

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:)
)
Sprint Nextel Corporation and Clearwire) WT Docket No. 08-94
Corporation Seek FCC Consent to Transfer) DA 08-1477
Control of Licenses and Authorizations)

OPPOSITION OF
NATIONAL EBS ASSOCIATION

The National EBS Association (“NEBSA”), pursuant to Section 1.939(f) of the FCC’s rules and the Public Notice released by the FCC on June 24, 2008^{1/} hereby opposes the Petition to Deny of AT&T Inc. (“AT&T”) in the captioned matter. AT&T asks the FCC to deny the applications (the “Applications” or “Transaction”) of Sprint Nextel Corporation and Clearwire Corporation (the “Applicants”), seeking approval of the FCC 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”). NEBSA disputes AT&T’s misguided assertion that Educational Broadband Service (“EBS”) leased spectrum should be included in a “revised spectrum screen” and applied to the New Clearwire Transaction. The interests of EBS licensees, educators generally, and the public would be served by the Transaction being approved and effectuated as quickly as possible.

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

Introduction

NEBSA has already submitted comments in support of the New Clearwire Transaction. NEBSA noted that the proposed transaction would “benefit the EBS community, as it will enhance New Clearwire’s ability to develop individual EBS licensees’ EBS channels more rapidly into a nationwide advanced wireless broadband network.” NEBSA also noted that these benefits extend beyond EBS licensees, as the transaction would “enable EBS Licensees and other educational institutions, as well as their students, faculty and staff, to finally obtain the educational benefits made possible by 2.5 GHz-based advanced wireless broadband services.”^{2/}

AT&T seeks to have the Applications dismissed, contending that, in evaluating whether the Transaction is in the public interest, the Commission should apply a “revised spectrum screen” that includes Broadband Radio Service (“BRS”) and EBS spectrum.^{3/} AT&T argues that because the spectrum screen is triggered in this case, the Applicants have the burden of prevailing in a balancing

and Clearwire Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, Erratum, WT Docket No. 08-94 (rel. July 11, 2008).

^{2/} Comments of NEBSA at 1.

^{3/} Petition to Deny of AT&T at 1.

test that weighs the potential harms of spectrum aggregation against the benefits of the proposed transaction.^{4/}

NEBSA is aware that Wireless Communications Association International (“WCA”) and the Applicants will generally oppose including the 2.5 GHz band in a revised spectrum screen based on, among other things, the band’s less favorable propagation characteristics as compared to the other spectrum below 2 GHz included in the Commission’s spectrum screen. NEBSA will therefore not address the technical and operational reasons why the band should not be included in a revised spectrum screen. Rather, NEBSA focuses on why leased EBS spectrum, in particular, should not be included in any spectrum screen, to the extent it is even appropriate at all to apply a mobile telephony screen to the New Clearwire Transaction.

I. EBS spectrum under lease is unique and should not be included in any Spectrum Screen.

AT&T asserts that EBS spectrum should be included in a spectrum screen because “there appear to be no material distinctions between EBS leases and other commercial mobile leases that are attributed in other contexts.”^{5/} AT&T is flatly wrong. There are significant differences between EBS leased spectrum and commercial mobile wireless licenses and leases that require different treatment. In essence, EBS spectrum under lease is not a faceless and generic wireless spectrum “commodity” that can be simply compared, bought, sold, leased, built out, utilized

^{4/} Petition to Deny of AT&T at 3.

^{5/} Petition to Deny of AT&T at 9.

and divested (if need be) as any other spectrum, but a unique and important educational resource the partial incorporation of which into a commercial wireless system must be and is based on carefully structured, on-going relationships between educational and commercial “partners.” If these relationships are disrupted by unnecessary competitive or regulatory tinkering, the value of EBS spectrum to EBS licensees, educators and the public will be squandered.

Under the FCC’s Secondary Markets leasing rules that apply to other wireless services, a spectrum lessee must be eligible to be a licensee in the same service – EBS is the sole exception.^{6/} The Applicants here and New Clearwire are able to lease EBS spectrum under certain terms and conditions that apply uniquely to EBS spectrum, but they are not able to become EBS licensees because, under Section 27.1201 of the Commission’s rules, EBS licenses may only be held by, “an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations.”

The difference between the license eligibility rules for EBS and other wireless spectrum is based on Commission insistence that EBS – the only spectrum specifically allocated to and reserved for the use of educators – continues to be used to serve educational needs. This imperative has carried over into the leasing

^{6/} *See, e.g.*, 47 C.F.R. 1.9030(d)(2), noting that a spectrum lessee must meet the same eligibility requirements as applicable to the licensee except with respect to EBS and public safety licenses.

environment. Since the 1983 decision in which the FCC first allowed leasing of excess capacity of Instructional Television Fixed Service (“ITFS,” the predecessor to the EBS) stations, leases were intended to help EBS licensees build out and fully utilize their spectrum, including for educational purposes, while also generating needed revenue (which is used as well to advance educational objectives).^{7/} In 1993, the Commission granted EBS licensees additional flexibility to shift required educational programming onto a subset of their authorized channels, to enhance the value of the leased spectrum by allowing whole channels to be leased, but it did not pull back in any respect on the educational services requirements.^{8/} In 1998, the Commission again provided flexibility to the EBS industry with respect to the amount of capacity that could be leased, as well as the ability to use spectrum on a two-way transmission basis, but the FCC again was very careful to emphasize the essentially educational nature of the spectrum.^{9/}

EBS leasing rules combined with the transition of the 2.5 GHz band plan are intended to enable EBS licensees to further their important educational missions, while at the same time encouraging full and efficient use of the spectrum. Even

^{7/} *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, Report and Order, 94 FCC 2d 1203 (1983).

^{8/} *Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, Report and Order, 9 FCC Rcd 3360 ¶ 2 (1994) (*1994 R&O*).

^{9/} *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112, 19157 ¶¶ 86-87 (1998).

though EBS is now leased under Secondary Markets leasing principles and procedures, EBS spectrum leases are based on carefully considered cooperative relationships between EBS licensees and commercial lessees that are intended to further the development of wireless broadband systems that can offer consumers another choice for broadband access *and* facilitate the use of EBS spectrum to improve the ability of educators to serve America's students through wireless technology.¹⁰

AT&T incorrectly assumes that EBS licensees, like commercial wireless licensees that lease their spectrum to system operators, have no continuing interest in the spectrum that they lease, and obtain only monetary consideration for such leases. This is simply not the case. EBS licensees are required to reserve a portion of their spectrum capacity, and to actually utilize services transmitted over the spectrum, to further their educational missions. Consequently, EBS licensees must and do maintain an active role in the use of their leased spectrum. In many cases, educational capacity takes the form of wireless system capacity made available to EBS licensees for their use and the use of their faculty, staff and students, thus investing EBS licensees in the coverage and scope of services offered on the system. Many EBS licensees also retain entire channels of their licensed capacity so as to preserve independent transmission capabilities (typically for educational video

¹⁰ *See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Red 5606, para.2 (2006).

purposes, but increasingly for wireless broadband purpose as well). In addition, many EBS licensees have negotiated provisions giving them rights to recapture initially-leased EBS channels during the lease term in order to support additional educational transmission requirements that may develop over time. Finally, under the Commission's rules, all EBS spectrum leases of a certain duration are required to ensure that the EBS licensee has the right periodically to come to the table with its commercial lessee reassess the EBS Licensee's educational needs, enabling it to readjust spectrum rights under the lease if need be.

These leasing rules, and the specific leasing practices that have resulted from those rules, are specifically designed to promote and facilitate educational policy objectives, and make EBS spectrum anything but generic wireless spectrum. It makes no sense for the Commission to treat EBS leased spectrum as comparable to such generic wireless spectrum by including it in any spectrum screen analysis.

II. Including EBS leased spectrum in a spectrum screen would adversely affect the interests of EBS licensees, educators and their students, faculty and staff, and the public.

Including EBS leased spectrum in a wireless spectrum screen would have deleterious effects on EBS licensees and educational services provided over EBS spectrum, and would thus be contrary to Commission objectives. Necessarily, including EBS in a screen means that, if the amount of spectrum permitted by the screen is exceeded, EBS leased spectrum would be among the spectrum that may have to be declined in the first place or divested after the fact. Going further, NEBSA recognizes the reality that an operator faced with the obligation of limiting

its spectrum holdings, where these spectrum holdings include the operator's own wireless licenses, leases of commoditized generic wireless spectrum under commercial Secondary Markets rules, and leases of EBS spectrum under the special rules applicable to EBS leasing arrangements, *may be motivated to choose to decline or divest its EBS leased spectrum first, rather than its owned or commercially leased spectrum.* In essence, then, putting EBS leased spectrum in the screen has the reasonably anticipated consequence of putting EBS leased spectrum on the chopping block first, to the great disadvantage of EBS licensees and the educational communities they serve.

Here, for example, should the Commission determine that the New Clearwire could not obtain additional EBS spectrum rights through *de facto* lease arrangements in a particular market, or even worse, that as a condition of the Transaction it was necessary for the New Clearwire to divest some portion of its 2.5 GHz holdings in a particular market, the Commission would effectively disenfranchise EBS licensees by precluding them from having their leased EBS spectrum become part of the New Clearwire broadband network. EBS licensees would thus lose the many educational and instructional benefits that will flow to educator licensees and their students, faculty and staff. There is no guarantee that any other operator would be prepared to pick up and honor the negotiated EBS lease arrangements of these EBS licensees (certainly AT&T has not suggested any such interest), much less an operator that the EBS licensee would be interested in partnering with. Moreover, even if some other operator is interested in the stray

leased EBS channel group here and there, that lease arrangement will not provide the EBS licensee the benefits of participating in the New Clearwire national wireless broadband footprint.

Furthermore, by including EBS spectrum in a spectrum screen for any future transactions, to the extent an EBS licensee desires to lease its spectrum to, or had a spectrum lease with, any wireless provider that may also be subject to the screen, an EBS licensee could find itself severely and adversely constrained from leasing to the commercial wireless operator that might be best positioned and able to facilitate that Licensee's educational mission through a spectrum lease.

The multiple and varied carefully negotiated provisions and forms of consideration (beyond purely monetary consideration) in EBS leases represent a unique and tailored means of meeting both the lessee/operators' commercial needs and the educational needs of the EBS licensee. These leases are not readily capable (or in some cases, capable at all) of being assumed by another would-be lessee. Thus, Commission inclusion of EBS leased spectrum in a screen, potentially forcing divestiture of existing lease arrangements and limiting the future options available to EBS licensees seeking to lease spectrum, greatly disserves EBS licensees and will frustrate the Commission's goals for the spectrum.

III. Delay in the Commission's approval of the Transaction disserves EBS licensees, educators, and the public.

EBS Licensees rely on their EBS lease arrangements to provide valuable wireless broadband services that help them advance their educational objectives. Lease arrangements also provide funding that is critical to many educational

endeavors. Finally, these arrangements make possible the deployment of wireless broadband services that are needed to advance educational endeavors of even those that do not hold EBS licensees, and of the general public. NEBSA is convinced that, given current market realities, the New Clearwire Transaction is critical to achieving all these objectives, and that roadblocks placed in the path of the Transaction to frustrate its early and successful implementation serve only the private interests of those, like AT&T, who wish to use regulatory processes to obstruct and delay for competitive advantage.

The mere delay in approval of the Transaction occasioned by AT&T's objection harms EBS licensees, educators, and the public.

Conclusion

NEBSA respectfully requests that the Commission reject AT&T's request to include EBS leased spectrum in any spectrum screen which may be applied to the New Clearwire Transaction, and dismiss or deny the AT&T Petition to Deny, and approve the Transaction at the earliest possible time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition of National EBS Association have been served by First Class Mail this 4th day of August, 2008, on the following:

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