

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

In the Matter of)
)
Applications of)
Nextel Communications, Inc.)
Transferor, and)
Sprint Corporation, Transferee)
For Consent to Transfer Control)
Of Entities Holding Commission)
Licenses and Authorizations Pursuant)
To Sections 214 and 310(d) of the)
Communications Act)

WT Docket No. 05-63

**Petition to Impose Conditions of
Communications Workers of America**

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I. INTRODUCTION

The Commission must ensure that the proposed Sprint Nextel merger is in the public interest. Following the framework the Commission established in its review of the AT&T/Cingular transaction, the Commission must conduct a thorough case-by-case competitive analysis of the impact of the proposed merger on local telephony markets and require divestitures where the Commission determines that the merger will result in competitive harm.

While the Commission has determined that the mobile telephony market is local, the Commission must also consider the high level of concentration in the national mobile telephony market. The proposed transaction will result in the three largest wireless companies – Verizon, Cingular, and Sprint – controlling 90 percent of the wireless market. The U.S. Department of Justice (DOJ) uses the Herfindahl-Hirschman Index (“HHI”) to calculate market concentration. The HHI for the pre-merger national mobile telephony market is 2479 and post-merger the HHI rises to 3016. The DOJ considers a market with an HHI above 1800 highly concentrated, and an HHI increase over 100 to create a presumption of market power.¹ Thus, the Commission should begin its case-by-case market analysis with a presumption that the merger will increase market power.

In these comments, CWA focuses on the impact of the proposed merger on Sprint’s almost eight million local customers who reside in primarily rural and suburban communities in 18 states served by Sprint’s local telephone subsidiaries. The Applicants intend to spin-off Sprint’s local division upon completion of the Sprint Nextel merger. In fact, the Applicants

¹ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, Issued April 2, 1992 (revised April 8, 1997), 15.

highlight the separation of the local telephone companies as a merger-related benefit, claiming it will eliminate any competitive conflict in the local service market. Thus, if the Commission considers the local spin-off as evidence of a competitive benefit, it must also consider any potential harm that would result from the proposed spin-off.

As CWA details below, Sprint has supported its long-distance and Internet business with earnings from its local division. To protect local customers, the Commission must ensure an equitable division of debt and assets upon separation of the local business. Because the transactions are linked, the Commission must condition any approval in this instant application upon a commitment by the combined Sprint Nextel to an equitable division of assets and debt at the time of the local division spin-off, subject to full review by this Commission.

II. LEGAL FRAMEWORK

A. Standard of Review and Public Interest Framework

Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of Nextel's licenses and authorizations to Sprint will serve the public interest, convenience, and necessity.² The public interest standards of sections 214(a) and 310(d) involve a balancing process that weights the potential public interest harms of the proposed transaction against the potential public interest benefits.³ The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.⁴

² 47 U.S.C. §§ 214(a), 310(d).

³ See, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations, WT Docket 04-70, *Memorandum Opinion and Order*, ¶ 40, Oct. 26, 2004 (rel) ("*Cingular-AT&T Order*"); Applications for Consent to the Assignment of Licenses Pursuant to

The Commission’s public interest evaluation encompasses the “broad aims of the Communications Act”⁵ which includes, among other things, the preservation and advancement

Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd. At 2580-81 ¶ 24 (2004) (“*Cingular-NextWave Order*”); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. At 483 ¶ 15 (2004) (“*GM-News Corp. Order*”); WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, WC Docket No. 02-215, *Memorandum Opinion and Order*, 18 FCC Rcd. 26,484, 26,492 ¶ 12 (2003) (“*WorldCom Order*”); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No.02-70, *Memorandum Opinion and Order*, 17 FCC Rcd. 23,246, 23,255 ¶ 26 (2002) (“*AT&T-Comcast Order*”); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd. at 20,574 ¶ 25 (2002) (“*EchoStar-DirecTV HDO*”); VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9789 ¶ 17 (2001) (“*Deutsche Telekom-VoiceStream Order*”); GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd. at 14,045, 14,046 ¶¶ 20, 22 (2002) (“*Bell Atlantic-GTE Order*”); Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees, *Memorandum Opinion and Order*, 15 FCC Rcd. 3347 ¶ 12 (2000) (“*VoiceStream-Omnipoint Order*”); AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C, Violet License Co. LLC, and TNV [Bahamas] Limited Applications, IB Docket No. 98-212, *Memorandum Opinion and Order*, 14 FCC Rcd. at 19,150 ¶ 20 (1999) (“*AT&T Corp.-British Telecom. Order*”); Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 FCC Rcd. At 18,031 ¶ 10 (1998) (“*WorldCom-MCI Order*”); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., WT Docket No. 03-203, *Memorandum Opinion and Order*, 19 FCC Rcd. at 6241-42 ¶ 23 (WTB, MB 2004) (“*Nextel-WorldCom Order*”); Applications of SBC Communications Inc. and BellSouth Corporation, WT Docket No. 00-81, *Memorandum Opinion and Order*, 15 FCC Rcd. at 25,464, 25,467 ¶¶ 13, 18 (WTB, IB 2000) (“*SBC-BellSouth Order*”); Vodafone AirTouch, PLC, and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd. 16,512, 16,517 ¶¶ 13, 25 (WTB, IB 2000) (“*Bell Atlantic-Vodafone Order*”).

⁴ See, e.g., *Cingular-AT&T Order*, at ¶ 41, *Cingular-NextWave Order*, 15 FCC Rcd. at 2581 ¶ 24; *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 26; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3347 ¶ 11; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,464 ¶ 13; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16,512 ¶ 13; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178, *Memorandum Opinion and Order*, 14 FCC Rcd. 3160, 3169 ¶ 15 (1999) (“*AT&T-TCI Order*”); *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031-32 ¶ 10.

⁵ See *Cingular-AT&T Order*, at ¶ 41; *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 16; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,575 ¶ 26; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd. 9816, 9821 ¶ 11 (2000) (“*AT&T-MediaOne Order*”); *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3346-47 ¶ 11; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,146 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,030 ¶ 9.

of universal service, the accelerated deployment of advanced services, whether the merger will affect the quality of communication services, and the impact on employment.⁶

The Commission's public interest authority enables the Commission to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁷ 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."⁸ Indeed, the Commission's public interest authority enables the Commission to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.⁹

B. The Commission Must Review the Proposed Spin-Off of the Local Telecommunications Division in This Proceeding

The Commission must include in its public interest review of this transaction the impact of the proposed spin-off of Sprint's Local Division on Sprint's 7.7 million local customers. The Applicants have made it clear that the proposed spin-off is an integral part of the merger agreement. In the Agreement and Plan of Merger, the applicants state "(f)ollowing the closing of

⁶ See *Cingular-AT&T Order*, at ¶ 41; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031 ¶ 9.

⁷ See, e.g., *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15. See also *WorldCom-MCI Order*, 13 FCC Rcd. at 18,032 ¶ 10 (conditioning approval on the divestiture of MCI's Internet assets); *Deutsche Telekom-VoiceStream Wireless Order*, 16 FCC Rcd. 9779 (2001) (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns); *Cingular-AT&T Order* ¶¶ 251-267 (2004) (conditioning approval on divestiture of licenses and spectrum in specific markets).

⁸ *Cingular-AT&T Order* at 43 (2004); *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15.

⁹ See, e.g., *Cingular-AT&T Order* at 43 (2004); *GM-News Corp. Order*, 19 FCC Rcd. at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd. at 18034-35 ¶ 14. See also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

the merger, Sprint Nextel intends to spin off Sprint's local telecommunications business to the Sprint Nextel shareholders..."¹⁰ The Recitals in the Agreement and Plan of Merger state:

Sprint and Nextel intend, promptly after the Effective Time...to separate the incumbent local exchange carrier business (the ILEC Business) of the Resulting Company...from the other businesses of the Resulting Company pursuant to a spin-off of the entity or entities engaged in the ILEC Business to stockholders of Sprint, post-Merger...¹¹

Moreover, the joint Applicants in their Application to this Commission note that "the Parties intend that the merged company will spin off its ILEC assets" so that the combined Sprint Nextel "will be able to focus on its vision of the 'wireless future.'"¹² The Applicants claim that the ILEC spin-off will position the merged company to realize the competitive benefits of the merger, creating a wireless and long-haul company with no local wireline subsidiary to compete with its wireless operation for local service customers.¹³

The Applicants cite the decision to separate the ILEC business as a merger-related benefit. Thus, the Commission must evaluate not only the merger-related benefits but also any potential harm that would result from the proposed ILEC separation. This evaluation cannot wait until the time of the actual spin-off, since the ILEC separation is an integral component of the business strategy driving the proposed transaction. Moreover, once the merger is approved, it cannot be undone.

Therefore, in this instant proceeding the Commission must include a review of the impact of the planned spin-off of Sprint's ILEC Business on its 7.7 million local customers, and impose

¹⁰ Sprint/Nextel Agreement and Plan of Merger, SEC Form 8-K, Dec. 17, 2004, 2 ("Merger Agreement"). Attachment A to Sprint/Nextel Application for Transfer of Control.

¹¹ *Id.*, 4.

¹² Application, 10. (fuller cite if this is first time)

¹³ *Id.*

any conditions necessary to mitigate against potential harms that would result from the separation.

III. THE COMMISSION MUST CONDITION MERGER APPROVAL UPON APPLICANTS' COMMITMENT TO FAIR AND EQUITABLE ALLOCATION OF CORPORATE ASSETS AND DEBT AT THE TIME OF SEPARATION OF THE LOCAL DIVISION

The Commission must ensure that the combined Sprint Nextel equitably allocates corporate debt and assets at the time of the proposed spin-off of the Local Division. As we detail below, Sprint currently uses profits from its Local Division to support investment in and expenses incurred by its Global Markets (long-distance) Division. To protect Sprint's local customers and ratepayers, the Commission must therefore require as a condition of merger approval that the Applicants make a commitment to this Commission that they will equitably allocate assets and debt at the time of the Local Division spin-off, and the allocation will be subject to full Commission review at that time.

Using the public financial reports that Sprint files with the Securities and Exchange Commission (SEC), it is possible to determine that Sprint has used earnings from its Local Division to pay down debt and support operations of its Global Markets Division. We describe the financial flows as follows.

In November 1998, Sprint Corporation separated the allocation of its assets and liabilities into two groups, the FON Group ("FON") and the PCS Group ("PCS). FON included the Local Division, the Global Markets Division (long-distance, Internet), and Other Businesses consisting primarily of wholesale distribution of telecommunications products and directory publishing.

PCS included Sprint's wireless division. On April 23, 2004, Sprint re-combined the assets of FON and PCS.¹⁴

Between 1998 and 2003, Sprint's public financial statements reported separate results for FON and PCS. Within FON, Sprint reported separately at the operating income (loss) level on its three segments -- Local Division, Global Markets, and Other Businesses. During these years, Sprint reported separately the debt allocation between FON and PCS, but did not report separately debt allocation within the three FON segments. Beginning in 2004, Sprint reported debt at the consolidated corporate level.

According to Sprint's SEC Form 10-K annual reports, Sprint's FON Group paid down \$2.7 billion in debt between 1998 and 2003. Over the same period, Sprint's Local Division earned \$8.7 billion (after accounting for depreciation and capital expenditures). During the same years, Sprint's Global Markets Division lost \$3.6 billion.¹⁵ Sprint's Other Business Division represents a small portion of FON, earning \$21 million over the same period. Using simple arithmetic, it is clear that the earnings of Sprint's Local Division were the only source of cash to pay down the \$2.7 billion in FON debt.¹⁶ (See Appendix A for the financial analysis.)

In addition, profits from Sprint's Local Division supported the Global Markets Division over this time period. Between 1998 and 2003, Sprint's Global Markets invested \$10.2 billion in capital expenditures, despite an operating loss over the five-year period of \$741 million.¹⁷ During this same period, Sprint's Local Division operating income totaled \$10.1 billion of which

¹⁴ Sprint Corp. SEC Form 10-K for the year ending Dec. 31, 2003, dated March 9, 2004, 1.

¹⁵ Earnings = Operating Income + Depreciation – Capital Expenditures

¹⁶ Sprint SEC Form 10-K for the years ending 1998 – 2003.

¹⁷ *Id.*

\$7.9 billion in capital was invested in that division. In other words, Sprint's Local Division provided financial resources to Sprint's Global Markets business. (See Appendix A for the financial analysis).

Based on the SEC financial data, it clear is that the overwhelming portion of what in 2003 was allocated as FON debt should remain with the combined Sprint Nextel at the time of any Local Division spin-off.¹⁸ The Commission must condition merger approval upon Sprint commitment to an equitable debt and asset allocation at the time of the proposed Local Division separation, subject to full Commission review. Absent such a condition, Sprint's local customers will suffer deteriorating service and delayed investment in advanced services due to inadequate capital available for investment.

Already, Sprint's Local Division is experiencing the effects of Sprint's corporate policy of using profits from the Local Division to support the Global Markets division and debt retirement. According to FCC Armis reports, the service provided by Sprint's local telephone companies declined substantially on a number of critical measures related to network maintenance, repair, and adequate staffing in the years between 1997 and 2003.

The number of repeat trouble reports per 100 access lines at Sprint's two largest local telephone companies that serve primarily rural and suburban customers increased at North Carolina Tel & Tel by 165 percent and at United Florida by 165 percent. Repair intervals over the same period increased at North Carolina Tel and Tel by 49 percent, at United Florida by 83 percent, and at Central Tel of Nevada by 45 percent. Repeat out-of-service trouble reports as a percent of initial out-of-service trouble reports increased at North Carolina Tel & Tel by 199

¹⁸ In 2004, Sprint recombined PCS and FON making it more difficult to ascertain from SEC financial records the allocations of debt across business divisions.

percent, at United Florida by 109 percent, and at Central Tel of Nevada by 47 percent. (See Appendix B for service quality charts).

Sprint's primarily rural and suburban local customers are already victims of Sprint's corporate policies to shift Local Division profits into its long-haul Internet business. To protect against further service deterioration and a widening digital divide, the Commission must condition merger approval in this instant proceeding upon commitments to subject debt and asset allocation at the time of the spin-off to Commission review to assure an equitable distribution.

IV. CONCLUSION

To ensure that the proposed transaction does not harm Sprint's almost eight million primarily rural and suburban local customers, the Commission must ensure that the merger-related proposal to spin-off Sprint's local division is based upon a fair and equitable distribution of the consolidated company's assets and debt. While Commission review of the terms of the spin-off is premature in the context of this instant proceeding, it is not premature to require the Applicants to commit to an equitable allocation, subject to Commission review at the time of the spin-off.

Further, the Commission must condition merger approval upon the Applicants' consent to divest itself of spectrum and/or licenses in local markets where the proposed merger would result in competitive harm in the mobile telephony market.

Respectfully Submitted,

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