

BEFORE THE ~~DOCKET~~ FILE COPY ORIGINAL
Federal Communications Commission
WASHINGTON, D.C.

In re Applications of)
)
NEXTEL COMMUNICATIONS, INC.,)
Transferor,)
)
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)

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SEP 19 2005

Federal Communications Commission
Office of Secretary

WT Docket No. 05-63

OPPOSITION TO PETITION FOR RECONSIDERATION

I. INTRODUCTION

Sprint Nextel Corporation (“Sprint Nextel”) respectfully requests that the Federal Communications Commission (the “Commission”) summarily deny NY3G Partnership’s Petition for Reconsideration (“Petition”) of the Commission’s grant of the above-captioned application.¹

Following the applicants’ August 12, 2005 consummation of the approved merger, Sprint Nextel has moved forward to capitalize on the merger synergies that will enable it to offer innovative services to customers in a dynamic and competitive telecommunications marketplace. Just one petitioner, NY3G Partnership (“NY3G”), now

¹ *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, File Nos. 0002031766, et al. (rel. Aug. 3, 2005) (“Merger Order”).

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seeks to disrupt this progress with a baseless challenge to the *Merger Order*.² In its petition, NY3G mischaracterizes the Commission's reasoning in the *Merger Order* and presents no new relevant facts or arguments to support its request for onerous merger conditions. By expeditiously denying this petition, the Commission will eliminate any remaining uncertainty and facilitate Sprint Nextel's rapid deployment of wireless broadband infrastructure and services in the United States.

II. DISCUSSION

NY3G provides no legitimate reason for the Commission to reconsider the *Merger Order*. The Commission and courts have made clear that reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order, or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.³ As discussed below, NY3G does neither in this case.

² NY3G filed its Petition for Reconsideration on September 7, 2005, within the 30-day period for such petitions provided by Section 1.106(f) of the Commission's rules. 47 C.F.R. § 1.106(f). NY3G failed to comply, however, with rules requiring that such petitions "be served upon parties to the proceeding" "on or before the day on which the document is filed." 47 C.F.R. §§ 1.47(b), 1.106(f). While NY3G subsequently filed an "Erratum" and served Sprint Nextel with a copy of its petition on September 9, 2005 (*see* Letter from Jarrett Taubman, Counsel for NY3G, to Marlene H. Dortch, Secretary, FCC (Sep. 9, 2005)), the Commission can deny NY3G's petition on the basis of this violation of the Commission's rules.

³ *See Infinity Broadcasting Operations, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 20156, ¶ 3 (2004); *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c).

A. NY3G's Discussion of Precedent is Immaterial to the Commission's Approval of the Combination of the Applicants' 2.5 GHz Spectrum

In its petition, NY3G focuses largely on the *Merger Order's* reference to two decade-old decisions affecting the 2.5 GHz band, claiming that the Commission's merger approval "was grounded in" and "relie[d] heavily" on two decisions from the 1995 order establishing Multichannel Multipoint Distribution Service ("MMDS") auctions.⁴ This claim mischaracterizes the Commission's analysis. The *Merger Order's* rejection of NY3G's proposed conditions was based on the Commission's review of competitive conditions in the mobile data services market, not on this MMDS precedent. Specifically, the Commission concluded that the combination of the applicants' 2.5 GHz spectrum will not lead to anti-competitive harm, based on the following findings:

- There is significant spectrum outside the 2.5 GHz band that is conducive to the provision of mobile data services or will become so in the foreseeable future.⁵
- The 2.5 GHz band is not intrinsically superior to other spectrum for the provision of wireless services (*e.g.*, propagation characteristics). Rather, the 2.5 GHz band will be just one of many existing and potential inputs into the mobile data services market.⁶
- Sprint Nextel will have strong, nationwide competitors with powerful incentives to compete in all the potentially relevant product markets.⁷
- Local market concentration would not be increased by the merger of Sprint and Nextel, because the 2.5 GHz holdings of the applicants did not significantly overlap.⁸

⁴ Petition at 1, 4 (referring to Commission citation of *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, ¶¶ 37, 41 (1995) ("*MMDS Auction Order*").

⁵ *Merger Order* ¶ 156.

⁶ *Id.* ¶ 157.

⁷ *Id.* ¶ 151.

- Given the significant size of Sprint’s and Nextel’s respective regional footprints at 2.5 GHz, there is no specific competitive harm to be identified that could be avoided by a rejection of the merger.⁹
- Rejection of the merger would not necessarily result in the emergence of two national providers, or two large providers that would more willingly negotiate with smaller providers than the single merged entity.¹⁰

The Commission did not reference the *MMDS Auction Order* until after reviewing all of these factors and concluding that the merger would have no anti-competitive effects in the mobile data services market. The Commission’s subsequent allusion to its 1995 decisions was effectively “*dicta*,” intended only to show that the *Merger Order* was consistent with past policy and not meant to serve as a primary basis for this merger approval.¹¹ Accordingly, NY3G’s discussion of the *MMDS Auction Order* is immaterial to the Commission’s merger grant and therefore does not provide any basis for reconsideration of the *Merger Order*.¹²

B. The *MMDS Recon Order* Actually Strengthens the Case Against NY3G’s Proposed Conditions

NY3G accurately points out that the Commission’s discussion of the *MMDS Auction Order* did not account for a rule change made on reconsideration. Specifically, following the *MMDS Auction Order*, the Commission eliminated a right of first refusal with regard to the leasing of Educational Broadband Service (“EBS”) that the

⁸ *Merger Order* ¶ 158.

⁹ *Id.* ¶ 159.

¹⁰ *Id.*

¹¹ *Id.* ¶ 160.

¹² See *Saga Communications of New England, Inc.*, Order on Reconsideration, 20 FCC Rcd 4164, ¶ 3 n.10 (2005) (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff’d sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)).

Commission had granted to Basic Trading Area (“BTA”) auction winners within their BTA.¹³ Contrary to NY3G’s claims, however, this correction of the record does not support a grant of its petition.

From NY3G’s perspective, the Commission’s failure to account for the *MMDS Recon Order* can only be considered a harmless error. As described above, the *Merger Order*’s rejection of NY3G’s proposed conditions was based on the Commission’s competitive analysis for the mobile data services market, not on policy judgments made in the 1995 *MMDS Auction Order*. Accordingly, the fact that one of those judgments was reversed in the *MMDS Recon Order* is immaterial, and does not represent a legitimate basis for reconsideration of the Commission’s merger approval.¹⁴

If anything, however, the Commission’s decision in the *MMDS Recon Order* provides further support for the *Merger Order*’s competitive analysis and strengthens the case against NY3G’s proposed conditions. Without a right of first refusal, it is even more difficult for BTA licensees at 2.5 GHz to accumulate the vast spectrum rights in this band and elsewhere that would be necessary to achieve a dominant position in the mobile data services marketplace. *Thus, by highlighting this policy reversal, NY3G further weakens the argument in its petition that Sprint Nextel’s 2.5 GHz assets pose a competitive threat.*

Finally, the Commission’s action in the *MMDS Recon Order* in no way undercuts the Commission’s point in the *Merger Order* that its “long-standing regulatory policies regarding the 2.5 GHz band” are meant to “encourage[e] [the] consolidation of spectrum

¹³ *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*, Memorandum and Order on Reconsideration, 10 FCC Rcd 13821, ¶ 16 (1995) (“*MMDS Recon Order*”).

¹⁴ *See notes 3, 12 supra.*

in this band, due to its historical underutilization.”¹⁵ NY3G ignores the fact that the Commission eliminated this right of first refusal not because of any concern with spectrum consolidation, but because EBS licensees required certainty that they could “enter into contracts with parties who they feel are financially secure and able to provide technical support . . .”¹⁶ Thus, contrary to NY3G’s claim, the *Merger Order*’s approval of the Sprint Nextel merger and rejection of NY3G’s proposed merger conditions are consistent with the Commission’s long-time regulatory approach in this band.

C. NY3G Repeats Arguments Made Prior to the *Merger Order* and Offers Nothing New on Issues Material to Its Proposed Conditions

Aside from its discussion of MMDS precedent, NY3G can only repeat broad arguments made in pleadings prior to the *Merger Order*. NY3G fails to offer anything new on the issues that are material to its proposed merger conditions. It is well established that the Commission will deny any petition that merely repeats arguments previously considered and rejected, and the Commission’s approach should be no different in this merger proceeding.¹⁷

Fundamentally, NY3G presents no new evidence or arguments to contradict the Commission’s conclusion that the Sprint Nextel merger will not harm competition in the mobile data services market. NY3G also fails to refute the Commission’s findings that NY3G’s proposed merger conditions are premature, “given the nascency of broadband

¹⁵ *Merger Order* ¶ 160.

¹⁶ *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*, Memorandum and Order on Reconsideration, 10 FCC Rcd 13821, ¶ 16 (1995).

¹⁷ *See, e.g., Applications of Bennett Gilbert Gaines et al.*, Memorandum Opinion and Order, 8 FCC Rcd 3986, ¶ 3 (Rev. Bd. 1993).

uses and the on-going transition process in the 2.5 GHz band.”¹⁸ Significantly, as the *Merger Order* pointed out, the Commission raised the issue of spectrum caps and roaming requirements in its Broadband Radio Service (“BRS”)/EBS rulemaking, and, after notice and comment, the Commission determined that such rules were not in the public interest.¹⁹ NY3G (and other earlier proponents of merger conditions) did not address the need for such requirements in that proceeding, despite the fact that Sprint and Nextel already held regional footprints at that time. NY3G makes no effort to defend this omission.

III. CONCLUSION

Sprint Nextel urges the Commission to deny NY3G’s Petition expeditiously. NY3G’s Petition mischaracterizes the Commission’s analysis in the *Merger Order*, presents no new relevant facts or arguments, and provides no basis for reconsideration of

¹⁸ *Merger Order* ¶ 162.

¹⁹ *Id.* ¶ 162. In addition, NY3G fails to address in any way the Commission’s finding that NY3G’s proposed divestiture conditions and 2.5 GHz spectrum cap could require the termination of Sprint Nextel leases with EBS licensees, which would disrupt EBS operations and harm EBS licensees and the communities they serve. *Id.* ¶ 161.

the Commission's merger grant. By summarily denying this meritless challenge, the Commission will remove any remaining uncertainty and facilitate Sprint Nextel's rapid deployment of wireless broadband infrastructure and services in the United States.

Respectfully submitted,

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September 19, 2005

CERTIFICATE OF SERVICE

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