

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

To: The Commission

Comments of

**The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance,
Inc. (“IMWED”)**

About IMWED

IMWED was formed in 2003. Currently, it is composed of six organizations that are licensed to operate EBS systems in scores of communities nationwide, ranging in size from Chicago to Kona, Hawaii.¹ It is a non-profit organization intended to provide member licensees with technical and business assistance needed to convert their systems successfully to digital two-way mobile operation.

IMWED members currently deliver a wide variety of EBS video services. For instance, North American Catholic Educational Programming Foundation produces original instructional programming in many academic subject areas, and it also grants to county and state correctional facilities

¹ The members of IMWED are: Chicago Instructional Technology Foundation (“CITF”), Denver Area Educational Telecommunications Consortium (“DAETC”), Instructional Telecommunications Foundation (“ITF”), North American Catholic Educational Programming Foundation (“NACEPF”), Portland Regional Educational Telecommunications Corporation (“PRETC”), and Twin Cities Schools’ Telecommunications Group (“TCSTG”).

reading/phonics courses to address high inmate illiteracy rates. Through its EBS service, Instructional Telecommunications Foundation helps elementary and secondary schools to build libraries of instructional videos in wide array of school subjects. In addition to both public and private schools, DAETC provides video service to juvenile detention facilities in the Denver area, and CITF delivers video service not only to schools but also to Chicago's Children's Memorial Hospital and five community churches.

IMWED's members have experience in secondary market transactions involving excess EBS capacity for both video and data uses. They have been parties to excess capacity agreements with subsidiaries of a variety of well-known firms, including Sprint, Nextel, BellSouth, and Clearwire.

IMWED member organizations are looking forward to expanding their educational service to include data service (including mobile data service) for students, teachers, and educational institutions.

Background

In advocating for the grant of the above-captioned transfers, Sprint and Nextel have sought to portray their merger as having relatively little effect on 2.5 GHz spectrum. See, for instance, the February 8, 2005 joint declaration of Robert Finch of Nextel and Todd Rowley of Sprint, filed as an exhibit to the above-captioned transfer application ("Finch-Rowley Joint Declaration"). One of the key arguments adduced by Sprint and Nextel is that the bulk of spectrum in the 2.5 GHz band is allocated to the Educational

Broadband Service, and that they may only lease, rather than own, such capacity. Sprint and Nextel contend that any domination of EBS capacity is at best temporary, as these leases will expire:

The majority of the spectrum that a combined Sprint Nextel would hold in the 2.5 GHz band is leased, not owned, because more than sixty percent of the 2.5 GHz spectrum is ineligible for commercial licensing... *Sprint Nextel will need to negotiate a large number of new leases with BRS and EBS license incumbents on the open market and must continually negotiate renewals of existing leases that are already in place.*² [Emphasis added.]

However, prior to making such arguments to the Commission in connection with this proposed merger, Sprint already was attempting to obtain leases for EBS spectrum that it can retain forever. Specifically, on January 7, 2005—more than a month prior to the date of the Finch-Rowley Joint Declaration—EBS licensee Clarendon Foundation (“Clarendon”) filed an excess capacity lease between it and Sprint (“Clarendon Lease”) which allows Sprint to retain the agreement for any number of five-year terms Sprint chooses, up to the maximum permitted by the FCC.

The details of the Clarendon Lease became public only due to unusual circumstances; it was filed as an exhibit to a transfer application by which the license for EBS Station WAU-27 was assigned to Clarendon from Milwaukee Regional Medical Instructional TV Station, Inc. This transfer application was filed on FCC Form 301 on January 7, 2005,³ only three days

² Finch-Rowley Joint Declaration at pp. 4-5.

³ This transfer application was assigned the file number 20050107AAA. A full copy of this application, including the Clarendon Lease appended as Exhibit 5, is available on-line at the

before the Rules set forth in the EBS/BRS Report and Order⁴ became effective. Had this application been submitted four days later, it could have been filed on FCC Form 603, without any requirement that a copy of the lease itself be submitted. Further, the new Rules eliminated the Commission's prior policy that copies of EBS leases must be filed with the FCC and consequently become available for public inspection.

Here are some salient features of the Clarendon Lease.

Infinite Term. As mentioned above, assuming that Sprint desires, and FCC Rules do not prohibit the practice, the Clarendon Lease provides that the lessee may control the excess capacity of WAU-27 forever.⁵

Purchase Option. Under the Clarendon Lease, Sprint has the right to purchase WAU-29 for an undisclosed sum, should FCC Rules permit.⁶

Lowest Permitted Educational Use. The Clarendon Lease specifies that Clarendon's educational use of WAU-27's capacity will be the minimum allowed under current Commission Rules.⁷

following URL:

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517882144

The Commission approved this application, and on April 13, 2005, the parties filed a notification that the transfer had been consummated.

⁴ *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 ("EBS/BRS Report and Order") and Further Notice of Proposed Rulemaking ("FNPRM"), FCC 04-135 (rel. July 29, 2004), 19 FCC Rcd 14165 (2004).

⁵ See Section 2 of the Clarendon Lease at p. 3. Pursuant to Section 2, Sprint is entitled to an initial term of five years, plus two five-year renewal terms ("each a 'Renewal Term'"). In addition to these rights, Sprint is entitled to: "such number of additional terms of five years each as the FCC permits at the expiration of the Second Renewal Term or any Extension Term..." An Extension Term is defined in Section 2 as a term beyond the two Renewal Terms.

⁶ See Section 14.M, at pp. 26-27.

Confidentiality. Though disclosure of the Clarendon Lease to the Commission was required as part of a Form 330 transfer application, the parties agreed that they would not publicize any aspect of the document without written consent of the other, “which may be granted or withheld at the other Party’s discretion.”⁸

On the public policy front, only two weeks after Finch and Rowley contended that Sprint Nextel’s hold on 2.5 GHz spectrum was limited by the fact that EBS leases expire, both Nextel and Sprint argued against the Commission’s limiting the length of such leases.

In its Consolidated Opposition to Petitions for Reconsideration in WT Docket 03-66, dated February 22, 2005, Sprint opposed pleadings submitted by the National ITFS Association and The Catholic Television Network (“NIA/CTN”) in WT Docket 03-66. CTN/NIA seek to maintain a maximum 15-year term limit for EBS leases. Sprint argued as follows:

To the extent NIA/CTN is requesting that EBS spectrum leases entered into after [the effective date of the EBS/BRS Report and Order] must be subject to 15-year lease terms, such request has no merit. The underlying goal of the BRS/EBS rule overhaul has been to promote flexibility and the efficiencies that result. As explained above, the public interest and spectrum management goals derived from the Commission’s secondary market leasing policies have been well-established, and NIA/CTN does not address why the 15-year term limit is or could be consistent with these goals. In fact, NIA/CTN presents no justification for applying the 15-year limit, other than to state that it was adopted in 1998. The facts and circumstances

⁷ See Section 5.A.1, at p. 5.

⁸ See paragraph 14.S at p. 29.

that justified the limit in 1998, however, seem irrelevant with respect to the new, open-ended and flexible licensing rubric that will govern BRS/EBS operations hereforward...⁹ [Footnotes and original emphasis omitted.]

For its part, Nextel devoted more than five pages to attacking the NIA/CTN position on EBS lease term limits.¹⁰ Here are excerpts:

The Catholic Television Network and the National ITFS Association, however, urge the Commission to... impose a single, non-renewable fifteen-year limit on EBS leases. Nextel opposes this request...

Providing parties the flexibility to negotiate renewal terms will allow them to take into account individual marketplace dynamics without undermining the EBS licensee's educational mandate, which will continue to be protected by the Commission's minimum educational use requirements.

Barring this flexibility would be contrary to the Commission's stated effort to move away from "command-and-control" regulation toward a "greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to a more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country." [Footnotes omitted. This passage cites the Commission's Secondary Markets Order, as well as the EBS/BRS Report and Order.]

Discussion

IMWED agrees with the Rowley-Finch Joint Declaration that Sprint Nextel's hold over 2.5 GHz spectrum is limited significantly by the fact that

⁹ Sprint's Consolidated Oppositions to Petitions for Reconsideration in WT Docket 03-66, pp. 6-7. In its WT Docket 03-66 pleadings, IMWED took issue with Sprint and Nextel's position with respect to the maximum length of EBS leases. See IMWED's Consolidated Reply to Oppositions to Petitions for Reconsideration at pp. 4-8.

¹⁰ Nextel's Consolidated Opposition to Petitions for Reconsideration in WT Docket 03-66, pp. 14 – 20.

EBS capacity can only be leased, *combined with* the need to renew leases in an environment that is subject to competition from other spectrum users.

However, as shown above, even as Sprint advanced this argument, it was seeking contractual arrangements that would allow it to obtain a perpetual hold over EBS spectrum. As it did so, Sprint sought to cloak this arrangement through a confidentiality clause, and its subsequent EBS leases have been kept from public view due to a change in Commission Rules. As well, both Sprint and Nextel are seeking Commission policies that would permit them to enter into perpetual leases for EBS spectrum, assuming that the underlying EBS licenses are renewed.

In order to assure the diversity in control over 2.5 GHz spectrum that the Rowley-Finch Joint Declaration posits, IMWED hereby requests that any merger between Sprint and Nextel be subject to the following conditions:

- The combined Sprint Nextel should be allowed to lease EBS capacity for a maximum term of 15 years, with no automatic renewals or renewals at the lessee's option permitted.
- Sprint Nextel should be barred from including purchase options in EBS leases.
- EBS licensees should be required to file unredacted copies of all capacity leases they enter into with Sprint Nextel, and these leases should be available for public inspection, so that the Commission can be assured that the above limitations are adhered to.

