup> See generally 47 C.F.R. § 27.1214.

such as its solely site-specific character, with the absence of any licensee in various unassigned EBS “white spaces,” complicate use of this spectrum for commercial purposes. Furthermore, we are sensitive to the concerns raised by EBS licensees that potential divestitures, in response to spectrum aggregation concerns relating to competition among commercial services, could disproportionately harm EBS licensees.<sup>200</sup> Accordingly, we will not consider spectrum associated with EBS spectrum leases as part of the spectrum screen.

72. *Inclusion of AWS-1 and other spectrum.* With respect to AWS-1 spectrum in the 1.7/2.1 GHz band, we conclude that sufficient progress has been made in clearing AWS-1 spectrum to consider that spectrum suitable for mobile telephony/broadband services in those markets where the spectrum has been cleared and is available for use. In the *AT&T-Dobson Order*, we concluded, in the context of a nationwide spectrum screen, that AWS-1 spectrum – while meeting the other requirements for suitability – was not generally available for mobile use throughout the country because of the need to clear governmental and non-governmental incumbent users.<sup>201</sup> Recent information available to us now indicates that substantial progress continues to be made in clearing AWS-1 spectrum and that widespread deployment of mobile services using AWS-1 spectrum will be occurring in the near term. Our records show that AWS-1 spectrum has been cleared in approximately two-thirds of all counties. Furthermore, T-Mobile USA, an AWS-1 licensee, recently reported that it intends to offer wireless broadband service using AWS-1 spectrum in 25 markets by the end of 2008 and that it has “placed about one million AWS-ready handsets either into customer hands or the supply chain.”<sup>202</sup> Under these circumstances, we clearly should consider AWS-1 spectrum in the initial screen in markets that have already been cleared.

73. We decline to make additional changes to the spectrum screen at this time. In previous Commission orders, we stated that although satellite providers offer facilities-based mobile voice and data services, the price of these services is, at present, significantly higher than for services offered by cellular, PCS, or SMR providers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony.<sup>203</sup> The record in this proceeding does not provide any basis for revisiting that conclusion. With regard to MSS/ATC spectrum, we have insufficient evidence of availability and nature of ATC service to justify placing it in the screen at this time.

74. *Spectrum screen applied to this transaction.* Based on the analysis presented above, we find that it is appropriate to review the proposed Sprint Nextel-Clearwire transaction under a market-specific spectrum screen that includes spectrum in the AWS-1 and BRS (excluding the MBS, BRS Channel 1, and J and K guard band) where such spectrum is available. The spectrum screen varies depending on the availability of spectrum in the AWS-1 and BRS bands in a particular market. For markets in which AWS-1 and BRS spectrum is available, we revise the screen to 145 megahertz. For markets in which AWS-1 is available but BRS is not available, we use a spectrum screen of 125 megahertz. For markets in

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<sup>200</sup> See NEBSA Opposition at 7-9; CTN Comments at 3; Source for Learning Opposition at 4; CTN *ex parte*; NEBSA *ex parte*.

<sup>201</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20314 ¶¶ 32-33.

<sup>202</sup> See *Ex Parte* Presentation, T-Mobile USA, WT Docket No. 07-195 (Jul. 18, 2008) at 3.

<sup>203</sup> See Global Com, Iridium Satellite Phone Service Plans, at [http://www.globalcomsatphone.com/satellite/services/iridium\\_service\\_plans.html](http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html) (last visited Sept. 17, 2008); GlobalStar, Airtime Pricing, Voice Pricing, at <http://www.globalcomsatphone.com/satellite/services/globalstar.html> (last visited Sept. 17, 2008). See also *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38.

which BRS is available but AWS-1 is not available, we use a spectrum screen of 115 megahertz. Finally, for markets in which neither BRS nor AWS-1 is available, we use a 95 megahertz spectrum screen.

#### 4. Market Participants

75. In its recent wireless transaction orders, when computing initial measures of market concentration, the Commission limited its analysis of transactions involving mobile telephony services to cellular, PCS, and SMR facilities-based service providers, and excluded satellite service providers, nomadic wireless Voice over Internet Protocol (“VoIP”) providers, mobile virtual network operators (“MVNOs”), and resellers from consideration.<sup>204</sup> We find that mobile telephony/broadband services offered by facilities-based providers using cellular, PCS, and SMR spectrum and employing various technologies offer similar voice and data functionalities and are indistinguishable to the consumer.<sup>205</sup> Accordingly, we consider cellular, PCS, and SMR facilities-based mobile telephony/broadband service providers to be market participants. Similarly, to the extent that entities provide facilities-based mobile telephony/broadband services using 700 MHz, AWS-1, and BRS spectrum, we also consider them to be market participants.<sup>206</sup>

##### B. Initial Screen

76. The purpose of this initial screen is to eliminate from further review those markets in which there is clearly no competitive harm relative to today’s generally competitive marketplace.<sup>207</sup> When examining the effect of proposed transactions or other spectrum acquisitions, the Commission applies a two-part initial “screen” that identifies those local markets in which there is no competitive harm arising from the transaction or spectrum acquisition. One part of the screen utilizes a post-transaction

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<sup>204</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 38-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is, at present, significantly higher than for services offered by cellular, PCS, or SMR providers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony. See Global Com, Iridium Satellite Phone Service Plans, at [http://www.globalcomsatphone.com/satellite/services/iridium\\_service\\_plans.html](http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html) (last visited June 26, 2008); GlobalStar, Airtime Pricing, Voice Pricing, at <http://www.globalcomsatphone.com/satellite/services/globalstar.html> (last visited June 26, 2008). See also *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. We also do not consider wireless VoIP providers as providing the same functionality as mobile telephony providers because the service they provide now is nomadic rather than mobile. See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. Wireless VoIP services are nomadic in the sense that one can use them from a number of different locations (for example, by using a laptop at different internet cafes all over a town). See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544-45 n.134; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 n.151.

<sup>205</sup> See, e.g., *AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 32; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 91.

<sup>206</sup> See *AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36.

<sup>207</sup> See, e.g., *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 51; *AT&T-Dobson Order*, 22 FCC Rcd at 20317 ¶ 39; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11547 n.151; *Sprint-Nextel Order*, 20 FCC Rcd at 13993 ¶ 62; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073-74 ¶ 48; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106-109.



Herfindahl-Hirschman Index (“HHI”) of market concentration in conjunction with the change from the pre-transaction HHI, which we calculate based on providers’ subscriber market shares, while the second part examines spectrum aggregation. Because the instant transaction does not increase concentration in the relevant product markets, as discussed above, it is not necessary for us to apply the HHI screen. Accordingly, our competitive analysis below involves only the spectrum aggregation portion of the screen.

77. Specifically, we apply a spectrum screen where Sprint Nextel would have a 10 percent or greater interest in cellular, PCS, SMR, 700 MHz spectrum, as well as AWS-1 and BRS spectrum where available. As discussed above, at closing Sprint Nextel will hold an approximate 51 percent ownership in New Clearwire.<sup>208</sup> Although Sprint Nextel and Clearwire argue that a spectrum screen should not be applied to this transaction, as discussed elsewhere in this order, we find that the 2.5 GHz band should be included in our spectrum screen where it has been transitioned, and we must evaluate any potential competitive harm associated with spectrum aggregation arising from this transaction that pertains to the provision of mobile telephony/broadband services.<sup>209</sup> The application of our spectrum screen as it applies to Sprint Nextel’s attributable interests results in 43 CMAs requiring further competitive review.

78. AT&T argues that, in addition to Sprint Nextel’s spectrum holdings both within and outside of the 2.5GHz band, the Commission should attribute the AWS spectrum holdings associated with other investors.<sup>210</sup> Specifically, AT&T notes that Comcast Corporation holds a controlling interest in SpectrumCo, which holds several AWS-1 licenses, while Time-Warner and Bright House also hold interests in SpectrumCo.<sup>211</sup> In particular, Comcast owns approximately 54.3% of SpectrumCo, while Time Warner Cable owns approximately 26.6% and Bright House owns approximately 4.5% of SpectrumCo.<sup>212</sup> We also note, however, that the Applicants have indicated that none of these particular investors would hold a 10% or greater interest in New Clearwire.<sup>213</sup> Comcast would hold a 7.2% ownership interest in New Clearwire, while Time Warner would hold a 3.8% interest and Bright House would hold a 0.7% interest.<sup>214</sup> In addition, as mentioned above, New Clearwire’s “strategic investors,” which include Intel, Comcast, Time Warner, Bright House Networks, and Trilogy Equity Partners, have the right to name four members of New Clearwire’s Board of Directors. Because none of the investors in SpectrumCo AWS holds a 10 percent or greater interest in New Clearwire, we decline to attribute the AWS spectrum when evaluating the transaction, consistent with the Commission’s practice with regard to previous wireless merger transactions.<sup>215</sup>

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<sup>208</sup> Public Interest Statement at 4.

<sup>209</sup> See Sprint Clearwire Joint Opposition at 22-23 (citing *AT&T-Dobson Order* ¶ 32 and *Verizon-RCC Order* ¶¶ 44-47). See also Google Opposition at 3-5; Source for Learning Opposition at 2-3; HITN Opposition at 8-10; WCA Reply at 7-9.

<sup>210</sup> See AT&T Reply at 4.

<sup>211</sup> See AT&T Reply at 4.

<sup>212</sup> See SpectrumCo’s FCC Form 602 Ownership Chart, FRN 0015028434 (dated December 7, 2006).

<sup>213</sup> Public Interest Statement at 12.

<sup>214</sup> Clearwire Proxy Statement at 13.

<sup>215</sup> We need not address further AT&T’s assertion that Eagle River’s holdings of MSS spectrum should be attributed because that can be used to provide ATC-based services. See AT&T Reply at 4. As discussed above, we do not include MSS spectrum when evaluating spectrum aggregation.

## C. Market-by-Market Analysis

### 1. Analytical Standard

79. In this section, we examine the 43 CMAs identified by the Commission's initial spectrum aggregation screen, consistent with the approach the Commission has applied in previous wireless transaction orders.<sup>216</sup> In undertaking this market-by-market analysis, we consider variables that the general analyses in these orders have shown are important for evaluating competitive harms associated with spectrum aggregation.<sup>217</sup> These include: the total number of rival service providers; the number of rival firms that can offer competitive nationwide service plans; the coverage of the firms' respective networks; the amount of spectrum suitable for the provision of mobile telephony services controlled by the combined entity; and the spectrum holdings of each of the rival service providers. In reaching determinations, we balance these factors on a market-specific basis, and consider the totality of the circumstances in each market.

80. Thus, for example, if our count of the number of rival service providers and our scrutiny of their spectrum holdings and network coverage indicates that the response of rival service providers will likely be sufficient to limit the ability and incentive of the combined entity to behave in an anti-competitive manner, we would find that the transaction is not harmful to competition in a specific market even in the presence of a relatively high post-transaction market share of the combined entity.<sup>218</sup> We also scrutinize, and base our determinations on, the uniformity of competitive conditions in local markets. Thus, in some instances, we may find that the transaction is not harmful to competition in a particular market if the potential harm from the transaction is confined to a small enclave within the market, and this harm is likely to be ameliorated by the more favorable competitive conditions in most of the market.<sup>219</sup>

### 2. Results of Analysis

81. Our market-by-market analysis finds that there would not be a significant likelihood of harm for the relevant product markets resulting from the proposed transaction from the aggregation of spectrum by Sprint Nextel in any of the 43 markets caught by the initial screen. Our market analysis looks at spectrum holdings of not only Sprint Nextel but also the other licensees in the market and considers multiple factors. Specifically, consideration is given to the relationship of Sprint Nextel's and other market service providers' NRUF-based market share, network coverage, and the amount of licensed spectrum. Also, the analysis considers if there is additional licensed spectrum that is not currently being

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<sup>216</sup> See, e.g., *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 70; *AT&T-Dobson Order*, 22 FCC Rcd at 20322 ¶ 51; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555, 11574-75 ¶ 63, App.; *Sprint-Nextel Order*, 20 FCC Rcd at 14046-14053 App. C; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13120-36 App. C, App. D; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21649 App. D.

<sup>217</sup> See, e.g., *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 70; *AT&T-Dobson Order*, 22 FCC Rcd at 20322 ¶ 51; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555 ¶ 63; *Sprint-Nextel Order*, 20 FCC Rcd at 13995-14009 ¶¶ 68-116; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13075-87 ¶¶ 54-93; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570-86 ¶¶ 115-164.

<sup>218</sup> See, e.g., *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 71; *AT&T-Dobson Order*, 22 FCC Rcd at 20322-23 ¶ 52; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555 ¶ 64; *Sprint-Nextel Order*, 20 FCC Rcd at 14010 ¶ 118; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13096 ¶ 118; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21595 ¶ 190.

<sup>219</sup> See, e.g., *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 71; *AT&T-Dobson Order*, 22 FCC Rcd at 20322-3 ¶ 52; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555 ¶ 64; *Sprint-Nextel Order*, 20 FCC Rcd at 14010 ¶ 118; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13095-96 ¶ 117; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21595 ¶ 190.

used for the provision of mobile telephony/broadband services that can be acquired by the other service providers in the market or by a new entrant. As the Commission determined in its previous wireless transaction orders, this multi-factor, market-specific analysis, which employs a combination of data sources, provides a reliable basis for making our determinations herein.

82. Specifically, with respect to a combined market for mobile telephony/broadband services, upon evaluation of the data, we find that there would be a sufficient number of competitors present post-transaction with thoroughly built-out networks, adequate bandwidth, and the ability to offer competitive nationwide services which would make competitive harm highly unlikely. In each of these markets, there is not a reduction in the number of competitors with sufficient network coverage<sup>220</sup> or market share<sup>221</sup> because Clearwire is an emerging service provider in a combined market for mobile/telephony broadband services. Generally in all of these markets, there are at least two, and as many as four, providers other than Sprint Nextel that currently have sufficient network coverage or market share as well as adequate capacity throughout the CMA to compete in the provision of mobile telephony/broadband services. Also, in each market several additional licensees currently hold sufficient spectrum that would enable either new entry or allow a current service provider that is capacity constrained, to acquire additional spectrum in the secondary market. In all but one of these markets Sprint Nextel would be attributed with no more than 34 percent of the available spectrum suitable for mobile/telephony broadband services. In these 50 markets, there is at least 40 megahertz and up to 90 megahertz of spectrum that is not being used by a service provider with either market share or network coverage,<sup>222</sup> and therefore could be acquired by a current service provider in the secondary market or by a new entrant. Our analysis indicates that, in the majority of these markets, Sprint Nextel's current market share is generally less than 20 percent, thus indicating it is not the dominant provider in the market.

83. The market in which Sprint Nextel would be attributed with more than 34 percent of the available spectrum suitable for mobile telephony/broadband services is CMA050 Honolulu, HI where they would be attributed with approximately 37 percent of the cellular, PCS, SMR and BRS spectrum. In this CMA, there are five wireless service providers, including Sprint Nextel with sufficient market share<sup>223</sup> and population coverage, although none of these providers cover 50 percent or more of the land area of the CMA. The four other service providers each hold at least 30 megahertz of spectrum, and there would be at least 24 megahertz of spectrum that would be available to either a current service provider or a new entrant on the secondary market.<sup>224</sup> Therefore, it is unlikely that Sprint Nextel would be able to behave in an anticompetitive manner in this CMA.

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<sup>220</sup> American Roamer provides data on network deployment by service provider. Combining American Roamer data with Census Bureau data provides the percent of land area and population covered within a CMA. The Commission has considered coverage of 70 percent of the population and 50 percent of the land area to be sufficient coverage. See Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20324 n.170 (2007).

<sup>221</sup> See, e.g., *Verizon Wireless-RCC Order*, FCC 08-181, at Appendix B (stating standard to identify service providers with sufficient market share to be counted as actual competitors in the market); *AT&T-Dobson Order*, 22 FCC Rcd at 20342 Appendix A (same).

<sup>222</sup> In each of these 43 CMAs, AWS-1 spectrum has not been transitioned and is therefore not included in the initial screen or calculations of spectrum available in the market.

<sup>223</sup> *Id.*

<sup>224</sup> AWS-1 is not included in the initial screen because there are transmitters/receivers with relocation times of 33 months. However, when the relocation is complete there will be an additional 20 MHz of spectrum available that is not licensed to a firm currently providing mobile telephony/broadband service in this CMA.

84. In addition, we believe that the nationwide mobile WiMAX network that New Clearwire plans to deploy in the 2.5 GHz band may serve as an alternative service platform for the provision of last mile fixed broadband services or mobile broadband services, or both, to residential and business customers. Consequently, regardless of whether the broadband services provided by the combined New Clearwire entity over its planned nationwide WiMAX network ultimately prove to be fixed, mobile, or both, the proposed Sprint Nextel-Clearwire transaction has the potential to promote competition by facilitating the emergence of a new market entrant.

## VI. OTHER ISSUES

### A. Roaming

#### 1. Background

85. RCA and SouthernLINC raise concerns about the potential for the transaction to have an adverse impact on roaming arrangements and request that the Commission prevent such adverse outcomes by imposing certain conditions on the transaction.

86. Roaming occurs when the subscriber of one CMRS provider travels beyond the service area of that provider and utilizes the facilities of another CMRS provider to place an outgoing call, to receive an incoming call, or to continue an in-progress call.<sup>225</sup> Subscribers can roam manually by providing a credit card number to the host carrier, while automatic roaming allows mobile telephone subscribers to place calls while roaming as they do in their home coverage area, by simply entering a phone number and pressing “send.” The provision of roaming is subject to the requirements of sections 201, 202, and 208 of the Communications Act.<sup>226</sup> In August 2007, the Commission determined that when “a reasonable request is made by a technologically compatible [commercial mobile radio service] carrier, a host [commercial mobile radio service] carrier must provide automatic roaming to the requesting carrier outside of the requesting carrier’s home market . . .”<sup>227</sup> on reasonable and non-discriminatory terms and conditions.<sup>228</sup> The Commission also said that if a carrier makes a reasonable request for automatic roaming, “then the would-be host carrier cannot refuse to negotiate an automatic roaming agreement with the requesting carrier.”<sup>229</sup> At the same time, the Commission maintained its existing manual roaming requirement, which imposes on CMRS providers the obligation to permit customers of other service providers to roam manually on their networks.<sup>230</sup>

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<sup>225</sup> See *AT&T Dobson Order*, 22 FCC Rcd at 20324 ¶ 59; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11561-62 ¶ 98; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13090 ¶ 101; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21586 ¶ 166; see also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Service, WT Docket No. 05-265, 00-193, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) (“*Roaming Notice*”).

<sup>226</sup> See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15818 ¶ 1 (2007) (“*Roaming Report and Order*”).

<sup>227</sup> See *Id.* at 15818 ¶ 2; see also *id.* at 15831 ¶ 33.

<sup>228</sup> See *Id.* at 15826 ¶ 23.

<sup>229</sup> See *Id.* at 15828 ¶ 28.

<sup>230</sup> 47 C.F.R. § 20.12(c) provides:

(continued....)

87. RCA notes that in light of the multiple mergers pending before the Commission, RCA believes it is necessary for the Commission to promote carrier-to-carrier network interoperability by means of a condition to its consent to the applications or to deny the applications. RCA states that “automatic roaming alone does not do enough to provide consumers with continuous service as they travel between wireless carriers’ service areas”<sup>231</sup> and therefore, interoperability should also be required so that calls in progress are handed off from one network to the other seamlessly and ensure that data is not lost or delayed when a consumer leaves a license area and wireless broadband services are not interrupted.<sup>232</sup>

88. SouthernLINC is interested in the potential service described by Applicants.<sup>233</sup> As a small regional carrier in an environment where there is continuing consolidation of carriers SouthernLINC would like greater clarity regarding the actual extent of Sprint Nextel and Clearwire’s commitments before the Commission approves the transaction.<sup>234</sup> SouthernLINC points out that it took multiple years of negotiation before Sprint Nextel agreed to provide automatic roaming services and thus, questions the Applicants assertion that this merger would further competition.<sup>235</sup> SouthernLINC would like the Commission to put mandatory data roaming obligations on New Clearwire to redress the market concentration in the wireless sector.<sup>236</sup>

89. In response to SouthernLINC, Sprint Nextel and Clearwire state that New Clearwire will provide wholesale access to its network “to other entities that are willing to negotiate commercially reasonable terms and conditions for this access.”<sup>237</sup> Sprint Nextel and Clearwire accuse RCA of not understanding the fact that any WiMAX-compliant device that does not harm the network may operate on New Clearwire’s proposed network.<sup>238</sup> They note that the Commission is considering the issue of wireless broadband roaming in a separate proceeding.<sup>239</sup> Applicants argue that it would be inappropriate to impose special requirements on a company to a new wireless broadband competitor that would not apply to existing operators.<sup>240</sup> RCA responds that it is “easily foreseeable” that Sprint Nextel could offer a mobile handset that offered both CMRS and WiMAX service.<sup>241</sup> RCA suggests that, at a minimum, the Commission note the pending rulemaking proceeding and state that Sprint Nextel would be required to

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Each carrier subject to this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, including roamers, while such subscribers are located within any portion of the licensee’s licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations.

<sup>231</sup> See RCA Petition to Deny at 7.

<sup>232</sup> See *Id.* at 7-8.

<sup>233</sup> See SouthernLINC Comments at 2-3.

<sup>234</sup> See *Id.* at 3-4.

<sup>235</sup> See *Id.* at 4-5.

<sup>236</sup> See *Id.* at 5-6.

<sup>237</sup> See Sprint Clearwire Joint Opposition at 15.

<sup>238</sup> See *Id.* at 16.

<sup>239</sup> See *Id.* at 17.

<sup>240</sup> See *Id.*

<sup>241</sup> See RCA Reply at 3.

comply with those rules regardless of whether Sprint Nextel uses its own spectrum or New Clearwire spectrum.<sup>242</sup>

## 2. Discussion

90. In response to SouthernLINC, Sprint Nextel and Clearwire commit that New Clearwire will provide wholesale access to its network “to other entities that are willing to negotiate commercially reasonable terms and conditions for this access.” SouthernLINC does not respond to that offer. We therefore see no need to impose additional commitments at this time.

91. With respect to RCA’s requested conditions, the Commission has previously found that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices.<sup>243</sup> We conclude that the transaction will not alter competitive market conditions in such a way as to harm consumers of mobile telephony/broadband services, including roaming services. Accordingly, we decline to condition our approval of the transaction on any special requirements relating to roaming rates or arrangements.

92. Furthermore, we note that we are considering, in the context of the Roaming Further Notice, whether to extend the automatic roaming obligation to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services offered by CMRS carriers. Any decisions reached or rules adopted in either of those proceedings will apply with equal force to New Clearwire. Accordingly, we decline to condition our approval of the transaction on any special requirements relating to data roaming as those issues will be fully addressed in the proceedings pending before the Commission. Given that the roaming-related concerns raised in this transaction fall within the scope of the Commission’s pending roaming proceedings, we find that addressing those concerns in the context of the larger proceedings would be more appropriate than requiring roaming-related conditions in this transaction.

### B. Exclusive Handset Agreements

#### 1. Background

93. RCA argues that exclusive handset agreements with supplier must be prohibited, stating that “the proposed Sprint Nextel-Clearwire transaction and the contemporaneous Alltel-Verizon merger proposal bring to the forefront an urgent need for the Commission to act promptly so that millions of consumers are not denied the benefits of latest innovations in handset technology.”<sup>244</sup> RCA concludes that for many consumers, the end result of such exclusive arrangements “is that customers are being channeled to purchase wireless service from a carrier that has monopolistic control over the desired handset, and therefore those consumers are paying higher prices for the services and accessories available with the desired handset, as well as, having to agree to unusual (and undesirable) terms and conditions of service, and having to pay a premium price for the handset because the market is void of any competition for the particular handset.”<sup>245</sup> RCA argues further that harms will result from exclusive handset agreements that will only get worse if the proposed transaction is permitted to proceed “without a solution

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<sup>242</sup> See *Id.* at 4.

<sup>243</sup> See *Verizon-RCC Order*, 23 FCC Rcd at ¶ 88; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21591 ¶ 180; *Roaming Report and Order*, 22 FCC Rcd at 15822 ¶ 13; see also *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11563-64 ¶ 104.

<sup>244</sup> See RCA Petition to Deny at 10-11.

<sup>245</sup> See *Id.* at 11.

that allows millions of rural Americans to obtain the latest models of handsets that New Clearwire and Sprint Nextel will offer.”<sup>246</sup>

94. Sprint Nextel and Clearwire contend that RCA’s request should be addressed in the context of RCA’s pending petition for rulemaking asking for rules banning exclusive handsets instead of in the context of this transaction.<sup>247</sup> They state that any factual findings by the Commission will not occur soon because RCA’s petition for rulemaking asks that the Commission first investigate exclusive handset arrangements.<sup>248</sup> They also argue that New Clearwire’s use of the open, non-proprietary WiMAX standard will promote a more open equipment market that would eliminate concerns about exclusive handset arrangements.<sup>249</sup> Applicants object to “singling out New Clearwire for government regulation.”<sup>250</sup> RCA responds that if the New Clearwire system is as described, Applicants “should not object to a condition that allows the public to purchase all compatible handsets from sources other than Sprint Nextel and its affiliates.”<sup>251</sup>

## 2. Discussion

95. RCA’s claim that exclusive handset agreements harm consumers is improperly placed in an opposition to approval of this transaction. RCA proposed conditions prohibiting exclusive handset contracts are not narrowly tailored to prevent a transaction-specific harm and are more appropriate for a rulemaking proceeding when all interested parties have an opportunity to file comments. Additionally, RCA makes no attempt to show that the creation of New Clearwire will increase the proliferation of exclusive handset agreements or harm consumers in the ways RCA’s proposal seeks to address. Indeed, Applicants allege that New Clearwire use of an open standard will lead to a greater diversity of equipment and will alleviate some of the harms caused by exclusive handset arrangements. While we do not adopt that argument, we conclude that RCA has failed to demonstrate any nexus between the instant transaction and the harms it seeks to address. We therefore decline to impose the conditions requested by RCA. Our action herein is without prejudice to action on RCA’s pending petition for rulemaking on this issue, for which the Wireless Telecommunications Bureau has issued a Public Notice establishing a pleading cycle.<sup>252</sup>

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<sup>246</sup> See *Id.* at 13.

<sup>247</sup> See Sprint Clearwire Joint Opposition at 18, *citing* Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, Rural Cellular Association (filed May 20, 2008).

<sup>248</sup> See Sprint Clearwire Joint Opposition at 18.

<sup>249</sup> See *Id.* at 18-19.

<sup>250</sup> See *Id.* at 19.

<sup>251</sup> See RCA Reply at 4.

<sup>252</sup> In light of our conclusion that the issues raised by RCA are not germane to this transaction, we need not resolve the dispute between HITN and RCA concerning whether RCA has standing to file a petition to deny. Compare HITN Opposition at 12 and RCA Reply at 1-3. See also see Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM No. 11497, *Public Notice*, DA 08-2278 (WTB rel. Oct. 10, 2008).

## C. Network Openness

### 1. Background

96. Sprint Nextel and Clearwire also describe New Clearwire's commitment to provide for an open network. Specifically:

New Clearwire will permit consumers to use any lawful device that they want so long as it is compatible with and not harmful to the WiMAX network. New Clearwire also will permit consumers to download and use any software applications, content, or services they desire, subject to reasonable network management practices and law enforcement and public safety considerations.<sup>253</sup>

97. According to Applicants, New Clearwire's open network will provide incentives for manufacturers to embed WiMAX chips in all types of consumer electronic devices, which will generate competition among software applications providers, content providers, device manufacturers, and resellers.<sup>254</sup> They claim, "The resulting innovation and improved broadband service will benefit consumers and will help the U.S. gain a global leadership position in wireless broadband technology and deployment."<sup>255</sup>

98. Vonage and PISC give only qualified support to the proposed transaction.<sup>256</sup> Vonage and PISC both generally support Applicants' proposal to open up the New Clearwire network.<sup>257</sup> Vonage expresses concern, however, that Clearwire customers had problems using Vonage's service.<sup>258</sup> Vonage alleges, based on a trade press article, that a Clearwire representative told a customer that Vonage could not be used over Clearwire.<sup>259</sup> Vonage also notes a report from a Sprint Nextel official that "New Clearwire will charge third party service providers for access to a "service quality API" that lets them set up their service to get priority over others," and it seeks clarification as to how that feature will work.<sup>260</sup> PISC similarly argues that too many details about Sprint Nextel's and Clearwire's commitments to network neutrality, non-exclusive wholesale access and an open device network remain unclear, thereby making the record too incomplete for the Commission to make a determination as to the strength of such commitments.<sup>261</sup> Vonage argues that the Commission should condition any grant of the Applications to ensure that the open network proposals are made enforceable through adoption as a merger commitment, a suggestion that is also supported by *ex parte* filers Bella Mia and PDQLink.<sup>262</sup> Specifically, Vonage seeks to have the Commission require New Clearwire to comply with the Commission's *Internet Policy Statement*, and offer its new WiMAX service on an unbundled basis, not tied to New Clearwire voice

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<sup>253</sup> See *Id.* at 26.

<sup>254</sup> See *Id.* at 27-28.

<sup>255</sup> See *Id.* at 27.

<sup>256</sup> See PISC Comments at 2; Vonage Comments at 3-4.

<sup>257</sup> See PISC Comments at 6; Vonage Comments at 3-4.

<sup>258</sup> See Vonage Comments at 4.

<sup>259</sup> See *Id.*

<sup>260</sup> See *Id.*

<sup>261</sup> See PISC Comments at 2-3.

<sup>262</sup> See Vonage Comments at 5; also see Bella Mia *Ex Parte* Request to Deny at 11 and PDQLink *Ex Parte* Request to Deny at 12.



service.”<sup>263</sup> PISC suggests that the Commission require as a mandatory condition, that any changes in the underlying contracts with entities providing financial backing that would substantially change the open network commitments must be submitted to the Commission.<sup>264</sup> PISC further advocates that such contract changes be placed on notice and comment as if they were contained in an application for major modification under Section 308, and allowed only if approval of the change would serve the public interest.<sup>265</sup>

99. Sprint Nextel and Clearwire respond that Vonage’s proposed conditions are unnecessary because New Clearwire’s WiMAX network will be inherently open.<sup>266</sup> They argue that Vonage has failed to show any connection between the relief they seek and the conditions Vonage wants imposed.<sup>267</sup> Applicants argue that the Commission has never imposed compliance with the *Internet Policy Statement* as a condition of approving a transaction except where the applicants made a voluntary commitment of compliance.<sup>268</sup> Clearwire represents that it provides its broadband internet access on a stand-alone basis and asserts that New Clearwire customers “will have unimpaired access over New Clearwire’s network to any service provider, application or WiMAX-compatible device they desire.”<sup>269</sup> Sprint Nextel and Clearwire have not responded to PISC’s late-filed ex parte filing.

## 2. Discussion

100. In response to SouthernLINC’s arguments, Sprint Nextel and Clearwire commit that New Clearwire will provide wholesale access to its network “to other entities that are willing to negotiate commercially reasonable terms and conditions for this access.” SouthernLINC did not respond. In these circumstances, we see no need for further Commission action at this time.

101. We decline to impose the conditions requested by Vonage and PISC and supported by Bella Mia and PDQLink. In previous cases where conditions based on the *Internet Policy Statement* were made a condition for approval of a transaction, the transactions involved service providers who had voluntarily agreed to the condition in question.<sup>270</sup> Furthermore, we believe that PISC’s proposal to require Commission review of all contracts regarding financial backing that would potentially affect network openness would be burdensome on the parties and on New Clearwire. PISC also fails to cite any precedent for such a review requirement. We therefore decline to adopt a condition that requires Commission review of all contracts between New Clearwire and entities providing financial backing.

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<sup>263</sup> See *Id.* at 5, citing *Internet Policy Statement*.

<sup>264</sup> See PISC Comments at 6.

<sup>265</sup> See PISC Comments at 6.

<sup>266</sup> See Sprint Clearwire Joint Opposition at 11.

<sup>267</sup> See *Id.*

<sup>268</sup> See *Id.* at 12.

<sup>269</sup> See *Id.* at 13.

<sup>270</sup> See *Verizon-MCI Order*, 20 FCC Rcd at 18509 ¶ 143; *SBC-AT&T Order*, 20 FCC Rcd at 18368 ¶ 144.

## D. Defective and Incomplete Applications

### 1. Background

102. AT&T argues that the Applications are defective because they have omitted any information relevant to the traditional public interest analysis.<sup>271</sup>

### 2. Discussion

103. We reject AT&T's argument that the applications are defective. An application is defective if it is "incomplete with respect to required answers to questions, informational showings, or other matters of a formal character . . ." <sup>272</sup> While AT&T argues that the application is defective because it did not contain the type of analysis AT&T believes is appropriate, the important consideration under the rule is whether the Applicants provided the information needed for the Commission to conduct an analysis. Based on that standard, the application is not defective under Section 1.934(d)(1) of the Commission's Rules because the Applicants provided all necessary and requested information for us to conduct our analysis. We therefore decline to dismiss the Applications as defective.<sup>273</sup>

## E. Request for Procedural Relief

### 1. Background

104. Sprint Nextel and Clearwire ask that the Commission grant approval of the transfer applications that may include any facilities or lease arrangements that may have been inadvertently omitted.<sup>274</sup> In addition, Applicants request a blanket exemption from sections 1.927(h) and 1.933(b) of the Commission's rules,<sup>275</sup> which require that amendments reporting a change in ownership be treated as major amendments that require a second public notice for still-pending applications.<sup>276</sup>

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<sup>271</sup> See AT&T Petition to Deny at 2.

<sup>272</sup> See 47 C.F.R. § 1.934(d)(1).

<sup>273</sup> Two other arguments made by AT&T warrant brief discussion. First, AT&T and Applicants debate whether incumbent Local Exchange carriers are dominant in the provision of special access services and the availability of alternatives to such services. See AT&T Petition at 14 n.37; Sprint Clearwire Joint Opposition at 41-42; AT&T Reply at 11. We view this discussion as having no bearing on the question of whether this transaction should be approved, and we decline to consider those arguments further. Second, in its reply, AT&T alleges that a pattern of inconsistent statements by Applicants raises questions about their candor. See AT&T Reply at 6-12. We strike these allegations as improperly made in a reply pleading. Under 47 C.F.R. § 1.45(c), replies shall be limited to matters raised in the oppositions, and new allegations may not be made in reply pleadings. See Paging Systems, Inc., *Order*, 21 FCC Rcd 7225, 7229 ¶ 12 (WTB PS&PWD 2006). In any event, we have reviewed AT&T's allegations, and AT&T has failed to provide any evidence of intent to deceive the Commission that is the *sine qua non* of misrepresentation or lack of candor. See Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 (1983).

<sup>274</sup> See *Id.* at 63.

<sup>275</sup> 47 C.F.R. §§ 1.927(h), 1.933(b).

<sup>276</sup> See *Id.* at 64.

## 2. Discussion

105. The request for relief where the transfer applications may include facilities that have been inadvertently omitted is granted based on previous Commission precedent.<sup>277</sup> Likewise, the exemption request from sections 1.927(h) and 1.933(b) of the Commission rules is also consistent with Commission precedent that finds that the ownership changes with respect to the pending applications are part of a larger transaction and are taken for legitimate business purposes.<sup>278</sup>

### F. Universal Service Fund Receipts

#### 1. Background

106. The Federal-State Joint Board on Universal Service (“Joint Board”) and the Commission have each recognized and addressed the need to control the explosive growth in high-cost universal service support disbursements to competitive eligible telecommunications carriers (“ETCs”).<sup>279</sup> Based on the recommendations of the Joint Board, on May 1, 2008, the Commission adopted an interim, emergency cap on the amount of high-cost support that competitive ETCs may receive.<sup>280</sup> Specifically, as of August 1, 2008, total annual high-cost competitive ETC support for each state is capped at the level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis.<sup>281</sup> The Commission also adopted two limited exceptions from the specific application of the interim cap.<sup>282</sup> First, a competitive ETC will not be subject to the interim cap to the extent it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent local exchange carrier.<sup>283</sup> Second, the Commission adopted a limited exception to competitive ETCs serving tribal lands or Alaska Native regions.<sup>284</sup> The interim cap will remain in place only until the Commission adopts comprehensive high-cost universal service reform, which is currently being considered in a pending rulemaking.<sup>285</sup>

<sup>277</sup> See, e.g., *Cingular Order* ¶ 275; *MCI-WorldCom Order* ¶ 226; Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd 19985 ¶ 247 (1997); Applications of Craig O. McCaw and AT&T for Consent to Transfer of Control of McCaw Cellular Communications, Inc. and Its Subsidiaries, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, ¶ 137 n.300 (1994) (*McCaw-AT&T Order*).

<sup>278</sup> See, e.g., Applications of PacifiCorp Holdings, Inc., Transferor, and Century Telephone Enterprises, Inc., Transferee, For Consent to Transfer Control of PacificTelecom, Inc., a Subsidiary of PacifiCorp Holdings, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 8891, ¶ 45 (1997); *McCaw-AT&T Order* ¶ 137 n.300.

<sup>279</sup> See Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Recommended Decision*, 22 FCC Rcd 8998, 8998 ¶ 1 (Fed.-State Jt. Bd. 2007) ; see also *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19520 ¶ 8.

<sup>280</sup> High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Order*, 23 FCC Rcd 8834 (2008) (“*USF Interim Cap Order*”).

<sup>281</sup> A summary was published in the Federal Register on July 2, 2008, establishing an effective date of August 1, 2008. See 73 Fed. Reg. 37882 (July 2, 2008).

<sup>282</sup> *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1.

<sup>283</sup> *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1.

<sup>284</sup> *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1.

<sup>285</sup> *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1. The Commission is required by statute to act within one year after receiving a recommendation from the Joint Board. 47 U.S.C. § 254(a)(2). See also High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, (continued....)

107. On November 3, 2008, Sprint Nextel filed a letter offering a voluntary commitment whereby, at the end of a five-year transition, it would not seek USF support for its wireless service unless such request is supported by an actual cost analysis or by whatever mechanism the Commission may subsequently adopt.<sup>286</sup> Specifically, Sprint Nextel commits that effective 30 days after the date of consummation of the transaction, but no later than December 31, 2008, its total federal high-cost support would be reduced by 20%, and by an additional 20% per year for the subsequent four years.<sup>287</sup> Sprint Nextel states that if the Commission adopts a different transition mechanism or a successor mechanism to the current equal support rule under which support is currently capped in a rulemaking of general applicability, then that rule of general applicability would apply instead.<sup>288</sup>

## 2. Discussion

108. The issue concerns the growth of the high-cost fund. Based on our view that it would be beneficial to control the growth of the high-cost fund, we condition our approval of the transaction on Sprint Nextel's compliance with its voluntary commitment to phase out its pursuit of universal service high cost support over the next five years, unless specifically supported by an actual cost analysis. We find that such condition will further ensure that consummation of the proposed merger serves the public interest, convenience and necessity. We note that the Commission is currently considering this issue, along with others, in a rulemaking on a comprehensive high-cost universal service reform.<sup>289</sup>

### G. E-911

#### 1. Background

109. On November 20, 2007, the Commission released a Report and Order ("*Location Accuracy Order*") requiring wireless licensees subject to section 20.18(h) of the Commission's rules,<sup>290</sup> which specifies the standards for wireless Enhanced 911 (E911) Phase II location accuracy and reliability, to satisfy these standards at a geographical level defined by the coverage area of a Public Safety Answering Point ("PSAP").<sup>291</sup> On March 25, 2008, the United States Court of Appeals for the District of Columbia Circuit (Court) stayed the *Location Accuracy Order*.<sup>292</sup>

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*Notice of Proposed Rule Making*, 23 FCC Rcd 1531 (2008) ("*Joint Board Recommended Decision NPRM*"); High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Notice of Proposed Rule Making*, 23 FCC Rcd 1467 (2008) ("*Identical Support NPRM*"); High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Notice of Proposed Rule Making*, 23 FCC Rcd 1495 (2008) ("*Reverse Auctions NPRM*") (collectively "*USF Reform NPRMs*").

<sup>286</sup> *Ex Parte* Letter from Lawrence M. Krevor, Vice President, Spectrum, Sprint Nextel Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 3, 2008) at 1. ("*Sprint Nextel USF Ex Parte Letter*").

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> See *USF Reform NPRM*, 23 FCC Rcd at 1531 ¶ 1. We also acknowledge that currently there is an interim cap imposed on ETC support for all USF recipients, including Verizon Wireless and ALLTEL, which superseded the interim cap adopted in the *ALLTEL-Atlantis Order*. *USF Interim Cap Order*, 23 FCC Rcd at 8837 n.21 (2008).

<sup>290</sup> 47 C.F.R. § 20.18(h).

<sup>291</sup> Wireless E911 Location Accuracy Requirements, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling, 911 Requirements for IP-Enabled Service Providers, PS Docket (continued....)

110. On July 14, 2008, the Association of Public-Safety Communications Officials – International (“APCO”) and the National Emergency Number Association (“NENA”) filed an *ex parte* letter addressing handset-based and network-based location accuracy criteria, stating that they “are now willing to accept compliance measurements at the county level” rather than at the PSAP level, and that “[p]ublic safety and wireless carriers are in current discussions on a number of other issues associated with E-911.”<sup>293</sup> On July 31, 2008, the Commission filed with the Court a Motion for Voluntary Remand and Vacatur, which requested remand based on the proposals contained in the July 14, 2008 *Ex Parte* Letter and “[i]n light of the public safety community’s support for revised rules.”<sup>294</sup> Following this filing with the Court, NENA, APCO, and Verizon Wireless submitted a written *ex parte* letter with the Commission with proposed new wireless E911 rules.<sup>295</sup> Taken together, these proposals reflect agreement among those parties for new E911 accuracy requirements for both handset-based and network-based technologies, in order to achieve E911 accuracy compliance at the county-level.

111. On October 29, 2008, Sprint Nextel filed a letter in this proceeding affirming its commitment to providing E911 with its current two-way interconnected CMRS voice offerings, as well as future interconnected two-way VoIP service it may offer over the New Clearwire network.<sup>296</sup> It made a voluntary commitment, as a condition for approval of this transaction, to meet the standards set forth in the August 20, 2008 E911 *Ex Parte* Letter.<sup>297</sup> Specifically, Sprint Nextel voluntarily agreed as follows:

- Two years after consummation of the New Clearwire transaction, on a county-by-county basis, 67% of Phase II calls must be accurate to within 50 meters in all counties; 80% of Phase II calls must be accurate to within 150 meters in all counties, provided, however, that Sprint Nextel may exclude up to 15% of counties from the 150 meter requirement based upon heavy forestation that limits handset-based technology accuracy in those counties.

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No. 07-114, CC Docket No. 94-102, WC Docket No. 05-196, *Report and Order*, 22 FCC Rcd 20105 (2007) (*Location Accuracy Order*).

<sup>292</sup> *Rural Cellular Association and T-Mobile USA, Inc. v. Federal Communications Commission and the United States of America*, No. 08-1069, slip op. at 1 (DC Cir. Mar. 25, 2008) (per curiam).

<sup>293</sup> *Ex Parte* Letter from Willis Carter, President, APCO, and Ronald Bonneau, President, NENA, to Derek Poarch, Chief, Public Safety and Homeland Security Bureau, FCC, PS Docket No. 07-114, (July 14, 2008), at 1-2 (“July 14, 2008 E911 *Ex Parte* Letter”).

<sup>294</sup> Motion of Federal Communications Commission for Voluntary Remand and Vacatur, *Rural Cellular Association and T-Mobile et al v. Federal Communications Commission and United States of America*, No. 08-1069 (D.C. Cir. July 31, 2008). On September 17, 2008, the Court granted the Commission’s request. Order Granting Mot. Rem. (Sept. 17, 2008).

<sup>295</sup> *Ex Parte* Letter from Brian Fontes, CEO, NENA, Robert M. Gurs, Director, Legal and Government Affairs, APCO, and John T. Scott, II, VP and Deputy General Counsel, Verizon Wireless to The Honorable Kevin Martin, Chairman, Federal Communications Commission, PS Docket No. 07-114, (Aug. 20, 2008), at 1 (“August 20, 2008 E911 *Ex Parte* Letter”). In addition, the parties pledged to convene, “within 180 days of the Commission’s order [adopting new location accuracy standards], an industry group to evaluate methodologies for assessing wireless E9-1-1 location accuracy for calls originating indoors and report back to the Commission within one year.” *Id.*

<sup>296</sup> *Ex Parte* Letter from Lawrence M. Krevor, Vice President, Spectrum, Sprint Nextel Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 29, 2008) at 1. (“Sprint Nextel E911 *Ex Parte* Letter”).

<sup>297</sup> *Id.*

- Eight years after consummation of the New Clearwire transaction, on a county-by-county basis, 67% for Phase II calls must be accurate to within 50 meters in all counties; 90% of Phase II calls must be accurate to within 150 meters in all counties, provided, however, that Sprint Nextel may exclude up to 15% of counties from the 150 meter requirement based upon heavy forestation that limits handset-based technology accuracy in those counties.<sup>298</sup>

## 2. Discussion

112. In light of the important public safety benefits to be derived from improved E911 location accuracy requirements, and Sprint Nextel's voluntary commitments in this proceeding, we condition our approval of this transaction on Sprint Nextel's compliance with the E911 location accuracy proposal set forth in the Sprint Nextel E911 *Ex Parte* Letter.<sup>299</sup> We find that such condition will further ensure that consummation of the proposed merger serves the public interest, convenience and necessity.

## VII. PUBLIC INTEREST BENEFITS

### A. Background

113. In addition to assessing the potential competitive harms of the proposed Sprint Nextel-Clearwire transaction, we also consider whether the respective combination of these companies' wireless operations is likely to generate verifiable, merger-specific public interest benefits.<sup>300</sup> In doing so, we ask whether the resulting combined entity would be able, and would be likely, to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that would not be pursued but for the combination.<sup>301</sup>

114. As discussed below, we conclude that the proposed transaction will result in major merger-specific public interest benefits. Because we have concluded that the merger will not result in any competitive harm in a market, we easily conclude that approval of the transaction would be in the public interest.

115. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."<sup>302</sup>

<sup>298</sup> *Id.* at 1-2.

<sup>299</sup> *Id.*

<sup>300</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12504 ¶ 91; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760 ¶ 200; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 105; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

<sup>301</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12504 ¶ 91; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760 ¶ 200; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 105; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

<sup>302</sup> E.g., *Verizon-RCC Order*, 23 FCC Rcd at 12504-12505 ¶ 93; *AT&T-Dobson Order*, 22 FCC Rcd at 20330 ¶ 75; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760 ¶ 201; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 107; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204; see also *DOJ/FTC Merger Guidelines* § 4.

Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms.<sup>303</sup>

116. The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction- or merger-specific. This means that the claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>304</sup> Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude.<sup>305</sup> In addition, as the Commission has noted, “the magnitude of benefits must be calculated net of the cost of achieving them.”<sup>306</sup> Furthermore, as the Commission has previously explained, “benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.”<sup>307</sup> Third, the Commission has stated that it “will more likely find marginal cost reductions to be cognizable than reductions in fixed

<sup>303</sup> See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12504-12505 ¶ 93; *AT&T-Dobson Order*, 22 FCC Rcd at 20330-31 ¶ 75; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760-61 ¶ 201; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 107; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204.

<sup>304</sup> See *XM-Sirius Order*, 23 FCC Rcd at 12383 ¶ 75; *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599-600 ¶ 205; *accord EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 189; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20063-64 ¶ 158 (“Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”); Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14825 ¶ 255 (“Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger . . .”). Cf. *DOJ/FTC Merger Guidelines* § 4.

<sup>305</sup> See *XM-Sirius Order*, 23 FCC Rcd at 12383 ¶ 75; *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564-65 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

<sup>306</sup> See *XM-Sirius Order*, 23 FCC Rcd at 12383 ¶ 75; *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

<sup>307</sup> See *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190).

cost.”<sup>308</sup> The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.<sup>309</sup>

117. Finally, the Commission applies a “sliding scale approach” to evaluating benefit claims.<sup>310</sup> Under this sliding scale approach, where potential harms appear “both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”<sup>311</sup> On the other hand, where potential harms appear less likely and less substantial, as in this case, we will accept a lesser showing to approve the transaction.<sup>312</sup>

118. Applicants cite a series of public interest benefits that they claim will flow from the transaction. They claim that the transaction will provide a new nationwide broadband platform and will lead to deployment of the world’s first nationwide WiMAX network.<sup>313</sup> New Clearwire’s WiMAX network will allegedly deliver customers speeds of up to 6 Mbps across the country.<sup>314</sup> Applicants claim that they cannot create such a network without this transaction because they lacked the necessary funding and the nationwide footprint.<sup>315</sup> In that regard, New Clearwire will receive \$3.2 billion from a series of investors upon closing.<sup>316</sup> Applicants also claim that the transaction will result in various operational efficiencies by allowing the parties to share equipment, transmitter sites, and back office systems, and obtain volume discounts on equipment.<sup>317</sup> They also cite their commitment to an open network.<sup>318</sup>

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<sup>308</sup> See *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331-32 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205. See also *DOJ/FTC Merger Guidelines* § 4.

<sup>309</sup> See *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206; see also *DOJ/FTC Merger Guidelines* § 4.

<sup>310</sup> See *XM-Sirius Order*, 23 FCC Rcd at 12384 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12506 ¶ 95; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 77; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 203; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 109; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206.

<sup>311</sup> See *XM-Sirius Order*, 23 FCC Rcd at 12384 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12506 ¶ 95; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 77; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671-72 ¶ 203; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565-66 ¶ 109; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206. Cf. *DOJ/FTC Merger Guidelines* § 4 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

<sup>312</sup> See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12384 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12506 ¶ 95; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 77; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 203; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11566 ¶ 109.

<sup>313</sup> See Public Interest Statement at 16-17.

<sup>314</sup> See *Id.* at 17.

<sup>315</sup> See *Id.* at 23.

<sup>316</sup> See *Id.* at 24.

<sup>317</sup> See *Id.* at 24-25.



119. Sprint Nextel and Clearwire also claim that the transaction will allow them to make more intensive use of the 2.5 GHz band. They claim they will exceed the buildout obligations imposed in the *Sprint-Nextel Merger Order* and cover 140 million people by the end of 2010.<sup>319</sup> They contend that the irregular shape of many BRS and EBS licensing areas, together with a requirement that can cause a licensee to reduce power at transmitter sites if the transmitters have line-of-sight to adjacent license areas,<sup>320</sup> can create large “exclusion zones” which it make it difficult or impossible for operators to provide service.<sup>321</sup> Sprint Nextel and Clearwire contend that the transaction will allow them to provide service without having exclusion zones between their operations.<sup>322</sup> They also argue that the transaction will make it easier for them to have enough contiguous spectrum for the 10 and 20 megahertz channels they need to meet consumer demand.<sup>323</sup>

120. Another benefit claimed by Sprint Nextel and Clearwire is New Clearwire’s proposal to “permit a number of unaffiliated firms to purchase access to its advanced wireless broadband service on a non-exclusive wholesale basis and resell that service directly to consumers.”<sup>324</sup> Several investors in New Clearwire will become mobile virtual network operators (MVNOs) that will compete with New Clearwire and enhance their products and services with wireless broadband mobility.<sup>325</sup> Applicants claim that New Clearwire’s commitment to allow MVNOs on its network will enhance competition and consumer choice.<sup>326</sup>

121. Finally, Sprint Nextel and Clearwire argue that the transaction will benefit EBS licensees by providing them with a lessee with a stronger financial footing.<sup>327</sup> They also allege that the transaction

(Continued from previous page) \_\_\_\_\_

<sup>318</sup> See *Id.* at 26-28.

<sup>319</sup> See *Id.* at 20. In the *Sprint Nextel Merger Order* the Commission conditioned our grant of the Application on Sprint Nextel’s commitment to meet the following two milestones. “First, within four years from the effective date of [the *Sprint/ Nextel Merger Order*], the merged company will offer service in the 2.5 GHz band to a population of no less than 15 million Americans. This deployment will include areas within a minimum of nine of the nation’s most populous 100 BTAs and at least one BTA less populous than the nation’s 200<sup>th</sup> most populous BTA. In these ten BTAs, the deployment will cover at least one-third of each BTA’s population. Second, within six years from the effective date of [the *Sprint Nextel Merger Order*], the merged company will offer service in the 2.5 GHz band to at least 15 million more Americans in areas within a minimum of nine additional BTAs in the 100 most populous BTAs, and at least one additional BTA less populous than the nation’s 200<sup>th</sup> most populous BTA. In these additional ten BTAs, the deployment will cover at least one-third of each BTA’s population. Accordingly, based on the four and six year commitments, within six years of the effective date of this Order applicants will offer service in the 2.5 GHz band to at least 30 million American in at least 20 BTAs, at least two of which are rural communities outside of the nation’s top 200 most populous BTAs. The deployment in each of the twenty BTAs will cover at least one-third of each BTA’s population.” *Sprint Nextel Merger Order*, 20 FCC Rcd 14028-14029 ¶¶ 164-166.

<sup>320</sup> See 47 C.F.R. § 27.1221.

<sup>321</sup> See Public Interest Statement at 30-34.

<sup>322</sup> See *Id.* at 33.

<sup>323</sup> See *Id.* at 34.

<sup>324</sup> See *Id.* at 21.

<sup>325</sup> See *Id.*

<sup>326</sup> See *Id.* at 21-22.

<sup>327</sup> See *Id.* at 35-36.

will make it easier for EBS licensees to provide traditional video services and offer EBS licensees new tools for learning and development.<sup>328</sup>

122. EBS licensees that filed comments in the proceeding largely support the arguments made by Sprint Nextel and Clearwire. They contend that current leases with Sprint Nextel and Clearwire offer EBS licensees the financial freedom to offer more quality programming in local communities.<sup>329</sup> Supporting commenters contend that New Clearwire will accelerate the deployment of the first nationwide mobile WiMAX broadband network creating a unique opportunity to deliver new broadband products and services in the 2.5 GHz band that will enhance the way the EBS community can access the Internet – combining mobility and speed.<sup>330</sup> They also allege that the transaction enables New Clearwire to receive essential funding to build and operate the critical broadband infrastructure needed to deploy the next generation nationwide mobile wireless broadband services that will benefit the community and for which neither entity alone possesses sufficient spectrum and financial resources to deploy alone.<sup>331</sup> According to Northeast Georgia Regional Educational Service and Clarke County School District, New Clearwire will have the capacity, scale and money necessary to unleash the promise of the historically underutilized 2.5 GHz band to the benefit of the educational community, consumers and businesses.<sup>332</sup> They also believe that combining Sprint Nextel and Clearwire’s 2.5 GHz spectrum licenses maximizes spectrum buildout capability.<sup>333</sup> Clarendon Foundation and Shekinah Network suggest that the merger would speed arrival of a wireless broadband pipe by advancing the core public interest objectives of the Commission’s comprehensive rewrite of the 2.5 GHz band plan and associated rules, and by accelerating the evolution and deployment of new WiMAX-based wireless broadband services.<sup>334</sup>

## B. Discussion

123. This transaction will create major transaction-specific benefits by facilitating the development of a nationwide WiMAX network. The Applicants have shown that the merger can speed the arrival of a wireless broadband pipe that will increase competition and consumer choice, make

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<sup>328</sup> See *Id.* at 36.

<sup>329</sup> See, e.g., Letter from Henry S. Smith, Supervisor, St. Bernard Parish School Board to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from John Primeau, President, North American Catholic Educational Programming Foundation, Inc. to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

<sup>330</sup> See, e.g., Comments of Atlanta Interfaith Broadcasters, Inc. (filed Jul. 24, 2008); Letter from Frank T. Brogan, President, Florida Atlantic University to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

<sup>331</sup> See, e.g., Letter from Mike Wooten, Director of Public Relations and Communications, Clarke County School District to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from Monsignor John P. Caulfield, Pastor, St. Joseph’s Church, Diocese of Orlando to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

<sup>332</sup> See, e.g., Letter from Russell W. Cook, Executive Director, Northeast Georgia Regional Educational Service to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from Mike Wooten, Director of Public Relations and Communications, Clarke County School District to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

<sup>333</sup> See, e.g., Letter from Kemp R. Harshman, President, Clarendon Foundation to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from Charles McKee, President, Shekinah Network to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

<sup>334</sup> See, e.g., WCA Comments; Joint EBS Comments in Support of the Proposed New Clearwire Transaction (filed Jul. 24, 2008).

possible new services, and promote the availability of broadband for all Americans. Sprint Nextel and Clearwire have also shown that these benefits are unlikely to occur without the transaction because they lack the nationwide footprint and capital needed to build the network. The combination of their license assets and investments in New Clearwire that will occur as a result of this transaction will address those problems. Unlike in many transactions, where existing operations will be combined, this transaction will facilitate the provision of a new, advanced WiMAX-based network throughout the country.

124. Furthermore, the transaction will facilitate the intensive use of the 2.5 GHz band, which will help EBS licensees and other stakeholders in the 2.5 GHz band. We note the enthusiastic support this transaction has received from educators.

125. The conditions we impose will maximize the public interest benefits resulting from this transaction. Our conditions concerning E911 and universal service serve important public policy objectives and ensure that the transaction will lead to public interest benefits. We also note that none of the parties who filed petitions and comments have identified any specific public interest harm that could result from this transaction.

126. Three *ex parte* commenters argue against the public interest benefits of a Sprint Nextel - Clearwire merger, stating that the underlying transfers have both a potential upside and downside and that the review process seems disadvantageous to the general public.<sup>335</sup> However, in their filings Bella Mia, PDQLink and PART 15.org all failed to adequately demonstrate how any potential disadvantages outweighed the benefits of this transaction to the public interest.<sup>336</sup>

127. We conclude that the transaction is in the public interest because it will facilitate the development of a nationwide WiMAX network and there are no corresponding public interest harms. Using the sliding-scale approach described above, we easily conclude that the benefits are sufficient to conclude that the transaction is in the public interest. Furthermore, we believe the conditions we have imposed pursuant to Sprint Nextel's voluntary commitments will maximize the chances that public interest benefits will flow from this transaction.

## VIII. CONCLUSION

128. As discussed above, we find that public interest harm is unlikely as a result of this transaction. We also conclude that there are significant potential public interest benefits and that a grant of the Applications would be in the public interest, convenience, and necessity.

## IX. ORDERING CLAUSES

129. Accordingly, having reviewed the applications, the petitions, and the record in this matter, IT IS ORDERED that, pursuant to Sections 4(i) and (j), 309, 310(b), 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(b), 310(d), the applications for the transfer of

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<sup>335</sup> See PDQLink *Ex Parte* Request to Deny at 1-2; Bella Mia *Ex Parte* Request to Deny at 1-2; PART 15.org *Ex Parte* Request to Deny at 1-2.

<sup>336</sup> We also reject the arguments of those parties that our review of these applications was "rushed" or improper in any way. See PDQLink *Ex Parte* Request to Deny at 5; Bella Mia *Ex Parte* Request to Deny at 4-5; PART 15.org *Ex Parte* Request to Deny at 1-2. Our public notice seeking comment on the Applications provided the 30-day period for comments that we normally provide for commenting on major transactions. Furthermore, these commenters have not stated what additional information or analysis the Commission would need. PART15.org suggests that the Applicants should be required to meet an accelerated buildout schedule in order to ensure the spectrum does not lie fallow. See PART 15.org *Ex Parte* Request to Deny at 4. We find no transaction-specific basis for requiring any further acceleration of currently applicable buildout requirements. Although these parties failed to file timely comments, we have fully considered their arguments.

control of licenses from Sprint Nextel Corporation to Clearwire Corporation are GRANTED, to the extent specified in this *Memorandum Opinion and Order* and subject to the conditions herein.

130. IT IS FURTHER ORDERED that the above grant shall include authority for Clearwire Corporation to acquire control of: (a) any Broadband Radio Service, Educational Broadband Service, Local Multipoint Distribution Service, or microwave license or authorization issued to Sprint Nextel Corporation and its subsidiaries during the Commission's consideration of the transfer of control applications or the period required for consummation of the transaction following approval; (b) construction permits held by such licensees that mature into licenses after closing; and (c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

131. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petitions to Deny the transfer of control of licenses from Sprint Nextel Corporation to Clearwire Corporation filed by Rural Cellular Association and AT&T, Inc. are DENIED for the reasons stated herein.

132. IT IS FURTHER ORDERED that this *Memorandum Opinion and Order* SHALL BE EFFECTIVE upon adoption. Petitions for reconsideration under Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this *Memorandum Opinion and Order*.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX  
COMMENTING PARTIES AND PETITIONERS**

**Petitions to Deny Filed by:**

Rural Cellular Association  
AT&T, Inc.

**Comments in Opposition Filed by:**

Bella Mia, Inc. (*Ex Parte* Request)  
Part 15 Organization (*Ex Parte* Request)  
Prime Directive Quick Link (*Ex Parte* Request)  
SouthernLINC Wireless  
Vonage Holdings Corporation

**Comments Filed by:**

Acadia Parish School Board  
Albion Community Development Corporation  
Albright College  
Anaheim City School District  
Archdiocese of Los Angeles  
Association for Continuing Education  
Atlanta Interfaith Broadcasters  
Blake Twedt/Broadband Spectrum Development III LLC/Broadband Mobile Data IV LLC  
Board of Governors of the Colorado State University System  
Calcasieu Parish School Board  
California Human Development Corp.  
Caritas Telecommunications  
Catholic Television Network  
CBeyond, Inc.  
Centimeter Wave Television, Inc.  
Chicago Instructional Technology Foundation  
Clarendon Foundation, Inc.  
Clarke County School District/Clarke Central High School  
Colorado Public Television, Inc.  
Comfort Independent School District  
Community Telecommunications Network  
Connecticut Public Broadcasting, Inc.  
Dallas County Community College  
Delta Band Service, LTD  
DigitalBridge Communications Corp.  
Diocesan Telecommunications Corp.  
Dr. Michael R. Kelley

Educational Broadband Corp.  
Escondido Union School District  
Florida Atlantic University  
Fortitude Ventures, LLC  
Franciscan Canticle, Inc.  
Gallaudet University  
Gasconade County R-1 Schools  
Georgia Institute of Technology  
Gryphon Wireless  
Hampton Roads Educational Telecommunication Association, Inc.  
Heritage Christian University  
Hispanic Chamber of Commerce  
Hispanic Information and Telecommunications Network, Inc.  
The Hubbard Family Trust  
ideastream  
IDT Spectrum LLC  
Illinois Institute of Technology  
Indiana Higher Educations Telecommunications System  
Innovative Technology Education Fund  
Jackson County School System/Board of Education  
Jefferson Davis Parish School Board  
Johnson & Wales University  
Junior College District of Metropolitan Kansas City, Missouri  
Knippa Independent School District  
La Roche College  
League of United Latin American Citizens  
Leeton R-X School District  
Level 3 Communications  
Louisiana Independent Higher Education Research Foundation  
Lowndes County Public Schools  
Mars Communications, Inc.  
Mississippi Authority for Educational Television  
Missouri Baptist College  
National Association of Women Business Owners (NAWBO®)  
National Educational Broadband Services Association  
Nederland Independent School District  
New Trier Township High School District 203  
Newburgh City School District  
NorCal Services for Deaf & Hard of Hearing (*late-filed*)  
North American Catholic Educational Programming Foundation, Inc.  
North Carolina Association of Community College Presidents  
Northeast Georgia RESA  
Northern Indiana Educational Service Center

Oregon Wireless Instruction Network/Oregon State University  
Oceanside Unified School District  
Okaloosa-Walton College Foundation, Inc.  
Oklahoma State University/Oklahoma Distance Learning Association  
Patrick J. Burns  
Point Pleasant Beach Board of Education  
Private Networks, Inc.  
Region IV Education Service Center  
Reorganized School District No. R-IV of Pettis County  
Richard P. West  
Rockne Educational Foundation  
Rockne Educational Television  
Round Top-Carmine Independent School District 78954  
Rutgers, The State University of New Jersey  
San Diego Community College District  
San Diego County Office of Education  
San Diego State University  
SCE Broadband FL, LLC  
SCE Broadband NW, LLC  
SCE Broadband, TX, LLC  
School District No. 1 in the City and County of Denver and the State of Colorado  
School District of Oakfield  
Shekinah Network  
Sioux Valley Wireless  
Springfield Local Schools  
St. Bernard Parish School Board  
St. Joseph's Church/Diocese of Orlando  
St. Louis Community College  
St. Norbert College  
Texas State Technical College – Harlingen  
Texas State Technical College – Waco  
The Board of Trustees of the Leland Stanford Junior University  
The Foundation for Excellence in Louisiana Public Broadcasting  
The Free State Foundation, Randolph J. May, President  
The Knowledge Network of Greater Omaha  
The Learning Paradigm, Inc.  
The Louisiana Educational Television Authority  
The Northern Arizona University Foundation, Inc.  
The School Board of Miami-Dade Florida  
The Source for Learning  
University of Central Florida  
University of Maryland  
University of Southern Indiana

US Pan Asian American Chamber of Commerce (USPAACC)  
Victoria Independent School District  
Views On Learning, Inc.  
Vista Unified School District  
Walton County School District  
Warren County R-3 School District  
Weld County School District RE-1  
Wellsville-Middletown R-1  
Weslaco Independent School District  
Wireless Communications Association International, Inc.  
Xanadoo, LLC

**Joint Opposition to Petitions to Deny Filed by:**

Sprint Nextel Corporation and Clearwire Corporation

**Oppositions to Petitions to Deny and Comments Filed by:**

Google, Inc.  
Intel Corporation  
The Source for Learning and the Indiana Higher Education Telecommunication System  
National EBS Association (NEBSA)  
Hispanic Information and Telecommunications Network, Inc. (HITN)  
Media Access Project Opposition to AT&T's Petition to Deny (*Late Filed*)  
Catholic Television Network  
Public Interest Spectrum Coalition

**Replies to Opposition and Comments Filed by:**

AT&T, Inc.  
Hispanic Information and Telecommunications Network, Inc.  
Rural Cellular Association  
Wireless Communications Association International, Inc.  
Motorola, Inc.



**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

Re: Applications of Sprint Nextel Corporation and Clearwire Corporation, WT Docket No. 08-94; Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket No. 08-95; Applications of Union Telephone Company, Cellco Partnership d/b/a Verizon Wireless for 700 MHz Band Licenses, Auction No. 73

Broadband and the advanced applications that it enables have become increasingly critical drivers of both economic and social development. With these three items, we take significant steps to advance the roll out of wireless broadband Internet access to consumers across the country, and promote long term investment in broadband infrastructure that will support increased innovation, expanded services and economic growth in the future. These items also advance networks that are more open to devices and applications, as we implement the open platform requirements of the 700 MHz C Block and approve a transaction that will advance the promises of New Clearwire to allow applications and devices of the consumers' choice on these networks. Taken together with our action today approving the use of the television "white spaces" for unlicensed wireless use, the future of wireless broadband is indeed bright.

These transactions will provide significant benefits to wireless consumers. Specifically Verizon will now be able to fill in holes in its coverage area and provide a more robust national wireless service to its customers. Notably, Verizon is required to divest overlapping areas, numbering more than 100.

With respect to roaming, the commitment proposed by Verizon Wireless to extend its roaming obligations provides added certainty to small and rural carriers. In addition, Verizon Wireless has made additional commitments with respect to continuing the Alltel GSM network and allowing carriers to choose which roaming agreement to continue. This should all help smaller, rural and regional carriers providing roaming to their consumers.

Consumers are also beneficiaries of a new entrant into the wireless market, Clearwire. This provider will enhance competition and solidify wireless as an additional broadband platform. Moreover, Clearwire committed to embrace more open networks, one open to all applications and devices. This approach will spur innovation and give greater choice and improved services to consumers.

I am also very pleased with the voluntary commitments made by Sprint Nextel and Verizon Wireless with respect to the Universal Service Fund and E911 location accuracy. With respect to E911, these companies have taken a leadership role in the industry and are following through on their promises to meet E911 location accuracy obligations at the county-level. This is an issue that is critical to consumers and first responders, and an issue that has been a priority to me as Chairman. This commitment will allow first responders to reach those in need more quickly, and find callers more consistently. This is clearly in the public interest.

With respect to USF, the phase-out of high-cost competitive ETC funding to these carriers will provide significant benefits to the fund, while also providing certainty to the carriers. High-cost support for competitive ETCs has grown rapidly over the last several years, placing extraordinary pressure on the federal USF. In 2001, high-cost universal service support totaled approximately \$2.6 billion. By 2007, the amount of high-cost support had grown to approximately \$4.3 billion per year. In recent years, this growth has been due mostly to increased support provided to competitive ETCs, which receive high-cost support based not on their own costs, but on the per-line support of the incumbent LECs. Competitive ETC support, since 2001, has grown from under \$17 million to over \$1.18 billion—an annual growth rate of over 100 percent. The offers made by the carriers here provide certainty for the carriers, while reducing the pressure on the fund over time.

Finally, I note that the industry has made considerable progress with respect to the issue of openness of devices and applications. With the issuance of Verizon Wireless's 700 MHz licenses the open platform obligations we imposed on the C Block become a step closer to implementation. The availability of third party handsets with the capability of downloading the applications of the user's choice will provide substantial opportunities and competitive pressure to ensure that the benefits of open platforms are realized. Moreover, coupled with the considerable openness plans that New Clearwire intends to include as it rolls out its new network and our action today on making available the white spaces, there is a ripe field for wireless innovation and growth.

**SEPARATE STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: Sprint Nextel Corporation and Clearwire Corporation Applications For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 08-94*

Today's item enables the creation of a new competitor in the broadband Internet access market. That's good news—really good news. Of particular importance—given the haunting economic times in which we find ourselves—the new company will have access to billions of dollars of capital to build out its new WiMAX network. This network will provide millions of Americans with an additional option in the market for high-speed fixed broadband access—which is currently a duopoly or worse between cable and phone companies. The new network will also provide millions of Americans with a new option for mobile broadband Internet access—also currently a duopoly or worse between incumbent providers. So this counts as very good news for American consumers.

Equally important, the new network we enable today will be contractually committed to important principles of openness. Device manufacturers, application developers and content providers will not need to seek permission to innovate from a centralized network operator. Companies that seek to improve their devices can simply install a WiMAX radio, or design their software or Website for use on a WiMAX handheld device, secure in the knowledge that customers of the new company will be able to use these products as their designers intended—and on a fast, widely-deployed and robust network. This evolution will continue the important work in encouraging openness that this Commission began in the 700 MHz auction. Indeed, the new company's commitment to providing wholesale access actually goes beyond our 700 MHz conditions. This too counts as very good news for American consumers and innovators.

Finally, today's item requires Sprint Nextel to meet important E911 location accuracy benchmarks and to open its books to ensure that its Universal Service Fund support is commensurate with its real costs of providing service. As I stated in my previous statement, these are two reforms that I have supported in other proceedings and I am glad that consumers will benefit from them here.

Despite my enthusiasm for today's Order, I must note one element that I would have preferred to handle differently. The Commission has a statutory duty to prevent undue consolidation in the wireless marketplace. A spectrum cap—or the far less robust “spectrum screen” that the Commission, over my objection, uses instead—is a critical tool to enforcing this policy. As I have stated before, I believe the right way to account for new bands that have been made available for advanced wireless services would be through a comprehensive, industry-wide proceeding that would establish appropriate rules for valuing the relative desirability of different spectrum. But we have not conducted such a proceeding. Instead, we simply raise the spectrum screen in an ad hoc fashion merger-by-merger. While I appreciate the willingness of my colleagues to fashion a spectrum screen for this transaction that somewhat reasonably (but far from perfectly) reflects the current marketplace realities, I think that a general rulemaking is still necessary and desirable and by far the better option.

Many thanks to the Bureau for their hard work on this item under demanding time constraints.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *In the Matter of Applications of Sprint Nextel Corporation and Clearwire Corporation for Consent To Transfer Control of Licenses, Authorizations and Leases, WT Docket No. 08-94, Memorandum Opinion and Order.*

I join my colleagues today in approving the transfer of control applications filed by Sprint Nextel and Clearwire. Under this agreement, the entities will combine their next generation broadband assets to form a new entrant into the marketplace for mobile broadband service. Because the Applicants have demonstrated that this transaction will enhance competition within the relevant market and be of significant benefit for consumers, I approve this Order.

The Applicants' plans to deploy a nationwide mobile WiMAX network optimized for high-bandwidth data transfers will provide consumers with a new option for quality, high speed service, and will spur competition by adding an additional service provider for wireless broadband services. My support for this order is based on the significant public interest benefits arising from the development of this nationwide network and the potential for increased competition and consumer choice.

In any transaction, as mandated under Sections 214(a) and 310(d) of the Communications Act, the Commission must analyze the record evidence and determine whether the public will be better served by the transaction being approved or being denied. Thus, the Commission balances the potential public interest benefits against any public interest harms. The Commission always seeks to accelerate private sector deployment of advanced services, promote diversity of license holdings, maintain a high level of quality in communications services, and manage the spectrum in the public interest. Approval of this transaction between Sprint Nextel and Clearwire will allow us to uphold these key goals while being mindful of the rapidly changing nature of the technology and communications industries.

The Commission has closely examined whether this transaction is cause for competitive concern, and has found that no competitive harm would result regarding concentration in the markets that these companies serve. In concluding that this transaction will not increase market concentration in the product market for mobile broadband, the Order aptly considers that the resulting entity, New Clearwire, is a new entrant just at the beginning of the process of deploying next-generation networks based on WiMAX standards and not an established provider with significant build out. I believe we take the right course by recognizing that this is not a merger in which two established providers with spectrum holdings and facilities-based operations are merging, but rather a transaction in which one entity brings spectrum, facilities and customers to the table, while the other offers critical spectrum input. I am pleased that I was able to work closely with my colleagues to assess the potential competitive effects of the proposed transaction by properly and carefully delineating the appropriate market definitions and input market for spectrum.

Additionally, because our job is to assess whether the proposed transaction will advance the public interest, we have fully considered the public interest benefits that will flow from this transaction. In addition to a new nationwide broadband platform from which a nationwide WiMAX network will be deployed, the Applicants cite gains in operational efficiencies and a more intensive use of the 2.5GHz spectrum band allowing for coverage of 140 million people by the end of 2010. The Applicants contend that New Clearwire's planned development of WiMAX will serve as a new alternative broadband platform, and will spur competition with fixed broadband service that incumbent wireless broadband operators are providing, as well as developing technologies from other industry leaders. New Clearwire submits that its commitment to allow mobile virtual network operators on its network and to open its network for consumers to use devices and download applications, content and services, are benefits that

will flow directly to consumers in the form of enhanced competition and consumer choice.

Given our determination that this transaction is unlikely to result in competitive harm, and in light of the significant benefits consumers will reap as a result of this transaction, including increased competition, greater consumer choice and new services, I support this item in its entirety.

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

*Re: Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer Control of Licenses and Authorizations*

This order approves the transfer of licenses in a transaction involving Sprint Nextel, Clearwire, and a consortium of other companies that provide services across a variety of platforms – including Google, Intel Corporation, Bright House Networks, Comcast Corporation, and Time Warner. The resulting entity, New Clearwire, will be a provider of broadband services across a nationwide WiMax network. As I stated in my comments on the Verizon Wireless – Alltel transaction, when reviewing such deals, the Commission must balance the risks of anticompetitive harm to consumers against the potential for a variety of pro-consumer benefits. In this particular transaction, the weight of the evidence leans solidly to approval.

In reviewing the potential anticompetitive harm from a transaction, the Commission must consider the extent to which the merging parties are competitors, or may compete with each other in the future. As an emerging broadband provider, New Clearwire has few if any operational assets in place that compete with those of Sprint Nextel. Of course, over time, the wireless broadband service of one firm could compete with the other, which must be considered in evaluating the competitive effects of this transaction. But on the whole, given the nascent status of Clearwire and the relatively early stages of wireless broadband services, the competitive analysis is straightforward.

Indeed, I am hopeful that New Clearwire will become a textbook example of the “third pipe” – the much-anticipated wireless provider of broadband that competes with existing wireline and cable services. While all competition in the provision of broadband is welcome, New Clearwire claims that it will offer speeds up to 6 Mbps, which may be especially effective in encouraging faster speeds from wireline and cable providers, as well as wireless companies that may provide broadband. Accordingly, I am pleased to support this item.

I thank the staff of the Wireless Bureau for their review of this transaction and for all they do to ensure a competitive market in wireless services.

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL  
CONCURRING IN PART**

RE: Sprint Nextel Corporation and Clearwire Corporation; Applications For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 08-94, *Memorandum Opinion and Order*, FCC 08-259

I am very pleased to approve this transaction, which joins together two existing licensees to create a new entrant capable of injecting new and meaningful competition into the wireless broadband marketplace. Today's action paves the way for Sprint, Clearwire and other investors to partner to deploy a nationwide wireless broadband network in the 2.5 GHz band, something that these companies have not been able to accomplish individually. New Clearwire will possess the spectrum breadth and depth, technical expertise, and financial resources necessary to construct a nationwide wireless broadband network. By rationalizing the spectrum holdings of Sprint and Clearwire, New Clearwire is well-poised to create efficiencies, spread the substantial business risk, and raise the financing necessary to deploy a competitive mobile WiMax service that will deliver advanced wireless services to millions of American consumers.

I am pleased that today's order refrains from analyzing this application as if Sprint and Clearwire are currently competitors. Although the potential for such competition is there, this approach is not yet ripe given the nascent stage of the converged wireless broadband market. Moreover, New Clearwire is a market entrant competing against established players with large, existing subscriber bases. Similarly, with respect to our treatment of the 2.5 GHz spectrum, the Commission correctly recognizes that encumbrances and lease commitments make unworkable a simple megahertz-to-megahertz comparison of this band with other spectrum bands for purposes of our spectrum aggregation screen. In other words, we're properly comparing apples to apples.

I do not oppose the open access and wholesale commitments set forth in this order given that the parties offered this approach voluntarily and from day one. As I've said for some time, the private sector long ago recognized the weaknesses of walled garden business plans well before the Commission started to issue unnecessary mandates in this area.

I am, however, concurring in part due to the universal service condition imposed here. First, this condition is not merger-specific. In addition, while I may agree with some of the universal service policies contained in this order, I see no need to potentially prejudice the Commission's ongoing rulemaking on this important matter. This is especially the case given that I, along with three of my colleagues, have made public our commitment to wrap up our work on universal service reform no later than December 18, 2008. Moreover, the text of today's order is unclear as to whether our action today would be superseded by action in the universal service proceeding.

At the end of the day, the next two years present a unique window for New Clearwire to take advantage of its time-to-market opportunity. I congratulate the company and its investors. I look forward to the day in the not too distant future that WiMax and LTE will compete head-to-head.