Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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

To: The Commission

PETITION FOR RECONSIDERATION
OF
THE PUBLIC INTEREST SPECTRUM COALITION

Media Access Project, on behalf of the Public Interest Spectrum Coalition (PISC),[1] hereby submits this *Petition for Reconsideration* in the above captioned proceeding. PISC seeks reconsideration of the Commission's decision to include Broadband Radio Service (BRS) spectrum in its "spectrum screen." In addition, PISC seeks reconsideration of the Commission's refusal to impose a modest condition of contractual review to ensure that New Clearwire will provide the open networks promised in its public interest statement. Alternatively, PISC requests that the Commission clarify the manner in which it intends to hold New Clearwire accountable to its open network commitments by application of the *Internet Policy Statement*.

ARGUMENT

PISC notes at the outset that it fully supports the Commission's conclusion that its analysis of the potential public interest benefits or possible harms must include consideration of the competitive market as a whole. Section 310(d) of the Communications Act requires that Commission make

[1]The Public Interest Spectrum Coalition 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 (OSWC), Public Knowledge (PK), and U.S. PIRG.

a determination on whether the transfer at issue will serve "the public interest, convenience and necessity." 47 U.S.C. §310(d). As the Commission has noted previously, Congress intended the Commission to consider not merely whether a proposed transaction would prove likely to reduce competition. Rather, in addition to promoting the broader goals of the Communications Act and the First Amendment, "the Commission must be convinced that it will enhance competition." *AOL Time Warner Merger Order*, 16 FCCRcd 6547, 6555 (2001). The Commission therefore properly placed considerable emphasis in its analysis on the potential for the transaction to create a new, national wireless broadband service operating under a more open and neutral model than traditionally offered by carriers.

PISC therefore fully supports the ultimate conclusion of the Commission to permit the transfer. At the same time, however, PISC must ask the Commission to reconsider two aspects of the decision.[2] First, the Commission should not include BRS spectrum in the spectrum screen, even phased-in manner announced by the Commission. Second, the Commission should impose some condition to ensure that New Clearwire follows through on its commitment to build and operate an open network.

I. THE COMMISSION SHOULD NOT INCLUDE BRS SPECTRUM IN THE SPECTRUM SCREEN.

First, PISC seek reconsideration of the decision to include BRS spectrum in the Commission's "spectrum screen." The screen already does little to prevent the ongoing consolidation of the wireless industry. The Commission has further undermined the value of the screen in the last several years by altering it to permit pending transactions. *See AT&T-Dobson Order*, 22 FCCRcd 20295, 20307-08 (2007). The inclusion of BRS spectrum in the screen effectively raises the screen to the benefit of

[2]Although PISC supports the general result of the Commission's *Order*, PISC has standing to seek reconsideration on aspects of the *Order* that would create binding precedent. *See Tribune Co. v. FCC*, 133 F.3d 61, 67 (D.C. Cir. 1998).

the largest incumbents and to the detriment of and members of the public who benefit from greater competition and of potential competitors such as Clearwire.

The Commission based its determination to include BRS spectrum on the grounds that WiMax and other potential future mobile broadband services could potentially compete with existing mobile voice and mobile data services. The key word here, however, is "potentially." By including BRS spectrum before seeing any evidence that it will provide genuine competition to existing wireless providers, the Commission has transformed the pro-competitive intent of the screen into an anti-competitive gift to existing providers that actually penalizes competitors trying to make use of their BRS holdings.

Providers already offering service, with access to cleaner spectrum unencumbered by leasing rights and with better propagation characteristics, may now acquire even more spectrum to solidify their advantage even before their competitors can really begin using their BRS spectrum to compete with well established incumbents. As explained in the *Order*, the Commisison will include the 55 MHz of BRS spectrum "as available for mobile telephony/broadband services where the transition has been completed." *New Clearwire Order* at ¶70. In other words, regardless of whether the holder of the BRS spectrum is genuinely ready to offer service and compete with well established incumbents offering services on the "beachfront" frequencies below 2.3 GHz, the Commission will consider this spectrum as part of its consideration of whether to allow incumbents to acquire even more spectrum.

Certainly the Commission has generally included all spectrum available to applicants as part of its screen, even if the applicants have not completed build out. But this facially neutral application ignores the reality that ever since AT&T divested its BRS spectrum as part of the merger with BellSouth, *see AT&T-BellSouth Merger Order*, 22 FCCRcd 5662 (2007), neither Verizon nor AT&T

hold any significant BRS spectrum. As these two carriers now have dominant positions in the wireless service market – notably in their holding of spectrum below 2.3 GHz, as well as in the number of subscribers – the inclusion of BRS spectrum in the screen will have the effect of increasing the spectrum to which these two dominant players can acquire access. Every time a potential BRS competitor clears spectrum to begin offering competitive service, it increases the ability of the two most powerful, vertically integrated incumbents to acquire an even greater spectrum advantage.

No competing provider can hope to win such a race. To add insult to injury, the already established incumbent can increase its spectrum advantage even before the BRS competitor is ready to actually offer service. No matter how swift and smooth a transition – and the history of the BRS band is not reassuring on this score – it will take some time before the spectrum is ready and the competitor can begin actually offering a working service. To allow the two largest rivals to acquire even more spectrum during this period of vulnerability will kill the nascent competition the Commission purportedly wishes to encourage with a spectrum screen in the first place.

The Commission should therefore reverse its decision to include BRS in the spectrum screen. The Commission already allows transactions that trigger the spectrum screen to continue without divestitures if it finds that such transactions serve the public interest. *See AT&T-Aloha Order*, 23 FCCRcd 2234 (2008). Rather than issuing an invitation for incumbents to swoop into a market as soon as a potential competitor clears BRS spectrum, the Commission should exclude BRS from the spectrum screen and require that any incumbent show that acquisition of additional spectrum access in the relevant markets will serve the public interest.

II. THE COMMISSION MUST ENSURE THAT NEW CLEARWIRE MAINTAINS AN OPEN NETWORK IN ACCORDANCE WITH ITS COMMITMENTS AND THE PRINCIPLES OF THE *INTERNET POLICY STATEMENT*.

Similarly, although PISC concurs with the *Order*'s conclusion that the commitment made

by New Clearwire accords with the goals set forth in the *Internet Policy Statement*, the Commission failed in its responsibility when it did not impose the condition requested by PISC to ensure that New Clearwire would abide by its commitments. The Commission appears to have predicated this on the mistaken assumption that it would require "Commission review of all contracts between New Clearwire and entities providing financial backing." *New Clearwire Order* at ¶101.

PISC did not propose any such sweeping condition. Rather, the Commission appears to have conflated two separate requests by PISC. First, PISC urged that the Commission thoroughly investigate the existing agreements and propound significant interrogatories to the Applicants so that the Commission could assure itself that the promised benefits were, in fact, part of the underlying agreements and that New Clearwire had genuine intentions to provide these benefits. *PISC Ex Parte Comments* at 3-4 (filed September 18, 2008). In addition, PISC asked that the Commission require that the Applicants submit any changes to the ***specific portions*** of those agreements related to the "open network benefits" for public notice and comment. *Id.* at 4-7.

The Commission therefore misstates the proposed condition, and thus imagines a far greater burden on New Clearwire and Commission staff, by characterizing it as a "review of ***all*** contracts between New Clearwire and entities providing financial backing." Although the failure to include the relevant documents in the record makes it difficult to assess the genuine nature of the administrative burden, by Applicants' own admission it cannot possibly exceed more than a few documents. Further, it cannot be that Applicants contemplate that these documents will often change in ways that would implicate the proposed condition. Only if a proposed change would impact the "open network conditions" identified by PISC in its comments, *i.e.*, conditions relating to network neutrality, network device attachments, and wholesale access, would New Clearwire need to submit it to the Commission for public notice and comment. *PISC Ex Parte Comments* at 2.

Furthermore, although the Commission has not imposed specific conditions like this under the *Internet Policy Statement*, it has routinely imposed reporting requirements or submission of contracts or other documentation to ensure that merger applicants have, in fact, fulfilled their merger obligations and provided promised benefits to the public. For example, the *AOL-Time Warner Merger Order*, the Commission required AOL Time Warner to submit regular status reports on its efforts to create an interoperable instant messaging application and on its contract negotiations with rival independent ISPs for access to its broadband facilities. The contractual review condition requested by PISC are consistent with these previous cases in which the Commission has required merger applicants to keep the Commission informed of potential future developments that would impact the public interest benefits identified by the Commission as flowing from approval of the transaction under review.

Finally, although the *Internet Policy Statement* offers protection to subscribers of the "four freedoms" outlined in the *Order*, the Commission has not sufficiently clarified how it will apply the *Internet Policy Statement* in the wireless context. The Commission's conclusion that it has never imposed additional conditions to protect subscriber rights provided in the *Internet Policy Statement* absent a voluntary commitment from Applicants, *Order* at ¶101, is therefore irrelevant here. In the wireline context, the Commission made clear that it would accept complaints on a showing that parties blocked or degraded user access to lawful applications or content of their choice. *See Adelphia Transaction*, 21 FCC Rcd 8203, 8295-8299 (2006). Here, where the Commission has yet to clarify explicitly how it will enforce the subscriber rights outlined in the *Internet Policy Statement*, the inclusion of an additional condition to ensure that New Clearwire keeps its contractual commitment to openness is warranted.

CONCLUSION

The Commission correctly found that approval of the transaction would enhance competition and further encourage wireless providers to embrace open networks. In reaching this conclusion, however, the Commission needlessly altered its policy on the spectrum screen in a way that will hinder the development of additional competition in mobile voice and mobile data. Further, the Commission appears to have misunderstood the condition proposed by PISC, and therefore declined to impose a reasonable requirement to submit a narrow class of future commercial agreements for review. Properly understood, the condition proposed by PISC imposes a minimal burden on either the Commission or New Clearwire, and is fully consistent with previous Commission precedent.

WHEREFORE, the Commission should grant the *Petition for Reconsideration* filed by the Public Interest Spectrum Coalition, and grant all such other relief as is just and proper.

Respectfully submitted,

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December 8, 2008