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November 2, 2005

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Via Electronic Filing

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

**Re: EX PARTE SUBMISSION**  
WT Docket 03-66; Amendment of Parts 1, 21, 73, 74, and 101 of the  
Commission's Rules to Facilitate the Provision of Fixed and Mobile  
Broadband Access, Educational and Other Advanced Services in the 2150-  
2162 and 2500-2690 GHz Bands

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Dear Ms. Dortch:

NY3G Partnership ("NY3G") hereby responds to the recent ex parte letters submitted by Trans Video Communications, Inc. ("TVC") and Sprint Nextel Corporation ("Sprint Nextel") in the above-referenced proceeding.<sup>1</sup> The TVC and Sprint Nextel letters purport to show that the "split-the-football" approach is an appropriate solution for resolving the mutual exclusivity between TVC and NY3G, the grandfathered licensees operating on the F group channels in New York City. As explained below, the submissions of both parties, however, are flawed and misleading. They provide no real basis for refuting NY3G's demonstration that such an approach in New York City would create a service exclusion zone, denying service on the F group channels to millions of consumers, and would stymie competitive entry into the market, at an estimated annual cost to consumers of several hundred millions of dollars. Indeed, even regardless of any

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<sup>1</sup> See, e.g., Letter to Marlene Dortch from Edwin Lavergne (October 26, 2005) ("TVC Letter"); Letter to Marlene H. Dortch from Lawrence R. Krevor (October 27, 2005) ("Sprint Nextel Letter").

exclusion zone, any attempt to split the New York City market down the middle leaves both halves non-viable. A successful wireless broadband business needs to be able to offer service throughout the entire local market. For these reasons, NY3G has urged the adoption of its compromise solution to divide the frequencies between grandfathered co-channel licensees in those rare situations where applying the split-the-football approach would be contrary to the public interest.<sup>2</sup> This approach would provide both licensees with the critical ability to provide market-wide service.

As NY3G has shown, in the unique case of the F group channels in New York City, the split-the-football approach would create an exclusion zone at least 15.6 km wide, adversely affecting over seven million consumers in the heart of the city, and impractical service areas covering less than half the metro area.<sup>3</sup> Under such circumstances, application of the split-the-football approach would effectively prevent the entry of viable competition on the F group channels, potentially costing consumers up to several hundred millions of dollars in lost savings annually.<sup>4</sup> For these reasons, NY3G has proposed a compromise solution of dividing the frequencies between grandfathered co-channel licensees in those extraordinary cases where split-the-football would create exclusion zones affecting millions of people and a significant percentage the market.<sup>5</sup> NY3G's solution would not require the Commission to choose between commercial and educational interests, because it would both facilitate the deployment of broadband, a stated goal of the Chairman and President Bush, and preserve the ability of EBS licensees to continue to transmit educational programming. Moreover, it would not only eliminate the exclusion zone, but would expand both licensees ability to serve the entire New York City market.

In its recent filing, TVC attempts to refute NY3G's demonstration as to the relevance of the exclusion zone by misleadingly asserting that "all commenting parties

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<sup>2</sup> See Letter to Fred Campbell from Bruce Jacobs (October 17, 2005) (discussing in more detail NY3G's proposal to resolve mutual exclusivity in such cases).

<sup>3</sup> See, e.g., Letter to Marlene Dortch from Bruce Jacobs and accompanying engineering studies (May 31, 2005).

<sup>4</sup> See Dr. Thomas W. Hazlett, "Efficient Rights Assignments in the 2.5 GHz Band" attached to Comments of NY3G Partnership (January 10, 2005).

<sup>5</sup> See Attachment B to Letter to Marlene Dortch from Bruce Jacobs (October 17, 2005) (EBS licensee would receive the high power channel; BRS licensee would receive three low-power channels).

support the split-the-football solution proposed by WCA, CTN, and NIA.” Attachment to TVC Letter, at 1. While it is true that there is wide acceptance (including by NY3G) of the “split-the-football” approach as a general solution to resolving mutual exclusivity between co-channel licensees, there is no consensus that such a solution is appropriate in the unique situation facing the F group licensees in New York City. Moreover, other than the parties directly affected in New York City (i.e. TVC, NY3G and Sprint Nextel), the few commenters that have addressed the F group situation have provided only unsubstantiated, conclusory remarks.<sup>6</sup> In contrast, as discussed above, NY3G has demonstrated that, while the split-the-football approach may work in the vast majority of markets, it is not a viable solution for the F group channels in New York City.

Neither TVC’s prior engineering analysis, Sprint Nextel’s recent engineering submission, nor any filing in the record refutes NY3G’s conclusions about the size of the exclusion zone. Both TVC and Sprint Nextel make the same technical assumptions that NY3G has previously demonstrated are flawed.<sup>7</sup> In brief, the parties assume a much lower-powered operation than would be reasonable (i.e. base stations having EIRP levels in the antenna nulls that are 20 dB less than the levels assumed by NY3G).<sup>8</sup> Their imagined systems would be incapable of providing reliable in-building service in Manhattan and are thus completely impractical. TVC and Sprint Nextel’s engineering analyses also rely in part on successful coordination between co-channel licensees, which simply cannot be presumed in light of the history between the licensees. Moreover, even under those grossly unrealistic technical assumptions, TVC and Sprint Nextel concede that there would still be an exclusion zone up to 2 km wide on each side of the GSA border,<sup>9</sup> which would cut through the heart of New York City, precluding service on the F group channels to approximately 1.8 million consumers living in the affected area, not

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<sup>6</sup> See Attachment to TVC Letter, at 1.

<sup>7</sup> See, e.g., Letter to Marlene Dortch from Bruce Jacobs and accompanying engineering studies (May 31, 2005).

<sup>8</sup> While NY3G uses an assumed EIRP of 0.1 watts towards the GSA border in determining the 7.8 km exclusion zone (with this EIRP level representing the power in the antenna null for directional base station transmissions), TVC and Sprint use a *maximum* EIRP of 0.1 watts, with a null signal suppressed by 20 dB below the maximum (for an unrealistically low EIRP of 0.001 watts in the pattern null).

<sup>9</sup> See Sprint Nextel Letter, at 1 (exclusion zone would be 0.98 km wide on each side of the GSA border); Engineering Statement attached to Letter to Marlene Dortch from Michael Lazarus, at 1 n.\* (April 27, 2005) (exclusion zone would be 2 km wide on each side of the GSA border).

to mention the millions more working and traveling there.<sup>10</sup> At bottom, the paper systems drawn by TVC and Sprint Nextel are feeble and unrealistic.

A split-the-football approach for the F group channels in New York City would also thwart competitive entry into the market, to Sprint Nextel's private benefit, but not to the benefit of the public. The resulting service areas would cover less than half the metro area and exclude all of Manhattan, the Bronx, and Staten Island, and much of Brooklyn and Queens -- the heart of New York City. Such limited coverage would make any rival broadband service on the F group channels undesirable to consumers, in comparison to any market-wide service offered by Sprint Nextel, and thus unviable for competitors.<sup>11</sup>

Sprint Nextel controls the dominant block of the BRS/EBS spectrum in the market, even without its interest in TVC's F group channels.<sup>12</sup> It can use its many other channels in this band to offer a broadband service that covers the entire metro area, giving it an overwhelming competitive advantage against any F group competitor that can serve only half the market under a split-the-football approach. Sprint Nextel controls so much spectrum in New York City that loss of market wide coverage on TVC's F group channels will not affect it competitively.

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<sup>10</sup> See attached Exhibit 1.

<sup>11</sup> The Commission has consistently recognized that awarding authorizations with functional service areas is critical to the viability of licensees and the effective deployment of communications services. See, e.g., *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, at ¶ 73 (1993) (adopting MTA and BTA service areas, because smaller service areas "likely would result in unnecessary fragmentation of natural markets").

<sup>12</sup> Altogether Sprint Nextel controls the vast majority of the BRS/EBS spectrum nationwide and 61% of the spectrum in New York City (in terms of MHz-Pops), or roughly 120 MHz. See Attachment 1 to Attachment E of the Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Section 214 and 310(d), WT Docket 05-63 (February 8, 2005); *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation*, FCC 05-148, at ¶ 147 (August 8, 2005) ("Sprint and Nextel are the two largest current holders of rights to spectrum in the 2.5 GHz band" and combined control "nearly 85% of the pops in the top 100 markets . . ."). Sprint Nextel's BRS/EBS holdings far exceed the 70 MHz threshold that the Commission has established in the mobile telephony market as a bright line screen for competitive concerns. *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation*, FCC 05-148, at ¶ 63 (August 8, 2005).

With its domination of the BRS/EBS spectrum both in New York City and nationwide, Sprint Nextel has every economic incentive and interest to thwart the entry into the New York City market by new broadband competitors, such as NY3G.<sup>13</sup> Sprint Nextel's private gain from doing so would vastly offset its private loss from not being able to use the F group channels in New York City.<sup>14</sup>

The BRS/EBS band is the spectrum band that is most ideally suited for Wi-Max service that is compatible and interoperable with worldwide standards. Wi-Max will be the driver of the most innovative and far-reaching of wireless broadband services for the foreseeable future. It is therefore no surprise that Sprint Nextel urges that the split-the-football approach be applied to the F group channels in New York City. Sprint Nextel is relying on a split-the-football regulatory barrier to avoid competition in New York City from NY3G for Wi-Max services in this critical spectrum band. The public interest deserves a fully competitive service and another approach for markets like New York City.

Unlike TVC, which appears to be uncertain as to whether it may enter into some unspecified project with Northrop Grumman or continue its spectrum lease arrangement with Sprint Nextel,<sup>15</sup> NY3G stands ready to move forward and deploy much-needed innovative broadband services in New York City at an affordable cost. In fact, NY3G recently announced with ADAPTIX, Inc., a Wi-Max vendor, a trial broadband deployment in New York City scheduled for early next year.<sup>16</sup> The public interest clearly lies in favor of facilitating such entry and in providing affordable ubiquitous service to the public.

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<sup>13</sup> The Commission's public interest analysis include "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advance services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest." *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation*, FCC 05-148, at ¶ 21 (August 8, 2005).

<sup>14</sup> NY3G has explained in a related proceeding its concerns about the anticompetitive effects of the lease arrangement between TVC and Sprint Nextel. *See, e.g.*, Letter to Marlene Dortch from Bruce Jacobs, WT Docket No. 05-63 (July 29, 2005).

<sup>15</sup> *See* TVC Letter, at 1.

<sup>16</sup> *See* attached Exhibit 2.

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For these reasons, the Commission should reject the arguments raised by TVC and Sprint Nextel in their recent filings and adopt NY3G's proposal to resolve co-channel interference on the F group channels in New York City.

Very truly yours,

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/s/

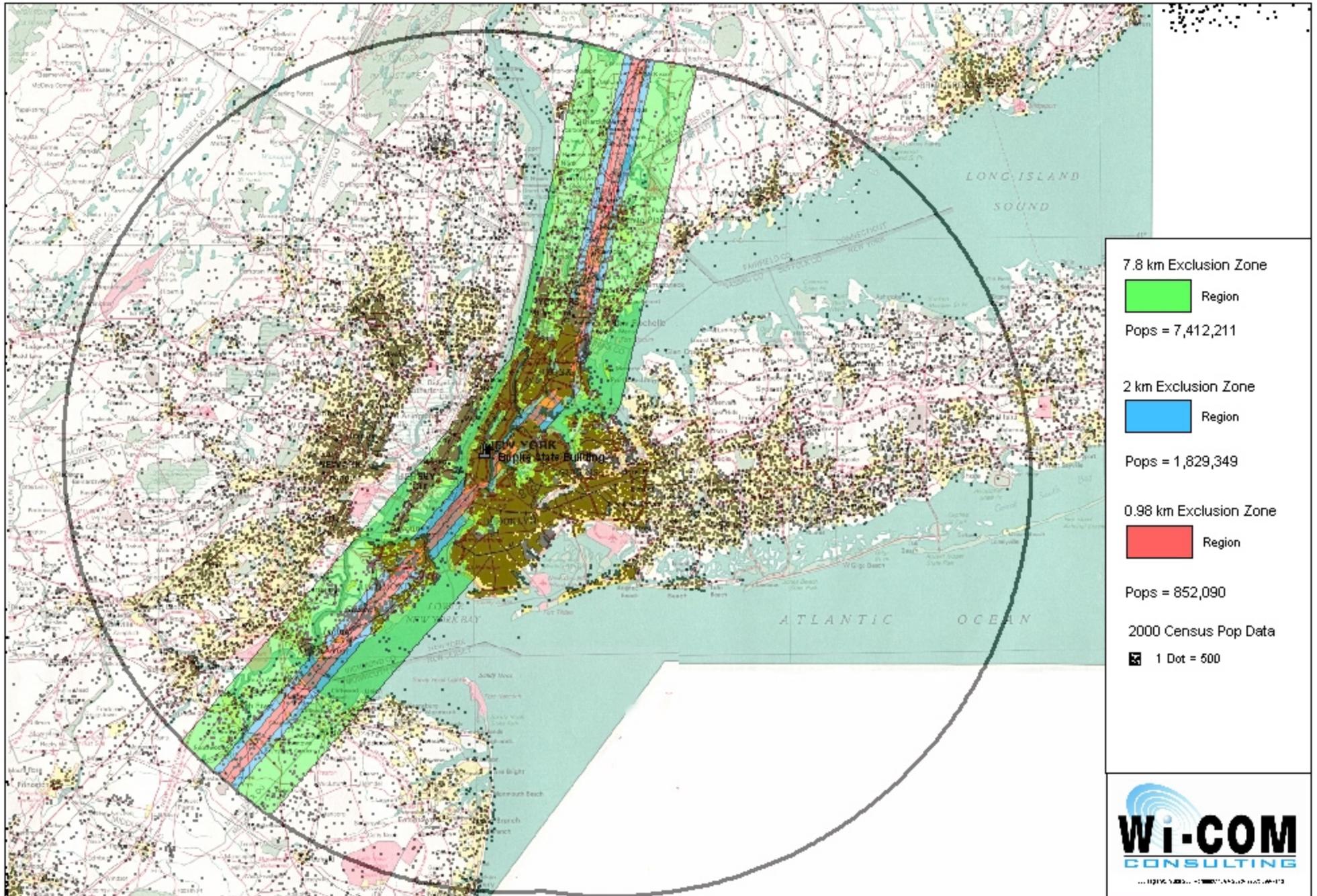
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Attachments

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## **Exhibit 1**

# F Group GSA Map - New York City



## **Exhibit 2**

## **NY3G Partnership and ADAPTIX Announce Mobile Broadband Deployment for New York City**

*Pre-WiMAX Trial in Manhattan to Commence in Early 2006*

**SEATTLE and NEW YORK – September 8, 2005** – ADAPTIX, Inc., a leader in software defined, all-IP Orthogonal Frequency Division Multiple Access (OFDMA) wireless mobile broadband access technologies, and the NY3G Partnership, a Broadband Radio Services (BRS) spectrum licensee in New York City, today announced a trial of ADAPTIX' line of broadband fixed and mobile OFDMA/TDD pre-WiMAX systems. The trial, to commence in early 2006, will be deployed over several locations on the island of Manhattan.

“As the largest market in the U.S., New York City offers the opportunity for ADAPTIX and NY3G to show the robustness of the OFDMA/TDD platform in a challenging environment for any wireless technology,” said Vern Fotheringham, president and CEO of ADAPTIX. “Now fixed and mobile multi-megabit applications such as Voice over IP, data downloads and transfers, full-length movies and music downloads and multiplayer video games, can finally fulfill the promise of a truly connected Internet, whenever and wherever.”

ADAPTIX recently demonstrated mobile WiMAX capabilities in its GMC Yukon Denali at the WiMAX Forum event on July 15, where it simultaneously received mobile Voice over IP calls, played video content such as feature-length movies and transferred large files, at throughput of up to 2.5 Mbps traveling at vehicular speeds through the coverage area. The technology is based on the forthcoming 802.16e wireless standard, expected to be ratified by the WiMAX Forum and Institute of Electrical and Electronics Engineers (IEEE) later this year.

“This trial commences at a very exciting time in the evolution of mobile broadband wireless,” said Bradley Holmes, chief operating officer of NY3G. “NY3G’s spectrum is capable of providing a variety of New York City-wide broadband services to businesses, residents, public safety organizations, community groups and schools. The scalability, flexibility and resource efficiency of the ADAPTIX platform appear to be an ideal fit for our deployment strategy.”

### **About ADAPTIX**

ADAPTIX is headquartered in Seattle, Washington, with product development and manufacturing facilities in Shanghai, China. To meet the exploding demand for integrated mobile voice, video, and data applications, ADAPTIX has developed a dynamic software-defined, hardware enabled infrastructure platform for service providers globally. The ADAPTIX OFDMA/TDD operation system gives service providers the highest level of special and resource flexibility and efficiency to deploy applications such as mobile VoIP, multimedia messaging, and other multi-megabit, QoS dependent services quickly and cost effectively. For more information please visit, [www.adaptix.com](http://www.adaptix.com).

### **About NY3G Partnership**

NY3G Partnership is one of two BRS spectrum licensees in New York City, the nation’s number one market. The partners of NY3G have significant telecom, media, and technology interests and have decades of experience in providing new and innovative wireless services in New York City. They include several founders



of the cellular telephone industry who played key roles in the design, construction and operation of the non-wireline cellular system in New York City. Another provided wireless cable and information services to colleges, hospitals, and assisted living facilities in New York City.

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