

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

In the Matter of)
)
SPRINT NEXTEL CORPORATION) WT Docket No. 08-94
and)
CLEARWIRE CORPORATION)
)
Applications for Transfer of Control of Various)
Licenses, Authorizations, and De Facto)
Spectrum Leases)

To: Secretary, Federal Communications Commission

For distribution to: Chief, Broadband Division, Wireless Telecommunications Bureau

**JOINT OPPOSITION TO
PETITION TO DENY OF AT&T, INC.**

The Source for Learning, Inc. (“SFL, Inc.”) and Indiana Higher Education Telecommunication System (“IHETS”), by their attorneys and pursuant to Section 1.939(f) of the Commission’s rules and the *Public Notice*, DA 08-1477, released June 24, 2008¹, hereby jointly oppose the “Petition to Deny of AT&T, Inc.” (“Petition”) submitted in the above-captioned proceeding. In the Petition, AT&T objects to the proposed merger of Sprint Nextel Corporation (“Sprint”) and Clearwire Corporation (“Clearwire”) (“Sprint-Clearwire Proposal”). AT&T argues that the Commission’s review of the Sprint-Clearwire Proposal should utilize a “revised spectrum screen” that includes both BRS and EBS spectrum because Sprint and Clearwire intend to use such spectrum to compete with traditional mobile services. As described herein, SFL, Inc. and IHETS submit that it would be inappropriate to include EBS spectrum in any such analysis (or to apply a CMRS spectrum screen analysis to this wireless broadband transaction at all) due to the unique nature of EBS and the educational mission of its licensees.

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

In comments filed on July 24, 2008, SFL, Inc., and IHETS supported the Sprint-Clearwire Proposal on grounds that the Sprint-Clearwire Proposal would afford EBS licensees an opportunity to have their spectrum rapidly integrated into an advanced nationwide high-speed broadband network. The Sprint-Clearwire Proposal would provide SFL, Inc., IHETS and other EBS licensees with new and vital tools for fostering learning and development across a robust, national broadband platform. EBS licensees could also further their educational missions by acquiring or using advanced infrastructure facilities and IP-based system architecture – facilities that otherwise would be cost prohibitive. New Clearwire also would provide EBS lessors with a financially and competitively stronger lessee.

The Commission would deprive the EBS community of these many benefits if they include EBS spectrum in a spectrum screen used to assess the Sprint-Clearwire Proposal. Contrary to AT&T's assertions, Petition at pp. 6-7, Commission precedent does not support inclusion of EBS spectrum in a spectrum screen. First, the Commission, in the *AT&T-Dobson Order*², did not consider the possible inclusion of EBS spectrum in the initial spectrum screen – only BRS spectrum.³ Second, the Commission determined in that case that because BRS spectrum was then unavailable on a nationwide basis, it was inappropriate to include BRS in the initial spectrum screen.⁴ Due to the eligibility and usage restrictions under Commission rules,⁵ EBS spectrum is not available on a nationwide basis but rather only to accredited institutions and

² See In the Matter of Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 22 FCC Rcd 20295 (2007) (“*AT&T-Dobson Order*”)

³ See *AT&T-Dobson Order*, 22 FCC Rcd at 20308 ¶17 and 20314-315 ¶¶32-34. On August 1, 2008, the Commission again declined to include BRS spectrum in the initial screen when it considered the proposed merger of Verizon and Rural Cellular Corporation. See Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling, *Memorandum Opinion and Order and Declaratory Ruling*, FCC 08-181 at ¶¶35 & 47, released August 1, 2008 (holding at ¶44 that BRS spectrum still does “...not yet meet one of the criteria for suitability on a nationwide basis”).

⁴ *AT&T-Dobson Order*, 22 FCC Rcd at 20314-315 ¶¶32-34.

⁵ See 47 C.F.R. §§27.1201 and 27.1203, respectively.

governmental organizations for educational purposes.⁶ Thus, it is inappropriate to adopt AT&T's proposal to include EBS spectrum in any spectrum screen.

AT&T also errs in claiming that there are no material distinctions between EBS spectrum leases and commercial mobile spectrum leases. Petition at pp. 8-9. The Commission's restrictions on EBS spectrum leases render them vastly different from leases entered into pursuant to the Commission's secondary markets rules. EBS leases are subject to 30-year term limits.⁷ EBS licensees must retain a minimum portion of their spectrum capacity for educational uses, and must provide a minimum number of hours per week of educational programming or usage.⁸ Additionally, EBS leases must permit the parties to periodically review the EBS licensee's educational use requirements and must contain recapture rights or other provisions that allow the EBS licensee access to additional services, capacity, support and/or equipment necessary to advance the licensee's educational mission. Licensees maintain an active role in promoting their mission, and the evolution of the leasing rules reflects Commission policy imperatives that promote local educational purposes. By contrast, the commercial leases for mobile services are generally subject to the secondary markets rules, which lack these restrictions and the distinctive commercial/educational symbiosis of the Commission's EBS policies. Inclusion of leased EBS spectrum in any spectrum screen would disregard the unique role of this spectrum in favor of AT&T's unfounded – and ill-advised – comparisons to more fungible commercial spectrum.

Additionally, inclusion of EBS spectrum in a spectrum screen could result in inclusion of EBS spectrum in a spectrum cap or divestiture scheme the Commission might impose on the Sprint-Clearwire Proposal as a condition to approval. Such a result would have the unintended consequence of negating the benefits that EBS licensees would derive from the Sprint-Clearwire

⁶ See 47 C.F.R. §27.1201.

⁷ See 47 C.F.R. §27.1214

⁸ *Id.*

Proposal. Divestiture of EBS spectrum would deprive affected EBS licensees of a valuable resource for advancement of their educational missions by eliminating a financial source (*i.e.*, lease fees), foreclosing access to a nationwide broadband network and advanced broadband services and thwarting the development of advanced infrastructure and broadband facilities, which experts contend are necessary for education.⁹

More specifically, AT&T's proposal would undermine existing contracts that Sprint and Clearwire have with EBS licensees, such as SFL, Inc. and IHETS. The Commission should not deprive EBS licensees of the benefits of their bargains with Sprint and Clearwire. Conditioning approval of the Sprint-Clearwire Proposal on a spectrum cap or divestiture requirement may compel Sprint and Clearwire to prematurely terminate EBS spectrum leases. Such a result could significantly disrupt the affected EBS licensees' operations, to the detriment of their communities. Also, including EBS spectrum in any spectrum cap or divestiture scheme would contravene the Commission's policy of furthering use of the 2.5 GHz band by EBS licensees by providing more flexibility to promote educational purposes.¹⁰

Sprint and Clearwire, individually, would have no need or incentive to maintain these EBS spectrum leases, because their remaining spectrum will become part of New Clearwire's proposed nationwide network. Also, there is no certainty that other commercial operators would be sufficiently willing or able to assume these leases or enter into new leases with the affected EBS licensees. If another commercial operator did step in, they might be unable to offer access to a nationwide WiMAX footprint or to advanced broadband services on the same scale as

⁹ See, *U.S. Education System Must Step-Up High-Speed Broadband Efforts to Maximize the Potential of Technology for Student Achievement and the 21st Century Global Economy*, released July 5, 2008.

¹⁰ See, *e.g.*, In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 14027 ¶¶161; 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 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165, 14222 ¶¶150-52 (2004) ("*BRS/EBS R&O*").

proposed by Sprint and Clearwire. Thus, affected EBS licensees would lose not only the benefit of their bargains with Sprint or Clearwire, but benefit of the proposed nationwide advanced mobile broadband network.

Therefore, in consideration of the forgoing, SFL, Inc. and IHETS request that the Commission deny AT&T's Petition and approve the Sprint-Clearwire Proposal.

Respectfully submitted,

**THE SOURCE FOR LEARNING, INC.
and INDIANA HIGHER EDUCATION
TELECOMMUNICATION SYSTEM**

August 4, 2008

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CERTIFICATE OF SERVICE

I, Steve Denison, a paralegal at the law firm of Rini Coran, P.C., hereby certify that I have caused a copy of the foregoing "JOINT OPPOSITION TO PETITION TO DENY OF AT&T, INC." to be sent by electronic mail or U.S. mail, postage prepaid, this 4th day of August, 2008, to each of the following:

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