

July 18, 2005



Marlene H. Dortch
Secretary
Federal Communications Commission
TW-A325
445 Twelfth St., SW
Washington, DC 20554

Re: *Notice of Ex parte* presentation in WT Docket No. 05-63

Dear Ms. Dortch:

On July 18, 2005, Harold Feld of Media Access Project spoke with Paul Margie, Advisor to Commissioner Adelstien, regarding the above captioned proceeding.

Media Access Project voiced its support for the filing by IMWED on July 11, 2005. Evidence submitted by IMWED, however, demonstrates that Sprint and Nextel have already used their superior size and market power to impose terms on small EBS licensees that compromise the educational nature of the EBS band. Because Sprint/Nextel would be one of only three remaining significant national lessors of EBS band service, it is rational to expect that they will exert considerable influence over EBS licensees who are, generally, smaller and less sophisticated.

Mr. Margie asked why the Commission should address this issue in the context of the merger, rather than in Docket No. 03-66. Mr. Feld replied that the Applicants in the merger had stated that their dominance of the BRS/EBS band should not be considered against them in the merger, as much of the band was controlled by EBS licensees and therefore Sprint/Nextel must negotiate for its use. Accordingly, if Applicants maintain they do not exercise sufficient control over EBS spectrum to require divestiture in those regional markets where they control significant spectrum, the Commission must impose conditions to insure the independence of the EBS operators in those markets. Otherwise, the Commission should consider the Applicants in full control of the 190 MHz of spectrum and require divestiture of licenses in those markets where Applicants control sufficient spectrum as to reduce the likelihood of competition for wireless services.

Mr. Feld also argued that the Commission should consider the, for want of a better term, "EBS leasing market." As a result of the merger, the number of likely buyers for EBS spectrum dropped from four roughly equal sized companies (Bell South, Nextel, Sprint, and Clearwire) to two roughly equal sized companies and one dominant company – a change from a competitive market to a concentrated market. Given the weak and unsophisticated nature of the EBS licensees, the Commission has a

responsibility under the public interest standard to impose conditions that will protect these licensees.

Finally, the Commission should not approve a merger where approval of the merger will vitiate Commission policies or make enforcement of its rules impossible. The Commission recently affirmed the EBS set aside and the importance of maintaining the EBS service as educational and non-commercial in Docket No. 03-66. To allow the merger to go forward under terms that permit the applicants to undermine that service would violate the public interest.

Mr Feld suggested the following merger conditions:

- Applicants prohibited from having lease terms longer than the license term;
- Applicants prohibited from including automatic renewal provisions, rights of first refusal, renewal at the lessee's exclusive option, or other terms that limit the negotiating power of the EBS licensee at expiration of the license.
- Applicants prohibited from including "purchase option" provisions in the event the Commission changes its rules and allows EBS licensees to sell or permanently lease capacity or licenses.
- Applicants prohibited from requiring EBS licensees to lease the maximum spectrum permitted under Commission rules, and prohibited from preventing EBS licensees from reclaiming spectrum for educational use in accordance with Commission rules.
- Applicants required to conform all existing lease contracts to these conditions, as well as all future contracts with EBS licensees.
- Applicants required to file unredacted copies of all leases with EBS licensees with the Commission, and the Commission to make these available for public inspection;
- Creation of an expedited complaint process for EBS licensees or other effected parties in the event Applicants use their market power to compel EBS licensees to act in accordance with prohibited contract provisions despite removal of such provisions from the contract.

In accordance with Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206, this letter is being filed with your office. If you have any questions, please do not hesitate to contact me.

Respectfully Submitted,

Harold Feld

Senior Vice President

cc:
Paul MArgie