

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
SPRINT NEXTEL CORPORATION AND)	WT Docket No. 08-94
CLEARWIRE CORPORATION)	
)	File Nos. 0003462540 <i>et al.</i>
Applications For Consent to Transfer Control)	
of Licenses, Leases, and Authorizations)	
)	

COMMENTS IN OPPOSITION OF CLEARWIRE CORPORATION

Clearwire Corporation (“Clearwire”) hereby submits its Comments in Opposition to the Petition for Reconsideration (the “Petition”) of the Public Interest Spectrum Coalition (“PISC”) in the above referenced matter.^{1/} For the reasons stated below, the Commission should uphold the *Clearwire Order* as released.

I. BACKGROUND

The *Clearwire Order* considered and approved applications submitted by the former Clearwire Corporation^{2/} and Sprint Nextel Corporation (“Sprint Nextel”) seeking Commission consent to transfer control of licenses, authorizations and *de facto* transfer spectrum leases in the

^{1/} *In the Matter of Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer Control of Licenses, Leases and Authorizations*, Memorandum Opinion and Order, FCC 08-259 (rel. November 7, 2008) (“*Clearwire Order*”). Section 1.106(f) of the rules, governing Petitions for Reconsideration in other than notice and comment rule making proceedings, requires that petitions be served on all parties to the proceeding. 47 C.F.R. § 1.106(f). PISC did not serve a copy of its Petition on Clearwire or its counsel. Because Clearwire was not served with a copy of the Petition by hand or electronically, it is entitled to at least the three additional days for mail service contemplated by Section 1.4(h) of the Commission’s rules. 47 C.F.R. § 1.4(h).

^{2/} As a result of the transaction approved by the *Order*, a new Clearwire Corporation was formed and its subsidiaries hold all of the licenses formerly controlled by the former Clearwire Corporation, Sprint Nextel and their subsidiaries. *See, e.g.*, File No. 0003669067 (filed December 8, 2008). References herein to Clearwire mean either the former Clearwire

2.5 GHz Band and certain associated bands to Clearwire. In approving the transaction, the Commission found that there would be “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.”^{3/}

PISC admittedly supports the Commission’s decision to approve the Clearwire/Sprint transaction, noting that the Commission “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...” Indeed, PISC explicitly states that it “fully supports the ultimate conclusion of the Commission to permit the transfer.”^{4/} Despite its support however, PISC asks the Commission to reconsider two aspects of the *Clearwire Order*. First, it asks that the Commission reconsider its decision to include 55 megahertz of Broadband Radio Service (“BRS”) spectrum in the spectrum screen. Second, it asks that the Commission impose some type of condition on Clearwire to ensure that it follows through on its stated plans to build and operate an open network. The Commission fully addressed each of these issues in the *Clearwire Order* and it need not take any further action at this time to reconsider them. To the extent either issue warrants subsequent consideration, the Commission can and should more appropriately consider them in proceedings of more general applicability.

II. DISCUSSION

A. There is No Need to Reconsider the Inclusion of BRS Spectrum in the Analysis of the Instant Transaction

PISC asserts that “[t]he inclusion of BRS spectrum in the screen effectively raises the screen to the benefit of the largest incumbents and to the detriment of the public who benefit

Corporation or the new Clearwire as the context indicates.

^{3/} *Clearwire Order* ¶ 3.

^{4/} Petition at 2.

from greater competition and of potential competitors such as Clearwire.”^{5/} PISC further asserts that the Commission included BRS spectrum in the screen because the FCC found that WiMAX could *potentially* compete with existing voice and data mobile services. PISC is concerned that by including BRS spectrum in the spectrum screen, a competitor can increase its spectrum advantage before a BRS licensee is ready to *actually* offer service.

Although the Clearwire/Sprint application initially opposed the inclusion of all 2.5 GHz spectrum in the Commission’s spectrum screen, it did so, in part, on the basis that the Commission had only used the spectrum screen to evaluate transactions involving Commercial Mobile Radio Service (“CMRS”) licensees in the past. The Commission nevertheless determined that it should include 55 megahertz of BRS spectrum in the spectrum screen based on its recognition of a new combined product market for mobile telephony and broadband services. The Commission found that Clearwire will “compete directly with Verizon Wireless’s and AT&T’s soon-to-be launched mobile broadband 4G services.”^{6/} Based on its decision to redefine the relevant product market to a combined mobile telephony/broadband service market, the Commission determined to include, as the input market, the spectrum capable of serving that product market.^{7/}

Despite its use of a spectrum screen including 55 megahertz of BRS spectrum, the Commission made clear that the spectrum screen is not the only tool it employs in evaluating wireless transactions. It relies, in addition, on factors such as market concentration and potential competitive harm to evaluate whether a particular transaction serves the public interest,

^{5/} *Id.* at 2-3.

^{6/} *Clearwire Order* ¶ 43.

^{7/} Clearwire fully supports the Commission’s decision to exclude the 2.5 GHz middle band segment (“MBS”), BRS Channel 1, the J and K guard bands and all Educational Broadband Service (“EBS”) from any current or future spectrum screen for the purposes set forth in the *Clearwire Order*. See *Clearwire Order* ¶¶ 67, 68, 69, 71.

convenience and necessity.^{8/} In addition, the Commission considers whether the proposed transaction is likely to generate verifiable, merger specific public interest benefits.^{9/} The Commission’s inclusion of certain BRS spectrum in its spectrum screen for evaluating the Clearwire transaction did not foreclose the Commission from taking into account numerous other factors in determining that the transaction was in the public interest. Similarly, exclusion of the 55 megahertz of BRS spectrum from the Commission’s consideration would not have changed any other aspect of the Commission’s approval of the transaction. Accordingly, there is no need to reconsider including the 55 megahertz of BRS spectrum in the spectrum screen for purposes of the Clearwire transaction.

B. The Commission Correctly Declined to Impose an Openness Condition

PISC also argues that the Commission rejected its request that Clearwire be required to submit for Commission review portions of any agreements related to “open network benefits” because it misinterpreted PISC’s request to mean that *all* contracts between Clearwire and its financial backers be submitted for Commission review. Moreover, PISC argues that the Commission has “routinely imposed reporting requirements or submission of contracts or other documents to ensure that merger applicants have, in fact, fulfilled their merger obligations...”^{10/} Finally, PISC argues that an openness condition is appropriate here because “the Commission has not sufficiently clarified how it will apply the *Internet Policy Statement* in the wireless context.”^{11/}

These assertions do not merit reconsideration of the Commission’s decision declining to

^{8/} 47 U.S.C. § 310(b). The Commission uses a Herfindahl-Hirschman Index (“HHI”) to evaluate market concentration that would result from a proposed transaction, regardless of the spectrum involved in a transaction.

^{9/} See, e.g., *Clearwire Order* ¶ 113.

^{10/} Petition at 6.

impose an “openness” condition on Clearwire. The Commission has consistently held that regulation imposes costs on regulated entities as well as regulators and is appropriate only in the instance of market failure. Here, there is no evidence of Clearwire refusing to provide unimpaired access to any content, application or WiMAX- compatible device their customers desire to use on its 2.5 GHz broadband network. Nor is there any evidence of broader market failure with respect to access to open standard WiMAX networks such as the one Clearwire is constructing. Indeed, Clearwire has affirmatively stated that the WiMAX network it is deploying is inherently open in nature, obviating the need for any Commission-mandated condition that requires what WiMAX technology already embraces.^{12/} By choosing to adopt and deploy WiMAX technology in its nationwide 4G broadband network, Clearwire ensures that consumers using its network can and will enjoy the rights set forth in the *Internet Policy Statement*.^{13/} Therefore, it is inappropriate, unnecessary and unwarranted for the Commission to impose any open network conditions on Clearwire, as it properly declined to do in the *Clearwire Order*.

Finally, as the Commission has noted and Clearwire acknowledged,^{14/} the Commission has ample authority over broadband providers who allegedly block or degrade Internet content.^{15/}

^{11/} *Id.*

^{12/} *Clearwire Order* ¶ 99.

^{13/} *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Policy Statement, 20 FCC Rcd 14986 (2005) (“*Internet Policy Statement*”).

^{14/} *See In the Matter of Sprint Nextel Corporation and Clearwire Corporation, Applications for Consent to Transfer Control of Licenses, Leases and Authorizations, Joint Opposition to Petitions to Deny and Reply to Comments*, at 14 (filed August 4, 2008).

^{15/} *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 220 (2006); *see also Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, File No. EB-08-IH-1518*, Memorandum Opinion and Order, 23 FCC Rcd 13028 (2008).

PISC provides no reason why the Commission would not be able to use the authority it has exercised in the past in the context of wireless broadband communications.

III. CONCLUSION

As PISC itself has recognized, the *Clearwire Order* creates a new entity which will compete with existing broadband providers to offer a new nationwide broadband wireless competitor. The Commission should promptly uphold the *Clearwire Order* in all respects.

Respectfully submitted,

Clearwire Corporation

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CERTIFICATE OF SERVICE

I, Jennifer A. Cukier, hereby certify that on this 22nd day of December, 2008 a copy of the foregoing Comments in Opposition of Clearwire Corporation was served on the following by the method indicated below:

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