BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In re Applications of	)	
	)	
NEXTEL COMMUNICATIONS, INC., Transferor,	)	
	)	
and	)	
	)	
SPRINT CORPORATION, Transferee,	)	WT Docket No. 05-63
	)	
	)	
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	)	

JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY TO COMMENTS

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April 11, 2005

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SUMMARY

Sprint and Nextel demonstrated in their Application that the combined Sprint Nextel will be one of America's premier communications companies offering advanced, broadband wireless and integrated communications services to consumer, business, and government customers. The merger will create the largest independent wireless carrier in the nation with the financial, technical and additional resources necessary to compete with other wireless and wireline carriers. Sprint Nextel will be on the cutting edge in some of the fastest growing areas of telecommunications, including developing and providing wireless interactive multimedia and other advanced broadband communications services.

None of the parties filing comments or petitions to deny challenged Sprint's and Nextel's estimate that the merger will yield significant efficiencies, amounting to a total net present value of approximately $12 billion. These synergies will enable Sprint Nextel to improve the scope, quality, and efficiency of wireless services offered to consumers, including bringing advanced technology services to more customers faster than either company could achieve on a stand-alone basis. Sprint and Nextel also demonstrated that the merged company will be able to develop and deploy wireless multimedia broadband infrastructure across the United States faster and at less cost than either company could do alone. Finally, the Application contained a detailed showing that these public interest benefits will be accomplished without any harm to competition and that grant of the Application will thus promote the public interest.

The petitions to deny and comments provide no facts or arguments that undermine this conclusion. Indeed, the vast majority of the objections raise issues that are not properly part of the FCC's review of this merger and should be considered, if at all, in pending FCC rulemaking proceedings. Some parties, for example, are attempting to use this proceeding to obtain reconsideration of the FCC's recent decision in the 800 MHz public safety proceeding. Others, expressing unsubstantiated concerns regarding the prospective merged company's roaming practices, ask the Commission to issue a "policy statement" on roaming, despite the fact that the Commission is already conducting a comprehensive rulemaking on future roaming regulation. These and similar claims are plainly outside the scope of the Commission's review of this transaction and should be rejected.

Several of the petitioning and commenting parties raise concerns about Sprint Nextel's prospective 2.5 GHz spectrum holdings. Since only one of the merging companies has a presence in 409 out of the 493 BTAs in the United States, the merger has no effect on BRS spectrum ownership in those areas. Even in those 84 BTAs where both Sprint and Nextel have a presence today, the combination of the two companies' 2.5 GHz spectrum will not harm competition or the public interest for several reasons. First, contrary to the claims of some merger opponents, 2.5 GHz spectrum is neither a separate product market nor a unique input. The spectrum is simply an input that can be used to provide end users a vast array of broadband wireless services, particularly video-intensive wireless interactive multimedia services. Of course, there is no way to predict today precisely which types of services ultimately will be commercially successful in the 2.5 GHz band; thus, it would be premature and contrary to precedent for the Commission to undertake an antitrust analysis of these services. Second, there is plenty of spectrum – both assigned to licensees and available to be assigned in the future

through auctions – with which to provide both the existing and the new services that may compete with the services Sprint and Nextel plan to offer using the 2.5 GHz band.

In sum, the combination of the BRS assets of Sprint and Nextel, far from raising competitive concerns, will promote the development and availability of new broadband services in competition with other wireless carriers. The nationwide BRS footprint of the merged company offers the prospect of gaining the economies of scale that will foster the development and deployment of new types of visually-oriented, advanced interactive communications services. The proposed merger fully complies with the FCC's rules and precedent, and the petitioners and commenters have raised few objections that are even within the scope of the FCC's merger review. None of them warrants extensive Commission review. Accordingly, the Commission should approve the proposed merger of Sprint and Nextel on an expedited basis.

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JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY TO COMMENTS

Sprint Corporation ("Sprint") and Nextel Communications, Inc. ("Nextel") (collectively the "Applicants" or the "Parties"), by their undersigned counsel, hereby submit their Joint Opposition to Petitions to Deny and Reply to Comments in the above-captioned proceeding.

I. INTRODUCTION

Sprint and Nextel demonstrated in their Application that their proposed merger would create a strong, independent, and innovative competitor in the telecommunications marketplace, improve the scope, quality, and efficiency of wireless services available from the combined firm, and develop and deploy wireless broadband infrastructure in the U.S. more quickly and

efficiently than either company could do alone.[1] The Application similarly demonstrated that these substantial, pro-competitive public interest benefits would be accomplished without any harm to competition or the public interest, and that grant of the Application would thus serve the public interest, convenience, and necessity, as required by sections 309 and 310 of the Communications Act of 1934, as amended. The comments and petitions to deny filed in response to the Commission's Public Notice provide no facts or arguments that change that conclusion.[2]

As demonstrated in the Application, upon receipt of necessary approvals and consummation of the merger, Sprint Nextel will be one of America's premier communications companies – the leading independent wireless carrier with a nationwide fiber optic and global IP network that will offer broadband wireless and integrated communications services to consumer, business, and government customers. With the completion of this merger, Sprint Nextel will be well-positioned in some of the fastest growing areas of telecommunications, including mobile data services and push-to-talk features, where the companies have been technological pioneers. Among other public interest benefits, the merger of Sprint and Nextel will:

- Create a strong, independent, and innovative competitor in the telecommunications marketplace that will enhance competition for mobile telephony services and bring about significant movement toward true intermodal competition;
- Improve noticeably wireless service coverage, capacity, and quality by allowing cost-effective optimization of Sprint Nextel cell sites, spectrum, networks, and operations; and

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1 *See Applications of Nextel Communications, Inc., Transferor, and Sprint Corp., Transferee, For Consent to Transfer Control of Licenses and Authorizations,* WT Dkt. No. 05-63 (filed Feb. 8, 2005) ("Application").

2 *Nextel Communications, Inc. and Sprint Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations*, Public Notice, WT Dkt. No. 05-63, DA 05-502 (Feb. 28, 2005).

- Deploy broadband infrastructure more efficiently, obviating the need for a multi-billion dollar investment by Nextel in new wireless communications facilities.

The combination of Sprint and Nextel also is expected to yield significant efficiencies, amounting to a total net present value of approximately $12 billion. These savings will help enable the company to undertake future investments in research and development that will lead to the implementation of cutting-edge, multimedia products and services that will generate economic growth and bring tremendous innovation and value to consumers, including "wireless interactive multimedia services" or WIMS offered using 2.5 GHz spectrum.

As a result of these public interest benefits, the proposed Sprint Nextel merger has been endorsed by a diverse group of commenting parties, including consumers of wireless services, other carriers, and a leading representative of the public safety community.[3] The Northern California Center on Deafness, for example, noted that the merger would promote the deployment of "better and more creative innovations, especially new products to incorporate all Americans who have different language needs, all of which can only serve to benefit and help

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[3] *See* Letter to Marlene H. Dortch, Secretary, from Craig Mock, General Manager, United Telephone and Communications Association, Inc. (Apr. 1, 2005) ("United"); Letter to Marlene H. Dortch, Secretary, from Sheri A. Farinha, Chief Executive Officer, NorCal Center on Deafness (Mar. 29, 2005) ("NorCal Center"); Letter to Marlene H. Dortch, Secretary, from Richard Ruhl, General Manager, Pioneer Telephone Cooperative, Inc. (Mar. 29, 2005) ("Pioneer") (filed on behalf of the Cooperative and the Cellular Network Partnership, d/b/a Pioneer Cellular); Letter to Marlene H. Dortch, Secretary, from Chuck Canterbury, National President, Fraternal Order of Police (Mar. 30, 2005) ("F.O.P."); Letter to Marlene H. Dortch, Secretary, from Larry E. Sevier, President, Nex-Tech Wireless, LLC (Mar. 30, 2005) ("Nex-Tech Wireless"); Letter to Marlene H. Dortch, Secretary, from Marc H. Morial, President and Chief Executive Officer, National Urban League (Mar. 29, 2005) ("National Urban League"); Letter to Federal Communications Commission from James T. Martin, Executive Director, United South and Eastern Tribes, Inc. (Mar. 24, 2005) ("Southern and Eastern Tribes") (representing 24 federally recognized tribes from Texas to Maine); Letter to Marlene H. Dortch, Secretary, from Harry C. Alford, President and Chief Executive Officer, National Black Chamber of Commerce (Mar. 23, 2005) ("NBCC").

the Deaf and Hard of Hearing community reach our goal for more functional equivalence products and services as a result."[4] Similarly, Pioneer Telephone Cooperative, Inc., the largest telephone cooperative in the State of Oklahoma, and Pioneer Cellular support the merger because "[t]he combined synergies of the Sprint Nextel merger would, in our opinion, overflow to rural wireless carriers, such as Pioneer, and be a direct benefit to our customers, and would assist us in our ongoing efforts to continue to serve and support Rural America."[5] Nex-Tech Wireless, which provides PCS in rural northwest Kansas, agreed that the merger would lead to "substantial benefits" for its customers.[6]

United Wireless Corporation, which provides wireless service to customers in rural areas in southwest Kansas and is a partner in Sprint's Strategic Rural Alliance, stressed that the merger "is in the public interest by providing more choices and innovations to the combined company's urban subscribers, and to United's own rural customer base."[7] The Fraternal Order of Police also endorsed the merger, noting that "[a]s a combined entity, Sprint Nextel will be able to enhance services and provide more choices to the public safety community."[8] Other commenters pointed out that the record of Sprint and Nextel demonstrates their commitment to advancing diversity and emphasized the benefits the merger would produce for tribal as well as urban communities.[9]

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4 NorCal Center at 2.

5 Pioneer at 2.

6 Nex-Tech Wireless at 2.

7 United at 2.

8 F.O.P. at 1.

9 National Urban League at 1; NBCC at 1; Southern and Eastern Tribes at 1.

Only a few petitioners raise issues that purportedly relate to the merger.[10] Other petitioners and commenters introduce an assortment of extraneous claims that do not arise as a result of the merger, and thus are not properly examined in this proceeding, as discussed below.[11] Significantly, not a single commenter challenges the competitive analysis submitted by the Applicants, including its conclusion that the proposed merger will not adversely affect competition for mobile telephony.[12] In fact, the petitioners and commenters raise only one issue truly specific to the proposed transaction: the combination of the spectrum assets of the two companies.[13] As explained below, the spectrum position of the merged company will not reduce competition. Accordingly, the Commission should dismiss these allegations in their entirety.[14]

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[10] *See* Petition to Deny of Community Technology Centers' Network, WT Dkt. No. 05-63 (Mar. 30, 2005) ("CTCN"); Petition to Deny of Consumer Federation of America and Consumers Union, WT Dkt. No. 05-63 (Mar. 30, 2005) ("CU/CFA"); Comments of National Rural Telecommunications Cooperative, WT Dkt. No. 05-63 (Mar. 30, 2005) ("NRTC"); Petition to Deny of NY3G Partnership, WT Dkt. No. 05-63 (Mar. 30, 2005) ("NY3G") (on April 6, 2005, NY3G amended the title of its filing to a "Petition to Deny").

[11] Petition to Impose Conditions of the Communications Workers of America, WT Dkt. No. 05-63 (Mar. 30, 2005) ("CWA"); Petition to Deny of the New Jersey Division of the Ratepayer Advocate, WT Dkt. No. 05-63 (Mar. 30, 2005) ("N.J. Ratepayer Advocate"); Petition to Deny of Richard W. Duncan d/b/a Anderson Communications, WT Dkt. No. 05-63 (Mar. 30, 2005) ("Duncan"); and Petition to Deny of Safety and Frequency Equity Competition Coalition, WT Dkt. No. 05-63 (Mar. 30, 2005) ("Coastal"); Comments of Rural Cellular Association, WT Dkt. No. 05-63 (Mar. 30, 2005) ("RCA"); Comments of SouthernLINC Wireless, WT Dkt. No. 05-63 (Mar. 30, 2005) ("SouthernLINC"); and Comments of United States Cellular Corporation, WT Dkt. No. 05-63 (Mar. 30, 2005) ("USCC").

[12] *See* "Joint Declaration of Stanley M. Besen, Steven C. Salop, and John R. Woodbury, Charles River Associates," Attachment B to the Application ("CRA Analysis").

[13] The N.J. Ratepayer Advocate makes a general claim that the merger will reduce competition. *See* N.J. Ratepayer Advocate at 2. This claim is premised solely on the bare fact that Sprint and Nextel propose to merge, and does not offer any supportive evidence or analysis. Similarly, NY3G argues that the merger should not be approved; however, its petition is limited to proposing merger approval conditions. The Commission's rules require that "[a] petition to deny must contain specific allegations of fact sufficient to make a *prima facie* showing that the petitioner is a party in interest and that a grant of the application would be inconsistent with the public interest, convenience and necessity. Such allegations of fact, except for those of which

II. ALL NON-MERGER SPECIFIC ISSUES SHOULD BE DISMISSED WITHOUT FURTHER CONSIDERATION IN THIS PROCEEDING

Most of the issues raised by the petitions to deny and comments are outside the scope of the proposed merger of Sprint and Nextel. Rather than address effects of the merger, numerous parties are attempting to use this transaction as a vehicle for pursuing pre-existing or collateral policy goals relating to such issues as roaming, 800 MHz reconfiguration, and the 2.5 GHz band (also referred to herein as the Broadband Radio Services and Educational Broadband Services, or BRS-EBS band). The Commission should reject these non-merger specific claims without

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official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof." 47 C.F.R. § 1.939(d). Accordingly, neither the N.J. Ratepayer Advocate nor NY3G has met the Commission's pleading standard for a petition to deny.

[14] Although we address its contentions below, CTCN has not complied with the threshold requirement that it demonstrate that it is a "party in interest." 47 U.S.C. § 309(d)(1). The Act requires CTCN to make specific allegations of fact sufficient to "establish that it is likely, as opposed to merely speculative, that the alleged injury would be prevented or redressed if these … applications are denied." *Applications for Consent to the Assignment of Licenses Pursuant to 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*, Memorandum Opinion and Order, 19 FCC Rcd 2570, ¶ 21 (2004). CTCN's two one-page declarations stating that the declarant "has been anxiously awaiting the availability of wireless Broadband services soon to be available over the 2.5 GHz Band," *see* CTCN Exhibits 2 & 3, do not allege the type of direct consequences needed to confer standing to challenge the merger. *See Applications of AT&T Wireless Servs., Inc. and Cingular Wireless Corp. for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522 n.196 (2004) ("*Cingular-AT&T Wireless Order*"). The Commission therefore should find that CTCN lacks standing to petition to deny the proposed merger. In addition, the petitions filed by CTCN and CWA are procedurally defective because they include no proof of service. *See* 47 C.F.R. § 1.939(c) (cross-referencing 47 C.F.R. § 1.47(g) (absent proof of service, the relief requested will not be considered)).

While the Applicants recognize that CU/CFA are participating in the merger proceeding in a good faith effort to ensure that consumers' interests are protected, they did not include any affidavit or declaration concerning how they will be affected by the merger, nor any proof of service. *See Friends of the Earth, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 23622, ¶ 3 (2003). In any case, the Applicants submit that their Application, as supplemented by this pleading, demonstrates unequivocally that the benefits of the merger will inure to consumers.

further consideration. As the Commission has previously made clear, its "merger review is limited to consideration of merger-specific effects."[15] The Commission has further stated:

> It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction — i.e., harms and benefits that are "merger-specific." The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.[16]

The Commission has repeatedly declined to "impose remedies where the harms have not been shown to be merger-specific."[17] As demonstrated below, most of the harms alleged by the petitioners and the commenters "have little if any relationship to the transaction" and certainly do not "flow from the proposed transaction."

A number of the issues raised by petitioners and commenters either are the subject of ongoing Commission rulemaking proceedings or were the subject of recent Commission rulemaking decisions. To the extent that these claims warrant further consideration, it should

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15 *Applications for Consent to the Transfer of Control of Licenses From Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, Order, 17 FCC Rcd 22633, ¶ 11 (2002).

16 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc., and America Online, Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 6547, ¶ 6 (2001).

17 *Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc. For Consent to Assignment of Licenses,* Memorandum Opinion and Order, 16 FCC Rcd 21105, ¶ 18 (2001); *Applications of Pacific Wireless Techs., Inc. and Nextel of California, Inc. for Consent to Assignment of Licenses,* Memorandum Opinion and Order, 16 FCC Rcd 20341, ¶ 17 (2001).

come only in the ongoing proceedings.[18] Merger reviews are an improper forum for making "those legal determinations [that] would have *industry-wide application*, as well as legal and practical implications that extend far beyond the contours of [the] particular merger."[19] As the Supreme Court has found, rulemaking proceedings are "generally 'better, fairer, and more effective'" for the purposes of "implementing a new industry-wide policy" than are the "uneven application of conditions in isolated" adjudicatory decisions.[20] As discussed below, petitioners and commenters ignore these fundamental principles with recycled claims that are extraneous to the proposed merger.

A. The Comments Raise No Issues Regarding The Availability Of Roaming That Should Be Dealt With In This Proceeding

USCC and SouthernLINC state that it is "striking" that the Application does not address the subject of roaming.[21] That is hardly the case. First, as USCC and SouthernLINC should know, the Commission has addressed, and continues to address, roaming issues in industry-wide

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18 *See Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246 ¶ 30 (2002) (to the "extent commenters raise concerns regarding an industry-wide trend…, we conclude that the appropriate forum to consider such issues is a rulemaking of general applicability"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from S. New England Telecomm. Corp. to SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21292 ¶ 29 (1998). *See also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp., Transferee,* Memorandum Opinion and Order, 15 FCC Rcd 9816 ¶ 126 (2000) ("*AT&T-MediaOne Merger Order*") (explaining that the Commission's merger review process "does not provide an appropriate forum for a determination of the legal status of cable broadband Internet access services"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160 ¶¶ 60, 62 (1999) (rejecting arguments that Commission should require multiple ISP access).

19 *AT&T-MediaOne Merger Order* ¶ 126 (emphasis added).

20 *Cmty. Television of So. California v. Gottfried*, 459 U.S. 498, 511 (1983).

21 *See* USCC at 7; SouthernLINC at 1, 14.

proceedings, where the Commission's decisions affect all industry participants, not just those that are involved in a particular transaction. Such proceedings are a more appropriate forum for addressing these issues both because a larger number of affected parties can make their views known and because the Commission can ensure that its actions do not adversely affect competition among wireless carriers. USCC and SouthernLINC provide no reasons why the Commission should depart from its past practices in this proceeding.

Second, USCC and SouthernLINC provide no evidence that they, or other wireless carriers, have been unable to negotiate agreements that permit their subscribers to obtain wireless service when they roam into Sprint or Nextel service areas. In fact, Sprint currently has over 90 domestic and over 40 international roaming agreements, and customers of Sprint's roaming partners will continue to roam on Sprint Nextel's CDMA network after the merger. Significantly, Nextel provides roaming services to SouthernLINC's subscribers even where those subscribers reside in areas where Nextel competes directly with SouthernLINC.[22] This is hardly evidence of anticompetitive behavior.

Moreover, the record is replete with statements, including statements from USCC and SouthernLINC, approving the Applicants' current roaming practices. For instance, USCC acknowledged that "previous negotiations with Sprint have not reflected any… anti-competitive

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[22] SouthernLINC complains about the length of time it took to reach a roaming agreement with Nextel. SouthernLINC at 5. This ignores the fact that there were significant technical hurdles associated with iDEN roaming that had to be resolved to implement its roaming relationship. Unlike the licensing and operation of CDMA, TDMA, and GSM networks, iDEN-based services do not operate on a consistent set of control channels, and the technology was not built for roaming among multiple carriers with overlapping coverage areas. Thus, iDEN systems have much more difficulty managing overlapping networks, and Nextel's current roaming arrangements with SouthernLINC have required extensive technological work-arounds in order for roaming to work properly.

practices."[23] And, in a previous filing with the Commission, SouthernLINC "emphasized that… it is pleased to have negotiated its current [roaming] agreement with Nextel" and did not raise any complaints about the Nextel agreement's terms.[24]

Third, the Commission recognized less than seven months ago that the availability of Commercial Mobile Radio Service ("CMRS") roaming is competitive.[25] The Commission also noted that it had "heard no complaints from CDMA carriers or seen other evidence to indicate that the availability and pricing of roaming services have been less favorable for CDMA carriers than for GSM carriers."[26] Nothing has occurred in the intervening period to alter these conclusions.

Apparently changing its position in this proceeding, SouthernLINC now objects that it currently has only a "non-reciprocal" arrangement with Nextel under which SouthernLINC's customers can roam on Nextel's network but not vice versa.[27] However, there is no requirement that roaming agreements be reciprocal. There are many reasons why a carrier might choose not

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23 USCC at 5. Other commenters detailed numerous "substantial benefits" that would accrue to rural customers from roaming agreements as a result of the transaction. Pioneer explained that the "combined synergies" of the merger would "overflow to rural wireless carriers, such as Pioneer, and be a direct benefit to our customers, and would assist us in our ongoing efforts to continue to serve and support Rural America." Pioneer at 2. Nex-Tech Wireless, a Sprint roaming partner, posited that "[c]ombining Sprint's voice and data expertise with Nextel's advanced services will ultimately bring more rapid technology improvements to rural Nex-Tech Wireless customers." Nex-Tech Wireless at 1. United further noted that a "portion of [its] monthly revenue will accrue from Sprint-Nextel roamers passing through its territory" and argued that merger will "provid[e] more choices and innovation to… United's own rural customer base." United at 2.

24 *See* Letter from Christine M. Gill, Attorney, McDermott, Will & Emery to Magalie R. Salas, Secretary, Federal Communications Commission (WT Dkt. No. 00-193, Oct. 24, 2001).

25 *Cingular-AT&T Wireless Order* ¶ 173.

26 *Id.*

27 SouthernLINC at 2, 12.

to enter into an agreement to pay another carrier when its own subscribers roam into the other carrier's areas, including unattractive terms demanded by the potential roaming partner, the inability of the potential partner to offer services that are comparable to those provided by the carrier in its home territory, and the availability of superior roaming alternatives. There can be no better evidence that SouthernLINC's complaint regarding reciprocity is unrelated to the Sprint Nextel merger than that Nextel chose not to pay SouthernLINC to provide roaming services to Nextel's customers *even before the merger*.

Despite its various claims, SouthernLINC does not actually oppose the merger.[28] Similarly, USCC and RCA do not request the Commission take any action with respect to this transaction. Rather, they seek the "issuance of a policy statement" on roaming.[29] As noted above, these requests are more properly considered in a rulemaking proceeding. In fact, the Commission is currently examining roaming issues in a number of ongoing proceedings, including a pending rulemaking solely devoted to CMRS roaming.[30] The *Roaming NPRM* sought comments on the effect of disparities between carriers' sizes and geographic footprints on roaming agreements,[31] roaming for new technologies,[32] and the sufficiency of remedies under

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28 *See* SouthernLINC at i.

29 *See* RCA at 3; USCC at 9.

30 *See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 15 FCC Rcd 21628 (2000) ("*Roaming NPRM*"). In addition, less than seven weeks ago, the Commission issued a request for information about roaming in its annual *CMRS Competition Report Public Notice*. *WTB Seeks Comment on CMRS Market Competition,* Public Notice, WT Dkt. No. 05-71, DA 05-487, at 5 (rel. Feb. 24, 2005).

31 *Roaming NPRM* ¶¶ 18-19. Other Commission inquiries regarding the provision of roaming services to rural customers also have raised questions on size disparities between carriers. *See, e.g. Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services,*

sections 201, 202, 208, and 251. Accordingly, consistent with Commission and court precedent, the roaming issues discussed by RCA, USCC, and SouthernLINC should be considered there, not in this merger proceeding.

B. The Commission Should Reject Efforts To Re-Litigate The Commission's 800 MHz Reconfiguration Plan In This Merger Proceeding

In the Application, Sprint and Nextel made clear that the merged company will accept Nextel's obligations pursuant to FCC orders in the *800 MHz Public Safety Proceeding*.[33] The assumption of these obligations is an unambiguous, express provision of the parties' merger agreement.[34] The Sprint Nextel merger consequently will in no way undermine or delay the implementation of the 800 MHz reconfiguration plan to eliminate CMRS-public safety interference. The implementation of the plan is well underway, with the Commission, Nextel, and the Transition Administrator already having taken numerous steps to help ensure that 800 MHz reconfiguration takes place efficiently and expeditiously. The Commission has emphasized that time is of the essence in remedying the 800 MHz public safety interference problem through

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Notice of Inquiry, 17 FCC Rcd 25554, ¶ 19 (2002) (inquiring whether "nationwide carriers [are] better able to offer lower prices, better roaming capability, or more services due to economies of scale").

[32] *See Roaming NPRM* ¶ 17 (seeking comment on automatic roaming "utilizing current and/or anticipated technologies").

[33] *See Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004) ("*800 MHz R&O*"), *modified*, *Improving Public Safety Communications in the 800 MHz Band,* Order, 19 FCC Rcd 25120 (2004) ("*800 MHz Supplemental Order*").

[34] *See* Application at 62-63 (summarizing Nextel's obligations under the *800 MHz R&O*, and stating that "[a]s specified in the Merger Agreement for this transaction, the merged company will accept the obligations enumerated in the[] conditions" imposed on Nextel by the *800 MHz R&O*); Sprint Corporation, Form 8K, § 6.12 (Securities and Exchange Commission, Dec. 15, 2004) (Attachment A to the Application) ("From and after the Effective Time, the Surviving Company will assume and honor all obligations accepted by Nextel pursuant to the FCC's 800 MHz rebanding proceeding, Improving Public Safety in the 800 MHz Band, Report and Order, Fourth Memorandum Opinion and Order, and Order[.]").

band reconfiguration. Delay in this process would cause "palpable – even life-threatening – harm to both public safety agencies and to the public as a whole resulting from continued and unabated interference to public safety and CII systems."[35]

Three petitioners, however, attempt to inject into this proceeding issues regarding 800 MHz reconfiguration that have no relevance whatsoever to the Commission's public interest review of the proposed Sprint Nextel merger. All three – Coastal,[36] Richard W. Duncan ("Duncan"),[37] and Preferred Communications Systems, Inc. ("Preferred")[38] – are 800 MHz licensees who express one complaint or another about the Commission's *800 MHz R&O*. Coastal, which, as discussed below, makes meritless arguments regarding a so-called "dispatch market," criticizes the *800 MHz R&O* and even attaches the petition for reconsideration it has filed in the 800 MHz proceeding to its petition to deny the proposed merger.[39] Notwithstanding the merged company's unambiguous commitment to the Commission's 800 MHz reconfiguration decision, Duncan makes several misdirected efforts to tie the Commission's 800 MHz reconfiguration plan to this merger proceeding.[40] In its petition to deny, Preferred offers a rambling discourse on the FCC's merger review standards and some conclusory assertions

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35 *Improving Public Safety Communications in the 800 MHz Band*, Order in WT Dkt. No. 02-55, DA 05-82, ¶ 16 (rel. Jan. 14, 2005) ("*800 MHz Stay Denial*").

36 *See generally* Coastal.

37 *See generally* Duncan.

38 *See generally* Preferred.

39 *See* Coastal at 8.

40 Duncan's convoluted claims regarding the impact of the proposed merger on the 800 MHz reconfiguration plan do not warrant a point-by-point rebuttal. Suffice it to say that, contrary to Duncan's claims, the merger has no relevance to the Commission's well-supported findings underlying its 800 MHz reconfiguration plan, including the need to provide Nextel replacement spectrum in the 1.9 GHz band in return for its substantial spectral and financial contributions to the plan.

regarding the Applicants' 2.5 GHz spectrum holdings, and then, in a *non sequitur* devoid of any connection to this merger proceeding, proposes merger conditions that are tantamount to a request that the Commission reconsider the replacement spectrum various 800 MHz licensees should receive under the 800 MHz reconfiguration plan.[41]

Duncan, Preferred, and Coastal are replicating their efforts in the *800 MHz Public Safety Proceeding*. These parties have filed petitions for reconsideration in that proceeding, and certain of these companies also filed motions for stay of the *800 MHz R&O*, all of questionable merit.[42] The petitions to deny filed in the instant proceeding are merely the latest attempt of the 800 MHz opponents to game the FCC's regulatory process.

The legal maneuverings of Duncan, Preferred, and Coastal have nothing to do with the public interest. They amount to efforts to gain unwarranted spectrum rights and enhance their competitive position. For example, Preferred's proposed merger conditions effectively would require not only that Nextel divest spectrum rights it has been assigned under the *800 MHz R&O*, but that this spectrum then be assigned to Preferred. This amounts to an unjustified spectrum grab with no FCC precedent. The Commission should therefore reaffirm its strong policy against such tactics, and summarily deny the petitions of Duncan, Preferred, and Coastal.

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[41] Preferred also attaches to its petition to deny the petition for reconsideration it has filed in the 800 MHz proceeding.

[42] After the U.S. Court of Appeals and the Commission denied stay motions filed by Skitronics, one of the Coastal members, *see* "Motion for Partial Stay of Decision Pending Appellate Review," filed by Mobile Relay Associates and Skitronics, WT Docket No. 02-55 (Nov. 19, 2004), *motion denied*, *800 MHz Stay Denial*, and *motion denied*, *Mobile Relay Associates and Skitronics, L.L.C. v. FCC*, 2005 U.S. App. LEXIS 1632 (D.C. Cir. Feb. 1, 2005), Skitronics filed yet another stay request, which is currently pending before the Commission. "Petition for Partial Stay of Decision" filed by Mobile Relay Associates and Skitronics, WT Dkt. No. 02-55 (Feb. 7, 2005).

Finally, as noted above, whatever the merits of these arguments, they are more properly addressed – if at all – in the 800 MHz proceeding. Coastal, Duncan, and Preferred have each filed a petition for reconsideration of the Commission's 800 MHz decision. That is the proper forum for their arguments, *not* this merger review.

C. Coastal's Claims Regarding Dispatch Services Are Not Merger Specific

Coastal incorrectly suggests that the Commission must consider the competitive impact of the Sprint Nextel merger on what it variously calls the "dispatch market," the "dispatch service market," or the "trunked dispatch market."[43] In fact, there is no separate dispatch market. The Commission has repeatedly found that wireless voice services have converged into a single, integrated mobile telephony services market,[44] a reality that marketplace developments in recent years have made abundantly clear.[45] In any case, Coastal contends that Sprint does not offer any dispatch services.[46] It thus effectively admits that the Sprint Nextel merger would have no effect whatsoever on the provision of services in that so-called "market," and the Commission should summarily dismiss this non-merger specific concern.

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43 Coastal at 6.

44 *See Implementation of Sections 3(n) and 332 of the Communications Act*, Third Report and Order, 9 FCC Rcd 7988, ¶¶ 37-43 (1994); *see also Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corp., N.A., and C-Call Corp.*, Order, 10 FCC Rcd 3361, ¶ 27 ("*OneComm*"), *modified*, 10 FCC Rcd 10450 (1995); *Applications of Motorola, Inc. for Consent to Assign 800 MHz Licenses to Nextel Communications, Inc.*, Order, 10 FCC Rcd 7783, ¶ 17 (1995) ("*Motorola 1995*"), *recon. denied*, 15 FCC Rcd 4562 (2000). In the *OneComm* and *Motorola 1995* decisions, in particular, the Wireless Telecommunications Bureau concluded, based on the Third R&O, that "800 MHz SMR [is viewed] as just one of many competitive services within the larger CMRS marketplace." *OneComm* ¶ 27; *Motorola 1995* ¶ 17.

45 *Ninth CMRS Market Report* ¶ 89 (citations omitted); *see also id.* ¶ 152 ("Recently, a number of mobile wireless operators have begun to offer competing PTT services" in response to Nextel's PTT offering).

46 Coastal at 6.

D. CWA's Request For Commission Action Relating To The Future Spin-off Of Sprint's Local Telephone Operations Is Misplaced And Premature

While Sprint and Nextel have stated their intention to spin-off Sprint's ILEC operations, that spin-off is not before the Commission at this time. Notwithstanding this fact, CWA has requested that the Commission impose conditions on the Sprint Nextel merger that concern this contemplated spin-off.[47] Not only are its comments not germane to the instant transaction, but its requests are entirely premature. The details of the contemplated spin-off have not been determined. When the Board of Sprint Nextel has made the required determinations, including determining the capital structure of the spin-off, all required approvals will be obtained.

E. Most Of The Opponents' Claims Regarding The 2.5 GHz Band Are Not Merger-Specific And, Thus, Are Irrelevant To The Commission's Public Interest Analysis

Only potential competitive harms or benefits that occur *as a result of the merger* are relevant to the Commission's public interest analysis.[48] Several petitioners, however, attempt to use this merger proceeding as a vehicle for challenging the 2.5 GHz BRS-EBS licenses and leases currently held by Sprint and Nextel. The vast majority of these claims are not merger-specific and, therefore, irrelevant to the Commission's merger-review analysis, as explained herein.

The pre-merger 2.5 GHz spectrum holdings of both Sprint and Nextel comply with FCC regulations today and will continue to comply after the merger. Regardless of the measure used to document the companies' holdings, the two companies have little 2.5 GHz spectrum capable of serving the same population. Simply put, Sprint and Nextel hold few licenses or leases in the same geographic areas; therefore, combining Sprint's and Nextel's spectrum holdings generally

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47 *See* CWA at 6.

48 *See supra* notes 15-17 & accompanying text.

does not materially increase the depth of Sprint Nextel's spectrum rights.[49] Indeed, the merger results in no incremental effect in 409 out of the 493 BTAs nationwide – because no more than one or none of the merging parties has spectrum rights in these markets. In most of the 84 BTAs where both Sprint and Nextel have a presence in the same BTA, one carrier covers only a minimal percentage of the MHz-pops in that BTA.[50] On average, the combination results in an increase of only 4.3 percentage points on a MHz-pops basis. In only 17 of those 84 BTAs will the merger increase the MHz-pops coverage of the combined entity by more than a *de minimis* amount of more than ten percentage points.

CTCN appears to argue that BTAs are not the correct geographic unit for analyzing overlap of Sprint and Nextel's combined 2.5 GHz spectrum.[51] Sprint and Nextel used BTAs as a study area because the Commission used BTAs as the basic licensing unit for the 2.5 GHz band.[52] Contrary to CTCN's contentions, BTAs actually overstate the degree of incremental change as a result of the merger because any holdings by one of the merging parties in a small geographic service area (GSA) within a BTA are counted as increasing the concentration of BRS-EBS holdings of the combined company in that BTA even if there is no coverage overlap. Suppose, for example, that a Sprint-licensed GSA were in the eastern portion of the BTA and a

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49 In other words, 90% of the nation's 493 BTAs will exhibit a change of one percentage point or less, as measured on a MHz-pops basis. *See* Joint Declaration of Todd Rowley and Robert Finch ¶¶ 11-12 (appended as Attachment E to Application) ("Rowley-Finch Declaration"); *see also* BRS-EBS Spectrum Chart at 1 (appended as Attachment 1 to Rowley-Finch Declaration) ("BRS-EBS Attachment 1").

50 Sprint and Nextel previously reported 85 BTAs in which both companies had a joint presence. *See* Rowley-Finch Declaration ¶ 12. The York-Hanover BTA (BTA No. 483), however, was erroneously listed. In fact, Sprint has no licenses or leases in the York-Hanover BTA.

51 CTCN at 9-10.

52 *See* 47 C.F.R. § 27.1208.

Nextel-licensed GSA were in the western portion of the BTA, but the two GSA licenses never physically overlap. Even though these licensees in the two GSAs do not serve the same people and do nothing to increase the depth of the companies' 2.5 GHz holdings, the previous analysis provided by Sprint and Nextel counts the presence of these two GSAs within the same BTA as increasing the percentage of MHz-pops held by the combined company. Thus, the already limited incremental change in the combined companies' 2.5 GHz holdings as a result of the merger would only *decrease* if a geographic unit smaller than a BTA is used for purposes of the overlap analysis.

CTCN and some of the other 2.5 GHz commenters are essentially asking the Commission to reexamine the Applicants' pre-merger 2.5 GHz holdings, rather than the minimal increase in geographic overlap of the two companies *that occurs as a result of the merger*. CTCN, for example, presents two tables that purport to demonstrate the effects of the "Proposed Nextel/Sprint Merger."[53] CTCN asserts that Sprint Nextel would have significant licensed and leased 2.5 GHz holdings in the so-called "Major Markets" of selected GSAs located within the "50 largest BTAs following the combination."[54] CTCN does not distinguish between the existing, non-overlapping 2.5 GHz spectrum holdings of Sprint and Nextel and the incremental increase in the overlapping service areas that will occur as a result of the merger.[55] CTCN's own

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[53] CTCN at 14-16; *see also* NY3G at 8-9 (failing to tie proposed conditions to the effect of the merger). As discussed below, 2.5 GHz spectrum is by itself not a "market," but rather one of many potential alternative sources of spectrum that constitute an input to a product or service.

[54] CTCN at 15-16.

[55] There are at least two errors in the data presented by CTCN in Exhibit 4. First, in Columbus, Ohio, CTCN attributes the same four channels (A1, A2, A3, A4) to both Sprint and Nextel. *Id.*, Exhibit 4, at 34. Sprint leases the "A" group in Columbus. Second, CTCN claims that Sprint leases six channels (D1, D2, D3, D4, G1, G2) in Jacksonville. *Id.*, Exhibit 4, at 45. As demonstrated by BRS-EBS Attachment 1 to the Rowley-Finch Declaration, Sprint does not hold any leased 2.5 spectrum in Jacksonville; these channels are leased to BellSouth. In

data, however, confirm that there is *no change as a result of the merger in 39 of the "Major Markets" in the top 50 BTAs.*[56] Thus, CTCN's arguments are not merger-specific and should be summarily denied.

Significantly, many of the complaints regarding the companies' 2.5 GHz spectrum holdings also raise issues of general applicability that are already the subject of Commission rulemaking proceedings. For more than two years, the Commission has considered sweeping proposals to reconfigure the former MDS and ITFS bands, and on January 10, 2005, a new regulatory regime for BRS and EBS became effective.[57] The notice of proposed rulemaking in that proceeding specifically solicited comments on the need for both spectrum caps[58] and rules to facilitate roaming.[59] Yet, none of those now raising such concerns in the context of this merger chose to participate in the rulemaking proceeding. The further notice of proposed rulemaking

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addition, the Applicants believe CTCN has overstated the leasehold interest and channel rights in numerous other markets. The Applicants address other flaws in CTCN's analysis below. *See infra* Section III.E.

[56] CTCN Exhibit 4. In the seven markets where CTCN claims there is the greatest increase, there is absolutely no overlap between the two companies' 2.5 GHz holdings. *Id.*

[57] *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,* Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) ("*BRS Order*").

[58] *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,* Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722, ¶¶ 117, 127-128 (2003) (seeking comment on circumstances under which to "restrict or require [EBS] leasing in order to ensure that access to spectrum is not unduly limited" and stating the FCC's position that spectrum ownership "restrictions are not necessary for the 2500-2690 MHz band").

[59] *See id.* ¶ 142 (seeking "comment on whether the Commission should adopt standards for mobile operation to promote interoperability and roaming").

that remains pending addresses other concerns, including alleged "spectrum warehousing."[60] Any matters that remain pending should be addressed in that rulemaking context, not in this merger proceeding.

III. THE MERGED COMPANY WILL NOT HAVE MARKET POWER IN THE PROVISION OF SERVICES AT 2.5 GHZ

In the Application, Sprint and Nextel described how the combination of their 2.5 GHz band spectrum would lead to significant public interest benefits, including the accelerated deployment of wireless interactive multimedia services. While numerous parties support this effort, two petitioners and two commenters allege that this combination will have anti-competitive consequences.[61] The Commission should summarily reject these parties' claims, which are based on a fundamentally flawed market definition and a distorted analysis of the Applicants' spectrum holdings. First, spectrum in the 2.5 GHz band is only an input, not a service or a market itself. Second, competitors can provide similar services in myriad other ways. Third, the historical regulatory scheme of the 2.5 GHz band creates obstacles to achieving commercial success using the 2.5 GHz spectrum. Therefore, no rational basis exists for limiting Sprint Nextel's 2.5 GHz spectrum holdings.

A. The Services Sprint Nextel Will Provide Using 2.5 GHz Spectrum Do Not Constitute A Relevant Product Market

Various parties allege that the merged company will have "market power" in the provision of services in the 2.5 GHz band.[62] It is premature to discuss market power, however, when no market exists and the technology is still under development. The band itself is now

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60 *See BRS Order* ¶ 325 (discussing proposals for substantial service standards to limit warehousing).

61 CTCN at 13-18; CU/CFA at 9-10, 14; NRTC at 1-3; NY3G at 2-4.

62 *See, e.g.*, CTCN at 13-18; CU/CFA at 9-10; NY3G at 2.

beginning a multi-year transition from a broadcast-type allocation to one conducive to advanced two-way communications. Moreover, Sprint Nextel's vision of a visually-oriented wireless interactive multimedia service ("WIMS") is only one of several potential uses of the 2.5 GHz band spectrum.[63] But whether the band is used for WIMS or for one of the other potential uses of the spectrum, the technologies that will ultimately predominate are still under development, and the transition of the band that is essential to its efficient utilization has not yet begun.

For the reasons explained in detail in the Application,[64] no one at this time can predict with any certainty the services that will prove to be commercially viable in the 2.5 GHz band. As stated previously, Sprint and Nextel expect and intend that their nationwide service at 2.5 GHz will be much more than simply a broadband access service. Many elements of the business plan at 2.5 GHz, however, remain in the planning stage and are subject to change. The combined company's ultimate choice of technology is unknown, and, at this point it cannot be predicted which mix of services and performance requirements will be commercially successful.

Moreover, the 2.5 GHz band itself is in a severe state of flux. In June 2004, the Commission adopted an order that drastically reconfigured the band, and the transition period for this reconfiguration commenced on January 10, 2005. It is likely to be several years before this band realignment process is complete and Sprint Nextel and other users can gain access to clear interference-free blocks of spectrum that can be used to provide the types of wireless interactive multimedia services the companies envision. Services that may be provided in the future in that band do not constitute a distinct relevant product market for antitrust purposes. Consequently,

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63 Sprint Nextel also intends to use some of the 2.5 GHz spectrum for high-bandwidth backhaul connections.

64 *See* Application at 46; Rowley-Finch Declaration ¶¶ 22-23.

objections to the merger that are based on these erroneous assumptions are without merit and should be rejected.

Given the incipient development of the 2.5 GHz band, the Commission should treat these services in the same manner as it has other nascent technologies and platforms. In the *Cingular-AT&T Wireless Order*, for example, the FCC concluded that the market for stand-alone mobile data services was "not sufficiently developed at this time to [be] subject to a credible antitrust review."[65] Similarly, in its analysis of the AT&T-MediaOne merger, the Commission concluded that the "nascent condition of the broadband industry" made it "premature to conclude that the proposed merger pose[d] a sufficient threat to competition and diversity in the provision of broadband Internet services, content, applications, or architecture to justify denial of the merger or the imposition of conditions."[66] Indeed, the 2.5 GHz band presents an *a fortiori* case for such "hands off" treatment: revised rules for the band just became effective (and are subject to pending petitions for reconsideration), transition of this spectrum is just beginning, and proposed technologies that ultimately will be deployed are still in development.

The merged company simply cannot "dominate" a service that does not yet exist using a technology not yet developed in a band not yet reconfigured. Allegations to the contrary rest on so many suppositions, assumptions, and predictions that they merit no consideration whatsoever.

B. Potential Competitors Will Have Ample Access To Spectrum

In the Application, Sprint and Nextel described the potential for deploying high-speed wireless interactive multimedia services at 2.5 GHz.[67] Other present and future licensees or

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65 *Cingular-AT&T Wireless Order* ¶ 78.

66 *AT&T-Media One Merger Order* ¶ 123.

67 Application at 49-50.

lessees in the 2.5 GHz band have and may develop other types of services using the same spectrum. The 2.5 GHz band, however, represents only a portion of the spectrum that could be used for such services. Accordingly, no plausible basis exists for claims that the merged company's 2.5 GHz spectrum holdings would raise competitive concerns.

1. Sprint Nextel's 2.5 GHz Holdings Are Just A Small Fraction Of The Total Amount Of Spectrum Available For New Advanced Services

The 2.5 GHz band is not a unique resource. The combined company's 2.5 GHz holdings represent a small percentage of the total spectrum capable of supporting WIMS-type and other potential services.[68]

Even leaving aside the spectrum at 2.5 GHz that is not licensed to or leased by Sprint or Nextel, competitors will have access to nearly 300 MHz of spectrum in other licensed bands that could be used to provide WIMS and other types of advanced wireless services.[69] Moreover, all of this alternative spectrum occupies lower frequency bands that possess generally more favorable propagation characteristics than the 2.5 GHz band. First, 130 megahertz of unassigned Advanced Wireless Services ("AWS") spectrum is available in the following bands with no limits on the total amount of spectrum licensees can hold:

- 90 MHz at 1710-1755/2110-2155 MHz
- 10 MHz at 1915-1920/1995-2000 MHz (H Block)
- 10 MHz at 2020-2025/2175-2180 MHz (J Block)

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[68] As discussed *infra*, the merged company would hold licenses for only 19 percent of the 2.5 GHz spectrum and would hold licenses and leases for less than half of this one band.

[69] The availability of 2.5 GHz spectrum is discussed *infra*.

- 20 MHz of currently unpaired spectrum at 2155-2175 MHz[70]

Another 78 megahertz of spectrum exists in the 700 MHz band. In addition, Verizon Wireless and Cingular already have access to portions of the 43 megahertz of Wireless Communications Services ("WCS") spectrum available in the 1390-1395 MHz, 1432-1435 MHz, 1670-1675 MHz, 2305-2320 MHz, and 2345-2360 MHz bands.[71] Finally, the more than 56 megahertz dedicated to the 2 GHz and Big LEO Mobile Satellite Service Ancillary Terrestrial Component in the 2000-2020/2180-2200 MHz and 1610-1615.5/1621.35-1626.5/2487.5-2493 MHz bands may also support WIMS and other potential services.[72]

Thus, the post-merger Sprint Nextel's licensed 2.5 GHz holdings would represent only a small percentage of the total spectrum capable of supporting WIMS and other potential services. Using a rough MHz-pops analysis, the combined company would be licensed to operate in less than 8% of the total "WIMS-capable" spectrum below 3 GHz that is already licensed, available for licensing, or likely to become available in the near future.[73] This spectrum position raises no competitive concerns.

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[70] The Commission has proposed the allocation of an additional 10 MHz of spectrum at 2155-2165 MHz to fixed and mobile services, including AWS. *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, ¶ 68 (2003).

[71] The WCS allocation spans 43 MHz of spectrum. Due to bandwidth limitations and other factors, the useful portion of this band occupied or available to competitors is conservatively estimated here to be approximately 35 MHz. Nextel holds a small amount of WCS spectrum; however, its holdings are limited and primarily exist in rural areas.

[72] More than 150 MHz of additional unlicensed spectrum is available at 900 MHz, 2400 MHz, and 3650 MHz that could support WIMS-type services.

[73] This figure drops below 6% when the unlicensed spectrum identified above is included.

2. The Majority Of 2.5 GHz Spectrum Is Available To Competitors That Wish To Offer Competing Services

In the 2.5 GHz band, ample spectrum remains for competitive entry. Following the merger, the majority of the 198 MHz of BRS-EBS spectrum at 2.5 GHz will be available to potential competitors just as it is today. Moreover, less than 40% of the combined company's "holdings" will actually be licensed to Sprint Nextel, which represents only 19% of the overall spectrum at 2.5 GHz. The combined company's remaining 2.5 GHz "holdings" are term-limited leases, many of which will become available for competitors to lease when Sprint's and Nextel's current leases expire. Indeed, 17% of the leased MHz-pops held by the combined Sprint Nextel – or eight percent of all leased spectrum at 2.5 GHz – expire within the next two years, and 30% of the leased MHz-pops held by the merged company – or 15% of all leased spectrum in the 2.5 GHz band – expire within the next five years. As a result, ample spectrum – both licensed and leased – exists in the 2.5 GHz band for other competitors to deploy WIMS-type or other services.[74]

C. The Companies' Combined BRS-EBS Spectrum Holdings Are Essential To Successful Commercial Development Of The 2.5 GHz Band

Successfully deploying a video-centric, two-way communications service will require facilities-based investment, long-term staying power, and a great deal of broadband capacity. Sprint Nextel's services in the 2.5 GHz band will represent the first national *wireless* service engineered from the ground up to provide two-way, multimedia communications to consumers

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[74] CTCN complains that the Applicants do not provide sufficient information regarding their leases. CTCN at 12. The analysis presented in the Application, however, conservatively attributed 100% of the leased spectrum to the combined company and assumed that *none* of this spectrum is available to others, regardless of the timing of lease expirations, renegotiations, limitations on the services that could be provided under the terms of the lease, etc. Limitations in lease provisions thus are irrelevant for purposes of the analysis presented in the Application.

throughout the nation. Today, wireless carriers provide primarily voice communications and try, with varying degrees of success, to provide multimedia services by tweaking the existing voice-centric networks. Unlike today's national wireless services, however, Sprint and Nextel intend to use 2.5 GHz spectrum to deploy a network dedicated entirely to the provision of high-speed, two-way multimedia content at a price consumers can afford. To compete with other existing and anticipated broadband multimedia offerings, Sprint and Nextel will need to realize economies of scope and scale beyond those typically contemplated in the narrowband, voice-centric environment.

In more than forty years, no licensee has ever successfully deployed a nationwide service using 2.5 GHz spectrum. If Sprint Nextel hopes to succeed where so many other companies have failed, it will require access to sufficient spectrum to overcome the many technical and business obstacles to using this band to deploy service at the performance levels the companies envision. Sprint and Nextel intend to use the 2.5 GHz spectrum to deploy high-speed wireless interactive multimedia services and many other associated wireless services, such as fixed wireless backhaul. Gaining – and maintaining – access to sufficient spectrum to deploy WIMS will prove challenging because more than sixty percent of the available spectrum in the band is only available through leases and, in most cases, Sprint and Nextel have no assurance that these lease relationships will continue beyond their expiration dates. Meanwhile, the ever-improving throughput performance of cable, DSL, and fiber providers will continue to raise customer expectations.

Under the proponent-driven transition process, Sprint and Nextel will likely bear primary responsibility for implementing and funding a comprehensive band reconfiguration through

2009.[75] Sprint Nextel's nationwide footprint in the 2.5 GHz band will allow the companies to develop expertise in the transition process and help accelerate the migration of this band from its current configuration to the modernized band plan.

Having access to sufficient spectrum at 2.5 GHz will also allow Sprint Nextel to overcome the technical impediments that have long prevented the 2.5 GHz band from realizing its full potential to offer services to the public. The 2.5 GHz band has propagation characteristics that are in many ways less desirable than the alternative, lower-frequency spectrum bands that could support WIMS. As a result, 2.5 GHz operators will face higher infrastructure costs when deploying their network. In addition, neither the old band plan nor the new band plan provides for common control channels, standardized emission characteristics, or other common performance measurements recognized by national and international standards bodies. Perhaps most significantly, the Commission has also decided to permit both Frequency Division Duplexing ("FDD") and Time Division Duplexing ("TDD") technologies to operate in the same and adjacent band segments, an approach that may require an operator to set aside spectrum for guardband use if other operators in the market or in neighboring markets elect to deploy non-synchronized technologies.[76] As a result, Sprint Nextel and other operators will need the spectrum flexibility to fashion a functional spectrum environment for WIMS and other bandwidth-intensive advanced multimedia services.

One of the most notable benefits of the merger of Sprint and Nextel is combining the companies' geographically disparate spectrum holdings into a near-nationwide footprint to provide new and innovative services to consumers. Opponents of the merger demand that the

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75 *See, e.g.*, *BRS Order* ¶¶ 78-83.

76 *See id.* ¶¶ 132-134.

Commission preserve the patchwork quilt of licenses in this band ostensibly to prevent some ill-defined, highly speculative harm to competition. The merger opponents, however, confuse the effects of the merger on *competition* with its effects on *competitors*. Only the former is relevant to an appraisal of the Sprint Nextel merger.

As discussed in the Application, Sprint Nextel's footprint in the 2.5 GHz band will extend to nearly 85% of the pops in the top 100 markets.[77] This near-nationwide footprint will help provide the scale necessary to justify the substantial research, development, implementation, and operational costs required to make use of the band in a manner that will hopefully prove viable over the long term. The potential national reach of this service would create significant incentives to take opportunities and risks to deploy emerging new technologies, since any benefits from these aggressive development efforts would be realized over this larger customer base. The merged company should have the scale necessary to attract significant technology investment from major vendors. With their participation, Sprint Nextel should be able to deploy a common technology over a portion of the 2.5 GHz band and, thus, provide consumers with the same services in most areas of the country regardless of where they take their laptop computers, PDAs, or other wireless devices. As in prior mergers, the efficiencies that will result from the Sprint Nextel merger would enhance competition among providers of broadband services.[78]

The Commission has repeatedly approved holdings of 2.5 GHz spectrum in quantities as large or, in many cases, larger than the merger of Sprint and Nextel would create in any given geographic area. In approving the Cingular-AT&T Wireless merger, for example, the

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[77] Rowley-Finch Declaration ¶ 13.

[78] Sprint and Nextel, for example, believe that a nationwide position will make their combined service more attractive to partners that will want to distribute content including video, images, audio, business information, and games. The end result will be a more compelling service for customers.

Commission permitted one of Cingular's parents, BellSouth, to control substantial BRS-EBS spectrum in several top 50 metropolitan areas. Indeed, BellSouth's holdings in the Atlanta, GA; Miami, FL; New Orleans, LA; and Athens, GA BTAs are comparable to or larger than Sprint Nextel's holdings in other BTAs.[79] Similarly, the FCC recently concluded that it was in the public interest for Nextel to acquire BRS and EBS licenses and lease holdings from WorldCom, Inc. and Nucentrix Broadband Networks, Inc. in some markets that exceed the amount of spectrum holdings that the combined company will have in many BTAs.[80] The FCC has also permitted many rural providers to acquire or lease 2.5 GHz spectrum holdings that match or exceed the combined company's holdings in any given geographic area. Moreover, as the Applicants have demonstrated, the merger will result in virtually no incremental increase in overlapping service areas across the vast majority of the nation's BTAs. In short, there is no rational basis for the Commission to limit the amount of 2.5 GHz spectrum held by the Applicants.

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79 *See Cingular-AT&T Wireless Order* ¶ 11 (acknowledging in merger approval order that "Cingular subsidiaries and affiliates also have authority to operate systems using . . . Multipoint Distribution System [MDS] . . . licenses in various markets in the United States"); *see also* CTCN at 14 (noting that BellSouth has substantial BRS-EBS holdings in five of the top 50 BTAs).

80 *See Wireless Telecommunications Bureau Grants Consent to Assign Multipoint Distribution Service Station Licenses*, Public Notice, 19 FCC Rcd 6329 (2004); *Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 6232, ¶ 29 (2004) (concluding that one of the potential benefits of the transaction was that it would allow underutilized spectrum to be put into service, thus enhancing Nextel's ability to offer innovative wireless services). The FCC likewise concluded that Sprint's acquisitions of BRS licenses and EBS leaseholds in 1999-2000 were in the public interest.

D. 2.5 GHz Spectrum Is Not CMRS Spectrum

CU/CFA argues that the Commission should consider the Applicants' CMRS, BRS and EBS combined holdings for purposes of assessing the effects of the merger.[81] This claim should be rejected. The Commission has previously found that BRS spectrum holdings in the 2.5 GHz band should not be counted as CMRS or "mobile telephony" holdings. Specifically, in the *Cingular-AT&T Wireless Order*, the Commission concluded that BRS spectrum "does not currently meet [its criteria for spectrum suitable for provision of mobile telephony services] because it is committed to non-mobile telephony uses currently and for the near-term future."[82] The Commission reached this conclusion despite the elimination of rules that prohibit BRS-EBS licensees from providing mobile telephony services.[83]

The same analysis applies to the proposed Sprint Nextel merger. In contrast to the 800 MHz and 1.9 GHz bands, the technical and operational characteristics of the 2.5 GHz band – including the spectrum isolation of the band, the lack of equipment or standards, and the band's inferior propagation characteristics – make it ill-suited for mobile voice communications at least currently. The 2.5 GHz band will be unable to support voice communications economically with the same seamless interconnectivity and mobility that CMRS users enjoy today.

Accordingly, as described in the Application, Sprint and Nextel envision using BRS-EBS spectrum to provide wireless interactive multimedia services that – unlike CMRS – will be

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81 CU/CFA at 8-10, 13-14.

82 *Cingular-AT&T Wireless Order* ¶ 81 n.283.

83 *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, First Report and Order and Memorandum Opinion and Order, 16 FCC Rcd 17222, ¶¶ 19-26 (2001).

video-optimized, data-centric, and focused principally on stationary and portable consumer electronic and computing-oriented devices and hardware.[84]

E. The Applicants Properly Analyzed The Competitive Effects Of Combining Their BRS-EBS Spectrum Holdings

The Application filed in support of the proposed merger devoted considerable attention to analyzing whether combining the companies' respective BRS-EBS spectrum would raise competitive concerns.[85] That analysis demonstrated that the merger would have distinct and substantial pro-competitive effects for the provision of bandwidth-intensive services in that frequency band. CTCN, however, claims that the analysis presented in the Application is flawed. CTCN further offers its own assessment of the impact of consolidating the companies' BRS-EBS spectrum. As demonstrated below, not only are CTCN's criticisms misguided, but its method of analyzing the BRS-EBS impact of the merger in "Major Markets" appears to overstate systematically the actual population and geographic area that the combined company will be able to serve using 2.5 GHz spectrum.

Sprint and Nextel analyzed the effect of combining their 2.5 GHz holdings by computing the MHz-pops of the merged company in each BTA.[86] CTCN objects to this approach, claiming that the Commission should assess the Applicant's BRS-EBS license and leaseholds based on the number of GSA channels they hold in a "Major Market."[87] CTCN's definition of "Major Market" is unlike any other the Commission has ever used. CTCN does not rely on some basic measure of a geographic market, such as a census-designated place or urban area. Instead,

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84 Rowley-Finch Declaration ¶¶ 24-30.

85 Application at 48-49; Rowley-Finch Declaration ¶¶ 7-13.

86 Rowley-Finch Declaration ¶¶ 9-12 & BRS-EBS Attachment 1.

87 CTCN at 13.

CTCN's definition of "Major Market" uses the geography encompassed by the vagaries of the site-by-site selection process that occurred haphazardly over the last forty years for some, but not all, of the 2.5 GHz GSAs. CTCN appears to define a "Major Market" by reference to selected GSAs that happen to be within each of the top 100 BTAs in the nation. These GSAs need not be contiguous and in many cases are almost assuredly not contiguous.

CTCN's "Major Market" definition has no relevance to how people buy or sell communications services. Even if it did, CTCN's analysis appears to rely on a series of *ad hoc* judgments about which GSAs are located in a so-called "Major Market" and which are not. While its precise methodology is unclear, CTCN appears to have *excluded* competitors' suburban and rural GSAs from its calculations, but selectively *included* the Applicants' suburban and rural GSAs in its calculations. CTCN then improperly treats all GSA channels as equal, regardless of the population covered. By selectively adjusting the geographic area to exclude competitors' stations while including the Applicants' similarly situated stations and then treating all stations as equal, CTCN *overstates the number and ratio of* GSAs attributed to Sprint Nextel. Despite considerable effort, the Applicants have been unable to replicate CTCN's supposed results and therefore cannot validate its allegations or conclusions. In contrast, the Applicants provided the Commission with a highly granular analysis that accounts for every MHz-pop in the nation in each of the nation's 493 BTAs; CTCN, on the other hand, appears to have gerrymandered a series of so-called "Major Markets" for this proceeding.

Contrary to CTCN's characterizations,[88] the Applicants' analysis actually tends to *overstate* rather than *understate* the effects of combining the companies' BRS-EBS holdings. Using BTAs as the unit of observation, as opposed to a smaller geographic area, increases the

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88 *Id.* at 8-13.

number of areas in which both companies have a "joint presence." In a related vein, CTCN claims that, if the Applicants had focused their analysis solely on the "Major Markets" as CTCN defines them, the Applicants' study would have produced significantly different results.[89] CTCN is mistaken. Sprint and Nextel's analysis is weighted based on population. Because the outlying areas contain a relatively small proportion of the total population of the BTA, including these areas has little or no effect on the analysis.

CTCN also criticizes the Applicants' quantitative EBS-BRS assessment on the grounds that it includes EBS spectrum that is potentially unavailable for commercial leasing as well as currently unavailable EBS white space.[90] This modification, however, would not have a

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89 *Id.* at 9-10, 13-14.

90 *Id.* at 10-12. CTCN further complains that the Applicants should have attributed to the combined company all unused EBS white space in BTAs licensed to Sprint or Nextel because Sprint has argued in another proceeding that commercial BTA license holders should have "an exclusive last chance right to license any unused EBS white space prior to an EBS white space auction." *Id.* at 11 n.17. In so doing, however, CTCN grossly misstates Sprint's position. These issues really involve the wireless cable exception, which currently permits wireless cable entities to be licensed on vacant EBS channels under certain circumstances. What Sprint proposed was that instead of retaining the wireless cable exception in perpetuity, the Commission "[allow] BRS BTA authorization holders a 'last chance' opportunity to apply for vacant EBS spectrum pursuant to the wireless cable exception prior the EBS white space auction." *See* Reply Comments of Sprint Corp., WT Dkt. No. 03-66, at 16 (Feb. 8, 2005). Under the rules governing the wireless cable exception, the BRS BTA license holder cannot apply for spectrum unless at least eight EBS channels would be left vacant after grant of the application. *See* 47 C.F.R. § 27.1201(c)(1). Moreover, the BRS BTA licensee may not secure more than eight channels pursuant to the exception. *See id.* at § 27.1201(c)(2). And, the BRS BTA licensee cannot secure a license for any EBS spectrum for which an EBS licensee files a mutually exclusive application. *See id.* at § 27.1201(c)(5). Thus, contrary to CTCN's assertion, Sprint never suggested that it be permitted to secure all of the unused EBS spectrum in the BTAs where it holds the commercial BTA authorization. Not surprisingly, given the limited nature of the wireless cable exception, only a handful of stations have been licensed pursuant to it, and those stations are without exception located in very rural areas where the population is quite low. As such, it is unlikely that adopting Sprint's proposal (which was advanced by numerous other entities, too) would have a significant effect on the Applicants' quantitative analysis. Indeed, the alternative before the Commission, preserving the wireless cable exception in perpetuity, would result in less spectrum being available for others, not more.

significant effect on the applicants' overall quantitative analysis because: (1) unlicensed EBS white space accounts for less than 10% of the nation's total BRS-EBS MHz-pops; (2) the Commission has indicated that it plans to make this white space available to eligible licensees in the near future;[91] and (3) EBS licensees routinely lease excess capacity to commercial users.[92]

In sum, Sprint and Nextel have provided the Commission an accurate and granular analysis that accounts for every 2.5 GHz MHz-pop in every BTA in the nation. If that calculation suffers from any flaw, it is that it tends to *overstate* the number of BTAs in which the combined company's 2.5 GHz spectrum holdings would increase as a result of the merger. In any event, Sprint Nextel in almost all cases will not hold appreciably more 2.5 GHz spectrum in any given BTA as a result of the merger. Accordingly, the combined company's 2.5 GHz holdings raise no competitive concerns.

IV. CONCLUSION

Sprint and Nextel demonstrated in their Application and in this Joint Opposition that the merger of the two companies will confer numerous and substantial public interest benefits on American wireless consumers, including the creation of a new wireless carrier with the incentive and ability to develop and deploy innovative services. Until the Commission approves this transaction, however, the companies will not be able to begin to devote the joint effort required to make these innovative services a reality for American consumers. In the meantime, Sprint

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91 *See BRS Order* ¶ 162.

92 *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Notice of Proposed Rulemaking and Order, 16 FCC Rcd 596, ¶ 59 (2001) (recognizing that "[t]oday, most ITFS licensees lease excess capacity to MDS operators"); *see also Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service*, Notice of Proposed Rulemaking, 8 FCC Rcd 1275, ¶ 5 (1993) (acknowledging that "more than 90% of recently filed applications contained excess capacity lease agreements with wireless cable operators").

Nextel's competitors, with access to vast financial resources, will continue to enjoy their current advantages in developing and rolling out their own new wireless products. Because the merger of Sprint and Nextel is clearly consistent with the Commission's rules and precedent, including its recent decision in the Cingular-AT&T Wireless merger, and raises no anticompetitive concerns, the Commission can most effectively promote the public interest in the vibrantly competitive wireless industry by approving this merger before the end of the second quarter of 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennette Manson, do hereby certify that on this 11th day of April 2005, copies of the foregoing Joint Opposition To Petitions To Deny And Reply To Comments were delivered by first-class, postage-prepaid mail, unless otherwise indicated, to the following parties:

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