BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Applications of Sprint Nextel Corporation and Clearwire Corporation for Consent to Transfer Control of Licenses and Authorizations	)	WT Docket No. 08-94
	)	
File Nos. 0003462540, *et al.*	)	

OPPOSITION AND REPLY TO
PISC PETITION FOR RECONSIDERATION

Sprint Nextel Corporation (Sprint) opposes PISC's petition for reconsideration to the extent it seeks to impose conditions on the New Clearwire transaction.[1] Specifically, the Commission should affirm its rejection of PISC's proposal that the Commission review New Clearwire's commercial contracts with third parties. Given the inherently open nature of New Clearwire's WiMAX network, this proposed condition is unnecessary. PISC's proposed burdensome requirement would also place New Clearwire at an unfair competitive disadvantage and harm consumers by slowing New Clearwire's broadband deployment and increasing the cost of its next-generation wireless offerings.

Sprint, however, notes that the spectrum screen issues raised by PISC and in recent Commission orders illustrate the need for the Commission to initiate a separate proceeding to review, on a going-forward basis, the public interest objectives of the spectrum screen and how best to achieve these objectives. A transparent, comprehensive

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[1] Petition for Reconsideration of the Public Interest Spectrum Coalition (PISC) (Dec. 8, 2008) (Petition). Unless otherwise indicated, all pleadings cited herein were filed in WT Docket No. 08-94.

review of the screen will be more effective in promoting the Commission's competition policies than the *ad hoc*, case-by-case approach the Commission has taken to date.

I. THE COMMISSION SHOULD AFFIRM ITS REJECTION OF PISC'S PROPOSED CONTRACT REVIEW CONDITION

In the *Order*, the Commission denied a proposed condition from PISC that would require New Clearwire to file with the Commission "any changes in the underlying contracts with entities providing financial backing that would substantially change [New Clearwire's] open network commitments."[2] Under PISC's proposal, these contractual changes would be subject to notice and comment as if they were contained in an application for major modification under Section 308 of the Communications Act, and would be allowed only if approval of the change would serve the public interest.[3] The Commission denied PISC's proposal on the basis that this proposed requirement is unprecedented and would be overly burdensome for New Clearwire.[4] The Commission should affirm its rejection of PISC's proposed condition.[5]

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2 *Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer Control of Licenses, Leases, and Authorizations*, WT Docket No. 08-94, Memorandum Opinion and Order, FCC 08-259, 2008 FCC LEXIS 7678, ¶¶ 98, 101 (rel. Nov. 7, 2008), as amended by Erratum, 2008 FCC LEXIS 7776 (rel. Nov. 10, 2008), and Erratum (rel. Nov. 26, 2008) (*Order*); *Ex Parte* Comments of the Public Interest Spectrum Coalition at 6 (Sep. 18, 2008) (PISC *Ex Parte* Comments).

3 PISC *Ex Parte* Comments at 6.

4 *Order* ¶ 101.

5 PISC failed to serve its petition for reconsideration on the parties to this proceeding. The Petition does not contain a certificate of service, and neither Sprint nor its counsel received a service copy. PISC's failure to serve the Petition violates the Commission's rules, *see* 47 C.F.R. § 1.106(f)), and provides independent grounds for dismissing the "open network" arguments in the Petition. *See Application of Americom Network, Inc.,* Memorandum Opinion and Order, 16 FCC Rcd 18450, ¶ 5 (WTB 2001) (dismissing petition to deny for failure to comply with service requirements).

In its September 2008 *Ex Parte* Comments, PISC cited no record evidence demonstrating the need for its proposed condition, and it fails again in its Petition to offer any meaningful support for its argument. In fact, New Clearwire has a strong commitment to an open network in the 2.5 GHz band, and there is simply no need for PISC's cumbersome contract review process. The WiMAX network New Clearwire will deploy is inherently open in nature, eliminating the need for post-transaction conditions that mandate what WiMAX technology already embraces. Indeed, New Clearwire's business model *depends on* the proliferation of WiMAX devices and operations as a means of achieving the economies of scale necessary to produce highly affordable WiMAX chipsets. By choosing to adopt and deploy WiMAX technology in its nationwide broadband network, New Clearwire has already ensured that consumers using its network can and will enjoy the rights set forth in the Commission's *Internet Policy Statement*.[6]

The Commission correctly found in the *Order* that PISC's proposed condition would be overly burdensome for New Clearwire. Given the potential quantity and variety of New Clearwire's contractual arrangements with its investors, affiliates, and other parties, the company's administrative burden would involve far more than addressing the status of "a few documents," as PISC claims.[7] In addition, the scope and purpose of PISC's proposed review process is unclear, as PISC itself appears incapable of formulating a precise standard for determining which contractual changes must be filed

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[6] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

[7] Petition at 5.

with the Commission.[8] PISC's ambiguous review process would subject New Clearwire to unacceptable administrative delays as it seeks to deploy its service and respond to a fast-changing competitive environment. These delays would slow New Clearwire's broadband deployment, raise costs, and discourage innovation, all to the detriment of broadband consumers throughout the United States.

Moreover, contrary to PISC's assertion, there is no Commission precedent supporting its proposed condition. PISC's fails to identify a single decision in which the Commission required the post-transaction entity to seek prior approval for changes in third-party contracts. PISC's proposed condition goes far beyond the "status reports" that the Commission required in conjunction with mergers involving cable companies.[9] Moreover, the prior cases cited by PISC involved parties that the Commission found to have some degree of market power. New Clearwire, in contrast, is a new entrant facing strong competition from well established broadband providers. Indeed, the Commission found that the New Clearwire transaction "will result in major public interest benefits by facilitating the provision of a nationwide WiMAX-based network that will lead to increased competition, greater consumer choice, and new services."[10] The Commission should summarily reject PISC's proposed condition, as it would only serve to undermine these substantial consumer benefits.

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8 *See* PISC *Ex Parte* Comments at 6; Petition at 5.

9 Petition at 6.

10 *Order* ¶ 3.

II. THE COMMISSION SHOULD CONDUCT A SEPARATE REVIEW OF ITS SPECTRUM SCREEN AND EXCLUDE BRS FROM THE SCREEN

In its *Order* in this proceeding, the Commission excluded from its spectrum screen various portions of the 2.5 GHz band – the Educational Broadband Service (EBS) spectrum, middle band segment (MBS) spectrum, guard band spectrum, and Broadband Radio Service (BRS) Channel 1.[11] The Commission correctly concluded that licensing and technical characteristics unique to the 2.5 GHz band made these spectrum bands significantly different from spectrum that the Commission previously included in its CMRS spectrum screen. The Commission also correctly applied its spectrum screen on a market-specific basis, declining to include any 2.5 GHz spectrum in the screen where the transition to the new 2.5 GHz band had not yet been completed.[12] The Commission nonetheless included in its screen analysis 55.5 MHz of BRS spectrum in those markets that had been transitioned.[13]

In the Petition, PISC sets forth a number of public policy reasons why no 2.5 GHz spectrum, including BRS spectrum, should be included in the Commission's spectrum screen. PISC's Petition illustrates the need for the Commission to review in a separate proceeding the policies and objectives its spectrum screen purports to accomplish.[14] The

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11 *Id.* ¶¶ 62, 67-69, 71.

12 *Id.* ¶ 74.

13 *Id.* ¶ 70.

14 The issues raised by PISC concerning the spectrum screen do not warrant any reconsideration of the Commission's decision to approve the New Clearwire transaction. Although the Commission included certain BRS spectrum in applying its spectrum screen as part of its analysis in this proceeding, it ultimately approved all aspects of the transaction.

Commission has to date relied on the *ad hoc* development of the screen, modifying its screen analysis from time to time in the context of individual license transfer applications.

Sprint recognizes the need for the Commission to retain flexibility in applying the screen; at the same time, however, the Commission's *ad hoc* approach has created uncertainty about the public interest objectives behind the screen and the Commission's rationale for determining what bands get included in the screen. For example, as PISC points out, transactions involving AT&T and Verizon Wireless may in some cases now be subject to less scrutiny under the new screen because they hold no BRS spectrum, while possibly subjecting BRS transactions to greater scrutiny.[15] A screen that subjects the two largest CMRS carriers to *less* review while at the same time subjecting BRS new entrants to *more* review threatens to turn the Commission's competition analysis on its head.

Accordingly, a broader review of the competitive objectives behind the spectrum screen is warranted. This transparent, broader review would place the Commission's competitive review of spectrum holdings on a firmer foundation and help ensure future wireless transactions are reviewed more efficiently and effectively in the public interest.

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15 Petition at 3-4.

III. CONCLUSION

PISC's Petition provides no basis for the Commission to reconsider the Order approving the New Clearwire transaction. PISC's proposed condition is not supported by the record and would only impose unfair, unnecessary burdens on New Clearwire. Accordingly, it should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 18th day of December, 2008, I caused true and correct copies of the foregoing Opposition and Reply to PISC Petition for Reconsideration to be served (except where otherwise noted) by first class U.S. mail, postage prepaid, addressed to:

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