BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	)	
Nextel Communications, Inc., Transferor	)	
And	)	WT Docket No. 05-63
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	)	

REPLY OF NY3G PARTNERSHIP

NY3G Partnership ("NY3G") hereby submits this Reply to the Opposition of Sprint Nextel Corporation ("Sprint Nextel") in the above-referenced proceeding.[1] As noted in NY3G's Petition for Reconsideration ("Petition"), the approval of the Sprint Nextel merger was grounded in an erroneous characterization of Commission precedent. Nothing in the Sprint Nextel Opposition refutes this claim, and Sprint Nextel actually concedes that the Commission's analysis was erroneous. The Commission does not have a policy, much less a "long-standing" one, supporting the aggregation of EBS/BRS spectrum, contrary to the Commission's statements in the *Merger Order*. Further, and possibly as a result of the Commission's erroneous analysis of its own precedent, the *Merger Order* simply ignores the competitive harms identified by various

[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 (adopted Aug. 3, 2005) ("*Merger Order*").

parties in the merger proceeding, contrary to the Administrative Procedure Act. Accordingly, NY3G respectfully requests that the Commission reevaluate the potential anticompetitive effects of the merger on the market for nationwide EBS/BRS services, and impose the conditions requested by NY3G to protect consumers and promote competition in the nationwide and local EBS/BRS markets.

Discussion

As NY3G explained in its Petition, the Commission's analysis in the *Merger Order* relied on a fundamentally incorrect characterization of Commission precedent. Specifically, there is simply no "long-standing" policy in favor of spectrum aggregation in the EBS/BRS band, as the Commission stated in the *Merger Order*.[2] Sprint Nextel concedes that the Commission's analysis in the *Merger Order* was incorrect but contends that the Commission's erroneous statement was mere "dicta," and that the relevant basis for the Commission's decision was the competitive analysis appearing earlier in the *Merger Order*. Opposition at 4-6.

That contention is absurd. At issue in this proceeding is the largest consolidation of EBS/BRS spectrum in the history of the band, and it is disingenuous to argue that the Commission's specific statements about what it understood to be a "long-standing" policy in favor of spectrum consolidation in the band is irrelevant or immaterial to the Commission's decision. Moreover, as NY3G has demonstrated, Commission precedent, properly construed, has long recognized that limits on spectrum aggregation, particularly in nascent markets, can

[2] *Compare Merger Order* at ¶ 160 (citing existence of a BTA right of first refusal as evidence of a "long-standing" policy in favor of EBS/BRS spectrum aggregation) *with 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) (eliminating the BTA right of first refusal) ("*MDS Recon Order*").

play a valuable role in minimizing competitive harms.[3] The Commission's failure to recognize this established precedent *necessarily* undermines the Commission's justification for approving the merger,[4] and *necessarily* increases the likelihood that the merger will harm competing carriers and the public interest.[5] Neither the Commission in the *Merger Order* nor Sprint Nextel in its Opposition distinguish this precedent, and the Commission's failure to recognize or explain its shift in policy constitutes material error, warranting reconsideration.[6]

---

[3] *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); *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.").

[4] Sprint Nextel claims that the elimination of the right of first refusal does not undermine the Commission's "long-standing" policy in favor of EBS/BRS spectrum aggregation. Opposition at 5-6. However, as noted by NY3G in its Petition, once the elimination of the right of first refusal is recognized, there is no evidence in the *Merger Order* of any policy, "long-standing" or otherwise, in favor of EBS/BRS spectrum aggregation. Accordingly, the Commission's motives in eliminating the right are irrelevant. However, in eliminating the right, the Commission did clearly recognize the benefits that ITFS (EBS) licensees might gain from the ability to negotiate with numerous, competitive service providers. *MDS Recon Order* at ¶ 16.

[5] Sprint Nextel argues that the elimination of the BTA right of first refusal actually makes it harder for a single entity to attain a dominant position in the mobile data services market. Opposition at 5. Even if this were true, the elimination of this right has not prevented Sprint Nextel from attaining a dominant position by virtue of the merger. Rather, the elimination of the right merely makes it more difficult for other carriers to aggregate spectrum for competitive services.

[6] *See, e.g., Communications Investment Corp. v. FCC*, 641 F.2d 954, 978 (D.C. Cir. 1981) (*citing Louisiana Television Broadcasting Corp. v. FCC*, 347 F.2d 808, 811 n.6 (D.C. Cir. 1965)) (noting that the "summary and *sub silentio* overruling" of established policy "cannot be tolerated."). *See also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (administrative agency must articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made."); *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (agency action invalid where it "is not supported by substantial evidence, or the agency has made a clear error in judgment.").

Moreover, it appears that the Commission's incorrect interpretation of its own precedent resulted in further material errors in the Commission's competitive analysis. In the *Merger Order*, the Commission concluded in perfunctory fashion that the creation of a single nationwide carrier, instead of two regional carriers, would not cause competitive harm. *Merger Order* at ¶ 159. However, the Commission failed to articulate a clear rationale for this conclusion, and failed to address the specific arguments raised by NY3G and others demonstrating that the merger would likely result in competitive harms, as required by the Administrative Procedure Act.[7]

The Commission's misunderstanding of its policy on spectrum consolidation in the band also likely contributed to its failure to analyze or discuss the competitive implications of the various conditions proposed by NY3G and other parties, another material error.[8] The Commission merely concluded, again in perfunctory fashion, that "the petitioners have failed to identify any specific competitive harm that could be avoided by rejecting this merger and retaining [] two large regional providers as separate entities." *Merger Order* at ¶ 159. It is telling, however, that the Commission did not address whether specific competitive harms might be avoided by the imposition of merger conditions short of an outright rejection of the merger.

In fact, the merger is likely to create specific competitive harms that can be avoided only by the imposition of proper merger conditions, including a spectrum cap. As NY3G has repeatedly shown, a spectrum cap would guarantee that other carriers have sufficient access to spectrum in local markets with which to provide competitive, nationwide services.[9] At the same

---

[7] *See* 5 U.S.C. § 706(2)(A) (invalidating agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[8] *See, e.g.,* Petition to Deny of NY3G Partnership, WT Docket 05-63 (Mar. 30, 2005, erratum filed Apr. 8, 2005).

[9] *Id.* at 8-9.

time, a spectrum cap would not harm Sprint Nextel's efforts to provide its own services.[10] Accordingly, the imposition of a spectrum cap would serve the public interest by furthering the development of the 2.5 GHz band while ensuring robust competition amongst service providers.

Conclusion

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

Respectfully submitted,

By: /s/

Bruce D. Jacobs
Tony Lin
Jarrett Taubman*
*Admitted in NY. Not admitted in DC.
Supervised by Members of the DC Bar.

Pillsbury Winthrop Shaw Pittman LLP
2300 N St. NW
Washington, DC 20037-1128

Counsel for NY3G Partnership

Dated: September 29, 2005

[10] Sprint and Nextel have never argued that Sprint Nextel actually needs more than 48 MHz of spectrum in any local market to provide service.

CERTIFICATE OF SERVICE

I, Sylvia Davis, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that copies of the foregoing "REPLY OF NY3G PARTNERSHIP" were served via U.S. mail on this 29th day of September 2005 to the following:

A. Richard Metzger, Jr.
Regina M. Keeney
Charles W. Logan
Stephen J. Berman
A. Renee Callahan
Lawler, Metzger, Milkman & Keeney, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006

Philip L. Verveer
Michael G. Jones
Angie Kronenberg
David M. Don
Stephanie Podey
Megan Anne Stull
Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006

Paul C. Besozzi
Nicholas W. Allard
Stephen Diaz Gavin
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037

Mark Cooper
Consumer Federation of America
1424 16th Street, NW
Washington, DC 20036

Gene Kimmelman
Consumers Union
1666 Connecticut Avenue, NW, Suite 310
Washington, DC 20009

John J. Zoltner
Ryan Turner
Community Technology Centers Network
1436 U Street, NW, Suite 104
Washington, DC 20009

Julian L. Shepard
Mark Blacknell
Williams Mullen, A Professional Corp.
1666 K Street, NW, Suite 1200
Washington, DC 20006

Seema M. Singh, Esq.
Christopher J. White, Esq.
State of New Jersey
Division of Ratepayer Advocate
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101

Michael K. Kurtis
Bennet & Bennet, PLLC
10 G Street, NE, 7th Floor
Washington, DC 20002

Sylvia Davis