

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In re Applications of	)	
	)	
Nextel Communications, Inc.,	)	
Transferor	)	
	)	WT Docket No. 05-63
And	)	
	)	
Sprint Corporation,	)	
Transferee	)	
	)	
For Consent to the Transfer of Control of	)	
Entities Holding Commission Licenses and	)	
Authorizations Pursuant to Sections 214 and	)	
310(d) of the Communications Act	)	

**REPLY OF NY3G PARTNERSHIP**

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Dated: April 18, 2005

## Summary

Sprint and Nextel have utterly failed to respond to NY3G's showing that (i) the combination of Sprint and Nextel's EBS/BRS spectrum will create a single, dominant nationwide provider of high-speed wireless multimedia service; and (ii) the existence of this single, dominant nationwide provider will cripple competition in **both** nationwide and local markets. The result, unless the Commission prevents this aspect of the merger or imposes conditions such as those proposed by NY3G, will be higher prices, lower quality service, and less innovation.

Sprint and Nextel do not deny that the combination of their EBS/BRS spectrum will create an entity with unprecedented amounts of spectrum across a huge nationwide footprint; to be precise, Sprint Nextel will control an average of 84.5 MHz in 386 of the nation's 493 markets, and will be capable of reaching 85 percent of the population of the top 100 markets. Sprint and Nextel also do not deny that no other entity comes even close to the spectrum access or nationwide scope that Sprint Nextel will have after the merger. Their response instead is that, despite these facts, Sprint Nextel will not be dominant because there is alternative spectrum for competitors to use and, in any event, the Commission should not be concerned about competition for this kind of service because the market is only "nascent." Both of these arguments are demonstrably wrong.

The EBS/BRS spectrum is well suited for high-speed wireless multimedia service. The propagation characteristics of the EBS/BRS band are favorable, there are large frequency blocks, and the Commission's rules permit the spectrum to be configured for more efficient, asymmetric service. The band is in the midst of a transition, but the broad terms of that transition have been widely accepted and in most markets the transition should be smooth.

None of the bands that Sprint and Nextel identify are adequate substitutes for the EBS/BRS band. The biggest problem with these bands is that they do not provide nearly the same amount of spectrum required for competitors to effectively offer a nationwide, high-speed, data-intensive service. None offer the prospect of matching Sprint Nextel's average of 84.5 MHz per market, an enormous advantage in offering high-speed multimedia service. Moreover, some of the bands are not yet available for licensing, are encumbered by difficult sharing requirements, or permit only symmetric operations better suited to voice service.

Sprint and Nextel's second argument, that it is too early for the Commission to be concerned about competition in the market for high-speed wireless multimedia service, is also misplaced and disingenuous. Commission policy properly focuses on maintaining the right conditions for competition for all services, not just those that are well established. The success of cellular service and PCS, among others, is the direct result of the early steps that the Commission took to ensure competitive conditions in the then-nascent markets for these services. Now is precisely the time for the Commission to be concerned about the competition in this market. Billions of dollars are being invested in the development of this new service; its full development and deployment in the United States requires a competitive market. Waiting until after Sprint Nextel establishes its dominant position will lead only to years of frustration for policymakers and consumers alike.

By failing to adequately address the impact of the proposed merger on competition in the nationwide market for high-speed wireless multimedia service, Sprint and Nextel also fail to adequately address the impact of the proposed merger on local markets for this service. Sprint and Nextel simply state, repeatedly, that the merger would have no impact because the two companies currently have little overlap in local markets. What this mantra misses is the impact

of the creation of a single, dominant nationwide provider on local market competition. In every local market where the combined entity operates, it will have market power as a direct result its nationwide dominance. High-speed wireless multimedia is a mobile service, so customers want to be able to use it nationwide. As the only entity able to provide that nationwide service, Sprint Nextel will be able to raise consumer prices to levels that would be impossible in a competitive market.

This potential for anticompetitive effects is why the conditions NY3G has proposed are critical. These conditions would require a dominant Sprint Nextel (i) to facilitate roaming by the customers of non-dominant providers, (ii) to allow its own customers to take any assigned number with them in the event that they decide to switch to another service provider, and (iii) to limit its spectrum holdings in any given local market in order to allow other carriers to more easily construct their own nationwide service footprints. These conditions are critical to reduce the adverse effects of Sprint Nextel's dominant position. Sprint and Nextel fail completely to address the merits of the proposed conditions, instead arguing that consideration of the concerns raised by NY3G should be deferred to a rulemaking. This merger proceeding, however, is clearly the appropriate context in which to address the critical anticompetitive concerns that would be raised as a direct result of the proposed merger and its creation of a dominant provider.

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**REPLY OF NY3G PARTNERSHIP**

NY3G Partnership (“NY3G”)<sup>1</sup> hereby submits this Reply in the above-referenced proceeding. As NY3G noted in its Petition to Deny, if Nextel Communications, Inc. (“Nextel”) and Sprint Corporation (“Sprint”) are permitted to combine their EBS/BRS spectrum, the new entity (“Sprint Nextel”) will have a dominant position in the nationwide market for EBS/BRS services, thus harming both consumer welfare and the broader public interest. Sprint and Nextel utterly fail to address these concerns and do not contest the propriety of the specific merger conditions requested by NY3G to minimize the potential for anticompetitive harm. Despite the attempts by Sprint and Nextel to ignore the issues raised by NY3G, these issues remain critical, and should be addressed by the Commission in the instant proceeding.

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<sup>1</sup> NY3G is the incumbent MMDS co-channel licensee operating on the F group channels in the EBS/BRS band in New York City.

## Background

On February 8, 2005, Sprint and Nextel filed a series of applications seeking permission to transfer control of Nextel's licenses, authorizations, and leased spectrum rights to operate on EBS/BRS spectrum to Sprint as part of a merger of the two companies (the "Application").<sup>2</sup> Sprint and Nextel argued, among other things, that the merger would allow the new entity to use its combined EBS/BRS spectrum to provide what they called Wireless Interactive Multimedia Services.<sup>3</sup> Sprint and Nextel described their WIMS offering as a "new *differentiated* service" that is fundamentally distinct from voice or CMRS applications.<sup>4</sup> Specifically, Sprint and Nextel announced that they:

... intend to deploy wireless interactive multimedia services using the 2.5 GHz spectrum [and] that these services would be extraordinarily fast with initial average downlink throughput rates of 2 Mbps to 4 Mbps per carrier. Unlike CMRS offerings in the 800 MHz and 1.9 GHz bands, wireless interactive multimedia services over the EBS/BRS band would be data-centric and focus on stationary and portable consumer electronic and computing-oriented devices and hardware. Wireless interactive multimedia services would enable consumers and business users to interact with high bandwidth applications through visual-centric services, such as video-on-demand, online gaming, document collaboration, and video conferencing.<sup>5</sup>

Sprint and Nextel clearly contemplated that the combined entity would offer this new service as a two-way, nationwide product offering that would allow customers to roam on Sprint

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<sup>2</sup> See ULS File No. 0002031766 (Feb. 8, 2005) (lead application). See also *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, Application for Transfer of Control at 2, 47-48, WT Docket 05-63 (Feb. 8, 2005) ("Application"). NY3G takes no position with respect to the issues raised by the Applicants' proposed transfer of Nextel's CMRS licenses and authorizations.

<sup>3</sup> Application at 42.

<sup>4</sup> Application, Attachment D, Joint Declaration of Todd Rowley and Robert Finch, at ¶ 4 ("Rowley-Finch Declaration") (emphasis added).

<sup>5</sup> Application at 46-47.

Nextel's WIMS network.<sup>6</sup> Moreover, Sprint and Nextel noted that the ability to provide nationwide service would be one of the principal public interest benefits of the merger.<sup>7</sup> Sprint and Nextel described the proposed merger as giving them spectrum covering 85% of the population of the nation's top 100 markets and access to an average of at least 84.5 MHz of EBS/BRS spectrum in 386 of the nation's 493 BTAs – or at least 43.5% of the available spectrum in these markets.<sup>8</sup>

On March 30, 2005, NY3G filed a Petition to Deny the Application (the "Petition").<sup>9</sup> In its Petition, NY3G noted that Sprint and Nextel had failed to address the potential anticompetitive effects of the proposed merger on the market for nationwide EBS/BRS services, including high-speed wireless multimedia service. NY3G demonstrated that the proposed merger and the resulting combination of Sprint and Nextel's extensive EBS/BRS spectrum assets would provide Sprint Nextel with a dominant position in any such market. NY3G also noted that the next-largest competitor, Clearwire, would have a presence in only about 70 of 493 BTAs.<sup>10</sup> Specifically, NY3G established that potential competitors' ability to obtain EBS/BRS spectrum would be sharply curtailed by Sprint Nextel's extensive holdings in the vast majority of local markets. NY3G also established that potential competitors would face enormous obstacles in constructing their own nationwide footprints in a "piecemeal" or "patchwork" fashion, as such a

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<sup>6</sup> Application, Attachment B, at ¶ 44 ("CRA Analysis").

<sup>7</sup> Application at 47-49.

<sup>8</sup> *Id.*

<sup>9</sup> Petition to Deny of NY3G Partnership, WT Docket 05-63 (Mar. 30, 2005) ("Petition"). On April 6, 2005, NY3G filed an erratum in order to correct the title of its Petition to Deny.

<sup>10</sup> *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*, WT Docket 03-66, Petition for Partial Reconsideration of Clearwire Corporation, at 2-3 (Jan. 10, 2005).

strategy would involve numerous, lengthy, and expensive negotiations with individual licensees in hundreds of local markets.

NY3G noted that as a result of these barriers to entry, Sprint Nextel would face minimal competitive pressure as the sole carrier capable of servicing the nationwide market for WIMS. As such, NY3G contended that Sprint Nextel would have little incentive to offer either the lowest possible prices or the best possible service to consumers. NY3G also demonstrated that Sprint Nextel would have little reason to negotiate roaming agreements with other carriers in good faith given its extensive, geographically diverse spectrum holdings, while at the same time Sprint Nextel's consolidation of EBS/BRS spectrum would reduce the alternative roaming options available to other carriers.

Accordingly, NY3G requested that the Commission impose conditions on Sprint Nextel designed to address the potential competitive harms that would flow from the proposed merger, should the Commission otherwise determine that the merger would be in the public interest.<sup>11</sup>

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<sup>11</sup> Specifically, NY3G requested that the Commission:

- Require Sprint Nextel to engage in good faith negotiations with other EBS/BRS carriers to execute roaming agreements and to submit to arbitration if such agreements cannot be executed through negotiations.
- Require Sprint Nextel to provide service upon request to all subscribers in good standing to the services of any EBS/BRS carrier, including roamers, while such subscribers are located within any portion of Sprint Nextel's licensed service area where facilities have been constructed and service to subscribers has commenced, to the extent reasonably technically feasible.
- Prohibit Sprint Nextel from preventing its customers from reaching the networks of another EBS/BRS carrier.
- Require Sprint Nextel to publish all roaming agreements and to allow other carriers to adopt these agreements.
- Require Sprint Nextel to allow any customer to retain any existing telephone number assigned by Sprint Nextel in connection with its EBS/BRS service, if that customer switches from Sprint Nextel's EBS/BRS service to that of another service provider.

On April 11, 2005, Sprint and Nextel filed a Joint Opposition to the various petitions to deny and adverse comments filed in this proceeding (the “Opposition”).<sup>12</sup> Sprint and Nextel argue that the proposed merger would not raise competitive concerns with respect to the provision of high-speed wireless multimedia service, because (i) sufficient spectrum would be available to potential competitors in other bands for the provision of high-speed wireless multimedia service;<sup>13</sup> (ii) neither EBS/BRS services nor high-speed wireless multimedia service are relevant product markets subject to antitrust review;<sup>14</sup> and (iii) the merger would not significantly increase the combined entity’s EBS/BRS spectrum assets in any given local market.<sup>15</sup> Sprint and Nextel also argue that no petitioner or commenter had raised any issues related to CMRS roaming that should be dealt with in the context of the instant proceeding, although their argument does not address roaming issues in the EBS/BRS context.<sup>16</sup> Sprint and Nextel further contend that the Commission should not address the need for either an EBS/BRS

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- Prohibit Sprint Nextel from maintaining an attributable interest in a total of more than 48 MHz of licensed or leased EBS/BRS spectrum within any Basic Trading Area, and require Sprint Nextel to divest itself of its EBS/BRS spectrum to the extent necessary to comply with this condition.

<sup>12</sup> Joint Opposition to Petitions to Deny and Reply to Comments of Nextel Communications, Inc. and Sprint Corporation, WT Docket 05-63 (Apr. 11, 2005) (“Opposition”).

<sup>13</sup> Specifically, Sprint and Nextel suggest that competitors will be able to utilize:

- (i) Advanced Wireless Services (AWS) spectrum in the 1710-1755/2110-2155 MHz, 1915-1920/1995-2000 MHz, 2020-2025/2175-2180 MHz, and 2155-2175 MHz bands;
- (ii) 78 MHz of spectrum in the 700 MHz band;
- (iii) Wireless Communications Service (WCS) spectrum in the 1390-1395 MHz, 1432-1435 MHz, 1670-1675 MHz, 2305-2320 MHz, and 2345-2360 MHz bands; and
- (iv) Ancillary Terrestrial Component (ATC) spectrum in the 2000-2020/2180-2200 MHz and 1610-1615.5/1621.35-1626.5/2487.5-2493 MHz bands.

Opposition at 23-24.

<sup>14</sup> Opposition at 20-22

<sup>15</sup> Opposition at 27, 29, 31-34.

<sup>16</sup> Opposition at 8-12.

roaming condition or an EBS/BRS spectrum cap, since these issues have been addressed generally in the context of the Commission's *EBS/BRS Proceeding*.<sup>17</sup>

### Discussion

#### I. SPRINT AND NEXTEL ARE WRONG IN THEIR ASSERTION THAT THERE ARE ADEQUATE SUBSTITUTES FOR EBS/BRS SPECTRUM

The cornerstone of the Sprint Nextel response is that EBS/BRS spectrum is not particularly well-suited for high-speed wireless multimedia service,<sup>18</sup> and that there is ample spectrum available in other bands that is at least as well-suited for the provision of such service.<sup>19</sup> Both of these claims are false.

Contrary to the technical claims of Sprint and Nextel, EBS/BRS spectrum in fact has excellent propagation characteristics for the provision of high-speed wireless multimedia service.<sup>20</sup> The Commission's Wireless Broadband Access Task Force has identified the EBS/BRS band as the band most likely to promote the development of IEEE 802.16 and WiMax-compliant services in the near-term.<sup>21</sup> Numerous commenters have noted the transformative potential of the band, which will enable truly ubiquitous high-speed wireless broadband service, as opposed to limited service at "hot spots."<sup>22</sup>

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<sup>17</sup> Opposition at 19.

<sup>18</sup> Opposition at 27.

<sup>19</sup> Opposition at 23-24.

<sup>20</sup> See, e.g., *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 19 FCC Rcd 14165, at ¶ 1 (2004) (noting that EBS/BRS spectrum will permit "significant progress towards the goal of providing all Americans with access to ubiquitous wireless broadband connections, regardless of their location.").

<sup>21</sup> Wireless Broadband Access Task Force, *Connected & On the Go: Broadband Goes Wireless*, GN Docket No. 04-163, at 22-23 (Feb. 2005) ("Task Force Report").

<sup>22</sup> See also Wireless Communications Association International, Inc., the National ITFS Association, and the Catholic Television Network, *A Proposal for Revising the MDS and ITFS*

Sprint and Nextel also overstate the practical problems with using the band. The Commission is expected to finalize the rules for the band in the near future. The required transition will be a simple matter in many markets. In other markets, Sprint, Nextel, and others are poised to push the transition to a speedy conclusion. Sprint and Nextel argue that the combined entity's nationwide footprint will accelerate the transition, but they offer no evidence that they could not be just as effective without any merger.<sup>23</sup>

The biggest advantage of EBS/BRS band spectrum is that it is the only available spectrum that can be acquired in sufficient quantities and across a large enough geographic footprint to provide a nationwide or even regional deployment of high-speed wireless multimedia service. High-speed wireless multimedia service operators are unlikely to face resource competition or technical constraints from providers of CMRS or other wireless voice services.<sup>24</sup> Sprint and Nextel themselves argue that the public interest benefits they identify that are specific to the provision of high-speed wireless multimedia service, including the completion of a nationwide high-speed wireless multimedia service footprint, "are only possible through the proposed merger [of EBS/BRS band assets]."<sup>25</sup> If neither Sprint nor Nextel is capable of obtaining a nationwide high-speed wireless multimedia service footprint by unilaterally

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*Regulatory Regime*, RM-10586, at 5 (filed Oct. 7, 2002) (noting that EBS/BRS systems are suited for the provision of ubiquitous broadband service, as opposed to service at "hot spots" as provided by other bands). This Proposal was the principal basis for the Commission's recent reworking of the EBS/BRS band.

<sup>23</sup> Opposition at 25.

<sup>24</sup> See *Cingular-AT&T Merger Order* at ¶ 81 n.283 (noting that BRS spectrum "does not currently meet [the Commission's criteria for spectrum suitable for the provision of mobile telephony services] because it is committed to non-mobile telephony uses currently and for the near-term future."). See also Opposition at 30 (noting that "the technical and operational characteristics of the EBS/BRS band make it ill-suited for mobile voice communications at least currently.").

<sup>25</sup> Application at 50.

acquiring alternative, non-EBS/BRS spectrum, it is unreasonable and unrealistic to expect their competitors to do so.<sup>26</sup>

The alternative spectrum proposed by Sprint and Nextel is ill-suited for high-speed wireless multimedia service applications. Although some of this spectrum might be used to provide inferior, low-speed, low-bandwidth service, none could be used to effectively provide the type of high-speed multimedia service possible in the EBS/BRS band.

AWS spectrum is a poor choice for high-speed wireless multimedia service for a number of reasons. First, the vast majority of this spectrum will be distributed in paired blocks of 5, 10, and 15 MHz, significantly smaller than the 24-48 MHz typically granted to EBS/BRS licensees, let alone the average of 84.5 MHz that Sprint Nextel would hold.<sup>27</sup> Second, the Commission has not yet even scheduled the expected auction for this spectrum. Third, the AWS bands are currently occupied by incumbent microwave users. Carriers wishing to provide high-speed wireless multimedia service using this spectrum would be required to either voluntarily constrain their operations to protect these incumbents, or enter into a costly and time-consuming process to relocate these users to other spectrum, at the AWS operator's expense.<sup>28</sup> Fourth, the AWS bands

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<sup>26</sup> The Applicants' claim that 17% of their leased spectrum rights will expire within two years is irrelevant at best and likely disingenuous. Sprint and Nextel provide no information about their existing renewal rights or rights of first refusal with respect to this leased spectrum. NY3G's understanding is that such rights are typical of EBS leases, effectively providing the lessee with much more stability than Sprint and Nextel suggest. Moreover, Sprint Nextel, as a dominant provider of EBS/BRS services, would be in a privileged position to negotiate the renewal of its leases. In any event, even if Sprint Nextel were to have 17% less leased spectrum in two years than it has today, the position of the combined entity would remain dominant.

<sup>27</sup> See *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, 18 FCC Rcd 25162, at ¶ 41.

<sup>28</sup> *Id.* at ¶¶ 48-51. NY3G also notes that there may be significant out-of-band interference issues that would hinder operations in the 1915-1920/1995-2000 MHz band (the "H Block"). A number of industry commenters have expressed concern that H Block mobile terminals would interfere with incumbent PCS mobile terminals, and are proposing power limits for H Block operations to remedy this issue. Moreover, at least one MSS operator has argued that a 1 MHz

are optimized for CMRS; an equal amount of spectrum is allocated for both upstream and downstream use.<sup>29</sup> This allocation scheme will inherently limit the provision of high-speed wireless multimedia service in the AWS bands. As the Commission's Wireless Broadband Access Task Force has recognized, "[b]roadband services differ from traditional mobile telephony services in that they often involve a high volume of downstream traffic ... and a lower volume of upstream traffic." Consequently, although it is a two-way service, high-speed wireless multimedia service requires "asymmetric spectrum combinations" not currently feasible in the AWS bands.<sup>30</sup>

The 700 MHz band is a similarly poor substitute for EBS/BRS band spectrum. First, 700 MHz band licenses will be distributed in blocks of 6 and 12 MHz, again significantly less than the EBS/BRS spectrum blocks typically available.<sup>31</sup> Second, there simply is not much available spectrum in this band. Even if a carrier were able to aggregate *all* available 700 MHz spectrum (a total of 78 MHz), that carrier still would be unable to match the average EBS/BRS local market assets of Sprint Nextel. Third, this spectrum will not be available and unencumbered for wireless use until the completion of the DTV transition, which could take any number of years.<sup>32</sup>

WCS spectrum is also ill-suited for high-speed wireless multimedia service. First, Sprint and Nextel admit that this spectrum is only an option for Verizon and Cingular, leaving smaller

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guard band would need to be taken from the existing 1995-2000 MHz band in order to protect MSS/ATC base stations from interference.

<sup>29</sup> Task Force Report at 63.

<sup>30</sup> *Id.*

<sup>31</sup> *See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd 1022 (2002).

<sup>32</sup> *Id.*

competitors – the licensees most in need of additional spectrum – at a severe disadvantage.<sup>33</sup>

Second, the Commission itself has concluded that the strict out-of-band emission standards imposed on operators in the WCS spectrum “will, at least in the foreseeable future, make mobile operations in the WCS spectrum technologically infeasible.”<sup>34</sup> Third, the WCS blocks identified by Sprint and Nextel are much too small to facilitate high-speed wireless broadband service.<sup>35</sup>

Finally, the ATC spectrum identified by Sprint and Nextel raises similar problems, including that ATC spectrum is licensed in relatively small blocks of 10-20 MHz. Moreover, any terrestrial service must be ancillary to and integrated with satellite service.<sup>36</sup>

More generally, as Sprint and Nextel concede, even if these frequency bands were substitutes for EBS/BRS spectrum, it would be extremely difficult for any carrier to aggregate spectrum sufficient in any one of these bands to provide a nationwide high-speed wireless multimedia service footprint.<sup>37</sup> NY3G demonstrated in its Petition that these aggregation difficulties would prevent other carriers from effectively contesting Sprint Nextel’s dominant position in the nationwide market for EBS/BRS services, a demonstration that goes unchallenged in Sprint and Nextel’s Opposition. The same obstacles that prevent the effective aggregation of EBS/BRS spectrum are likely to prevent the effective aggregation of spectrum in the alternative

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<sup>33</sup> Opposition at 24.

<sup>34</sup> *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, 12 FCC Rcd 10785, at ¶ 3 (1997).

<sup>35</sup> The 1392-1395/1432-1435 MHz band offers only 6 MHz of total spectrum and has not yet been auctioned. The 1390-1392 MHz band is unpaired, offers only 2 MHz of spectrum, and is also unauctioned. The 1670-1675 MHz block, with a total of 5 MHz of spectrum was auctioned in 2003 for \$12 million. These figures clearly show that WCS spectrum is not only scarce, but also prohibitively expensive.

<sup>36</sup> *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, 18 FCC Rcd 1962, at ¶¶ 67-71, 87-88 (2003) (“[S]haring between MSS and terrestrial mobile services is neither advisable, nor practical.”).

<sup>37</sup> Application at 49. *See also* Opposition at 27-28.

bands identified by Sprint and Nextel, to an even greater extent. As noted above, the spectrum blocks in these bands are significantly smaller than the 24-48 MHz of spectrum typically licensed to EBS/BRS licensees. In addition, the spectrum in these bands is likely to be heavily demanded by carriers in other services, increasing the difficulties faced by potential aggregators.

Moreover, the difficulties inherent in aggregating spectrum *within* any given service would be compounded by the difficulties of aggregating spectrum *across* different services. Under Sprint and Nextel's alternative scheme, competitors would be forced to mix and match whatever AWS, 700 MHz, WCS, and ATC spectrum they can acquire on a market-by-market basis. In order to meaningfully aggregate this spectrum into an effective nationwide high-speed wireless multimedia service footprint, competitors would be forced to develop customer equipment – particularly mobile terminals – capable of operating in any of these bands, at great difficulty and expense. Consequently, any high-speed wireless multimedia service provider operating in the EBS/BRS band, including Sprint Nextel, would enjoy a significant competitive advantage over carriers operating in other bands.

**II. SPRINT AND NEXTEL ARE WRONG IN THEIR ASSERTION THAT THE COMMISSION SHOULD IGNORE THE ANTICOMPETITIVE EFFECTS OF THE MERGER ON MARKET FOR HIGH-SPEED WIRELESS MULTIMEDIA SOLELY BECAUSE IT IS NASCENT**

The claim of Sprint and Nextel that the high-speed wireless multimedia service market is “nascent,” and therefore excused from antitrust review, is grounded in an erroneous and disingenuous interpretation of Commission precedent. The Commission has never excused a market from antitrust review simply because it was “nascent.” To the contrary, the Commission has consistently acted to protect and encourage the development of competitive markets for new technologies and new services, recognizing that nascent markets are particularly susceptible to

anticompetitive harms.<sup>38</sup> CMRS is an excellent example; the Commission imposed both specific roaming obligations<sup>39</sup> and a CMRS spectrum cap<sup>40</sup> in order to ensure the competitive development of the CMRS market.

The reliance by Sprint and Nextel on the *AT&T-MediaOne Merger Order* is misplaced. In the *AT&T-MediaOne Merger Order*, the Commission chose not to analyze the competitive implications of the proposed merger on the market for broadband services because the Justice Department had already entered into a consent decree covering these services.<sup>41</sup> Further, the Commission specifically recognized the vital need to protect competition in this nascent market.<sup>42</sup>

In the *Cingular Merger Order*, the Commission chose not to evaluate the “stand-alone mobile data services” market as a separate market, but only after finding that these services constituted a minor market segment with limited consumer demand and limited benefits

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<sup>38</sup> See, e.g., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, at ¶ 124 (2000) (“*AT&T-MediaOne Merger Order*”) (concluding that “the imposition of proprietary architecture and protocols for broadband Internet applications would pose a serious threat to the openness, diversity, and innovation of the Internet and the development of competition in the provision of broadband services.”); *Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, at ¶458 n.458 (1999) (imposing structural safeguards in order to allow “the nascent market for advanced services [to] continue to grow in a competitive fashion, protected from anticompetitive behavior.”).

<sup>39</sup> 47 C.F.R. §20.12.

<sup>40</sup> See *Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Third Report and Order, 9 FCC Rcd 7988 at ¶¶ 238-40 (1994).

<sup>41</sup> *AT&T-MediaOne Merger Order* at ¶¶ 122-123.

<sup>42</sup> *Id.* at ¶ 124.

compared to other services.<sup>43</sup> Thus, the Commission concluded that mobile data services should be considered as a component of the broader “mobile voice services” market, as mobile data services were typically offered as an adjunct to voice services.<sup>44</sup> In contrast, as Sprint and Nextel themselves claim, high-speed wireless multimedia service will constitute a major market segment that will prompt significant consumer demand and confer substantial benefits upon the public. Moreover, high-speed wireless multimedia service cannot be characterized as an adjunct to any existing service, as was the case with the mobile data services considered in the *Cingular Merger Proceeding*.

### **III. SPRINT AND NEXTEL FAIL TO ADDRESS THE IMPLICATIONS OF THE MERGER’S CREATION OF A SINGLE DOMINANT NATIONWIDE PROVIDER OF HIGH-SPEED WIRELESS MULTIMEDIA SERVICE**

#### **A. As a Dominant Nationwide Provider, Sprint Nextel Will Be Dominant in Local Markets As Well As the Nationwide Market for High-Speed Wireless Multimedia Service**

Another key flaw in the response of Sprint and Nextel is their contention that the competitive effects of the combination of the EBS/BRS spectrum of Sprint and Nextel are neutral because there are few local market overlaps between the two companies. Sprint and Nextel repeat this contention again and again in both their application and their Opposition.<sup>45</sup> What this argument misses is that local market dynamics would be fundamentally changed by the merger’s creation of a single, dominant nationwide provider of what is inherently a nationwide service. Sprint Nextel’s dominance in the nationwide market would also make it dominant at the local level. Consumers with any interest in the ability to roam outside their

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<sup>43</sup> *Applications of AT&T Wireless Servs., Inc. and Cingular Wireless Corp. for Consent to Transfer of Control of Licenses and Authorizations*, 19 FCC Rcd 21522, at ¶ 78 (2004) (“*Cingular Merger Order*”).

<sup>44</sup> *Id.*

<sup>45</sup> Application at 48-49; Opposition at 27, 29, 31-34.

home market would be captive to Sprint Nextel, which would be able to price its service accordingly. Other providers would be unable to compete effectively in local markets simply because they would not be able to match Sprint Nextel's nationwide footprint.

**B. To Mitigate the Anticompetitive Effects, the Commission Must Adopt Appropriate Conditions**

The anticompetitive effects described above were the motivation for NY3G's proposed conditions. These conditions would require Sprint Nextel, as the dominant nationwide provider (i) to facilitate roaming by the customers of non-dominant carriers by entering into reasonable roaming agreements with these carriers; (ii) to allow its own customers to take any assigned number with them in the event that they decide to switch to another service provider; and (iii) to limit its spectrum holdings in any given local market in order to allow other carriers to more easily construct their own nationwide service footprints. These conditions were specifically tailored to address the potential competitive harms that would flow from Sprint Nextel's dominant position in the nationwide high-speed wireless multimedia service market.

In their Opposition, Sprint and Nextel essentially ignore NY3G's proposed conditions, and address NY3G's concerns in only the most perfunctory of ways. The only direct recognition of NY3G's Petition comes in a footnote, in which Sprint and Nextel make the unsupported claim that NY3G has not made a *prima facie* case that the grant of the Application would be contrary to the public interest, convenience, and necessity.<sup>46</sup> In fact, NY3G clearly demonstrated in its Petition that the proposed merger would provide Sprint Nextel with a dominant position in the nationwide market for EBS/BRS services such as high-speed wireless multimedia service, and

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<sup>46</sup> Opposition at 5-6, n.13.

requested specific conditions intended to address the anticompetitive harms that could flow from this dominant position.

Indirectly, Sprint and Nextel suggest that the concerns raised by NY3G need not be addressed because the propriety of a generally-applicable EBS/BRS roaming obligation and a generally-applicable EBS/BRS spectrum cap were addressed in the Commission's *EBS/BRS Proceeding*, without comment from NY3G or any other party to the instant proceeding.<sup>47</sup> Sprint and Nextel's analysis is flawed for several reasons. First, when the Commission examined these issues in the *EBS/BRS Proceeding*, the Commission did not do so with the knowledge that a dominant carrier would soon control the nationwide market for EBS/BRS services, including high-speed wireless multimedia service. In the instant proceeding, NY3G has requested conditions that respond directly to this change of circumstances, as Sprint and Nextel apparently concede.<sup>48</sup> Second, as the conditions requested by NY3G are directly responsive to issues that are specific to the Commission's review of the proposed merger, it would be inappropriate to apply these conditions to all ERS/BRS licensees.<sup>49</sup> A rulemaking of general applicability is therefore unwarranted. The invocation of the Commission's full rulemaking procedures "would be overly burdensome" as the instant "proceeding can offer adequate protection for the rights of

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<sup>47</sup> Opposition at 19.

<sup>48</sup> Opposition at 5.

<sup>49</sup> See also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to AOL Time Warner Inc.*, 16 FCC Rcd 6547, at ¶ 91 (2001) ("*AOL Time Warner Merger Order*") ("[A] rulemaking proceeding ... is designed to formulate rules of general applicability, and therefore would not necessarily produce requirements containing the level of specificity needed to resolve the unique concerns that arise from this proposed merger.").

interested parties,”<sup>50</sup> and would merely distract the Commission from the merger-specific issues raised in the instant proceeding, while delaying the ability of other carriers to effectively compete with Sprint Nextel. Under these circumstances, “the Commission must fulfill its responsibility in an adjudication to decide the issues presented by that case.”<sup>51</sup> The Commission has a “statutory duty to determine whether the proposed transaction would serve the public interest” and “cannot abdicate this duty on the basis of speculation that a future proceeding might be able to remedy harms to the public interest that we believe would result from a proposed merger.”<sup>52</sup>

In the event that the Commission uses its discretion to institute a rulemaking proceeding in order to address the critical issues raised by NY3G, NY3G urges the Commission, pending the outcome of that proceeding, to either deny or stay consideration of the proposed merger, at least with respect to Nextel’s licensed and leased EBS/BRS spectrum rights. The asserted benefits of the proposed merger, absent conditions, do not outweigh the significant harms identified by NY3G.<sup>53</sup> The resolution of the issues raised by NY3G, either in the instant proceeding or in the context of a rulemaking, is critical, and would directly effect the Commission’s consideration of whether the transfer of Nextel’s licenses to Sprint would be in the public interest.<sup>54</sup>

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<sup>50</sup> See *Comsat Corp.*, 14 FCC Rcd 3065, at ¶ 38 (1999) (noting Commission’s discretion to resolve matters through adjudication, particularly where interested parties have adequate notice of issues to be addressed and full opportunity to respond).

<sup>51</sup> *AOL Time Warner Merger Order* at ¶¶ 6-7 (2001).

<sup>52</sup> *Id.* at ¶ 90.

<sup>53</sup> *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, at ¶ 3 (1999).

<sup>54</sup> *AOL Time Warner Merger Order* at ¶ 92 (“[W]e believe that the conditions we impose must precede the merger itself in order to be effective.”).

Sprint and Nextel's unwillingness to meaningfully engage NY3G on any of these points shows an arrogant disregard for the statutory roles of the Commission in reviewing the merger and of interested parties in participating in the review process.<sup>55</sup> Sprint and Nextel act as if they are *entitled* to Commission approval of their Application, when in fact Sprint and Nextel bear the burden of demonstrating that such approval would serve the public interest, pursuant to Section 310(d) of the Communications Act.<sup>56</sup> The record reflects Sprint and Nextel's failure to meet this burden.

### Conclusion

For the reasons stated above, the Commission should either reject the combination of Sprint and Nextel in the EBS/BRS band or impose appropriate conditions to protect consumers and promote competition.

Respectfully submitted,

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Dated: April 18, 2005

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<sup>55</sup> Opposition at 18.

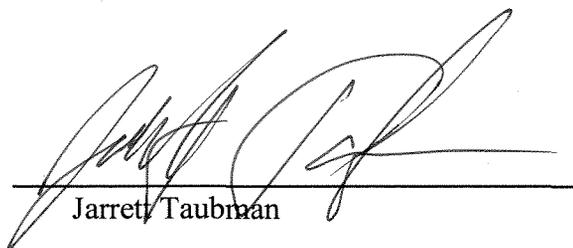
<sup>56</sup> 47 U.S.C. §310(d).

**CERTIFICATE OF SERVICE**

I, Jarrett Taubman, an attorney with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that copies of the foregoing "REPLY OF NY3G PARTNERSHIP" were served via U.S. mail on this 18th day of April 2005 to the following:

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