Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
SPRINT NEXTEL CORPORATION and	)	WT Docket No. 08-94
CLEARWIRE CORPORATION	)	DA 08-1477
	)	
For Consent to Transfer Control of Licenses,	)	
Authorizations, and *De Facto* Transfer	)	
Spectrum Leases	)	

PETITION TO DENY

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July 24, 2008

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Summary

Rural Cellular Association ("RCA") petitions the Commission to deny, or to condition its consent, to the proposal of Sprint Nextel Corporation and Clearwire Corporation for a transfer of control of their 2.5 GHz licenses, authorizations, and *de facto* transfer spectrum leases to a new wireless broadband company called Clearwire Corporation ("New Clearwire"). This landmark event would occur nearly simultaneously with the proposed elimination of the near-nationwide wireless network operated by Alltel upon its acquisition by what will become the nation's largest wireless carrier, Verizon Wireless.[1] Under these unique circumstances there is a manifest need for the Commission to recognize the impact of both transactions upon consumers and act to promote carrier-to-carrier network interoperability, including automatic roaming for voice and data, notably for wireless broadband services. Automatic roaming alone, as important as it is to consumers and carriers, does not do enough to provide consumers with continuous service as they travel between wireless carriers' service areas. Competition is promoted through interoperability because it allows small and regional wireless carriers to offer the public a service that is not interrupted by unsuccessful inter-carrier handoffs, and because consumers can make full use of their wireless devices regardless of which carrier is their serving carrier whenever the networks are technically compatible. And public safety is an extremely important benefit of interoperability agreements between wireless carriers. E911 Phase II location accuracy is more likely to be available if a subscriber's home carrier and the away-from-home, serving carrier have an interoperability agreement in place.

The proposed Sprint – Clearwire transaction and the contemporaneous Alltel – Verizon merger proposal bring to the forefront an urgent need for the Commission to act promptly so that

[1] See *Public Notice* released June 25, 2008 in WT Docket No. 08-95.

millions of consumers are not denied the benefits of latest innovations in handset technology. The harms resulting from exclusive handset agreements will only get worse if the proposed transaction is permitted to proceed without a solution that allows millions of rural Americans to obtain the latest models of handsets that New Clearwire and Sprint Nextel will offer. Likewise, customers of other carriers should have the opportunity to roam on the New Clearwire network by use of handsets that will function on the networks of compatible carriers. If the Commission is otherwise prepared to consent to the Sprint – Clearwire transfer application it should condition the grant upon a termination of existing handset exclusivity agreements and a prohibition on new agreements of the same nature.

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PETITION TO DENY

Rural Cellular Association ("RCA"), by its attorneys and pursuant to § 309(d)(1) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309(d)(1), § 1.939(a)(2) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.939(a)(2), and the Commission's Public Notice, DA 08-1477 (June 24, 2008), hereby petitions the Commission to deny the above-captioned applications of Sprint Nextel Corporation ("Sprint") and Clearwire Corporation ("Clearwire") for the Commission's consent to the transfer control of their 2.5 GHz licenses and lease arrangements to a new wireless broadband company to be called Clearwire Corporation ("New Clearwire"). In support thereof, the following is respectfully submitted:

I. Standing

RCA is an association representing the interests of approximately 80 small and rural wireless licensees providing commercial services to subscribers throughout the nation. RCA's wireless carriers operate in rural markets and in a few small metropolitan areas. No member has as many as 1 million customers, and all but one or two of RCA's members serve fewer than 500,000 customers. As an association of small, rural wireless carriers, RCA has an interest in

protecting its members from the competitive harm that is threatened by the proposal to combine the 2.5 GHz "spectrum" assets of Sprint and Clearwire (collectively "the Applicants").[2]

Although the Applicants have filed 116 individual applications, their filings comprise a single application for authorization to affect the transfer of control of their 2.5 GHz assets to New Clearwire for the express purpose of "creating a new nationwide advanced wireless broadband network,"[3] which meets the definition of a single "radio station."[4] Apparently in recognition of the fact that the 116 applications involve the same applicants and the same issues,[5] the Commission departed from its normal processing procedures for transfer of control applications[6] and consolidated the applications for consideration in a single proceeding in WT Docket No. 08-94. For the purposes of recognizing the "parties to the proceeding,"[7] the 116 consolidated applications should be considered as one.

RCA has representational standing to petition to deny the New Clearwire merger application if one of its members can show independently that it is a party in interest with respect to the application under § 309(d)(1) of the Act. *See Nancy Naleszkiewicz,* 5 FCC Rcd 7131, 7131 (Com. Car. Bur. 1990) (citing *Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application,* 82 F.C.C. 2d 89, 96 (1989)); *GTE Mobilnet of Terre Haute L.P.,* 7 FCC Rcd 7127, 7128 (Mob. Serv. Div. 1992).[8]

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[2] *E.g.,* Description of the Transaction and Public Interest Statement, File No.0003462540, at 7 (June 24, 2008) ("Transfer Application").

[3] *Id.,* at 15.

[4] A "radio station" is defined as "[a] separate transmitter or a group of transmitters under simultaneous common control, including the accessory equipment required for carrying on a radio communications service." 47 C.F.R. § 1.907.

[5] *Cf.,* 47 C.F.R. § 1.227(a)(1).

[6] *See id.* § 1.948(j).

[7] Public Notice, DA 08-1477, at 5.

[8] An association has representational standing under Article III of the Constitution if: (1) at least one of its members has standing; (2) the interests the association seeks to protect are germane to its purpose; and (3) neither

Several of RCA's members can claim "competitor standing" as parties in interest under § 309(d)(1) with respect to proposed transfer of spectrum assets to New Clearwire. *New World Radio, Inc. v. FCC,* 294 F.3d 164, 170 (D.C. Cir. 2002). Among RCA's members that will compete directly with New Clearwire is Cellular South, Inc. ("Cellular South"), which provides cellular and/or Personal Communications Service ("PCS") to residents in the states of Mississippi, Alabama, Florida and Tennessee.[9] Cellular South focuses on providing cutting-edge technology to its customers, including data and mobile services, as well as the latest wireless equipment and competitive wireless plans that provide nationwide coverage. Cellular South provides digital wireless services using CDMA technology. It is deploying third-generation CDMA2000® 1×EV-DO Revision A technology to upgrade its network. The EV-DO Rev. A platform enables Cellular South to provide its customers with faster uploads and downloads when connected to the Internet, and will allow for a range of mobile high-speed data services including mobile video telephony, high-quality music and other multimedia applications.

New Clearwire will have 2.5 GHz assets capable of supporting "cellularized broadband operations" in numerous counties in Mississippi, Alabama, Florida and Tennessee.[10] In many of those counties, New Clearwire will compete with Cellular South. The increase in competition can be expected to cause Cellular South to sustain economic injury that is direct, tangible and immediate.

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the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit. *See, e.g., American Library Ass'n v. FCC,* 406 F.3d 689, 696 (D.C. Cir. 2005).

[9] Cellular South is the parent company of Cellular South Licenses, Inc. which holds the cellular and PCS licenses.

[10] *See* Transfer Application, at 71, Appendix D.

With the infusion of $3.2 billion from its strategic investors,[11] New Clearwire will be "undertaking a multi-billion dollar deployment of the first mobile WiMAX network in the country."[12] The Applicants claim the "new nationwide advanced wireless broadband network ... will increase competition across the country."[13] They claim that the proposed transaction will generate significant synergies for New Clearwire that will decrease its network operating expenses, while increasing its operational and procurement efficiencies.[14] With its low-cost WiMAX architecture and nationwide reach, New Clearwire will achieve the economies of scale that should allow it to compete effectively with Cellular South.[15] The Applicants promise that New Clearwire will be "an effective new nationwide broadband competitor" that will "compete aggressively in the mobile broadband marketplace."[16]

Cellular South's status as a potential competitor to New Clearwire provides it with standing to file a petition to deny the transfer of control application under *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940) and its progeny. *See New World Radio,* 294 F.3d at 170. Consistent with *Sanders Brothers,* the Commission developed a "generous" standing policy in assignment and transfer cases "so as to enable a competitor to bring to the Commission's attention matters bearing on the public interest because its position qualifies it in a special manner to advance such matters." *Stoner Broadcasting System, Inc.,* 74 F.C.C. 2d 547, 548 (1979). *See WLVA, Inc. v. FCC,* 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972) (standing under

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[11] *See id.,* at 24.

[12] Transfer Application, at 60.

[13] *Id.,* at 15.

[14] *See id.,* at 24-25.

[15] *See id.,* at 27.

[16] *Id.,* at 40.

§ 309(d)(1) "liberally conferred" where a competitor alleges economic injury). If that policy is followed, Cellular South would be accorded standing under § 309(d)(1) to petition the Commission to deny its consent to the proposed transaction.

Despite recognizing that the administrative standard for establishing standing under § 309(d)(1) is "less stringent" than the judicial standard for establishing Article III standing to appeal, *see Paxson Management Corp. and Lowell W. Paxson,* 22 FCC Rcd 22224, 22224 n.2 (2007), the Commission nevertheless has applied the test for Article III standing to petitioners in transfer of control cases. *See, e.g., Shareholders of Tribune Co.,* 22 FCC Rcd 21266, 21268 (2007). RCA submits that several of its members, including Cellular South, can establish their Article III standing by alleging specific facts showing that: (1) they will suffer injury-in-fact; (2) there is a "causal link" between the proposed transfer and the injury-in-fact; and (3) the injury-in-fact would be prevented if the transfer application is not granted. *See id.*

Cellular South is likely to suffer injury-in-fact if it is forced to compete with New Clearwire and its nationwide WiMAX network. *See supra* p. 4. There is an obvious causal link between the proposed transaction and the injury-in-fact that Cellular South stands to suffer: the new nationwide WiMAX network will not be deployed unless the Commission approves the proposed transaction, since neither Sprint nor Clearwire can fund the deployment out of the cash flow from their existing operations.[17] It is equally obvious that the economic injury to Cellular South would be prevented if the Commission does not approve the proposed transaction and withholds its consent to the transfer of control of the Applicants' 2.5 GHz assets. The attached declaration of Eric B. Graham attests to the fact that Cellular South has standing as a party in interest under § 309(d)(1) to petition to deny the subject application.

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[17] *See* Transfer Application, at 22.

Because one of its members has shown that it has standing independently, RCA has representational standing to petition to deny the transfer of control application. *See Nancy Naleszkiewicz,* 5 FCC Rcd at 7131. However, if it finds otherwise, the Commission should exercise its discretion to treat this petition as an informal objection and to address it on its substantive merits. *See, e.g., Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp.,* 19 FCC Rcd 21522, 21547 n.196 (2004).

II. Argument

A. Interoperability and Automatic Roaming with Other Wireless Carriers is Needed Where Technically Feasible to Facilitate Consumer Access to Wireless Broadband Service

If the two overwhelmingly dominant holders of 2.5 GHz spectrum in the United States are permitted to consolidate spectrum holdings in a single new company, the public interest will not be served unless the Commission acts decisively to provide opportunity for carrier-to-carrier interoperability, including automatic roaming for subscribers of other carriers.

1. Consumer Access from other Networks Should be Promoted

Sprint and Clearwire propose to create a near-national mobile WiMAX broadband network that cannot be duplicated in the foreseeable future by any new entrant to the telecommunication industry. This landmark event would occur nearly simultaneously with the proposed elimination of the near-nationwide wireless network operated by Alltel upon its acquisition by what will become the nation's largest wireless carrier, Verizon Wireless.[18] Under these unique circumstances there is a manifest need and opportunity for the Commission to promote carrier-to-carrier network interoperability by means of a condition to its consent to the Sprint –Clearwire applications, or to deny the applications.

[18] See *Public Notice* released June 25, 2008 in WT Docket No. 08-95.

Consumers expect to make use of their wireless devices as they travel beyond the license areas of their own wireless carriers. Consumers are not typically aware of license area boundaries and understandably are concerned only with the availability, quality and cost of services they utilize. Where available, automatic roaming agreements among wireless carriers facilitate customer use of networks of other carriers by allowing calls to be placed and received, and data to be exchanged, without the customer needing to make direct arrangements with multiple carriers.[19] But automatic roaming alone, as important as it is to consumers and carriers, does not do enough to provide consumers with continuous service as they travel between wireless carriers' service areas.

As for voice traffic, calls in progress too frequently are dropped and need to be re-initiated after consumers cross the boundary of carrier license areas. Without the frequency planning that supports interoperability large carriers are known to create "moats" around their service areas such that calls attempted by customers of other carriers near the edge of a license area are not completed or are not sustained. The result is that consumers often need to try and retry calls that are dropped until they enter an area that is comfortably within the next carrier's license area, miles down the road from where calls were attempted unsuccessfully or service was disrupted. The same situation occurs when consumers attempt to use their devices for broadband and other data services.

With interoperability, calls in progress are handed off from one network to the other seamlessly. Likewise, data is not lost or delayed when a consumer leaves a license area. And wireless broadband services are not interrupted. This is not just a matter of convenience for

[19] In August 2007 the Commission amended Section 20.12 of the rules to clarify responsibilities of wireless carriers when they receive a reasonable request for automatic roaming agreements from other technologically compatible carriers. *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007).

customers. It is an important relationship between carriers that serves to promote healthy competition for wireless services and, of critical importance, public safety.

2. Interoperability Stimulates Competition

Competition is promoted through interoperability because it allows small and regional wireless carriers to offer the public a service that is not interrupted by unsuccessful inter-carrier handoffs, and because consumers can make full use of their wireless devices regardless of which carrier is their serving carrier whenever the networks are technically compatible.[20] Absent interoperability, small and regional carriers that provide excellent service in their license areas are relegated to a marginal competitive position by nationwide carriers that refuse to provide seamless service even when the same network technology is deployed. When a large carrier has the power, unilaterally and intentionally, to cause a competitor to disappoint and alienate consumers with a disruption in service as they leave a smaller sized license area, competition in the market is diminished. The Commission as regulator needs to act where the marketplace fails in order to safeguard and enhance competition in local markets.

3. Interoperability Furthers Public Safety

Public safety is an extremely important benefit of interoperability agreements between wireless carriers. E911 Phase II location accuracy is more likely to be available if a subscriber's home carrier and the away-from-home, serving carrier have an interoperability agreement in place. At a time when funding to upgrade Public Safety Answering Points ("PSAPs") to Phase II capability is a high priority for local, state and federal governments, and when carriers are investing in equipment to provide improved location accuracy information to PSAPs, the safety

[20] Not only will calls be handed off seamlessly but interoperability allows consumers to use important features of their handsets when travelling beyond their home carrier's license area. For example, consumer access to voice mail can be standardized from carrier to carrier. And consumers will not see a "roaming light" on their handsets and be confused about billing rates if carriers have coordinated their billing and service plans.

benefits that result from carrier interoperability agreements should be recognized by the Commission and carriers should be required to cooperate with one another to pursue those agreements when systems are technologically compatible. As the Commission reviews a consolidation proposal that rivals the largest ever presented for approval it should not miss this opportunity to promote public safety goals by conditioning consent upon an obligation that New Clearwire enter into interoperability agreements with other wireless carriers when a reasonable request is made and networks are technologically compatible.

4. Lack of Automatic Roaming Harms Consumers

A key component of interoperability is automatic roaming that allows consumers to roam automatically on other technologically compatible networks and make maximum use of their wireless devices for voice and data services at all levels, including Third Generation ("3G"), Fourth Generation ("4G") and the more advanced digital networks that are sure to follow. Consolidation in the wireless industry necessarily means fewer surviving national or near-national networks and the result is an increasing need for access to those networks by customers of other carriers. While the Commission may prefer to resolve such issues in the context of a rulemaking proceeding,[21] the Commission should not miss the opportunity when major transactions are proposed to improve prospects for consumer access to compatible wireless networks.

Fewer remaining wireless networks will only heighten the need for automatic roaming agreements between wireless carriers whose networks are technically compatible. Consumers expect more than voice services as they travel. The availability of broadband access, in addition

[21] See *Report and Order and Further Notice of Proposed Rulemaking,* WT Docket No. 05-265, 22 FCC Rcd 15817 (2007).

to voice and narrowband data, is of great importance to consumers when they leave the license areas of smaller market carriers.

The Commission may take official notice of the fact that data services have become indispensable to many users of wireless services. Access to email and to broadband services is increasingly important – indeed it is essential -- to many wireless customers as they travel from one community to another, or from one state to another. Consumers cannot distinguish between services that are available as the result of connection through the Public Switched Telephone Network ("PSTN"), and services that have been classified by government as "information service." The consumer has a basic need: continuous service both inside and outside the home carrier's license area.

To an ever increasing extent, Americans want to be connected to their businesses and families regardless of where they travel in the United States, and they want access to the Internet for business, educational and personal information. Consumer acceptance of technological innovation has been rapid. When new wireless devices make it possible to communicate or access information in a new or better way, customers have adopted the enhancements. They purchase new wireless devices that make it possible to benefit from the new technology and expect to use those devices as they travel within the United States and possibly beyond.

B. Exclusive Handset Agreements with Suppliers Must be Prohibited

RCA recently petitioned the Commission to investigate the widespread use and anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers, and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.[22] The proposed Sprint – Clearwire transaction and the

[22] *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers,* filed by RCA, May 20, 2008 ("Petition").

contemporaneous Alltel – Verizon merger proposal bring to the forefront an urgent need for the Commission to act promptly so that millions of consumers are not denied the benefits of latest innovations in handset technology.

1. Consumers are Harmed When Carriers Restrict Sale and Overprice Innovative Handsets

As RCA explained, the "Big 5" carriers – *i.e.*, AT&T, Verizon Wireless, Sprint Nextel, T-Mobile and Alltel Wireless[23] – enter into exclusive arrangements with handset manufacturers for what appears to be a variety of reasons, including unilateral control over the features, content and design of a particular handset, sole control over the marketing of a particular handset, monopolistic control over the sale price of a particular handset, and absolute control over the market availability of a particular handset. For many consumers, the end result of such exclusive arrangements is being channeled to purchase wireless service from a carrier that has monopolistic control over the desired handset, paying higher prices for the services and accessories available with the desired handset, having to agree to unusual (and undesirable) terms and conditions of service, and having to pay a premium price for the handset because the market is void of any competition for the particular handset.[24]

However, consumers who are forced to sign up for service with the one carrier with rights to the desired handset and pay a premium price for the handset and its capabilities are not the only ones harmed by these exclusive arrangements. Americans living in rural areas who cannot

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[23] Collectively, as of Dec. 31, 2006, the Big 5 carriers accounted for approximately 92% of all wireless telephone subscribers in the U.S. *CMRS Competition 12th Report*, ¶ 18, Chart 1: YE2006 Mobile Telephone Subscribers by Company. Verizon Wireless and AT&T collectively accounted for approximately 53% of all wireless telephone subscribers in the U.S. The top three carriers – AT&T, Verizon Wireless and Sprint Nextel – accounted for over 75% of all wireless telephone subscribers in the U.S. *Id.*

[24] Petition at 2.

get any coverage from the carriers benefiting from these exclusive arrangements are also harmed, since they are denied the technological benefits of many of the most popular handsets available today.

2. Competition is Harmed and Consumers Suffer as the Result of Exclusive Agreements

For carriers able to command these exclusive arrangements, the end result is a significant and unfair advantage over competitors.[25] By way of example, RCA members continue to encounter significant obstacles in attempting to provide prospective and current customers with the most popular handsets made by Samsung and LG. Despite repeated attempts to secure additional handset offerings, the two manufacturers still only offer a paltry number of handsets to RCA members. Moreover, the handsets that have been made available to RCA members are basic, low-end handsets without many of the cutting-edge features customers covet. As a result, the ability of RCA member carriers to compete effectively with the products and services offered by the largest carriers is significantly and unfairly diminished due to their limited handset selection, thereby further enhancing the Big 5's dominant market power.[26]

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[25] Of course, Tier II and Tier III carriers are further challenged in their ability to compete with the Big 5 not only because they are unable to get access to wireless handsets that are comparable in function and style to the high-end exclusive handsets, but also because they are unable to command the same volume discounts from vendors as the Big 5 – creating a wireless marketplace bordering on oligopsony. The stranglehold held by the country's two largest carriers – Verizon Wireless and AT&T -- on the U.S. CMRS marketplace was never more apparent than in the recently concluded 700 MHz auction in which the two companies spent a combined $16.3 billion on 700 MHz licenses out of the total $19.592 billon collected by the U.S. Treasury.

[26] Petition at 3-4. As the FCC also acknowledges in the *CMRS Competition 12th Report*, "market structure is only a starting point for a broader analysis of the status of competition based on the totality of circumstances, including the pattern of provider conduct, consumer behavior, and market performance..." *See CMRS Competition 12th Report*, ¶ 110. As highlighted in this petition, a deeper analysis demonstrates that while there are multiple competitors in most rural areas and most small, rural providers might offer wireless packages that "they feel are competitive with those offered by nationwide providers," few, if any, small, rural providers can provide the variety of handsets and handset features offered by the Big 5. *Id.*

The harms resulting from exclusive handset agreements will only get worse if the proposed transaction is permitted to proceed without a solution that allows millions of rural Americans to obtain the latest models of handsets that New Clearwire and Sprint Nextel will offer. Likewise, customers of other carriers should have the opportunity to roam on the New Clearwire network by use of handsets that will function on the networks of compatible carriers. If the Commission is otherwise prepared to consent to the Transfer Application it should condition the grant upon a termination of existing handset exclusivity agreements and a prohibition on new agreements of the same nature.

III. Conclusion

The Commission has the opportunity immediately at hand to improve public access to a new, near-national wireless network by conditioning approval of the transaction upon a requirement that New Clearwire offer interoperability, including automatic roaming agreements for voice, data and broadband services, when another carrier makes a reasonable request and can be technologically compatible.[27] Without such a condition, the Transfer Application should be denied. The Commission should also prohibit, as a condition to consent, exclusive handset agreements between the parties and their suppliers. Exclusive agreements for the best and most innovative handsets will deny their availability to millions of consumers who are not in the New

[27] The Commission must not allow New Clearwire to include terms in interoperability or automatic roaming agreements that limit a smaller carrier's ability to market its services to the public. Terms must be reasonable and nondiscriminatory.

Clearwire license areas and limit the choice of service providers for consumers that are in the New Clearwire markets.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION

[filed electronically]

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July 24, 2008

DECLARATION

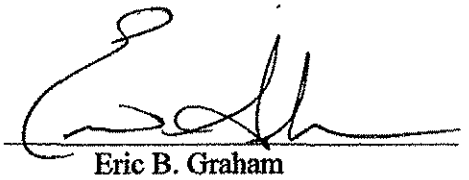
I, Eric B. Graham, declare and state the following:

1. I am the Director of Government Relations of Cellular South, Inc. ("Cellular South"), a wireless telecommunications carrier that provides cellular and/or Personal Communications Service in portions of Mississippi, Alabama, Florida and Tennessee. Cellular South's address is 1018 Highland Colony Parkway, Suite 300, Ridgeland, MS 39157.

2. Cellular South is a member of the Rural Cellular Association ("RCA") and I currently serve as a member of the RCA Government and Regulatory Committee.

3. I am familiar with the facts alleged by RCA in the foregoing petition to deny the applications of Sprint Nextel Corporation and Clearwire Corporation for the Commission's consent to the transfer of control of their 2.5 GHz licenses and lease arrangements to a new wireless broadband company to be called Clearwire Corporation. All such facts, except for those of which official notice may be taken by the Commission or those based on the representations of the applicants, are true and correct of my own personal knowledge.

4. I certify under penalty of perjury that the foregoing is true and correct. Executed on July 23, 2008.



Eric B. Graham

CERTIFICATE OF SERVICE

I, David L. Nace, hereby certify that on this 24th day of July, 2008, copies of the foregoing PETITION TO DENY were e-mailed, in pdf format, to:

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