



815 Connecticut Avenue, N.W., Suite 610
Washington, D.C. 20006

October 28, 2008

Via Electronic Filing

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Notice of Oral *Ex Parte* Communication

RE: Sprint Nextel Corporation and Clearwire Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, **WT Docket No. 08-94**

Dear Ms. Dortch:

On October 27, 2008, Craig O. McCaw, Chairman; Ben Wolff, CEO; Gerry Salemm, Executive Vice President, Strategy Policy and External Affairs; and the undersigned, of Clearwire Corporation ("Clearwire"), a licensee, lessee, and operator of 2.5 GHz spectrum in the Broadband Radio Service (BRS) and Educational Broadband Service (EBS), met with Commissioner Robert McDowell and Angela Giancarlo, his Chief of Staff and Senior Legal Advisor for Wireless and International. The purpose of the meeting was to discuss the above-referenced applications filed by Clearwire and Sprint Nextel for the approval of the transfer of control of the 2.5 GHz licenses, authorizations, and *de facto* transfer spectrum leases held by Clearwire and Sprint Nextel to a new wireless broadband company to be called Clearwire ("New Clearwire"). Clearwire reiterated the points made in its Public Interest Statement accompanying its application filed on June 6, 2008.¹

Specifically, Clearwire described the substantial benefits of the proposed transaction, including the potential of New Clearwire's alternative broadband platform to increase competition, offer consumers more choices, stimulate innovation, and enhance U.S. leadership in wireless broadband technology and deployment. Clearwire urged the Commission to expeditiously grant approval of the transaction, explaining that because the current status of the financial markets is dramatically different from the time the transaction agreement was entered into in May of 2008, that further delay of the approval of the transaction could impact the parties' abilities to close.

Clearwire also reiterated that 2.5 GHz spectrum is not appropriate for inclusion in the Commission's initial spectrum screen of nationwide spectrum suitable for mobile telephony because of the vast differences in this spectrum, as compared to the PCS, cellular, SMR, and 700 MHz bands that currently comprise the Commission's initial spectrum input market and have been applied to prior CMRS provider mergers.²

Indeed, the Commission has never considered including EBS spectrum even in its market-by-market level analysis after the initial three-part competitive screen has been triggered, let alone in the

¹ See Description of the Transaction and Public Interest Statement, File No. 0003368272 (Lead Call Sign B085 amended June 24, 2008) ("Public Interest Statement").

² See e.g., Public Interest Statement at 40-52; see also Joint Opposition to Petitions to Deny and Reply to Comments of Sprint Nextel Corporation and Clearwire Corporation, WT Docket No. 08-99, at 21-36 (filed Aug. 4, 2008).

initial screen determined by computing one-third of the nationwide spectrum input market.³ In fact, since the Commission implemented its spectrum screen analysis in the *Cingular-AT&T Wireless Merger Order*⁴ in 2004, the only merger proceeding that even discussed EBS spectrum was the *Sprint Nextel Merger Order*.⁵

Finally, Clearwire reiterated that New Clearwire is an independent company, not controlled by any of its investors, and that any attribution of its investors' wireless spectrum to New Clearwire or New Clearwire's spectrum to its investors, as a result of equity ownership, voting interest, or appointment rights to the Board of Directors (so long as such appointments do not result in control) would have a perverse and pernicious affect on New Clearwire's ability as a new entrant with no market share or market power to operate its technologically distinct advanced mobile wireless broadband network.⁶

Pursuant to Section 1.1206(b)(2) of the Commission's Rules, notice of this *ex parte* communication is being filed electronically. If you have any questions regarding this matter, please do not hesitate to contact the undersigned at 202-429-0107.

Sincerely,



Terri B. Natoli

cc: Commissioner Robert McDowell
Angela Giancarlo

³ As recently as August of this year, consistent with its earlier decisions in the AT&T-Aloha and AT&T-Dobson Merger orders in the *Verizon-RCC Order*, the Commission did not even suggest inclusion of EBS spectrum in either its initial spectrum screen analysis, or the market-by-market analysis, even though the Applicants in that transaction requested that the Commission include all 2.5 GHz spectrum, including EBS, in its spectrum screen analysis. See Verizon/RCC Public Interest Statement Application at 28-38, see also *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 that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and notice of Proposed Rulemaking, WC Docket No. 07-208 at 33-44 (rel. Aug. 1, 2008).

⁴ *Applications of AT&T Wireless Services, Inc., Transferor, and Cingular Wireless, Corp., Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21543 ¶ 40 (2004) ("*Cingular-AT&T Wireless Merger Order*").

⁵ See *Applications of Nextel Communications, Inc. and Sprint Corporation*, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967 (2005) ("*Sprint-Nextel Merger Order*"). In the *Sprint Nextel Merger Order*, in response to petitioners calling for divestiture of some portion of the aggregate 2.5 GHz spectrum held by the applicants, the Commission rejected the argument that competitive harm would result from the transaction and that any 2.5 GHz spectrum should be divested. See *Sprint Nextel Merger Order* at ¶ 159. Specifically, the Commission found that "divesting licens[es] of 2.5 GHz band spectrum would be inconsistent with the Commission's long-standing regulatory policies regarding the 2.5 GHz band, including the encouragement of consolidation of spectrum in this band, due to its historical underutilization." *Id.* at ¶ 160. Moreover, the Commission held that "any divestiture action . . . would . . . contradict . . . Commission policy of furthering use of the 2.5 GHz band by educational licensees . . . [and] could result in the termination of certain leases that Applicants have entered into with EBS licensees . . . significantly disrupt[ing] EBS operations," and that divestiture is "inconsistent with [its] long-established practice of structuring its rules to provide EBS licensees with flexibility to ensure that the very important educational mission it serves is not hampered [emphasis added]." *Id.* at 161. Finally, the Commission states that it "has repeatedly recognized that EBS provides critical educational services at a variety of locations where such instruction would generally be unavailable . . . [making] disruption of such service . . . greatly detrimental to the communities served by EBS." *Id.*

⁶ In this regard, the Commission previously declined to attribute the spectrum of a wholly-owned subsidiary of a CMRS provider to that CMRS provider because the spectrum was dedicated to the operation of a stand-alone nationwide mobile data system technically distinct from the infrastructure that Cingular used to provide mobile voice services and the spectrum used for the separate mobile data network was in a different band from Cingular's cellular and PCS spectrum. See *Cingular Wireless LLC; Request for Waiver of the CMRS Spectrum Aggregation Limits in Section 20.6(a) of the Commission's Rules*, 16 FCC Rcd 17564 (2001).

- BRS spectrum in the upper and lower band equates to 61.5MHz.
- BRS spectrum in the MBS equates to 12 MHz in where there are no grandfathered ITFS E and/or F groups.

	EBS/BRS Channel	Frequency (MHz)		Channel
		Start	End	Bandwidth (MHz)
Lower Band Segment	Lower Guard Band	2495.00	2496.00	1.0
	BRS1	2496.00	2502.00	6.0
	A1	2502.00	2507.50	5.5
	A2	2507.50	2513.00	5.5
	A3	2513.00	2518.50	5.5
	B1	2518.50	2524.00	5.5
	B2	2524.00	2529.50	5.5
	B3	2529.50	2535.00	5.5
	C1	2535.00	2540.50	5.5
	C2	2540.50	2546.00	5.5
	C3	2546.00	2551.50	5.5
	D1	2551.50	2557.00	5.5
	D2	2557.00	2562.50	5.5
	D3	2562.50	2568.00	5.5
MBS	J Channel Guard Band	2568.00	2572.00	4.0
	A4	2572.00	2578.00	6.0
	B4	2578.00	2584.00	6.0
	C4	2584.00	2590.00	6.0
	D4	2590.00	2596.00	6.0
	G4	2596.00	2602.00	6.0
	F4	2602.00	2608.00	6.0
	E4	2608.00	2614.00	6.0
Upper Band Segment	K Channel Guard Band	2614.00	2618.00	4.0
	BRS2	2618.00	2624.00	6.0
	E1	2624.00	2629.50	5.5
	E2	2629.50	2635.00	5.5
	E3	2635.00	2640.50	5.5
	F1	2640.50	2646.00	5.5
	F2	2646.00	2651.50	5.5
	F3	2651.50	2657.00	5.5
	H1	2657.00	2662.50	5.5
	H2	2662.50	2668.00	5.5
	H3	2668.00	2673.50	5.5
	G1	2673.50	2679.00	5.5
	G2	2679.00	2684.50	5.5
G3	2684.50	2690.00	5.5	