

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

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

ORDER ON RECONSIDERATION

Adopted: December 18, 2012

Released: December 19, 2012

By the Commission:

I. INTRODUCTION

1. In this Order on Reconsideration, we dismiss in part and otherwise deny a petition for reconsideration, filed by the Public Interest Spectrum Coalition (PISC),¹ challenging certain aspects of our order approving certain transfer of control applications filed by Sprint Nextel Corporation ("Sprint Nextel") and Clearwire Corporation ("Clearwire").² To the extent petitioner seeks reconsideration of our decision to include the Broadband Radio Service (BRS) in the spectrum aggregation screen used to evaluate transactions, we dismiss that argument in the context of this transaction because petitioner lacks standing and because this is the wrong forum for addressing the application of the spectrum screen to future transactions.³ To the extent petitioner requests reconsideration of the Commission's refusal to require Commission review of certain agreements between New Clearwire Corporation ("New Clearwire") and entities providing financial backing, we deny the petition.

II. BACKGROUND

2. On November 7, 2008, the Commission released an order approving the applications filed by Sprint Nextel, Clearwire, and certain of their subsidiaries (collectively, "the Applicants") seeking approval of the transfer of control of licenses, authorizations and de facto transfer spectrum leases in the

1 Petition for Reconsideration of the Public Interest Spectrum Coalition (filed Dec. 8, 2008) (Petition). PISC "consists of . . . [t]he CUWin Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDUCAUSE, Free Press (FP), the International Association of Community Wireless Networks (IACWN), Media Access Project (MAP), the National Hispanic Media Coalition (NHMC), the New America Foundation (NAF), the Open Source Wireless Coalition (OSWC), Public Knowledge (PK), and U.S. PIRG." Id. at 1 n.1.

2 See Sprint Nextel Corporation and Clearwire Corporation, WT Docket No. 08-94, Memorandum Opinion and Order, 23 FCC Rcd 17570 (2008) (Sprint-Clearwire Approval Order).

3 In any event, we reject this argument for the same reasons that we have rejected a similar argument by PISC and others in the context of the Verizon Wireless - ALLTEL transaction. See Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket No. 08-95, Order on Reconsideration, FCC 12-155 (rel. Dec. 19, 2012) ("Verizon-ALLTEL Reconsideration Order") at ¶¶ 8-9.

2.5 GHz Band and certain associated bands to New Clearwire, a new corporation.⁴ The Commission found 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.⁵ In making that analysis, the Commission concluded that 55.5 megahertz of Broadband Radio Services (“BRS”) spectrum (*i.e.*, all BRS spectrum except the Middle Band Segment 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 the Commission’s revised, market-specific spectrum screen.⁶ The Commission also concluded that the transaction would result in major public interest benefits by facilitating the provision of a nationwide WiMAX-based network that would lead to increased competition, greater consumer choice, and new services.⁷ The Commission adopted a series of conditions designed to ensure that the anticipated benefits of this transaction would, in fact, be realized.⁸

3. In conducting its public interest analysis, the Commission noted the parties’ commitment that “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.”⁹ In response to that commitment, PISC asked the Commission to 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 be submitted to the Commission.¹⁰ PISC further asked that such contract changes be placed on notice and comment as if they were contained in an application for major modification under Section 308 of the Communications Act, and allowed only if approval of the change would serve the public interest.¹¹ The Commission declined to impose the conditions requested by PISC, stating that such conditions would be burdensome on the parties and were unprecedented.¹²

4. On December 8, 2008, PISC filed a petition for reconsideration of the *Sprint-Clearwire Approval Order*. PISC states that it “fully supports the ultimate conclusion of the Commission to permit the transfer.”¹³ Although PISC’s earlier *ex parte* comments described above did not address the spectrum screen, its petition first seeks reconsideration of the decision to include BRS spectrum in the spectrum screen, alleging that “[t]he inclusion of BRS spectrum in the screen effectively raises the screen to the benefit of the largest incumbents and to the detriment of members of the public who benefit from greater competition and of potential competitors such as Clearwire.”¹⁴ PISC also challenges the Commission’s

⁴ *See id.*

⁵ *Id.* at 17572 ¶ 3.

⁶ *Id.* at 17596-99 ¶¶ 61-70.

⁷ *Id.* at 17572 ¶ 3.

⁸ *Id.*

⁹ *Id.* at 17608 ¶ 96.

¹⁰ *Id.* at 17609 ¶ 98, *citing* Ex Parte Comments of the Public Interest Spectrum Coalition, WT Docket No. 08-94 (filed Sep. 18, 2008) at 6.

¹¹ *Id.*

¹² *Id.* at 17609-17610 ¶ 101.

¹³ Petition at 2.

¹⁴ *Id.* at 2-3.

refusal to impose the contractual review conditions PISC had requested.¹⁵ PISC claims that the Commission misunderstood its previous request. According to PISC, it had asked the Commission to (1) review existing agreements to ensure that the promised open network benefits were in the existing agreements, and (2) require the applicants to “submit any changes to the *specific portions* of those agreements related to the ‘open network benefits’ for public notice and comment.”¹⁶ PISC also argues that its request is analogous to reporting requirements imposed in the AOL-Time-Warner merger proceeding.¹⁷ Finally, PISC argues that the condition is necessary because the Commission allegedly “has yet to clarify how it will enforce the subscriber rights outlined in the *Internet Policy Statement*.”¹⁸

5. Clearwire believes that it is unnecessary to reconsider the inclusion of BRS into the spectrum screen because the Commission has other tools to evaluate transactions and because excluding BRS from the screen would not have changed the Commission’s approval of the transaction.¹⁹ AT&T, Inc. supports the Commission’s decision to include BRS in the spectrum screen because it believes that “BRS spectrum meets all of the FCC’s criteria for inclusion in the input market for mobile broadband and telephony.”²⁰ Sprint argues that the spectrum screen should be reviewed in the context of a separate proceeding.²¹ Both Sprint and Clearwire oppose PISC’s request for a condition requiring review of contracts regarding network openness. Clearwire states that a condition is unnecessary because its WiMAX network is inherently open by nature.²² Sprint argues that PISC’s proposed review process is unclear and “would subject New Clearwire to unacceptable administrative delays as it seeks to deploy its service and respond to a fast-changing competitive environment.”²³

III. DISCUSSION

6. With respect to the inclusion of BRS in the spectrum screen, we decline to grant the relief requested in the PISC petition. We first dismiss the petition insofar as it seeks reconsideration of the screen that the Commission applied in the Sprint-Clearwire transaction.²⁴ PISC agrees with the Commission that the transaction was properly approved.²⁵ PISC thus is not a “party ... or any other person aggrieved or whose interests are adversely affected” under section 405 of the Act and lacks

¹⁵ *Id.* at 4-6.

¹⁶ *Id.* at 5 (emphasis in original).

¹⁷ *Id.* at 6.

¹⁸ *Id.*

¹⁹ Comments in Opposition of Clearwire Corporation (filed Dec. 22, 2008) (Clearwire Opposition) at 2-4.

²⁰ AT&T, Inc. Partial Opposition to Public Interest Spectrum Coalition Petition for Reconsideration (filed Dec. 18, 2008) (AT&T Opposition) at 1.

²¹ Opposition and Reply to PISC Petition for Reconsideration, Sprint Nextel Corporation (filed Dec. 18, 2008) (Sprint Opposition).

²² *Id.* at 5.

²³ Sprint Opposition at 3-4.

²⁴ Procedurally, we note that the PISC Petition does not comply with Section 1.106(f) of the Commission’s Rules because it was not served on the parties to the proceeding. See 47 C.F.R. § 1.106(f). See AT&T Opposition at 8 n.26, Clearwire Opposition at 1 n.1. In this instance, because we find that the petition does not raise any meritorious claims, we need not decide whether it should be dismissed based on that procedural deficiency.

²⁵ Petition at 2 n.2; see *Ex Parte* Comments of PISC in WT Docket No. 08-94 at 6 (filed Sept. 18, 2008).

standing to challenge the Commission's decision to include BRS in the spectrum screen.²⁶ Here, PISC cannot claim that the Commission's decision to consent to the Sprint-Clearwire transaction caused it any injury because it approves of the Commission's ultimate decision.

7. We also decline to grant PISC's petition to the extent that its concern relates to how the inclusion of BRS in the spectrum screen for review of the Sprint-Clearwire transaction may affect the Commission's consideration of future transactions. First, we note that, under its current case-by-case approach, the Commission evaluates the appropriate market definitions and input market for spectrum at the time applications are filed for a transaction, and interested parties are free to raise any concerns they may have, including concerns regarding what spectrum should be included in the input market, based on the marketplace and technological developments as they may have evolved at the time of the transaction. Thus, our decision on this petition does not prejudice the ability of PISC, or any other party, to argue in subsequent transactions that we should modify the spectrum screen to be applied in that transaction or that we should employ other approaches to evaluate spectrum aggregation. We will fully consider those arguments in our review of those transactions.²⁷ Second, we have recently initiated a rulemaking proceeding to revisit the mobile spectrum holdings policies that apply to both transactions and auctions.²⁸ In that proceeding, we specifically seek comment on whether we should adopt an approach, applicable to future transactions, "that accounts for differing characteristics of spectrum bands."²⁹

8. While PISC states that it fully supports the transfer in this proceeding, it continues to seek to impose conditions on the grant of Commission approval to the transfer. However, we affirm the Commission's prior decision not to impose the contractual review provisions requested by PISC. Under PISC's proposal, New Clearwire would face a unique burden of reviewing its agreements to determine which provisions relate to its open network commitments, and then submit for prior Commission approval changes that affect those provisions, subject to a notice and comment process. PISC advances no factual basis for imposing such a burden on New Clearwire in the competitive circumstances at issue here. Furthermore, while PISC attempts to clarify its request, there still appears to be considerable uncertainty as to the scope and number of agreements that would be subject to the proposed conditions. While PISC may be correct that there would be a small number of agreements requiring Commission review, New Clearwire may be required to review a larger number of agreements in order to determine what must be filed with the Commission. In addition, the review, public notice, and comment procedures proposed by PISC are fundamentally different from the reporting requirements imposed in the AOL-Time Warner merger cited by PISC. While the condition cited by PISC required status reports on AOL's efforts to create an interoperable instant messaging application, its proposed condition would prevent New

²⁶ 47 U.S.C. § 405(a). In assignment or transfer proceedings, "a party does not have standing unless it can establish that a grant of the application complained of would result in, or be reasonably likely to result in, some injury of direct, tangible or substantial nature." See, e.g., *Teleprompter Corp. Theta Cable of California Northwest, Inc.*, 87 FCC 2d 531, 537-38 (1981). Contrary to PISC's argument (Petition at 2 n.2), we do not believe that any potential claim of legal precedent from our decision would justify standing under *Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998). The issue in that case was whether a party can appeal conditions to the grant of its own application, and when there is a futility exception to Section 1.110's requirement first to seek reconsideration thereof.

²⁷ We note that we have recently rejected similar arguments made by PISC concerning the inclusion of BRS spectrum into the screen in the context of the Verizon Wireless – ALLTEL transaction. See *Verizon-ALLTEL Reconsideration Order*, *supra* at ¶¶ 8-9.

²⁸ See Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269, *Notice of Proposed Rulemaking*, 27 FCC Rcd 13477 (2012) (*Mobile Spectrum Holdings NPRM*).

²⁹ *Id.* ¶ 35.

Clearwire's agreements from taking effect prior to receiving Commission approval.³⁰ Finally, PISC's petition relies on the argument that "the Commission has not sufficiently clarified how it will apply to *Internet Policy Statement* in the wireless context."³¹ We note that since the *Sprint-Clearwire Approval Order*, the Commission has adopted rules addressing Open Internet issues.³² For all of the foregoing reasons, we deny this aspect of the PISC Petition.

IV. CONCLUSION AND ORDERING CLAUSE

9. We dismiss the Petition to the extent it challenges the inclusion of BRS into the spectrum screen because PISC lacks standing to raise such a claim in this proceeding given its full support for the Commission's decision to grant these applications, and because the Petition is not an appropriate procedural vehicle for addressing PISC's concerns about the application of the spectrum screen to future transactions. We deny the Petition and affirm the Commission's prior decision not to impose the contractual review provisions requested by PISC because such conditions would be unduly burdensome in the absence of any showing of need by PISC in the circumstances of this transaction, and in light of subsequent adoption by the Commission of its Open Internet rules addressing such issues.

10. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration of the Public Interest Spectrum Coalition filed on December 8, 2008 IS DISMISSED IN PART AND DENIED IN PART.

11. IT IS FURTHER ORDERED that WT Docket No. 08-94 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰ See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, CS Docket No. 00-30, *Memorandum Opinion and Order*, 16 FCC Rcd 6547, 6629 ¶ 197 (2001).

³¹ Petition at 6.

³² See Preserving the Open Internet; Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, *Report and Order*, 25 FCC Rcd 17905 (2010), *pet. for recon. and appeals pending*.