

**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	)	

**PETITION FOR RECONSIDERATION OF NY3G PARTNERSHIP**

NY3G Partnership (“NY3G”)<sup>1</sup> hereby submits this Petition for Reconsideration of the Commission’s *Memorandum Opinion and Order* in the above-referenced proceeding, in which the Commission approved the merger of Sprint Corporation (“Sprint”) and Nextel Communications, Inc. (“Nextel”).<sup>2</sup> As discussed below, the Commission’s analysis was grounded in a finding that Commission precedent supported unlimited accumulation of spectrum by MMDS licensees, when in fact the opposite is true. Accordingly, NY3G respectfully requests that the Commission reevaluate the potential anticompetitive effects of the merger on the market

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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.

<sup>2</sup> *Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WT Docket No. 05-63 (adopted Aug. 3, 2005) (“*Merger Order*”).

for nationwide EBS/BRS services, along with the need for conditions designed to address these harms such as those suggested previously by NY3G.

### **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>3</sup> NY3G filed a Petition to Deny the Application on March 30, 2005,<sup>4</sup> noting the potential anticompetitive effects of the proposed merger on the market for nationwide EBS/BRS services, and requesting that the Commission impose conditions on Sprint Nextel designed to address these harms.<sup>5</sup> NY3G noted that "Sprint Nextel could use its extensive EBS/BRS spectrum

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<sup>3</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").

<sup>4</sup> Petition to Deny of NY3G Partnership, WT Docket 05-63 (Mar. 30, 2005, erratum filed Apr. 8, 2005) ("Petition"). In the *Merger Order*, the Commission questions whether the NY3G Petition is valid, insofar as it did not include an affidavit. However, Section 309(d)(1) of the Communications Act, as amended, provides that "allegations of fact shall, *except for those of which official notice may be taken*, be supported by affidavit of a person or persons with personal knowledge thereof." 47 U.S.C. §309(d)(1) (emphasis added). As NY3G's Petition does not allege any facts which would not be subject to official notice by the Commission, no affidavit was included with the Petition.

<sup>5</sup> Specifically, NY3G requested that the Commission: (i) 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; (ii) Prohibit Sprint Nextel from preventing its customers from reaching the networks of another EBS/BRS carrier; (iii) 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; (iv) Require Sprint Nextel to publish all roaming agreements and to allow other carriers to adopt these agreements; (v) 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

holdings in the vast majority of local markets to frustrate the efforts of carriers seeking to construct their own facilities-based nationwide EBS/BRS footprints, which would exclude efficient competitors, reduce the quantity of wireless broadband service available to the public, and increase prices to the detriment of consumers.”<sup>6</sup>

Therefore, *inter alia*, NY3G urged the Commission to “[p]rohibit 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>7</sup> NY3G explained that this condition would “(i) approximate the previous CMRS cap; (ii) permit each licensee to operate up to eight channels, consisting of any combination of 6 MHz high-power channels and 5.5 MHz low-power channels, which would provide more than sufficient economies of scale to EBS/BRS carriers; and (iii) ensure at least two new competitors to Sprint Nextel within each local market as well as the nationwide market for EBS/BRS services.”<sup>8</sup>

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provider; and (vi) 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. In addition, NY3G subsequently filed an *ex parte* letter requested that the urging the Commission to urges the Commission to: (i) prohibit Sprint Nextel from including rights of first refusal or rights of automatic renewal in its lease agreements, where such rights could extend the cumulative lease term beyond ten years; (ii) require Sprint Nextel to conform its existing leases to these restrictions; and (iii) require Sprint Nextel to file unredacted copies of its EBS leases with the Commission for public inspection. *See* Letter to Marlene H. Dortch from Bruce D. Jacobs (July 26, 2005).

<sup>6</sup> Petition at 2.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.* at 8-9, n.21.

On April 11, 2005, Sprint and Nextel filed a Joint Opposition.<sup>9</sup> The Joint Opposition failed to respond to the specific concerns raised by NY3G.<sup>10</sup> On April 18, 2005, NY3G filed its Reply.<sup>11</sup>

The Commission approved the Application on August 3, 2005 and did not adopt any of the requested conditions.<sup>12</sup> The Commission based its decision in part on a finding that “divesting licensees of 2.5 GHz band spectrum would be inconsistent with the Commission’s long-standing regulatory policies regarding the 2.5 GHz band, including the encouragement of consolidation of spectrum in this band, due to its historical underutilization.”<sup>13</sup> As evidence of this “long-standing” policy, the Commission cited the *MDS Auction Order*, in which the Commission (i) afforded “BTA auction winners a right of first refusal with regard to the leasing of EBS spectrum within their BTA” in order to “further encourage and facilitate the accumulation of a full complement of channels necessary for viable systems,”<sup>14</sup> and (ii) “placed no restriction on the number of BTA service areas for which any entity could apply or on the number of BTA authorizations that could be awarded to one entity.”<sup>15</sup> As discussed below, this characterization of the Commission’s precedent is inaccurate.

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<sup>9</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>10</sup> Although Sprint and Nextel did not respond to NY3G’s specific arguments, Sprint and Nextel apparently conceded that NY3G’s claims were merger-specific. *Id.* at 5.

<sup>11</sup> Reply to Opposition to NY3G Partnership’s Petition to Deny, WT Docket 05-63 (Apr. 18, 2005) (“Reply”).

<sup>12</sup> See *Merger Order* at ¶ 1.

<sup>13</sup> *Id.* at ¶ 160.

<sup>14</sup> *Id.* See also *Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, Report and Order, 10 FCC Rcd 9589, 9609 ¶ 37 (1995) (“*MDS Auction Order*”).

<sup>15</sup> *Id.* See also *MDS Auction Order* at ¶ 41.

## Discussion

The Commission relies heavily on its belief that the Commission previously granted BTA licensees a right of first refusal with regard to the leasing of EBS (ITFS) spectrum within their BTA. However, no such right was ever effectively conferred. After a mere four months, the Commission abandoned that portion of the *MDS Auction Order* on reconsideration, after recognizing the competitive harms that could result from restricting the ability of multiple BRS (MDS) providers to freely negotiate lease arrangements with EBS (ITFS) licensees.<sup>16</sup>

Moreover, the abandoned BTA right of first refusal was never intended to facilitate the magnitude of consolidation intended by Sprint and Nextel. Rather, the Commission initially conferred the right of first refusal only to permit licensees to accumulate a “full complement of channels necessary for a viable MDS system.”<sup>17</sup> Conversion of the band to a virtual monopoly was not the stated purpose. Similarly, the Commission’s decision to “place[] no restriction on the number of BTA service areas for which any entity could apply or on the number of BTA authorizations that could be awarded to one entity” was adopted only so that “prospective bidders will be able to aggregate adjacent BTAs to utilize economies of scale that currently benefit wired cable competitors.”<sup>18</sup> There is no evidence that Sprint Nextel requires more than 48 MHz of EBS/BRS spectrum, or a dominant position in any given local market, to realize these “economies of scale.” Further, the *MDS Auction Order* expressly noted that “the legislative history accompanying our grant of auction authority states generally that the Commission’s regulations ‘must promote economic opportunity and competition,’” and promised that “[t]he

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<sup>16</sup> *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in The Instructional Television Fixed Service*, 10 FCC Rcd 13821, at ¶ 16 (1995).

<sup>17</sup> *MDS Auction Order* at ¶ 41.

<sup>18</sup> *Id.* at ¶ 37.

Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants[.]”<sup>19</sup> As explained in NY3G’s Petition to Deny and Reply, the Commission has historically sought to protect competition in nascent markets by ensuring that no one entity is able to horde scarce spectrum resources to the detriment of other carriers, consumers, and the public interest.<sup>20</sup>

In light of the foregoing, NY3G respectfully requests that the Commission reevaluate its summary dismissal of the merger conditions requested by NY3G and others in this proceeding. NY3G continues to believe that many of these conditions – particularly the EBS/BRS spectrum cap suggested by NY3G – would serve the public interest. The record demonstrates that Sprint Nextel’s local market spectrum holdings are sufficient to preclude any other carrier from constructing a nationwide, facilities-based EBS/BRS footprint. There is no evidence that Sprint Nextel requires more than 48 MHz of spectrum in any local market in order to develop and offer high-speed wireless broadband service.

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<sup>19</sup> *Id.* at ¶ 168 (quoting H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993)).

<sup>20</sup> While the Commission has generally sought to impose minimal regulations in order to spur the development and deployment of advanced services, the Commission has acted when necessary in order to protect vibrant competition and prevent the monopolization of new industries. *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) (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.”).

**Conclusion**

For the reasons stated above, NY3G urges the Commission to impose the conditions requested by NY3G in order to protect consumers and promote competition in the nationwide and local EBS/BRS markets.

Respectfully submitted,

By: \_\_\_\_\_ /s/

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