

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)

Sprint Nextel Corporation and Clearwire)
Corporation Seek FCC Consent to Transfer)
Control of Licenses and Authorizations)
_____)

WT Docket No. 08-94
DA 08-1477

COMMENTS OF VONAGE HOLDINGS CORPORATION

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Introduction

Vonage Holdings Corporation (“Vonage”), through its undersigned attorneys and pursuant to the Commission’s Public Notice,¹ submits these Comments on the Applications filed by Sprint Nextel Corporation (“Sprint”) and Clearwire Corporation (“Clearwire”) (collectively, “the Applicants”) pursuant to Section 310(d) of the Communications Act of 1934, as amended (“Act”).

Vonage does not oppose the Applications. For the reasons set forth herein, however, Vonage respectfully submits that the Commission should condition any grant of the Applications to ensure that the open network proposals are made enforceable through adoption as a merger commitment. Such a condition would be consistent with past Commission practices, and would ensure continued competitive access in the wireless broadband setting.

I. Background and Standard of Review

The Applications filed by Sprint and Clearwire seek Commission approval of the transfer of control of licenses, authorizations, and *de facto* transfer spectrum leases held by Sprint and

¹ *Public Notice*, Sprint Nextel Corporation and Clearwire Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, Pleading Cycle Established, DA 08-1477, WT Docket No. 08-94 (rel. June 24, 2008) (“Public Notice”).

Clearwire to a new wireless broadband company called Clearwire Corporation (“New Clearwire”). Under the proposed merger, all of Clearwire’s current Commission-authorized license and lease-holding subsidiaries will become indirectly held by New Clearwire. Further, Sprint plans to transfer control of its wholly-owned subsidiaries that hold all of Sprint’s respective 2.5 GHz related assets indirectly to New Clearwire, and will receive shares of New Clearwire amounting to an approximate 51 percent ownership, resulting in Sprint obtaining majority ownership of New Clearwire at the closing.²

Pursuant to sections 214 and 310(d) of the Communications Act, the Commission must determine whether Applicants have demonstrated that the proposed transfers of control of licenses and authorizations held by Clearwire and Sprint (and their affiliates) will serve the public interest, convenience, and necessity.³ In making this assessment, the Commission must first determine whether the proposed transaction would comply with the specific provisions of the Act,⁴ other applicable statutes, and the Commission’s rules. If the transaction does not violate a statute or rule, the Commission considers whether it could result in “public interest harms” by frustrating or impairing the objectives or implementation of the Act or related statutes. The Commission then employs a balancing process, weighing any potential public interest harms of the proposed transactions against any potential public interest benefits.⁵ The Applicants, of

² These transfer of control Applications pertain specifically to Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) licenses and leases in the 2.5 GHz Band, point-to-point microwave and Local Multipoint Distribution Service (“LMDS”) stations licensed under Part 101 of the Commission’s Rules, and Cable Television Relay Service (“CARS”) licenses issued under Part 78 of the Commission’s Rules. Sprint also has wireless radio licenses in the 800 MHz, 900 MHz, 1.9 GHz and 2.3 GHz bands.

³ 47 U.S.C. §§ 214, 310(d).

⁴ Section 310(d) requires that the Commission consider the Applications as if the proposed transferee were applying for the licenses directly. 47 U.S.C. § 310(d).

⁵ See, e.g., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelfia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelfia Order*”).

course, bear the burden of proving, by a preponderance of the evidence, that the proposed transactions, on balance, would serve the public interest.

Vonage submits that the Commission's public interest evaluation should encompass the broad aims of the Communications Act, which include, but are not limited to, "a deeply rooted preference for preserving and *enhancing competition in relevant markets*, accelerating private sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing the spectrum in the public interest."⁶

II. Vonage Supports the Applicants' Open Network Proposal

The Applicants state that after consummation of the transaction, New Clearwire will open its WiMax network. "New Clearwire will permit consumers to use any lawful device that they want so long as it is compatible with and not harmful to the WiMAX network."⁷ Similarly the Applicants state that "New Clearwire also will permit consumers to download and use any software applications, content, or services they desire, subject to reasonable network management practices and law enforcement and public safety considerations."⁸

Vonage agrees with Sprint and Clearwire that an open network will spur innovation in applications and devices. "New Clearwire's use of the transformational WiMAX technology for the U.S.'s first nationwide wireless 4G network will drive innovation in the development of broadband devices and applications."⁹

Further, by providing another widely available option for consumers to obtain broadband access, New Clearwire's nationwide WiMax network should spur competition in the provision of

⁶ See *Adelphia Order*, ¶ 24 (internal citations omitted) (emphasis supplied).

⁷ Description of the Transaction and Public Interest Statement, Form 603, File No. 0003462540, at 26 (amended Jun. 24, 2008) ("Description of the Transaction").

⁸ *Id.*

⁹ *Id.*

broadband service to the home--a market largely controlled by a duopoly of incumbent local exchange carriers and incumbent cable operators.

III. “Old” Clearwire’s Policies Were Not Consistent with the New Commitment to Openness

Although “Old” Clearwire never explicitly adopted a public policy of barring third-party VoIP providers from offering services over its wireless broadband network, several Vonage customers previously reported that they were unable to use Vonage’s VoIP service over Clearwire’s network. When at least one Vonage customer asked Clearwire why the service didn’t work, a Clearwire representative told the customer that they couldn’t use Vonage over Clearwire.¹⁰

Further, the future president of New Clearwire has given additional details about the new joint venture, which if true, could undermine the openness and non-discriminatory nature of the proposed WiMax network as described in the Applications. Specifically, Barry West, currently Chief Technology Officer for 4G Services at Sprint, stated that New Clearwire will charge third-party service providers for access to a “service quality API” that lets them set up their service to get priority over others.¹¹ The implications of this brief discussion of API access are not clear. Because this aspect of the proposed WiMax network is not discussed in the Applications, Vonage requests that the parties clarify how service quality APIs will be used in their network and whether and how service quality APIs will impact New Clearwire’s commitment to an open network.

¹⁰ See Paul Kapustka, Clearwire May Block VoIP Competitors, Networkcomputing.com (Mar. 25, 2005), available at: <http://www.networkcomputing.com/channels/networkinfrastructure/showArticle.jhtml?articleID=159905772>. See also Heather Forsgren Weaver, Vonage solves Clearwire blocking problem, asks feds for help, RCR Wireless (Apr. 22, 2005), available at: <http://www.rcrnews.com/article/20050422/SUB/504220709>.

¹¹ See Nancy Gohring and Stephen Lawson, Analysis: Clearwire Venture Promises New Kinds of Services, Computerworld Networking & Internet (May 13, 2008), available at: <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9085118>.

IV. The Commission Should Require the Applicants to Commit to Their Open Network Proposal

Because one of the key public interest benefits of the proposed transaction is the open and non-discriminatory WiMax network, the Commission should adopt conditions as part of its approval of the transaction. The Commission routinely works with merger applicants to develop conditions that ensure the claimed public interest benefits are realized. For example, in the *AT&T/BellSouth Order*, the FCC made clear that the merger conditions proposed by the applicants and adopted by the Commission are “enforceable,” and mandated that AT&T “shall comply” with all of them “as a condition of” the Commission’s order.¹² Both the Commission and courts have consistently treated merger conditions as legally binding provisions of agency orders.¹³

Vonage proposes two conditions that will ensure Applicants comply with their proposed open network policy. First, the Commission should require New Clearwire to comply with the Commission’s *Internet Policy Statement*.¹⁴ Second, the Commission should require that New Clearwire offer its new WiMax service on an unbundled basis, not tied to New Clearwire voice service.

Consistent with its comments in the Vuze Petition proceeding¹⁵ and its recent MOU regarding network management with Comcast,¹⁶ Vonage does not believe that it is necessary or

¹² See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, ¶¶ 222 & 227 (rel. Mar. 26, 2007) (“*AT&T/BellSouth Order*”).

¹³ See, e.g., *Ameritech Operating Cos., Tariff F.C.C. No. 2, et al.*, Transmittal No. 1666, *et al.*, Order, 23 FCC Rcd 2499, 2502, at ¶ 8 (2008); *SBC Communications Inc. v. FCC*, 407 F.3d 1223, 1230 (D.C. Cir. 2005); *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, ¶ 205 (rel. Nov. 17, 2005) (“*SBC/AT&T Order*”).

¹⁴ *Policy Statement*, 20 FCC Rcd 14986 (2005) (“*Internet Policy Statement*”).

¹⁵ *Vuze, Inc. Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators*, Comments of Vonage Holdings Corp., WC Docket No. 07-52 (filed Feb. 13, 2008).

desirable to adopt detailed regulation for what constitutes reasonable network management under the *Internet Policy Statement*. However, past industry practice has shown that the Commission needs to be vigilant and proactive to ensure that seemingly “reasonable measures” do not transform into discriminatory and unfair practices.¹⁷

Serious harm may also follow if broadband service providers are allowed to arbitrarily block independent VoIP services whenever, and however, they choose. Such practices necessarily lead to customers losing their voice communications service, and may also prevent those customers from reaching emergency services (or impede VoIP providers’ ability to accurately route 911 calls). The Commission has a “longstanding and continuing commitment to a nationwide communications system that promotes the safety and welfare of all Americans.”¹⁸ That policy is clearly frustrated whenever a broadband provider decides (especially without warning) to block independent VoIP services from its network, potentially cutting off customers from 911 access.

The *Internet Policy Statement* establishes that:

- consumers are entitled to access the lawful Internet content of their choice;
- consumers are entitled to run applications and use services of their choice;
- consumers are entitled to connect their choice of legal devices that do not harm the network; and
- consumers are entitled to competition among network providers, application and service providers, and content providers.¹⁹

¹⁶ Marguerite Reardon, Comcast and Vonage Collaborate on Network Management, CNET (July 9, 2008), available at: http://news.cnet.com/8301-10784_3-9986719-7.html.

¹⁷ See, e.g., *Madison River Communications, LLC and affiliated companies*, Order, File No. EB-05-IH-0110, Acct. No. 200532080126, FRN: 0004334082 (rel. Mar. 3, 2005) (fining Madison River for blocking Vonage VoIP traffic).

¹⁸ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rule Making, 20 FCC Rcd 10245, 10248, ¶ 5 (2005) (“*VoIP 911 Order*”).

¹⁹ *Internet Policy Statement*, ¶ 4.

The Commission has included open network and non-discrimination conditions in past merger orders. In the *SBC/AT&T Order*,²⁰ *Verizon/MCI Order*,²¹ and *AT&T/BellSouth Order*²² the Applicants were required to comply with the *Internet Policy Statement* as a condition of Commission approval.²³ The Commission should include the same merger commitment as a condition of approval here.

The Commission has no rules that would clearly prevent New Clearwire from requiring consumers to purchase broadband service bundled with voice and other services. In other mergers, however, the Commission imposed standalone broadband conditions to protect consumers. In the three most recent BOC mergers, the Commission conditioned those mergers on, among other things, the applicants' commitment to provide stand-alone DSL service, even though there was no unbundling rule that required them to do so.²⁴ Given that the Applicants have promoted their merger as a competitive option for consumer broadband services,²⁵ and Clearwire's past

²⁰ *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65 (rel. Nov. 17, 2005).

²¹ *Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-75 (rel. Nov. 17, 2005) ("*Verizon/MCI Order*").

²² *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74 (rel. Mar. 26, 2007).

²³ See *SBC/AT&T Order*, Appendix F; *Verizon/MCI Order*, Appendix G; *AT&T/BellSouth Order*, Appendix F.

²⁴ *Verizon/MCI Order*, Statement of Commissioner Adelstein ("By conditioning this merger on the offering of a stand-alone DSL broadband offering, we create an opportunity for the development of competitive Voice Over Internet Protocol (VoIP) and help spur innovative communications technologies. According to consumer advocates, many consumers will want bundled services, but when companies unilaterally mandate that broadband and phone services be purchased together, they diminish the incentive of consumers to purchase VoIP phone service from competing providers or to rely on wireless service as their primary option."). See also generally *SBC/AT&T Order*; *AT&T/BellSouth Order*.

²⁵ See Description of the Transaction, at 36-37 ("Combining the Sprint and Clearwire 2.5 GHz assets will help overcome the remaining challenges in fulfilling the Commission's objective of making the 2.5 GHz band a viable platform for providing competitive broadband services."). See also *id.*, at 2, 47, 52, 61, 62.

actions to prevent customers from using independent VoIP providers, the Commission should impose a similar condition in this case.

V. Conclusion

For the reasons set forth above, Vonage respectfully requests that the Commission condition any grant of the Applications on commitments by the Applicants to comply with the *Internet Policy Statement* and to provide broadband services on an unbundled basis. “Old” Clearwire has demonstrated a willingness to block independent applications on its network in favor of its own services, and should be prevented from doing so in the future. The only way to realize the public interest benefit of Applicants’ proposed open network is to adopt these commitments as enforceable merger conditions.

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