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

In the Matter of	)	
	)	
SPRINT NEXTEL CORPORATION and	)	WT Docket No. 08-94
CLEARWIRE CORPORATION	)	DA 08-1477
	)	

EX PARTE REQUEST TO DENY

Bella Mia, Inc., files this *Ex Parte* comment pursuant to the Federal Communications Commission's June 24, 2008 Public Notice in the above-captioned applications for Commission consent to the combination of licenses, leases and related assets held by Sprint Nextel Corporation ("Sprint") and Clearwire Corporation ("Clearwire") to form a New Clearwire Corporation ("New Clearwire") in conjunction with other partners and investors.

The applicants have failed to address in a sufficient way the public interest concerns for such an unusual application. Therefore, Bella Mia, Inc. respectfully requests that the applications be denied for failure to demonstrate that the proposed license transfers are, as claimed, in the public interest and otherwise compatible with the Commission's requirements.

Bella Mia, Inc. has significant concerns regarding this Application before the Commission. Our concerns are multi-fold and encompass a variety of aspects. Therefore, Bella Mia, Inc. agrees with the comments previously filed by PDQLink and supports their conclusions the New Clearwire deal is not in the best public interest and hereby submits our own comments.

Bella Mia, Inc. hereby submits comments for Commission consideration and review because: 1) Applicant's claims are unclear and ambiguous. 2) Intel admits Commission approval will create a monopoly of spectrum holding. 3) Required Ex Parte Permit-But-Disclose filings

beg for audit and close scrutiny by the use of “canned” filings. 5) FAST-TRACT processing of this application by the Commission fosters public mistrust. 6) Only a more thorough examination can provide the necessary public confidence that the correct result is being achieved.

STANDING

As the Commission is aware, Bella Mia, Inc. is a Wireless Internet Service Provider (WISP) providing broadband access in rural Ohio via license-exempt spectrum in the 902-928 MHz, 2.4 GHz, 3.65 GHz and 5 GHz bands. Bella Mia, Inc. voices our regulatory concerns via the PART-15 Organization who are active in many Commission proceedings that directly or indirectly affect the license-exempt industry, the deployment of broadband services, and consumers who want more choice and better services via enhanced competition.

Bella Mia, Inc. is the “third pipe” providing consumers a meaningful and viable alternative to other incumbent and more traditional broadband carriers. Bella Mia, Inc. serves the public cost-effectively, primarily in the license exempt bands. Like all WISPs, Bella Mia, Inc. needs usable broadband wireless spectrum, both licensed and unlicensed, and an otherwise equitable regulatory treatment in order to serve our customers. More specifically, Bella Mia, Inc. has operated with the hope of buying, leasing or otherwise obtaining licensed broadband spectrum on an equitable basis in order to serve any specialized needs for our service area, which combines rural and suburban characteristics.

The 194 MHz of spectrum in the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) in this proceeding form the 2.5 to 2.7 GHz band and are very important to Bella Mia, Inc.. This spectrum constitutes by far the largest amount of U.S. licensed broadband spectrum in the valuable lower bands below 4 GHz. Few of the original licensees

retain their spectrum aside from many EBS licensees, who for the most part received their rights decades ago, and a few BRS licensees, primarily in small markets. Rights to most of the spectrum have already been expertly acquired in secondary markets by Sprint Nextel Corp. or Clearwire Corp. via purchase or lease in recent years, with no direct payment to the U.S. government aside from the kinds of annual license fees paid by all commercial licensees. Sprint and Clearwire spectrum holdings include heavy components of lease rights from EBS holders, all of whom were awarded spectrum for educational purposes. A significant minority of EBS licenses belong to those who are in effect programmers who acquired their spectrum by Commission award without operating traditional schools, colleges or religious institutions. As a comparison to more recent allocation methods, the FCC's broadband auction of just 52 MHz of broadband spectrum in the 700 MHz band won $19.2 billion in gross winning bids after the Commission eliminated 10 MHz from the auction for public safety spectrum bidders' failure to meet the auction reserve price.[1]

The 2.5 GHz BRS and EBS band represents a unique spectrum resource of keen interest to Bella Mia, Inc. because the band has many local licensees in U.S. communities congruent with Bella Mia, Inc.'s market and because the spectrum characteristics are closely congruent with the spectrum that Bella Mia, Inc. commonly uses in the 2.4 and 5 GHz bands, but with vastly more potential for mobile uses that are increasingly favored by the public. This proceeding has brought forward a number of commentators with hopeful claims that their companies can extend broadband further to U.S. underserved areas in both rural and urban environments. But the entrepreneurial spirit of Bella Mia, Inc. and over 9,000 other WISPs have clearly provided the

[1] *See* Statement by FCC Chairman Kevin J. Martin, (March 20, 2007), available via http://wireless.fcc.gov/auctions/default.htm?job=releases_auction&id=73&page=P. See also http://wireless.fcc.gov/auctions/default.htm?job=releases_auction&id=73&page=N.

major competition so far to telco digital subscriber line (DSL) and cable incumbents. Smaller companies like Bella Mia, Inc. are leading the way in providing wireless broadband alternatives.

For these reasons, Bella Mia, Inc. and other WISPs possess the kind of longstanding and direct interest in the proceeding that is suitable for standing before the Commission.

DISCUSSION

Bella Mia, Inc. fully indorses and supports the PDQLink filing on this matter and submits on our own behalf the following: This proceeding's unusual features include: 1) its unusually fast schedule for public comment and Commission review, 2) the great magnitude of the joint venture constitutes a monopolistic concentration of spectrum, 3) the license transfers have significant potential to harm competitors and consumers, and 4) its potential to undermine public confidence in the regulatory process unless the Commission examines relevant issues carefully in a transparent and otherwise equitable manner.

The Comment Schedule Stifles Public Review and Comment

The Applicants filed their Application on June 6 of this year.[2] The Commission then put this proceeding on Public Notice June 24. Then the Commission compounded time pressures for public comment by establishing an unusually rigorous comment cycle, with initial comments due on July 24, Oppositions on Aug. 4 and Replies on Aug. 11. There must have been significant coordination by the Applicants' prior to submitting the Application as it seems the first 55 initial comments were filed within days of the Applications filing and by proponents and/or beneficiaries of the license transfers. While I'm sure large companies like Sprint and

[2] *See* Description of the Transaction and Public Interest Statement, File No. 0003368272 (Lead Call Sign B085, amended June 24, 2008) (Public Interest Statement, hereafter).

Clearwire usually coordinate their efforts among their beneficiaries but more importantly suggests that the Commission is being misled into believing that these commenter's represent the general public.

An Application that May Constitute a Monopoly of Spectrum Deserves Appropriate Scrutiny by the Commission

This Application has enormous -- and potentially adverse -- implications for the public, especially since it involves aggregating under one company so much of the U.S. commercially licensed spectrum currently available for mobile broadband, or likely to become available in the foreseeable future. In Intel's Opposition to Petitions to Deny and Reply Comments[3], Intel states "By combining the 2.5 GHz spectrum under a single entity, New Clearwire will unleash the promise of the 2.5 GHz spectrum on a nationwide basis for the benefit of consumers, businesses, and the educational community.

AT&T aptly summarized the scope of the proposed license transfers, as well as many unanswered questions. As AT&T summarized it as follows, "Clearwire Proposes to Undertake the Largest Consolidation of CMRS Spectrum in the Agency's History without Any Evaluation of its Competitive Effects."[4] Bella Mia, Inc. agrees that the combining of the 2.5 GHz spectrum "under a single entity" will in fact create a monopoly of that spectrum and therefore strongly urges the Commission to not only perform the needed spectrum screen but also include the 2.5

[3] *See Opposition to* Petition to Deny and Reply to Comments of Intel Corp., WT Docket No. 08-94 (filed August 4, 2008) available (like other comments in the proceeding) at http://www.fcc.gov/transaction/sprint-clearwire.html.

[4] *Id.*

GHz EBS and BRS spectrum in assuring that no monopoly of that spectrum takes place during this proceeding.

Bella Mia, Inc. disagrees with Intel's claim that the "fundamental issue before the Commission is whether the transaction will enhance competition." We believe the fundamental issue before the Commission to be what is best in the public interest and unfavorable regulatory competition is surely not in the best public interest.

Bella Mia, Inc. concurs with PDQLink and AT&T's arguments that Sprint's Commercial Mobile Radio Service (CMRS) and other mobile spectrum should be included in a competitive analysis of this transaction.[5] As AT&T noted, Sprint would be the 51% majority owner of the New Clearwire, and is widely recognized as the largest private spectrum holder in the U.S. in the more valuable sub-12 GHz spectrum bands. More specifically, we concur with AT&T and PDQLink that EBS spectrum should be included in a competitive analysis. We base this argument on the overwhelming evidence that the majority of supporters being EBS license holders. The preponderance of EBS filers in this proceeding warrants additional scrutiny by the Commission to ensure inclusion of the EBS spectrum in an appropriate spectrum screen. We suggest, based on the multitude of EBS filers, the EBS spectrum is a critical part of this deal for the purposes of spectrum screen and similar competitive reviews. Also a concern of Bella Mia, Inc. is the lack of perspective of EBS holders not yet affiliated, whose leasing options would be drastically foreclosed by the consolidation of two erstwhile competitors Sprint and Clearwire into one joint spectrum monopoly venture? Further we recommend the Commission's public interest inquiry should assess the impact of creating what amounts to a near-monopoly in market power by New Clearwire in ability to acquire EBS spectrum.

[5] *See* ATT Petition to Deny.

Bella Mia, Inc. realizes that EBS spectrum is leased in varying proportions to commercial operators in different markets. Most EBS providers lease to commercial operators most of their educational spectrum. But a small number of EBS licensees use their entire spectrum for educational purposes. So, this spectrum is different in that respect from other CMRS spectrum. That said, proponents of the New Clearwire deal attempt to mislead the Commission when they argue that no EBS spectrum should be counted toward a spectrum screen (and that even commercial spectrum in the 2.4-2.7 GHz band be disregarded).[6] Especially in view of the claims to investors by Sprint and Clearwire regarding the large extent of their mobile broadband spectrum (summarized by AT&T),[7] the reasonable course to ensure public interests are best served is for the Commission to undertake a rigorous market-by-market analysis that includes all available BRS and EBS spectrum, realizing the wide variances of the relevant leases.

Bella Mia, Inc., as a small entrepreneur further agrees with PDQLink that AT&T in this instance, is one of the few commentators that does not directly benefit from the deal and that they also used its financial resources to present comprehensive research and commentary within the proceeding's unusually tight timeframes this summer. Therefore, we do not endorse the unqualified oppositions to AT&T in the initial comments by the 12-group Public Interest Spectrum Coalition[8] ("Spectrum Coalition" hereafter), which described AT&T's arguments as a "transparent sham."[9] Following the money trail in this proceeding, some of the leading funders

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[6] *See* Public Interest Statement.

[7] *Id.*

[8] *See* Public Interest Spectrum Coalition Opposition to AT&T Petition to Deny (Aug. 11, 2008)

[9] *Id.* The Spectrum Coalition states that it consists of, in alphabetical order: The CUWIN Foundation (CUWIN), Consumer Federation of America (CFA), Consumers Union (CU), EDUCAUSE, 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 (OSAWC), Public Knowledge (PK) and U.S. PIRG.

and volunteer leaders of Spectrum Coalition members would be major beneficiaries of the license transfers. They include Intel Corp., Google Inc., New America Foundation.[10] The latter is a Spectrum Coalition leader along with the foundation's legal representative, the Media Access Project, which submitted the Spectrum Coalition's two filings so far.[11]

The Commission Must Examine Carefully Unsubstantiated Claims of Special Competitive Benefits

Proponents of the license transfers have filed numerous comments misdirecting the Commissions attention by predicting that the deal would benefit consumers in general, and that the Commission must approve their proposal without change. Clearwire and Sprint state, for example, "Without unconditional approval, the Applicants will lack the financing and spectrum assets they need to be a viable nationwide competitor and the 2.5 GHz band will continue its long history of underutilization."[12] Surely the Applicants "strong-arm" tactic additionally amplifies the need for further Commission review.

Applicant filings have been augmented by other carriers, EBS licenses, suppliers and advocacy groups especially interested in such specialized areas as education, rural broadband, open networks, etc. Bella Mia, Inc. respects the opinions as fellow competitors of the smaller EBS and BRS license holders even as we seek to ensure that the Commissioner's overall review process of their specific claims is thorough and otherwise fair. However, a roll-up of vast quantities of available spectrum designed for educational purposes into New Clearwire under terms largely unknown at this time has the potential severely to hurt the general public, including

[10] *See* New America Foundation website, About Us, http://www.newamerica.net/about/board.

[11] *See*, for example, Public Interest Statement, Spectrum Coalition Opposition to AT&T Petition to Deny,

[12] *See* Sprint Clearwire Joint Opposition Document (Aug. 4, 2008)

customers of Bella Mia, Inc. and the educational purposes the spectrum was originally designed to provide.

In this context, Bella Mia, Inc. responds to comments by the Catholic Television Network ("CTN"). First Bella Mia, Inc. agrees that "the Commission must consider the unique nature of the EBS spectrum". Under normal circumstances the EBS spectrum being utilized for educational purposes should not be included in the recommended spectrum screen. However, this is not the case here. In this case, the majority of EBS spectrum is being utilized for commercial purposes as evidenced and further amplified by the numerous comment filings of EBS license holders.

Each of the Progress and Freedom Foundation[13] and the Free State Foundation.[14] comments suggested that a competitive analysis at the Commission would unnecessarily duplicate work to be performed by either the U.S. Department of Justice or the Federal Trade Commission. With all due respect for the filers' long experience in government and in free-market advocacy, Bella Mia, Inc. suggests the that the FCC has the specific expertise in the engineering qualities of spectrum management, especially since an important claim in this proceeding is that certain kinds of spectrum should not be counted in a competitive analysis. Additionally, the FCC has the unique tradition of open decision-making that is at least formally on the books for the FCC via such procedures as its ex parte rules.[15]

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[13] *See* Progress and Freedom Foundation Comments (July 24, 2008).

[14] *See* Free State Foundation Comments (July 24, 2008).

[15] *See* 47 Code of Federal Regulations Sections 1.1200 to 1.1216, available with relevant history at the FCC Ex Parte Rules website section http://www.fcc.gov/ogc/xprte.html along with this definition: "An ex parte presentation is a communication directed to the merits or outcome of a proceeding that, if written, is not served on all the parties to a proceeding, and if oral, is made without advance notice to the parties and an opportunity for them to be present."

This kind of open decision-making process is much harder to achieve elsewhere in government. No other government entity focuses review of spectrum utilization. The FCC is the only governing body that can examine this Application based on its complexity and inherent potential impact on the U.S. wireless competitive industry and therefore need for more real-time public transparency and accountability. The Commission should utilize its expertise and oversight ensuring proper public interests are served.

WISPs Are the True "Third Pipe" Leaders in Rural Broadband

Bella Mia, Inc., like 9,000 other WISPs are routinely small entrepreneurs without capital investors and relay mostly on self-financing. We learned over ten years ago that the public interest in a viable "third pipe" -- and indeed a "fourth pipe," etc. -- to compete with cable and telco incumbents was needed. But to that end, we do not believe that a government industrial policy is appropriate if it favors one group of competitors or aspirants. This is particularly so when U.S. competitive landscape is littered with spectrum squatters from large telco companies whose visionary plans to meet Commission deadlines repeatedly go unfulfilled despite highly favorable regulatory treatment conferred upon them. This history reflects that simply affording special regulatory treatment in this proceeding will not guarantee "public interests" are being served.

Amplifying the need for further Commission review, the proponents claim that they will deploy an advanced mobile WiMAX broadband network that will cover up to 140 million people in the United States in 30 months, yet they make scant mention of specifics pertaining to which lucky 140 million people will enjoy this new competitive service. This is not the first time Sprint and Clearwire have made such claims without fulfilling them. Sprint accepted rigorous build-out

requirement for its BRS footprint as part of the conditions for its merger with Nextel and as part of a Commission commitment to rural broadband. Yet Sprint is far behind on its deployment schedules, even after all the favorable regulatory treatment that the FCC has extended them through the years.[16] To enhance true competition, the Commission should examine closely the aggregation of spectrum envisioned in this proceeding, as well as the impact on non-affiliated small carriers (as raised by the Rural Cellular Association ("RCA") and its member SouthernLINC Wireless).[17] Compliance with standard procedures will enable either a prompt buildout by licensees under previous deadlines, or refarming of this valuable spectrum via the market to competing providers who can serve the public interest.

Open Access Claims Need Meaningful Guarantees

Vonage provided a vital critique to the promise of "open access" that New Clearwire proponents raised as a public interest benefit.[18] Proponents state, "New Clearwire also will permit consumers to download and use any software applications, content, or services they desire, subject only to reasonable network management practices and law enforcement and public safety considerations."[19] However, as Vonage notes: What precisely are the obligations and guarantees that New Clearwire is undertaking?[20] The questions raised by Vonage are important not simply for its business, but for Bella Mia, Inc., and 9,000 other WISPs along with others who might want to provide new applications. As Vonage points out, New Clearwire proponents state: "New Clearwire will permit consumers to use any lawful device that they want

[16] *See* Public Interest Statement.

[17] *See* RCA Petition to Deny (July 24, 2008) and SouthernLINC Wireless Comments (July 24, 2008).

[18] *See* Vonage Holdings Comments (July 24, 2008).

[19] *Id.*

[20] *Id.*

so long as it is compatible with and not harmful to the WiMAX network."[21] But this commitment is almost meaningless without a clear definition of "compatible" and "harmful." Google -- the most prominent U.S. advocate of the general concept of open access -- described its commitment in the New Clearwire deal only briefly in its filing.[22] Sprint and Clearwire provided little more, and have a history of opposing open access.[23]

The Spectrum Coalition urged the Commission to require before approval "further details from the Applicants on how they intend to implement their commitments to open networks and a neutral wholesale business model."[24] Bella Mia, Inc. concurs with this recommendation.

The FCC Process Must Instill Public Confidence

The recent Wall Street financial bailout exceeding $700 Billion dollars, should be an encouragement for the Commission to carefully respond to "special favors" of this magnitude from commercial competitors. Special favors at this time can only add to public distrust of the governing body and should be avoided.

Most applicants to the Commission want speedy action on a request. The fast-track timetable for this proceeding has the effect of being unfair to small entrepreneurs who, with limited resources need time to examine and research the competitive aspects of this Application.

Especially relevant to this proceeding are questions raised about "open access", the wholesaling to competitors, network harm and compatibility.

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[21] *See* Vonage Comments.

[22] *See* Google Inc. Opposition to Petition to Deny (Aug. 4, 2008).

[23] *See* Heather Forsgren Weaver, "Vonage solves Clearwire blocking problem, asks feds for help," RCR Wireless (April 22, 2005), available at http://www.rcrnews.com/article/20050422/SUB/504220709, for example, as cited in Vonage Comments.

[24] *See* Ex Parte Comments of the Public Interest Spectrum Coalition (Sept. 16, 2008).

Required ex parte summaries of discussions during Commission visits and other communications by such companies as Clearwire[25] and Sprint[26] reveal the use of "canned" information, even though FCC rules are designed to provide the specifics to interested members of the public. Regarding numerous visits by Clearwire executives to the FCC , for instance, the Clearwire ex parte summaries of the substance of the discussions were simply, "Clearwire reiterated certain of the points made in its application filed on June 6, 2008."[27] In sum, a review of this indicates that the private sector participants obviously wanted to disclose as little as possible, even while claiming to be serving the public interest. This was despite the clear requirement in previously cited FCC's rules mandating that ex parte discussions be documented[28] and that, "Generally, more than a one or two sentence description is required."[29]

In conclusion, it is worth stressing that any concerns raised here by Bella Mia, Inc. primarily are to ensure a fair Commission review process, and not specific results. Moreover, Bella Mia, Inc. is not advocating any special conditions on the license transfers by this filing--only that the full Commission thoroughly examine the proponents' public interest claims (which proponents raised themselves) to reach a decision that will enhance public confidence in the Commission process for allocation of the unique resource of 194 MHz of BRS and EBS broadband spectrum.

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[25] *See* Clearwire Ex Parte Statements (Sept. 16, 2008) and Sept. 15, 2008) regarding: (Meetings with staff of Chairman Martin and Commissioner Robert M. McDowell) and (Meetings with staff of Commissioner Deborah Taylor Tate and Commissioner Michael J. Copps), respectively, and (July 2, 2008) (Meetings with staff of Chairman Martin and Commissioner Copps).

[26] *See* Sprint Ex Parte Statement (Aug. 29, 2008).

[27] *See* Clearwire Ex Parte Statements.

[28] *See* 47 CFR §§1.1200 to 1.1216, previously cited.

[29] *Id* at §1.1206(b)(2).

To accomplish this, we respectfully encourage all five of the Commissioners to focus their impressive experience on the full implications of this proceeding, and not just such bromides as enabling a “forth pipe” for broadband by a particular group of aspirants.

CONCLUSION

As an entrepreneurial company, Bella Mia, Inc. supports in general the concepts of expanding broadband and enabling new competitors to enter the market freely to increase their revenue and the benefits of competition for the public under Commission rules. But like major Wall Street companies now seeking a government bailout, Sprint, Clearwire and their allies have argued in effect (as demonstrated earlier in this filing) that their aspirations are so big and yet their finances are so limited that they must receive special consideration from government without normal oversight by the Commission in a thorough, transparent and otherwise equitable manner.

We have faith in the Commission to not exclude the WISPs and other competitors by an industrial policy deciding which competitors should enjoy special treatment. We further believe the Commission must foster public confidence in the regulatory process by denying this application unless it meets appropriate criteria. Such criteria must include thorough Commission review of the proponents’ claims, market analysis that includes EBS spectrum in proportion to its geographic area, inclusion of Sprint’s other spectrum holdings, and further examination of such issues as open access that are being cited as public interest rationales, and full disclosure as required under FCC rules of all relevant advocacy.

Respectfully submitted,

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