

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

In the Matter of)
)
Nextel Communications Inc. and)
Sprint Corporation Seek FCC Consent) WT Docket No. 05-63
to Transfer Control of Licenses and)
Authorizations)

PETITION TO DENY
of
CONSUMER FEDERATION OF AMERICA
and
CONSUMERS UNION

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Pursuant to sections 214 and 309 (d) of the Communications Act of 1934, as amended, and section 1.939 of the Commission's rules, the Consumer Federation of America^{1/} (CFA) and Consumers Union (CU)^{2/} respectfully submit this Petition to Deny the applications, submitted by Nextel Communications, Inc. ("Nextel") and Sprint Corporation ("Sprint") that seek approval of the Federal Communications Commission ("FCC" or "Commission") to transfer control to Sprint of the licenses held directly and indirectly by Nextel.^{3/}

PETITIONERS

FCC approval of this transaction will harm consumers by allowing one entity to control an excessive amount of mobile broadband communications spectrum in many markets throughout the country. The public and consumer interest of the 50 million members of the groups who form the Consumer Federation of America, who

^{1/} The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individuals. CFA is online at www.consumerfed.org.

^{2/} Consumers Union ("CU"), publisher of Consumer Reports, is an independent, non-profit testing and information organization serving only consumers. CU is online at www.consumersunion.org.

^{3/} As discussed more fully below, we object to Sprint-Nextel holding all of the spectrum in the band 2496-2690 MHz (the "2.5 GHz Band"), in addition to the other spectrum that the combined entity will control. Accordingly, we object specifically to the application that bears the file number 0002040097, which references all the licenses in the 2.5 GHz Band. However, the FCC should not grant any of the applications for transfer of control unless it conditions its action on the requirement that Sprint-Nextel divest its 2.5 GHz holdings.

are a substantial part of the public, could be affected by the anticompetitive harms identified in the petition.

In addition, CFA and CU have participated in dozens of similar proceedings before this agency. CFA and its member groups have routinely participated in license transfer proceedings at the Federal Communications Commission as both petitioners and interveners.^{4/} Similarly, CFA and CU have actively participated in

^{4/} Among the most recent activities are, “Petition to Deny of Consumer Federation of America and Consumers Union,’ *In the Matter of Application for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services Inc., and Its Subsidiaries to Cingular Wireless Corporation*, WT Docket No. 04-70, May 3, 2004; “Petition to Deny of Arizona Consumers Council, Association Of Independent Video And Filmmakers, CalPIRG, Center For Digital Democracy, Center For Public Representation, Chicago Consumer Coalition, Civil Rights Forum On Communications Policy, Citizen Action Of Illinois, Consumer Action, Consumer Assistance Council, Consumer Federation Of America, Consumer Fraud Watch, Consumers United/Minnesotans For Safe Food, Consumers Union, Consumers’ Voice, Democratic Process Center, Empire State Consumer Association, Florida Consumer Action Network, ILPIRG (Illinois), Massachusetts Consumers Coalition, MassPIRG, Media Access Project, Mercer County Community Action, National Alliance For Media Arts And Culture, MontPIRG, New York Citizens Utility Board, NC PIRG, North Carolina Justice And Community Development Center, OsPIRG(Oregon State), Oregon Citizens Utility Board, Texas Consumer Association, Texas Watch, United Church Of Christ, Office Of Communication, Inc., US PIRG, Virginia Citizens Consumer Council, WashPIRG, Wisconsin Consumers League,” *In the Matter of Application for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, April 29, 2002; “Petition to Deny of Consumers Union, the Consumer Federation of America, Media Access Project and Center for Media Education,” *In the Matter of Application of America Online, Inc. and Time Warner for Transfer of Control*, CS 00-30, April 26, 2000; “Reply comments of the Consumer Federation of America, Consumers Union and AARP, before the Federal communications Commission, before the Federal Communications Commission, *Proposed Transfer of Control SBC and Ameritech*, CC Docket” No. 98-141, November 16, 1998.

numerous proceedings dealing with spectrum policy, which is the focal point of this petition.^{5/}

^{5/} "Economic And Legal Reply Comments Of New America Foundation, Media Access Project, Free Press, Champaign-Urbana Community Wireless Project, Center For Digital Democracy, Common Cause, Consumer Federation Of America, Educause, And Prometheus Radio Project," *In the Matter of Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 04-186, ET Docket No. 02-380, January 31, 2005;"Comments of New America Foundation, Austin Wireless City Project, Consumers Union, Seattle Wireless, Consumer Federation of America, Educause, Tribal Digital Village, Free Press, Center for Digital Democracy, Center for Neighborhood Technology, Champaign-Urbana Community Wireless Network, Common Assets, Common Cause, Metrix Communication, LLC., Newbury Open.Net, NYCWireless, Office of Communications of the United Church of Christ, Inc., Personal Telco, Prometheus Radio Project, Public Knowledge, Benton Foundation, Wireless Tech Radio, *In the Matter of Unlicensed Operations in the TV Broadcast Bands, Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, ET Docket No. 04-186, ET Docket No. 02-380; November 30, 2004;"Comments of NYCWireless, New America Foundation, Free Press, Prometheus Radio Project, Center for Digital Democracy, Media Alliance, The Dandin Group, Consumer Federation of America, Public Knowledge, The electronic Privacy Information Center, and the Champaign-Urbana Community Wireless Project, *In the Matter of Unlicensed Operation in the Band 3650-3700 MHz, Additional Spectrum for Unlicensed Devices Below 900 MHz and the 3 GHz Band, Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band*, ET Docket No. 04-151, ET Docket No. 02-380, ET Docket No. 98-237, July 28, 2004; "Ex Parte Comments Of Prometheus Radio Project, Consumer Federation Of America, Public Knowledge, Champaign-Urbana Community Wireless Project, Benton Foundation, Electronic Frontier Foundation, New America Foundation, The Dandin Group Wireless Tech Radio And NYCWireless," *In the matter of Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands*, ET Docket No. 03-237, June 18, 2004; "Reply Comments Of The New America Foundation; Media Access Project; Rockwood Area School District, Somerset County, Pennsylvania; AMA Techtel Communications; Consumers Union; Consumer Federation Of America; Center For Digital Democracy; Public Knowledge; Benton Foundation; Emenity, Inc.; Roadstar Internet, Inc.; NYCWireless.Net; Bay Area Wireless Users Group; Bay Area Research Wireless Network; Newburyopen.Net And Seattlewireless.Net," *In the Matter of 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 Part 1 of the Commission's Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; 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. 03-66, RM-10586, WT Docket No. 03-67, MM Docket No. 97-217, WT Docket No. 02-68, RM-9718, October 23, 2003; "Comments Of The New America Foundation, Media Access Project, Consumers Union, Consumer Federation Of America, Center For Digital Democracy, Public Knowledge, Benton Foundation, Emenity, Inc., Roadstar Internet, Inc., NYCWireless.Net, Bay Area Wireless Users Group, Bay Area Research Wireless Network, And Seattlewireless.Net," In The Matter Of 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 Part 1 Of The Commission's Rules - Further Competitive Bidding Procedures; Amendment Of Parts 21 And 74 To Enable Multipoint Distribution Service And The Instructional Television Fixed Service Amendment Of Parts 21 And 74 To Engage In Fixed Two-Way Transmissions; 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. 03-66, RM-10586, WT Docket No. 03-67, MM Docket No. 97-217; WT Docket No. 02-68, RM-9718, September 10, 2003; Reply Comments Of The New America Foundation, Consumers Union Consumer Federation Of America, Media Access Project Center For Digital Democracy, Public Knowledge, Benton Foundation, In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz And in the 3 GHz Band, ET Docket No. 02-380, May 16, 2003; "Comments Of The New America Foundation, Consumers Union, Consumer Federation Of America, Media Access Project, Center For Digital Democracy, Public Knowledge, Benton Foundation," In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz And in the 3 GHz Band, ET Docket No. 02-380, April 17, 2003; "Reply Comments Of The New America Foundation, The Consumer Federation Of America, Consumers Union, The Association Of Independent Video And Filmmakers, The National Alliance For Media Arts And Culture, The Benton Foundation, The Center For Digital Democracy, United Church Of Christ, Office Of Communication, Inc., And The Media Access Project, In the Matter of Spectrum Policy Task Force Seeks Public Comment on Issues Related to Commission's Spectrum Policies, DA 02-1311, ET Docket No. 02-135, July 22, 2002; Comments Of The New America Foundation, The Consumer Federation Of America, Consumers Union, The Association Of Independent Video And Filmmakers, The National

VIOLATING A LAX STANDARD

The FCC recently considered spectrum aggregation issues in the context of Cingular's acquisition of AT&T Wireless.^{6/} There, the FCC noted that "spectrum is a necessary resource for wireless carriers to compete effectively" and therefore, it "analyzed those markets in which, post-transaction, the Applicants would have 70 MHz or more in at least part of the market."^{7/} The Commission stated that in light of "the unique role of spectrum as a critical input in the market for wireless services," it "carefully analyzed the potential impact of this merger on that input."^{8/}

Alliance For Media Arts And Culture, The Benton Foundation, The Center For Digital Democracy, United Church Of Christ, Office Of Communication, Inc., And The Media Access Project, *In the Matter of Spectrum Policy Task Force Seeks Public Comment on Issues Related to Commission's Spectrum Policies*, DA 02-1311, ET Docket No. 02-135, July 8, 2002; Comments Of The Consumer Federation Of America, In the Matter of Spectrum Policy Task Force Seeks Public Comment on Issues Related to Commission's Spectrum Policies, DA 02-1311, ET Docket No. 02-135, July 8, 2002; "Comments Of The New America Foundation, The Consumer Federation Of America, Consumers Union, The Association Of Independent Video And Filmmakers, The National Alliance For Media Arts And Culture, The Benton Foundation, The Center For Digital Democracy, United Church Of Christ, Office Of Communication, Inc., Public Knowledge And The Media Access Project," *In The Matter Of Spectrum Policy Task Force Seeks Public Comment On Task Force Report Released November 15, 2002*, DA 02-1311, ET Docket No. 02-135, January 27, 2002.

^{6/} *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations and Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses and Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, Memorandum Opinion and Order, 19 FCC Rcd. 21522 (2004) ("*Cingular-AT&T Wireless Merger Order*").

^{7/} *Id.* at 21568, ¶ 109.

^{8/} *Id.* at 21577, ¶ 138.

The spectrum-related harm, if any, from the merger, according to the Commission, “would be that the merger could result in an imbalance in the availability of spectrum that would cause other carriers to be more spectrum-constrained than Cingular at a later point in the deployment of next-generation services.”^{9/}

Accordingly, the Commission conditioned its grant of the Cingular- AT&T Wireless transaction on fulfillment of Cingular’s pledge to divest spectrum holdings in excess of 80 MHz in all areas.^{10/} The Commission also ordered additional divestitures in several markets to alleviate concerns that “in light of the higher spectrum demands in a denser market, not all the remaining carriers have sufficient bandwidth for [the Commission] to be confident that they can increase output and compete effectively for Cingular’s customers should Cingular attempt to raise price or reduce output.”^{11/}

Our comments and reply comments in that proceeding make it clear that we consider the threshold adopted by the FCC to be wholly inadequate to protect the public interest.^{12/} As predicted, the torrent of mergers has begun.^{13/} As expected, the industry is already pushing the limits of even the lax threshold established by the Commission. Sprint-Nextel proposes to own or control a huge swath of

^{9/} *Id.* at 21577, ¶ 140.

^{10/} *Id.* at 21577-78, ¶¶ 140-141.

^{11/} *Cingular-AT&T Wireless Merger Order* at 21597, ¶ 195.

^{12/} CFA/CU, Petition to Deny..

^{13/} *Id.* at 12.

spectrum across a number of bands, with signal carrying capacity in many markets far in excess of what the Commission contemplated.

The FCC should take the same action here that it took in the Cingular-AT&T Wireless transaction with respect to the 2.5 GHz spectrum held by Nextel and Sprint. As Attachment J to the Sprint-Nextel assignment application shows, the combined entity will control nearly 60 MHz of broadband wireless spectrum (other than in the 2.5 GHz band) in many markets.^{14/} A Basic Trading Area (“BTA”) license of the former Multipoint Distribution Service (“MDS”) (now Broadband Radio Service, or “BRS”) spectrum generally authorizes the use of 78 MHz of spectrum in a market.^{15/} Accordingly, even assuming a modest loss of spectrum as a result of the FCC’s recent reconfiguration of the 2.5 GHz band, Sprint-Nextel will still be licensed for over 130 MHz of wireless communications spectrum in many markets.

In addition to the BRS spectrum it will hold, Sprint-Nextel is also permitted to use, through leasing arrangements, spectrum in the former Instructional Television Fixed Service (“ITFS”) (now Educational Broad Service, or “EBS”). The

^{14/} *Applications of Nextel Communications, Inc., Transferor, and Sprint Corporation, Transferee, for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, Application for Transfer of Control, WT Docket No. 05-63, Attachment J (filed Feb. 8, 2005) (“*Nextel-Sprint Application*”).

^{15/} We realize that as a result of the FCC’s recent decision, BRS licensees that held BTA authorization may be licensed for less than 78 MHz in the future. However, it is not expected that these licensees will hold any less than 71 MHz under the FCC’s revised band plan.

2.5 GHz band consists of 194 megahertz of EBS and BRS spectrum at 2496-2690 MHz. Even assuming that some of the EBS spectrum will continue to be reserved for use by educational licensees and there now exists guard band spectrum in the 2.5 GHz band, it is nonetheless possible that in some markets Nextel-Sprint will have access to nearly 200 MHz of spectrum, dramatically in excess of what the FCC found to be an acceptable level of spectrum held by one entity in the Cingular-AT&T Wireless transaction.

Based on the data filed in the application, we conclude that in approximately half the BTAs in the nation, Sprint-Nextel will hold the rights licenses to more than 70 MHz of spectrum in the 2.5 GHz band in over one quarter of the BTAs in the nation. Sprint-Nextel will hold rights to use more than 130 MHz through license and lease in the CMRS, BRS and EBS. In almost a quarter of all BTAs, it will hold more than 150 MHz as the following table shows:

NUMBER OF BASIC TRADING AREAS MARKETS IN WHICH SPRINT-NEXTEL HOLDS RIGHTS TO USE 130 MHz OR MORE OF SPECTRUM

	BRS/EBS SPECTRUM	
	99 MHz – 150 MHz	OVER 150 MHz
OVER 50 MHz	44	37
CMRS SPECTRUM		
40 MHz to 50 MHz	22	6

As the Commission recognized in the Cingular-AT&T Wireless transaction, one entity holding so much spectrum is antithetical to the public interest.^{16/} Due to the finite quantity of wireless broadband spectrum available and the inability to utilize spectrum without an FCC license, any new firm attempting to provide wireless broadband services in competition with the merged Sprint-Nextel will face an extreme capacity constraint; due to this capacity constraint, few existing competitors (and no new competitors) would be in a position to discipline Sprint-Nextel's exercise of market power over price or the merged firm's decision to restrict output.^{17/} This is because, when a firm possesses a significant share of a market protected by entry barriers (which, in this case, are FCC licenses for finite spectrum), the risk of unilateral anticompetitive effects (*i.e.*, a price increase or reduction in output) is high and possibility of competitive entry and disciplining behavior is low.^{18/}

THE FUNGIBILITY OF SPECTRUM AND CONVERGENCE OF SERVICES

^{16/} See *Cingular-AT&T Wireless Merger Order* at 21620-21, ¶¶ 255-56 (requiring divestiture of spectrum in markets where the merger would result in “high spectrum holdings”).

^{17/} DOJ/ FTC Horizontal Merger Guidelines § 2.2 *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/toc.html.

^{18/} *Id.* at § 3.0 (“Entry may not be sufficient, even though timely and likely, where the constraints on availability of essential assets, due to incumbent control, make it impossible for entry to profitably achieve the necessary level of sales.”); *Id.* at § 2.22 (suggesting that entry is unlikely to occur on a sufficient scale to counteract unilateral effects).

As discussed further below, the 2.5 GHz band must be considered among the spectrum bands on which mobile broadband services can be offered. Even if were not, Sprint-Nextel's possession of substantially all licensed 2.5 GHz assets could allow it to exercise substantial market power over all mobile broadband services, regardless of the type of spectrum used to provide them, and therefore to distort the mobile broadband market across the different services (*i.e.*, across 2.5 GHz and other spectrum-based services). To the extent that the availability of complimentary broadband data services affects the pricing of, or demand for, voice services, the transaction could have implications in the traditional voice market as well.

We realize that the FCC has not typically considered the 2.5 GHz band as part of the wireless spectrum it considers when it evaluates the spectrum an entity holds in a market. However, changes in technology and regulation mandate that 2.5 GHz of spectrum be considered along with cellular, personal communications service ("PCS"), specialized mobile radio ("SMR") as broadband wireless spectrum. The Commission itself has recognized that there will soon be a convergence of the types of services to be offered on PCS, cellular, and 2.5 GHz spectrum.^{19/} In all of

^{19/} See, e.g., *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, Part 1 of the Commission's Rules – Further Competitive Bidding Procedures, Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions, Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution*

these bands, the next generation of offerings will emphasize broadband anywhere, and mobility will be possible in the 2.5 GHz band within the foreseeable future. The merger parties themselves have endorsed the use of the 2.5 GHz band for broadband mobility offerings that will compete with PCS and cellular services. In seeking approval of its purchase of Nucentrix, for instance, Nextel expressly acknowledged that it intended to use the 2.5 GHz spectrum for “3G mobile innovations,” and that the only impediment to deployment of such two-way services was “the existing regulatory structure.”^{20/} More recently, Nextel’s CEO has said that it considers its 2.5 GHz spectrum simply another variety of CMRS spectrum.^{21/} Trade press articles similarly refer to both Nextel’s and Sprint’s expectations that

Service and in the Instructional Television Fixed Service for the Gulf of Mexico, Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14165, 14268, ¶ 275 (2004) (“*2.5 GHz Report and Order*”) (“While useable for many purposes, licenses in the Lower and Upper Band Segments authorizing low-power use offer particularly significant opportunities for providing ubiquitous mobile service.”); *Id.* at 14185, ¶ 41 (The “technical rules we are adopting for the low-power bands are similar to those of both PCS and AWS rules, thus making all three services similar.”)

^{20/} Nextel-Nucentrix Public Interest Statement at 11.

^{21/} Howard Buskirk, “Donahue: Nextel Could Survive Without 1.9GHz Spectrum,” *Communications Daily*, September 24, 2004, at 3-4 (“[Nextel CEO Timothy] Donahue indicated he disagreed with the contention of some financial analysts that the 1.9 GHz spectrum provided by the rebanding order is critical to Nextel's growth: ‘We have our 800 [MHz] spectrum, which is extraordinary spectrum. We also have 900 spectrum, so have now about 21 contiguous MHz of spectrum at 800 and 900. . . . We also have been acquiring 2.5 [GHz] spectrum. I think we have on average 90 MHz or so in the top 60 cities across the country. It's not an issue that we're on our knees or that it's critical for us to get this.’”)

they will provide mobile broadband services over their 2.5 GHz spectrum.^{22/} The *2.5 GHz Report and Order*,^{23/} building on the 2001 mobile allocation for that band, creates the environment Nextel concedes is necessary for efficient advanced mobile use of the band.

Even the Sprint-Nextel application appears to suggest that the 2.5 GHz Band will be used to satisfy some of the same demands that are, and will be, satisfied by other mobile broadband spectrum. Attachment E to the assignment application explains that the 2.5 GHz band will likely be “data-centric and focused on stationary and portable consumer electronic and computing-oriented devices and hardware.”^{24/} Yet, Attachment C to the application states that a potential customer using the 1xEV-DO network (which it expects to operate in the 1.9 GHz band) “could be looking for high speed wireless data solutions, such as equipping its sales

^{22/} See, e.g., Dan Meyer, “Sprint’s Forsee Talks Towers, EV-DO Deployment Strategy,” *RCR Wireless News*, October 11, 2004, at 4 (“Forsee also said Sprint is continuing to look at offering advanced 802.16 or WiMax-based mobile broadband services using its substantial MMDS spectrum, but ‘it did not want to go into it as the third alternative to DSL and cable’ offerings.”); Dan Meyer, “Nextel Tests Flarion Technology,” *RCR Wireless News*, February 9, 2004, at 1 (“[Nextel CEO Timothy] Donahue hinted the carrier was looking at using its recently acquired 2.5 GHz MMDS spectrum to launch its wireless broadband network, noting the carrier had an average of 96 megahertz of spectrum in 67 of the country’s top 100 markets. Donahue added the Federal Communication Commission recently approved mobility for the 2.5 GHz band and that there was a white paper in front of the FCC that would allow pairing of channels in the spectrum.”)

^{23/} *2.5 GHz Report and Order* at 14165-14384.

^{24/} *Nextel-Sprint Application*, Attachment E at 3.

force with anywhere, anytime connection to the company's inventory database, on-line order processing system or similar data-intensive applications."^{25/}

EVALUATING THE CONCENTRATION OF SPECTRUM

As the FCC stated in the Cingular-ATT Wireless Merger Order, spectrum concentration should be reviewed on a local basis.^{26/} Accordingly, the Commission should review the 2.5 GHz spectrum that Sprint-Nextel will hold (either through license or lease), in addition to its other spectrum holdings, in considering the applications for transfer of control. As a result of that review, the FCC should require the combined entity to divest itself of spectrum on a market-by-market basis where Sprint-Nextel holds sufficient spectrum to produce anti-competitive results.

In making this assessment, the Commission may choose to evaluate the total amount of capacity held by a single entity on a weighted basis, recognizing the different propagation characteristics of different frequencies. Of course, this is a practice with which the Commission is quite familiar. In establishing the national cap on broadcast station ownership, it discounted UHF stations because of the nature the characteristics of broadcasting in those frequencies.²⁷ The purpose of that rule was identical to the purpose of the threshold established in the *Cingular-AT&T Order*, *i.e.*, to prevent undue concentration.

^{25/} *Id.*, Attachment C at 6.

^{26/} *See Cingular-AT&T Wireless Merger Order* at 21577, ¶ 138.

^{27 /} Media Bureau Seeks Additional Comment On Uhf Discount In Light Of Recent Legislation Affecting National Television Ownership Cap, MB Docket No. 02-277, February 19, 2004.

As advocates of unlicensed use of spectrum we believe that the two fundamental points we are making here are critical to an effective spectrum policy at the Commission. At one level, spectrum is spectrum and its use is fungible. We believe unlicensed users should be allowed to share the spectrum on a non-interfering basis throughout the full range of the frequencies. At another level, some frequencies are more useful than others. Because there are substantial differences in the ability of frequencies to propagate signals, unlicensed uses should not be relegated to the ghettos of weaker bands. A comprehensive and coherent spectrum policy must recognize these fundamental issues in both in license review and in establishing policies for unlicensed use.

The Sprint-Nextel merger removes a competitor from the CMRS market, one of the technologies the Commission has put forward as source of competition for both voice and data services. Simultaneously, allowing Sprint-Nextel to control a huge swath of BRS/EBS spectrum would be a further blow to the rapidly diminishing pool of potential competitors. Therefore, the Commission should deny this merger or require substantial divestiture of spectrum to repair the harm to actual and potential competition.

We hereby submit the foregoing Petition to Deny and ask the FCC to deny the application that seeks Commission consent to the transfer of control of the 2.5 GHz spectrum held by Sprint and Nextel and otherwise act in accordance with the views expressed.

Respectfully submitted,



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