

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)
)
Sprint Nextel Corporation and Clearwire) WT Docket No. 08-94
Corporation Application for Consent)
to Transfer Control of Licenses and)
Authorizations)

**EX PARTE COMMENTS OF
THE PUBLIC INTEREST SPECTRUM COALITION**

Media Access Project, on behalf of the Public Interest Spectrum Coalition (PISC),¹ hereby files these *ex parte* Comments in the above captioned proceeding. Although PISC generally supports the transaction based on the commitments made by the Applicants, PISC agrees with those parties that have urged the Commission to require further details from the Applicants on how they intend to implement their commitments to open networks and a neutral wholesale business model. In addition, the Commission must impose adequate safeguards to ensure that the public receives the benefits promised by the Applicants.

PISC proposes that the Commission require that the merged entity submit for Commission approval – subject to public notice and comment – any change in the underlying contracts or agreements which would alter the provision of any benefit identified in the public interest statement submitted by Applicants as if it were a “major modification” of the license subject to Section 308. This will simultaneously provide the new Clearwire with needed flexibility while ensuring that the

¹The Public Interest Spectrum Coalition Consists of, in alphabetical order: The CUWiN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDU-CAUSE, Free Press (FP), the International Association of Community Wireless Networks (IACWN), Media Access Project (MAP), the National Hispanic Media Coalition (NHMC), the New America Foundation (NAF), the Open Source Wireless Coalition (OSWC), Public Knowledge (PK), and U.S. PIRG.

public receives the promised benefits of the transaction.

ARGUMENT

The Applicants promise in their public interest statement to undertake as voluntary commitments numerous proposals PISC has sought as mandatory conditions in other proceedings. Specifically, Applicants committed: (a) to providing non-exclusive wholesale access (“wholesale commitment”); (b) to permitting any device that does not damage the network to connect to the network, and allowing any legal application that does not damage the network to run on the network (“any device/any app” or “open device” commitment); and (c) to observing principles of network neutrality, although reserving the right to prioritize traffic by type in a neutral manner to provide Quality of Service guarantees² (collectively the “open network commitments”). In addition, Applicants offer the possibility of a new national wireless broadband competitor – a goal shared by PISC and which PISC has sought to promote through participation in numerous proceedings before the Commission.

Nevertheless, PISC cannot at this time give its unqualified support to the transaction, nor recommend that the Commission approve the transaction without appropriate safeguards to ensure that Applicants follow through on these commitments. Too many details about the proposed

²PISC has significant reservations with regard to traffic prioritization and, especially absent additional information from Applicants, remains concerned that even a facially “neutral” prioritization might violate the Internet Policy Statement. However, since the proposed commitment goes far beyond the current requirements of wireless carriers, PISC accepts this commitment as a positive step and refer to the Applicants’ commitment here as the “network neutrality commitment.”

voluntary conditions remain unclear. Furthermore, as PISC has argued on other occasions, the critical importance of opening broadband networks to free expression, competition and innovation make these expected public interest benefits too important to rely solely on voluntary commitments by networks. At the same time, however, PISC recognizes that the circumstances of this merger, combined with genuine concern over the availability of capital to build the New Clearwire if the Commission does not approve the Application, mitigate against the kind of mandatory conditions proposed by PISC in the pending Verizon-Alltel Application.

I. TOO MANY QUESTIONS AROUND IMPLEMENTATION REMAIN UNANSWERED.

Clearwire proposes actively to pursue a wholesale model in addition to its retail services. It also states that these agreements will come from “commercial agreements negotiated by the New Clearwire” without explaining how this would be different from existing MVNO agreements. Furthermore, while incentive certainly exists for New Clearwire to encourage MVNO agreements and adopt an open equipment standard during the initial phases of WiMax deployment, it may change its practices once WiMax becomes firmly established in the market and the New Clearwire sees a benefit in capturing MVNO customers or exercising market power over the equipment market via network effects and consumer lock in.

Similarly, the record lacks needed detail on how Applicants will implement the open device commitment, or how Applicants will operate a neutral network that distinguishes between different classes of traffic. For example, does the New Clearwire plan to hold itself explicitly to the same standard as the C Block open device rules, or will it adopt a higher standard by unambiguously committing to publishing an open source standard for interconnection? Will the New Clearwire generally differentiate between different classes of traffic, or only in time of peak congestion? How

will the New Clearwire make these commitments known to subscribers and developers? What mechanisms of accountability does the New Clearwire propose, or does it intend to keep its commitments entirely voluntary and subject to change without notice?

PISC recognizes that Applicants may not be able to provide complete answers to these and other questions at this time, as issues may emerge during the construction and deployment of the network – particularly with regard to the availability of capital for build out. At the moment, however, the record on these issues remains far too incomplete for the Commission to make a determination. While Applicants no doubt intend their assurances in good faith, the Commission cannot rely on the unsupported good intentions of the Applicants. Certainly Applicants must have some details, even at this preliminary stage, on how they propose to deliver on the public interest benefits that justify approval of the transaction. The Commission owes a duty to the public to conduct a genuine and searching inquiry that ensures that the promised benefits will be concrete deliverables not aspirational goals.

II. THE COMMISSION SHOULD REQUIRE THAT CHANGES IN THE UNDERLYING CONTRACTS THAT THREATEN THE OPEN NETWORK PUBLIC INTEREST BENEFITS ARE SUBJECT TO PUBLIC NOTICE AND COMMENT.

Generally, the Commission can best ensure that the public receives the promised benefits of merger by imposing mandatory license conditions. At the same time, however, seeking mandatory conditions in this merger similar to those sought in *Verizon/Alltel* or in other proceedings raises significant practical issues. As a practical matter, the New Clearwire presents the best short term hope for a new entrant in either the wireless market or in the broadband market taken as a whole. As the result of the Commission's decisions in the last 6 years simultaneously to eliminate access to underlying transmission facilities while permitting unprecedented consolidation among wireless and

wireline carriers, and the refusal to adopt a mandatory wholesale requirement in the 700 MHz auction, it seems unlikely that a serious competitor will emerge without approval of the transfer. In addition, PISC recognizes that incumbents such as AT&T have already sought to hijack this review for anticompetitive purposes, and that undue delay may jeopardize the transaction. Nevertheless, because of the importance of these principles to the public interest, it is imperative that the Commission conduct an adequate review and impose suitable safeguards to ensure the promised benefits reach the public.

Applicants have stated publicly that contracts between the Applicants and its investors not yet included in the record will require Clearwire to live up to its commitments. Nor is it lost on PISC that Google, a long-time proponent of many of the same goals as PISC, is a substantial participant in the transaction and has a substantial interest in ensuring that Clearwire fulfills the commitments undertaken in the public interest statement.

While these contractual agreements – assuming they are entered into the record and subject to due diligence by the Commission – provide some reassurance, they do not provide a sufficient basis for concluding that New Clearwire will maintain the open network benefits over time. Third parties have no right to enforce the commitments in the contract. The parties to the contract may renegotiate the agreements at any time, without any notice to the Commission or members of the public. While the parties to the agreements clearly negotiated intensely for them and therefore intend to stand by them, the Commission cannot allow these critical public interest benefits to rest on the business judgement of a handful of private companies subject to shareholder pressure in an uncertain marketplace.

At the same time, PISC accept certain economic realities that mitigate against making the

contractual provisions into license conditions. New Clearwire is a new entrant, struggling against entrenched competitors. Imposing license conditions on a new competitor that has offered to undertake open network commitments long-advocated by PISC creates significant disincentive for other competitors to offer voluntary commitments. Given the opposition of cable operators financing the New Clearwire to mandatory open conditions, it is possible that the imposition of a license condition would jeopardize the financing of the merger at a time when New Clearwire might not find alternate financing. While PISC's members generally regard such arguments with suspicion, the unique nature of this merger and the unusually poor climate for financing make these concerns plausible.

Nevertheless, although PISC generally supports the merger and its outcome, PISC cannot ask the Commission simply to accept New Clearwire's assurances without adequate precautions. While it would not benefit the public to see the transaction collapse, it would equally disserve the public to permit a merger to take place only to find that the New Clearwire fails to deliver on the promised benefits.

PISC therefore recommends that the Commission impose the following requirement. Any change to the underlying contractual agreements that would substantially change the open network commitments must be submitted to the Commission and placed on notice and comment as if they were contained in an application for major modification under Section 308, and allowed only if approval of the change would serve the public interest. To the extent New Clearwire fears this may require disclosure of confidential business information, the Commission has adequate procedures to protect such information from commercial rivals.

This narrowly tailored and minimal requirement will provide flexibility for New Clearwire

and protection to the public. In the first instance, it will ensure that the Commission and the public receive adequate advance notice that New Clearwire intends to change a key provision on which numerous third parties will rely. It will also allow the Commission and the public to track the success or failure of the Commission's efforts to facilitate voluntary movement to open networks. At the same time, it will not prevent New Clearwire from changing its underlying contractual agreements when necessary, and with greater flexibility than if the Commission were to impose the underlying contractual agreements as license conditions. For example, commercial rivals will still have no right to seek enforcement of the benefits, or to petition for changes in the benefits, as they would if the Commission imposed an actual license condition.

CONCLUSION

The proposed New Clearwire proposes to advance several of the public interest goals PISC has long championed. PISC fully supports the creation of a new wireless broadband provider, especially one that will provide opportunities for wholesale access, permit open devices and applications, and operate in a neutral manner. At the same time, however, the Commission cannot abandon its responsibility to make certain that the transaction serves the public interest. By conducting the searching review and adopting the contractual review requirement recommended by PISC, the Commission can promote competition, encourage open networks, and fulfill its obligations to the public.

Respectfully submitted,

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September 18, 2008