

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
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| 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 |) | WT Docket No. 03-66 RM-10586 |
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| Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures |) | WT Docket No. 03-67 |
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| Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions |) | MM Docket No. 97-217 |
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| Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico |) | WT Docket No. 02-68 RM-9718 |
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**OPPOSITION OF SBC COMMUNICATIONS INC.
TO PETITIONS FOR RECONSIDERATION**

SBC Communications Inc. (“SBC”) hereby submits its Opposition to requests in Petitions for Reconsideration of the Commission’s *Report and Order and Further Notice of Proposed Rule Making* in the above-captioned proceeding (“*Report and Order*”)¹ that it (a) bar incumbent

¹ *In re 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, et al.*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd. 14165, *modified in Order*, 19 FCC Rcd. 22284 (2004).

local exchange companies (“ILECs”) from holding BRS licenses² and (b) specify that the first proponent of a transition plan or the proponent with the most spectrum will be the sole proponent of a transition plan.³ The Commission’s decision to continue to allow ILECs to hold BRS licenses is well reasoned, is consistent with precedent, and will facilitate bringing competitive broadband services to the American public in a timely manner. The proposal to permit a single entity effectively to control the transition does not adequately protect the legitimate interests of other licensees.

Introduction

SBC provides, through its operating subsidiaries and other interests, a broad range of communications services, both wireline and wireless, throughout the United States. SBC is actively exploring the use of wireless technologies to enhance the services it offers and to expand its ability to provide broadband services in rural areas. SBC participated in this proceeding by filing Reply Comments urging the Commission, *inter alia*, to allow ILECs to continue to hold MDS (now BRS) spectrum.

Making broadband service available to rural America will further well-established Congressional policies reflected in Section 706 of the Telecommunications Act of 1996, which requires the FCC and state commissions to encourage deployment of broadband services. In enacting that provision, Congress recognized the importance of ensuring that all Americans have access to such services. The President has lent his support to that goal, pledging to “make sure

² See, e.g., Pet. for Recon. of Wireless Direct Broadcast System (“WDBC”), WT Dkt. No. 03-66 at 5 (Jan. 10, 2005); Pet. for Recon. of Speednet, L.L.C., WT Dkt. No. 03-66 at 4–5 (Jan. 10, 2005); Pet. for Recon. of C&W Enterprises, Inc., WT Dkt. No. 03-66 at 5 (Jan. 10, 2005).

³ See Pet. for Partial Recon. of Nextel Communications, WT Dkt. No. 03-66 at 11–14 (Jan. 10, 2005) (“Nextel Petition”).

broadband technology is available in every corner of America by the year 2007.”⁴ Similarly, the FCC has set rural broadband deployment as an important policy goal,⁵ and has been aggressively pursuing that goal—including promoting broadband service over power lines (“BPL”),⁶ by satellite,⁷ and, with this proceeding, by terrestrial wireless. Because terrestrial wireless services are particularly well suited to the task of providing broadband service to a geographically dispersed population, the public interest will be served best by ensuring that BRS spectrum is available to strong competitors who can quickly deploy economical and robust service offerings to rural Americans. ILECs fit that role well, and the Commission should not deny them the opportunity to fulfill that goal by precluding them from holding this spectrum or adopting rules that would impair their ability to offer broadband service to rural America.

I. The Commission Should Not Preclude Local Telephone Companies From Holding BRS Spectrum.

In its *Report and Order*, the Commission rejected arguments that local telephone companies should be barred from holding BRS spectrum. It held that, in assessing whether to restrict access to spectrum, the Commission’s “overall goal has been to determine whether the

⁴ <http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html> (last visited 2/22/05).

⁵ See, e.g., *In re: Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, Report and Order and Further Notice of Proposed Rule Making, 19 FCC Rcd. 19,078 at ¶¶ 1–3 (rel. Sept. 27, 2004).; News Release, *FCC Chairman Powell to Visit Tennessee Telecom Facilities; Visit Will Emphasize How Rural Access to Broadband Can Spur Economic Development*, 2004 WL 1432311 (June 25, 2004).

⁶ See, e.g., *2004 Biennial Regulatory Review*, Staff Report, Office of Engineering and Technology, ET Docket No. 04-178 at ¶ 7 (January 5, 2005), available at 2005 WL 39116; *In re: Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems*, Report and Order, 19 FCC Rcd. 21265, 21271 ¶ 13 (rel. Oct. 28, 2004).

⁷ See, e.g., News Release, “*Making the Rural Connection*” *FCC Rural Satellite Forum Final Details*, 2004 WL 89918 (Jan. 20, 2004).

restriction is necessary to ensure that consumers will receive communications services in a spectrum-efficient manner and at reasonable prices.” *Report and Order*, ¶ 175 (footnotes omitted). In making that determination, the Commission stated that it evaluates whether “there is a significant likelihood of substantial competitive harm in specific markets,” and whether “eligibility restrictions will be effective in addressing such harms.” *Id.* In the case of BRS spectrum, the Commission concluded that the proponents of the ILEC restriction had not made the required “compelling showing that regulatory intervention” was necessary. Specifically, it held that they “have not cited relevant market facts and circumstances to demonstrate that the eligibility of [ILEC] providers is likely to result in substantial competitive harm or that, even if specific markets experienced harm to competition, the eligibility restrictions they advocate would be effective in eliminating that harm.” *Id.*

The petitioners seeking reconsideration of the Commission’s decision have not cured that fundamental defect. Rather, WDBS and the other petitioners urging that ILECs be excluded from the BRS spectrum merely argue in a conclusory manner and without support that ILECs desire “to acquire [BRS] spectrum for the sole purpose of thwarting competition,”⁸ and charge that if allowed to hold this spectrum, ILECs will warehouse the spectrum “to delay or quash competition.”⁹ While the petitioners attempt to justify their failure to support their claims by arguing that, because the use of this spectrum for data services is recent, there are “no relevant market facts and circumstances to cite,” that assertion ignores the Commission’s consistent view,

⁸ *See*, Pet. for Recon. of Wireless Direct Broadcast System, WT Dkt. No. 03-66 at 4–5 (Jan. 10, 2005); Pet. for Recon. of Speednet, L.L.C., WT Dkt. No. 03-66 at 4–5 (Jan. 10, 2005); Pet. for Recon. of C&W Enterprises, Inc., WT Dkt. No. 03-66 at 5 (Jan. 10, 2005).

⁹ *Id.*

reflected again in the *Report and Order*,¹⁰ that regulatory restraints are justified only where market forces fail and regulatory intervention is necessary to assure competition.¹¹

The burden thus was not on the Commission to justify its decision to allow the marketplace to operate, but on those seeking to limit competition by restricting ILEC participation. Indeed, since ILECs have been eligible to hold MDS (now BRS) spectrum for many years, the petitioners' suggestion that ILECs be barred in the future from holding BRS spectrum would constitute a change in the rules, something the Commission must support either by evidence or a reasoned justification for the change.¹² The petitioners have provided neither. Accordingly, the Commission should deny the relief sought for the same reasons it refused to preclude ILECs from holding BRS licenses in the *Report and Order*.

The petitioners' request suffers from an additional defect: it treats cable companies and ILECs together, even though the two present very different situations. As the Commission recognized in the *Report and Order*, Section 613 of the Communications Act limits cable company ownership of MDS and lease of ITFS spectrum, but is silent about telephone company ownership.¹³ Thus, any restriction on telephone company ownership of BRS licenses would constitute an expansion of Congressional policy, and one that is inconsistent with Congress's

¹⁰ *Report and Order*, ¶ 175.

¹¹ *See In re Implementation Of Competitive Bidding Rules To License Certain Rural Service Areas*, Report and Order, 17 FCC Rcd 1960, ¶ 13 (2002); *In re Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd. 9610, ¶ 2 (2001); *In re Implementation Of The Telecommunications Act Of 1996: Telecommunications Carriers' Use Of Customer Proprietary Network Information And Other Customer Information*, Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273, 14 FCC Rcd. 15550, ¶ 88 n.204 (1999).

¹² *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983); *Fox Television Stations, Inc. v FCC*, 280 F.3d 1027, 1044-45 (2002).

¹³ *See Report and Order*, ¶ 174.

objective in passing Section 613 to foster an alternative to the monopoly provision of multichannel video services by cable companies. Nevertheless, assuming, *arguendo*, the Commission could, given that Congressional decision,¹⁴ extend the prohibition to ILECs, it cannot do so without substantial evidence to justify that restriction.¹⁵ The petitioners have not supplied any such evidence, and there is none—ILECs do not have market power with respect to broadband local loops.¹⁶

Even if the Commission decides to revisit the issue, the petitioners' claims that allowing ILECs to hold BRS licenses will be anticompetitive is meritless. To the contrary, as SBC demonstrated in its Reply Comments,¹⁷ allowing ILECs to hold BRS licenses will advance Congress's and the Commission's interest in assuring the widespread availability of broadband services to the American public.¹⁸ Use of BRS spectrum will enable ILECs to provide broadband service to rural areas and urban areas outside the reach of DSL service. DSL can only be used for broadband service within a limited area around a central office, and many potential subscribers lie outside its reach. Those customers can be served by the wireless broadband technology made practical by the rule changes adopted in this proceeding. Thus, allowing ILECs

¹⁴ *Cf. Motion Picture Association Of America, Inc., v. FCC*, 309 F.3d 796, 807 (D.C. Cir. 2002).

¹⁵ *See Fox Television Stations, Inc.*, 280 F.3d at 1044–45.

¹⁶ FCC, *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, GN Dkt. No. 04-54, FCC 04-208 at 8 (Sept. 9, 2004), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf (last visited Feb. 22, 2005) (“*Fourth Report*”).

¹⁷ *See Reply Comments of SBC Communications, Inc.*, WT Dkt. No. 03-66 at 7–9 (filed Oct. 23, 2003).

¹⁸ *See generally* Telecommunications Act of 1996, Pub. Law 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153 (codified at 47 U.S.C. § 157 nt.).

to acquire BRS licenses will facilitate achieving President Bush's goal of making broadband technology "available in every corner of America by the year 2007."¹⁹

In addition, allowing ILECs to hold BRS spectrum will assure more robust competition for broadband access. According to the Commission's most recent report on High-Speed Services for Internet Access, cable companies provide more than 18.6 million homes with cable modem service, compared to only 11.4 million for DSL. They also provide 57.3% of the high-speed lines with 200 kbps (or greater) capacity in one direction and 74.8% of the high-speed lines with 200 kbps (or greater) capacity in both directions. Local telephone companies had only 35.1% and 16.1% of those lines.²⁰ Further, cable systems offering cable modem service today pass more than 95 million homes, or 88 percent of U.S. households.²¹ These systems reach homes that ILEC cannot serve with DSL, but which can be served by BRS technology. Hence, allowing ILECs to hold BRS licenses will assure increased competition to cable modem services.²²

¹⁹ The White House, President Bush: High Tech Improving Economy, Health Care, Education, available at <http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html> (last visited 2/22/05).

²⁰ *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, FCC 05-13, ¶¶ 45-46 (rel. Feb. 4, 2005); *High-Speed Services for Internet Access: Status as of June 30, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau, p. 2, Charts 2 & 4 (rel. Dec. 22, 2004) available at <http://www.fcc.gov/wcb/iatd/recent.html> (last visited Feb. 22, 2005).

²¹ National Cable & Telecommunications Association, Broadband Services, available at <http://www.ncta.com/Docs/PageContent.cfm?pageID=37> (last visited 2/22/05).

²² An estimated 25 million homes and small businesses lack access to terrestrial broadband services. *Fourth Report* at 23 (citing an estimate by WildBlue Communications). Over a quarter of the zip codes with the lowest population density and almost seven percent of all zip codes reported no high-speed lines as of December 2003. *Id.* at 30. Over 20 percent of rural households with dial-up Internet connections list "Not Available" as the reason they do not have broadband service. Nat'l Telecomms. & Information Admin., U.S. Dep't of Commerce, *A Nation Online: Entering the Broadband Age* at 2, 14 (2004), available at <http://www.ntia.doc.gov/reports/anol/index.html> (last visited Feb. 22, 2005).

Finally, the petitioners' warehousing claim is meritless. First, the very purpose of this proceeding was to free spectrum from antiquated regulations so that service providers would have the flexibility to offer innovative and economical services to the public.²³ This flexibility ensures that, after the transition, the 2.5 GHz spectrum at issue here is simply too valuable not to use. Second, given their competitive disadvantage vis-à-vis cable, telephone companies are not in a position to warehouse valuable spectrum that can be used to expand their ability to reach customers, particularly those they cannot otherwise serve. In all events, the Commission has less restrictive regulatory alternatives to prevent warehousing. It is currently considering, in its *Further Notice of Proposed Rule Making*, the imposition of construction or service mandates as a condition of any renewal and could, if experience warrants, impose those obligations as stand-alone requirements if market forces are not sufficient to assure that the spectrum is used.

II. Transition Planning Procedures Should Assure That The Legitimate Interests of All Affected Licensees Are Protected

In its Petition for Partial Reconsideration, Nextel proposes a number of changes to the transition plan that are designed to provide greater clarity to the transition process and to expedite the process. *See* Nextel Petition at 8–19. SBC is sympathetic to Nextel's desire for clarity and to assure that the transition moves forward with reasonable dispatch. However, Nextel's proposal that the first proponent of a transition plan be the sole proponent, *id.* at 13, and its alternative proposal that, "if two or more prospective proponents cannot agree to act as co-proponents within ninety days, then the entity with the most licensed and leased spectrum within

²³ *See* individual statements of the Commissioners *In re: 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 (Rel. July 29, 2004)

the transitioning area would become the sole proponent,” *id.* at 14, should be rejected. Both of these proposals are clearly designed to allow Nextel, with its large number of BRS licenses and concomitant EBS leases, to become the driving force in any transition.²⁴ More significantly, those proposals give one licensee the ability to essentially dictate the terms of any transition and do not assure that the legitimate interests of all the licensees affected by the transition plan are considered.

Under the Commission’s transition procedures, any transition plan will require substantial coordination between and among the licensees affected by the transition. Proponents are required to notify affected licensees that they are considering becoming a proponent of a transition plan by seeking specific information from every licensee in the transition area, and must notify those licensees that it is submitting a transition plan to the FCC.²⁵ If other licensees wish to become proponents, each potential proponent must consult with other potential proponents to see if they can reach an accommodation.²⁶ Once a plan is filed, affected licensees are then given the opportunity to submit alternative plans.²⁷

²⁴ According to the Commission’s ULS database, Nextel hold 198 BTA licenses and 1260 site-based BRS licenses. Those licenses arguably make Nextel the largest single holder of BRS spectrum and associated EBS excess capacity leases in the country. In addition, Sprint holds some 85 BTA and 391 site-based BRS licenses. According to the Public Interest Statement filed with the Sprint-Nextel merger application, the combined entity will have BRS spectrum in approximately 368 BTAs. *See* Application of Nextel Communications, Inc. and Sprint Corporation for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act, FCC File No. 0002031766, WT Docket No. 05-63 (Filed Feb. 8, 2005), Attachment 1 to Attachment E.

²⁵ 47 C.F.R. § 27.1231(f).

²⁶ *Id.* at § 27.1231(d)(6).

²⁷ *Id.* at § 27.1231(d).

While this procedure may not permit a proponent to move with the speed Nextel obviously desires, it assures instead that every affected licensee has a reasonable opportunity to participate in the planning process and to protect its legitimate interests. Allowing the first proponent to drive the transition will not provide any comparable assurance, while mandating that the licensee with the most spectrum shall be the proponent in the event of a dispute does not protect smaller licensees whose interests may be adversely affected by the larger licensee's plans. Indeed, if the licensee with the largest number of licenses is the default proponent in the event of a dispute, that licensee has no incentive to negotiate with others; it can stonewall for the 30-day negotiation period suggested by Nextel and then go forward with its own plans.

SBC recognizes, as did the Commission, that the current transition procedures can result in delays if a licensee is obstinate and refuses to agree to a reasonable transition plan. However, the Commission can address that concern, as it has proposed, by adopting the use of safe harbors. If additional safe harbors are required, the Commission can adopt them as necessary. As a practical matter, it is likely that a pattern of acceptable transition plans will evolve over time and parties will be able to transition with dispatch based on one of those models. Accordingly, SBC urges the Commission to reject Nextel's proposals concerning the selection of the proponent for any transition plans and to retain the current procedures with such minor modifications as may be appropriate, such as establishing reasonable periods for responses.

Conclusion

For the reasons set forth above, SBC urges the Commission to deny again the requests to preclude telephone companies from acquiring BRS licenses and to reject Nextel's proposal concerning the selection of the proponent for a transition plan.

Respectfully submitted,

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