



July 29, 2005

Bruce D. Jacobs
202.663.8217
bruce.jacobs@pillsburylaw.com

Via Electronic Filing

Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: EX PARTE SUBMISSION
Applications for Authority to Transfer Control to Sprint Corporation Licenses
and Authorizations Held by Nextel Communications, Inc.
WT Docket No. 05-63

Dear Ms. Dortch:

On July 26, 2005, NY3G Partnership (“NY3G”) filed an ex parte letter in the above-referenced proceeding in support of the proposal by the Media Access Project (“MAP”) to impose EBS lease-related conditions on any FCC grant of the proposed merger between Sprint Corporation (“Sprint”) and Nextel Communications, Inc. (“Nextel” and collectively “Sprint Nextel”). Such conditions are necessary to reduce the combined entity’s ability to foreclose competitive entry into the EBS/BRS market and to frustrate other Commission policy.

NY3G has experienced first hand how contract provisions, such as those identified by MAP, can be anticompetitive and prevent the timely development of service.¹ As part of its spectrum holdings in the New York City market, Nextel is the successor-in-interest to a 1994 lease agreement with Trans Video Corporation (“TVC”), the EBS (ITFS) licensee operating on the B and F group channels.² NY3G, as the co-

¹ Compare Letter to Marlene H. Dortch from David M. Don, Counsel for Sprint, and Renee Callahan, Counsel for Nextel, at 2 (July 22, 2005) (alleging that the harms from the contract provisions identified by MAP are theoretical).

² See TVC and CAI Wireless Systems, Inc., “Channel Coordination and Excess Channel Capacity Lease Agreement” (December 19, 1994) (“Lease Agreement”), attached hereto. Nextel holds

Footnote continued on next page

Marlene H. Dortch
July 29, 2005
Page 2

channel BRS (MMDS) licensee, is also authorized to operate on the F group channels in New York City. Although TVC's use of the F group channels is grandfathered, the Commission stated in 1983 that it expected grandfathered licensees to negotiate in good faith with co-channel MMDS permittees and come to an agreement to make channels available for MMDS.³ The Lease Agreement, however, effectively prevents such negotiations, frustrating Commission policy and foreclosing the competitive entry by NY3G on the F group channels.

The term of the Lease Agreement is ten years, with an optional ten-year renewal period.⁴ TVC is prohibited from negotiating with any other party for the lease of excess-capacity until nine months before the expiration of the Lease Agreement, and until December 2005, Nextel has a right of first refusal to match any offer regarding the lease of excess capacity. Nextel also has the right to request specific performance in the event of breach of contract.⁵ Such stringent terms prevent meaningful negotiations between TVC and NY3G.

As an example, shortly after TVC entered into its Lease Agreement in 1994, TVC improperly sought to expand its lessee's F group operations, despite an express Commission "freeze" on grandfathered facilities.⁶ Moreover, NY3G has reasonably offered on several occasions to bear the costs of relocating TVC to other facilities,

Footnote continued from previous page

licenses for 13% of the available spectrum in New York City, as measured by MHz-Pops, and has lease interests for another 48% of the spectrum. *See* Sprint Nextel Merger Application, at Attachment 1 to Attachment E. Thus, in total Nextel effectively controls 61% of the EBS/BRS spectrum in the market. At present, Nextel provides no service on this spectrum.

³ *See In the Matter of Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1209, at ¶¶ 110, 151 (1983).

⁴ NY3G believes that Nextel and TVC have not yet renewed the Lease Agreement.

⁵ *See* Lease Agreement at Sections 1.1 to 2.7, and 21.1.

⁶ *See, e.g., In the Matter of Trans Video Communications, Inc.*, 18 FCC Rcd 18211 (2003) (grant of applications would be inconsistent with redesignation of the E and F group channels to MMDS), *aff'd*, *Order on Reconsideration*, 19 FCC Rcd 18644 (2004).

Marlene H. Dortch
July 29, 2005
Page 3

frequencies, or alternative media, capable of permitting TVC to continue its current, grandfathered video operations,⁷ but TVC has ignored or rejected these offers.

For these reasons, NY3G urges the Commission to: (i) prohibit Sprint Nextel from including rights of first refusal or rights of automatic renewal in its EBS lease agreements, where such rights could extend the cumulative lease term beyond ten years; (ii) require Sprint Nextel to conform its existing EBS leases to these restrictions; and (iii) require Sprint Nextel to file unredacted copies of its EBS leases with the Commission for public inspection. Under such conditions, an agreement, such as the one between Nextel and TVC, which has already reached its ten-year limit cannot be renewed in its present form.⁸ These conditions are necessary to ensure that Sprint Nextel does not foreclose the entry of competitors, such as NY3G, or frustrate other Commission policy.

Very truly yours,

/s/

Bruce D. Jacobs
Tony Lin
Counsel for NY3G Partnership

Attachment

⁷ See, e.g., NY3G Partnership, Comments, WT 03-66, at 7-8.

⁸ To the extent necessary, the Commission should declare the Lease Agreement contrary to the public interest and null and void. See, e.g., *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 18 FCC Rcd 20604, at ¶ 124 (2003), *aff'd*, *Second Report and Order and Order on Reconsideration*, FCC 04-167, at ¶ 132 (2004) (Commission has authority to terminate lease agreements that are contrary to the public interest).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ex parte letter was sent via first-class mail on this 29th day of July 2005 to the following:

Robert S. Foosaner, Senior Vice President and Chief Regulatory Officer
Lawrence R. Krevor, Vice President, Governmental Affairs
Trey Hanbury, Senior Counsel, Governmental Affairs
Nextel Communications
2001 Edmund Halley Drive
Reston, VA 20191

John I. Stewart, Jr.
Michael Lazarus
Joseph Phillips
Crowell & Moring, LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595

/s/

Sylvia Davis