59. Sprint Nextel and Clearwire also argue that the Middle Band Segment (MBS)[175] of BRS spectrum should be excluded because those channels "are not compatible for use in the radio access network of cellularized mobile broadband operators in the presence of high-site facilities."[176] Finally, they argue that BRS Channel 1 (2496-2502 MHz) should be excluded from any spectrum screen because it is "an interference-prone, non-contiguous six megahertz channel so heavily encumbered by three other co-primary uses that wide-area cellularized broadband operations will prove difficult, if not impossible, to deploy on those frequencies."[177]

60. AT&T contends that the amount of BRS and EBS spectrum attributed to New Clearwire should not be decreased based upon various arguments made by Sprint Nextel and Clearwire.[178] AT&T contends that there is no material difference between operations on leased versus non-leased spectrum.[179] With respect to the MBS, it believes Sprint Nextel and Clearwire will control much of this spectrum across the country empowering the companies to ensure compatibility with adjacent spectrum.[180] AT&T argues that the guard band spectrum is fully available to New Clearwire for broadband deployment.[181] Finally, AT&T states that the Commission has already held that the other three co-primary users in BRS Channel 1 will not noticeably interfere with New Clearwire's operations.[182]

c. Discussion

61. In light of recent developments and our determination to evaluate the broader combined market for mobile telephony/broadband services in our competitive analysis, we decide to include AWS-1 and certain BRS spectrum in an updated, market-specific initial spectrum screen in those markets where that spectrum is available. The Commission has previously said with respect to mobile telephony that suitability for provision of these services "is determined by the physical properties of the spectrum, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony."[183] We apply the same factors to mobile telephony/broadband

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[175] The Middle Band Segment, 2572-2614 MHz, has different post-transition technical rules designed to accommodate high-power, high-site video operations after the transition. *See* 47 C.F.R. §§ 27.5(i)(2), 27.50(h)(1), 27.53(l)(1), 27.55(a)(4)(iii).

[176] *See* Sprint Nextel-Clearwire Application, Public Interest Statement at 41.

[177] *See Id.*

[178] *See* AT&T Petition to Deny at 8-13.

[179] *See Id.* at 9.

[180] *See Id.* at 9-10. AT&T claims that Applicants will control all available MBS spectrum in at least 284 counties. *Id.* at 10 n.27. It claims that in another 1,799 counties, Applicants will control all available BRS MBS spectrum. *Id.* It claims that in an indeterminate number of counties, Applicants will also control the available EBS MBS spectrum, but AT&T cannot determine how many such additional counties exist because it does not know how much EBS spectrum is licensed in a given county. *Id.*

[181] *See Id.* at 10-11.

[182] *See Id.* at 10, *citing* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14179 ¶ 27 (2004).

[183] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21560-21561 ¶ 81; *see also Verizon-RCC Order*, 23 FCC Rcd at 12486 ¶ 43; *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶ 26; *ALLTEL-Midwest Wireless Order*, 21 FCC (continued....)

services. With respect to spectrum that may become suitable for mobile telephony/broadband services in the near future, we consider that spectrum to be a relevant input if it will meet the criteria for suitable spectrum within two years.[184] We also revise our initial spectrum screen so that it applies on a market-by-market basis, rather than on a nationwide basis. This revised, market-specific screen allows us to apply the screen so as to reflect more accurately the availability of spectrum in particular markets when considering possible spectrum aggregation issues, and results in our considering the same spectrum bands when applying our initial screen and conducting any subsequent, more detailed market-by-market analysis.[185]

62. *Subjecting BRS and EBS spectrum to the spectrum screen.* We reject the arguments of Sprint Nextel and Clearwire that no 2.5 GHz spectrum associated with this transaction should be reviewed under a spectrum screen. Based on our analysis of this transaction, and the current state of the market for mobile telephony/broadband services, we find it appropriate to include certain BRS spectrum in a market-specific initial spectrum screen, while we exclude EBS spectrum from the spectrum screen, as discussed more fully below.

63. New Clearwire will be using 2.5 GHz spectrum when offering nationwide mobile WiMAX service offerings that will be competing with other existing and planned service offerings from other wireless carriers. While Sprint Nextel and Clearwire argue that there are distinctions between the 2.5 GHz band (both BRS and EBS) and other bands used to provide mobile broadband service, they do not provide a persuasive basis for excluding all BRS spectrum from inclusion in the spectrum screen. They clearly consider most of the BRS spectrum (in combination with certain available EBS spectrum) as suitable for the provision of mobile telephony/broadband services. Given this suitability, they fail to show that aggregation of that spectrum could not potentially lead to the sort of competitive concerns that would trigger the Commission's competitive review. Furthermore, ever since the Commission first determined to evaluate potential spectrum aggregation of 800 MHz cellular spectrum, 800/900 MHz SMR, and 1.9 GHz broadband PCS spectrum for purposes of competitive review, it has not differentiated among bands based on specific propagation characteristics or purported distinctions in trading value. Nor did we do so last year when we recently expanded the initial spectrum aggregation screen to include 700 MHz band spectrum. We decline to do so here with respect to the particular BRS spectrum that we find, below, suitable for mobile telephony/broadband services.[186] This initial spectrum screen is designed to be a trigger for further competitive analysis, in which we examine each of the identified markets to ensure that no competitive harm would result from the proposed transaction.

64. Sprint Nextel's and Clearwire's reliance on the *Sprint-Nextel Merger Order* and the *AT&T-Dobson Order* for the proposition that transactions involving the 2.5 GHz band will not be subject to the spectrum screen is misplaced. As mentioned above, we are revising the initial spectrum screen on a market-specific, rather than a nationwide, basis. This revised, market-specific screen will reflect more

(Continued from previous page)
Rcd at 11543 ¶ 31; *Sprint-Nextel Order*, 20 FCC Rcd at 13992 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 41.

[184] *See AT&T-Dobson Order*, 22 FCC Rcd at 20313 ¶ 30. That time frame is consistent with the DOJ/FTC Merger Guidelines, which "state that a significant market impact from entry must result within two years for the entry to be considered 'timely.'" *Id.* at 20313 n.117, *citing DOJ/FTC Merger Guidelines §3.2.*

[185] *Compare AT&T-Dobson Order*, 22 FCC Rcd at 20315 ¶ 35 (stating that, although AWS-1 and BRS was not included in the initial spectrum screen, we considered this spectrum, to the extent that this spectrum was locally available, in our case-by-case analysis of those markets identified by the initial screen).

[186] We note that no party or commenter has made a specific proposal regarding a specific discounted value for 2.5 GHz spectrum. As discussed below, we also do not differentiate the AWS-1 spectrum in the 1.7/2.1 GHz band that we also determine, in this *Memorandum Opinion and Order*, to include in the Commission's initial spectrum screen.

accurately the availability of spectrum in particular markets when considering possible spectrum aggregation issues, and will result in the Commission's consideration of the same spectrum bands when applying the initial screen and conducting any subsequent, more detailed market-by-market analyses.

65. Circumstances have changed substantially since the *Sprint-Nextel Merger Order* was adopted in 2005. At the time of the *Sprint-Nextel Merger Order*, the Commission held that it was "premature" and "imprudent" to consider the 2.5 GHz band as part of the spectrum market for mobile telephony services because the new service rules that allowed for mobile services had just been adopted.[187] As Sprint Nextel and Clearwire recognize, they have made great progress in the last three years since release of the *Sprint-Nextel Merger Order* in terms of transitioning to the new band plan, finalizing the WiMAX standards, developing equipment, and formulating their plans for using the 2.5 GHz band to provide service.

66. More recently, in the *AT&T-Dobson Order* adopted last year, we examined the availability of BRS spectrum in particular. We noted that the availability of BRS spectrum for mobile uses was dependent on the process of transitioning to the new band plan. We determined, in the context of a uniform nationwide initial spectrum screen, that we could not yet conclude that sufficient BRS spectrum would be available nationwide soon enough to affect current behavior,[188] And therefore decided not to include BRS spectrum as part of the initial spectrum screen. We did, however, include BRS spectrum as part of our market-specific analysis of competitive harm that might result through spectrum aggregation when BRS spectrum was in fact available in a particular market.[189] Furthermore, in the time since release of the *AT&T-Dobson Order*, significant additional progress has been made in completing the transition of BRS spectrum to the new band plan. Currently, the transition has been completed in 337 out of 493 Basic Trading Areas (BTAs).[190] Indeed, all BRS licensees must be operating and be able to demonstrate substantial service by May 1, 2011 or lose their licenses,[191] a requirement that should further accelerate completion of the transition.

67. We do agree, however, with Sprint Nextel and Clearwire that the MBS channels should not be included in our spectrum screen because of specific features associated with this spectrum. While nothing in our service rules precludes the potential use of the MBS channels for mobile telephony/broadband services, the Applicants are correct that low-power, cellularized operations in the MBS could be subject to interference from legacy high-power video operations. At this time, we lack a sufficient record to determine the extent to which MBS is in fact available for mobile telephony/broadband services. We also agree with Sprint Nextel and Clearwire that the J and K guard bands should not be included in as part of our spectrum screen. Operations in the J and K guard bands are secondary to adjacent-channel operations.[192] Moreover, channels in those bands are only 1/3 megahertz

[187] *See Sprint-Nextel Merger Order*, 20 FCC Rcd at 14022 n.338.

[188] *See AT&T-Dobson Order*, 22 FCC Rcd at 20315 ¶ 34.

[189] *See AT&T-Dobson Order*, 22 FCC Rcd at 20347 Appendix A (Market-Specific Analysis of Markets Involving Divestiture), Texas 10-Navarro. Although we also did not include AWS-1 spectrum as part of the initial spectrum screen in these orders, when AWS-1 spectrum was in fact available in a particular market, we similarly found it appropriate to include AWS-1 spectrum as part of our analysis of potential competitive harm that might result through spectrum aggregation. *See AT&T-Dobson Order*, 22 FCC Rcd at 20347 Appendix A (Market-Specific Analysis of Markets Involving Divestiture), Texas 10-Navarro; *see also Verizon-RCC Order*, 23 FCC Rcd at 12541 (Appendix B Market-Specific Analysis of Markets Involving Divestiture), Vermont 1-Franklin.

[190] At the time of the *AT&T-Dobson Order*, the transition had been completed in only 113 BTAs. *Id.* at n.128.

[191] *See* 47 C.F.R. § 27.14(o).

[192] *See* 47 C.F.R. § 27.1222.

wide, and we find that it would be highly improbable that those channels could be used unless an operator aggregated all of the channels in a market.

68. With respect to BRS Channel 1, we note that the Commission previously rejected Sprint Nextel's arguments that spectrum in the 2495-2500 MHz band is not suitable replacement spectrum for old BRS Channel 1,[193] but that Sprint Nextel has appealed that ruling.[194] We note, however, that BRS Channel 1 (2496-2502 MHz) is not contiguous to any other BRS channels. Instead, it is adjacent to EBS Channel A1, which is not part of the spectrum screen. Furthermore, at this time many WiMAX deployments require 10 megahertz channels, and there does not appear to be a role for BRS Channel 1 in the WiMAX deployments contemplated by Applicants. Accordingly, we will not include BRS Channel 1 in the spectrum screen at this time. We emphasize our determination to exclude BRS Channel 1 spectrum does not prejudice in any way the Commission's conclusions that spectrum sharing between BRS and MSS operations is feasible and that 2496-2502 MHz comprises suitable replacement spectrum for the provision of comparable facilities to accommodate BRS operations that currently operate in the 2150-2160/62 MHz band.[195]

69. Finally, we agree with Sprint Nextel and Clearwire that the J and K guard bands should not be included in as part of our spectrum screen. Operations in the J and K guard bands are secondary to adjacent-channel operations.[196] Moreover, channels in those bands are only 1/3 megahertz wide, and we find that it would be highly improbable that those channels could be used unless an operator aggregated all of the channels in a market.

70. We conclude that 55.5 megahertz of BRS spectrum (*i.e.*, all BRS spectrum except the MBS channels, BRS Channel 1, and the J and K guard bands) should be considered both suitable and available, in the markets where the transition has been completed, for purposes of our revised spectrum screen. As noted above, historically, the availability of BRS spectrum for mobile uses is dependent on the process of transitioning to the new band plan.[197] For purposes of this transaction, we will apply that test and consider 55.5 megahertz of BRS as available for mobile telephony/broadband services where the transition has been completed.

71. We decline, however, to include EBS in the revised spectrum screen. The primary purpose of EBS is to further the educational mission of accredited public and private schools, colleges and universities providing a formal educational and cultural development to enrolled students through video, data, or voice transmissions.[198] While licensees are allowed to lease their excess capacity to commercial operators, leasing is subject to various special requirements designed to maintain the primary educational character of services provided using EBS.[199] In addition, other elements of the EBS licensing regime,

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[193] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order,* WT Docket No. 03-66, 21 FCC Rcd 5606, 5619-5621 ¶¶ 23-26 (2006).

[194] *Sprint Nextel Corporation v. Federal Communications Commission and United States of America,* Case Nos. 08-1233, 06-1278 (D.C. Cir.)

[195] *See BRS/EBS 3rd MO&O,* 21 FCC Rcd at 5623 ¶ 29.

[196] *See* 47 C.F.R. § 27.1222.

[197] *See AT&T-Dobson Order,* 22 FCC Rcd at 20315 ¶34.

[198] *See* 47 C.F.R. § 27.1203(b).

[199] *See generally* 47 C.F.R. § 27.1214.

such as its solely site-specific character, with the absence of any licensee in various unassigned EBS "white spaces," complicate use of this spectrum for commercial purposes. Furthermore, we are sensitive to the concerns raised by EBS licensees that potential divestitures, in response to spectrum aggregation concerns relating to competition among commercial services, could disproportionately harm EBS licensees.[200] Accordingly, we will not consider spectrum associated with EBS spectrum leases as part of the spectrum screen.

72. *Inclusion of AWS-1 and other spectrum.* With respect to AWS-1 spectrum in the 1.7/2.1 GHz band, we conclude that sufficient progress has been made in clearing AWS-1 spectrum to consider that spectrum suitable for mobile telephony/broadband services in those markets where the spectrum has been cleared and is available for use. In the *AT&T-Dobson Order*, we concluded, in the context of a nationwide spectrum screen, that AWS-1 spectrum – while meeting the other requirements for suitability – was not generally available for mobile use throughout the country because of the need to clear governmental and non-governmental incumbent users.[201] Recent information available to us now indicates that substantial progress continues to be made in clearing AWS-1 spectrum and that widespread deployment of mobile services using AWS-1 spectrum will be occurring in the near term. Our records show that AWS-1 spectrum has been cleared in approximately two-thirds of all counties. Furthermore, T-Mobile USA, an AWS-1 licensee, recently reported that it intends to offer wireless broadband service using AWS-1 spectrum in 25 markets by the end of 2008 and that it has "placed about one million AWS-ready handsets either into customer hands or the supply chain."[202] Under these circumstances, we clearly should consider AWS-1 spectrum in the initial screen in markets that have already been cleared.

73. We decline to make additional changes to the spectrum screen at this time. In previous Commission orders, we stated that although satellite providers offer facilities-based mobile voice and data services, the price of these services is, at present, significantly higher than for services offered by cellular, PCS, or SMR providers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony.[203] The record in this proceeding does not provide any basis for revisiting that conclusion. With regard to MSS/ATC spectrum, we have insufficient evidence of availability and nature of ATC service to justify placing it in the screen at this time.

74. *Spectrum screen applied to this transaction.* Based on the analysis presented above, we find that it is appropriate to review the proposed Sprint Nextel-Clearwire transaction under a market-specific spectrum screen that includes spectrum in the AWS-1 and BRS (excluding the MBS, BRS Channel 1, and J and K guard band) where such spectrum is available. The spectrum screen varies depending on the availability of spectrum in the AWS-1 and BRS bands in a particular market. For markets in which AWS-1 and BRS spectrum is available, we revise the screen to 145 megahertz. For markets in which AWS-1 is available but BRS is not available, we use a spectrum screen of 125 megahertz. For markets in

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[200] *See* NEBSA Opposition at 7-9; CTN Comments at 3; Source for Learning Opposition at 4; CTN *ex parte*; NEBSA *ex parte*.

[201] *See AT&T-Dobson Order*, 22 FCC Rcd at 20314 ¶¶ 32-33.

[202] *See Ex Parte* Presentation, T-Mobile USA, WT Docket No. 07-195 (Jul. 18, 2008) at 3.

[203] *See* Global Com, Iridium Satellite Phone Service Plans, at http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html (last visited Sept. 17, 2008); GlobalStar, Airtime Pricing, Voice Pricing, at http://www.globalcomsatphone.com/satellite/services/globalstar.html (last visited Sept. 17, 2008). *See also AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38.

which BRS is available but AWS-1 is not available, we use a spectrum screen of 115 megahertz. Finally, for markets in which neither BRS nor AWS-1 is available, we use a 95 megahertz spectrum screen.

4. Market Participants

75. In its recent wireless transaction orders, when computing initial measures of market concentration, the Commission limited its analysis of transactions involving mobile telephony services to cellular, PCS, and SMR facilities-based service providers, and excluded satellite service providers, nomadic wireless Voice over Internet Protocol ("VoIP') providers, mobile virtual network operators ("MVNOs"), and resellers from consideration.[204] We find that mobile telephony/broadband services offered by facilities-based providers using cellular, PCS, and SMR spectrum and employing various technologies offer similar voice and data functionalities and are indistinguishable to the consumer.[205] Accordingly, we consider cellular, PCS, and SMR facilities-based mobile telephony/broadband service providers to be market participants. Similarly, to the extent that entities provide facilities-based mobile telephony/broadband services using 700 MHz, AWS-1, and BRS spectrum, we also consider them to be market participants.[206]

B. Initial Screen

76. The purpose of this initial screen is to eliminate from further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace.[207] When examining the effect of proposed transactions or other spectrum acquisitions, the Commission applies a two-part initial "screen" that identifies those local markets in which there is no competitive harm arising from the transaction or spectrum acquisition. One part of the screen utilizes a post-transaction

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[204] *See AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 38-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is, at present, significantly higher than for services offered by cellular, PCS, or SMR providers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony. *See* Global Com, Iridium Satellite Phone Service Plans, at http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html (last visited June 26, 2008); GlobalStar, Airtime Pricing, Voice Pricing, at http://www.globalcomsatphone.com/ satellite/services/globalstar.html (last visited June 26, 2008). *See also AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. We also do not consider wireless VoIP providers as providing the same functionality as mobile telephony providers because the service they provide now is nomadic rather than mobile. *See AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38. Wireless VoIP services are nomadic in the sense that one can use them from a number of different locations (for example, by using a laptop at different internet cafes all over a town). *See AT&T-Dobson Order*, 22 FCC Rcd at 20316 n.130; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544-45 n.134; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 n.151.

[205] *See, e.g., AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11544 ¶ 32; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 38; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 91.

[206] *See AT&T-Dobson Order*, 22 FCC Rcd at 20316 ¶ 36.

[207] *See, e.g., Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 51; *AT&T-Dobson Order*, 22 FCC Rcd at 20317 ¶ 39; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11547 n.151; *Sprint-Nextel Order*, 20 FCC Rcd at 13993 ¶ 62; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073-74 ¶ 48; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106-109.

Herfindahl-Hirschman Index ("HHI") of market concentration in conjunction with the change from the pre-transaction HHI, which we calculate based on providers' subscriber market shares, while the second part examines spectrum aggregation. Because the instant transaction does not increase concentration in the relevant product markets, as discussed above, it is not necessary for us to apply the HHI screen. Accordingly, our competitive analysis below involves only the spectrum aggregation portion of the screen.

77. Specifically, we apply a spectrum screen where Sprint Nextel would have a 10 percent or greater interest in cellular, PCS, SMR, 700 MHz spectrum, as well as AWS-1 and BRS spectrum where available. As discussed above, at closing Sprint Nextel will hold an approximate 51 percent ownership in New Clearwire.[208] Although Sprint Nextel and Clearwire argue that a spectrum screen should not be applied to this transaction, as discussed elsewhere in this order, we find that the 2.5 GHz band should be included in our spectrum screen where it has been transitioned, and we must evaluate any potential competitive harm associated with spectrum aggregation arising from this transaction that pertains to the provision of mobile telephony/broadband services.[209] The application of our spectrum screen as it applies to Sprint Nextel's attributable interests results in 43 CMAs requiring further competitive review.

78. AT&T argues that, in addition to Sprint Nextel's spectrum holdings both within and outside of the 2.5GHz band, the Commission should attribute the AWS spectrum holdings associated with other investors.[210] Specifically, AT&T notes that Comcast Corporation holds a controlling interest in SpectrumCo, which holds several AWS-1 licenses, while Time-Warner and Bright House also hold interests in SpectrumCo.[211] In particular, Comcast owns approximately 54.3% of SpectrumCo, while Time Warner Cable owns approximately 26.6% and Bright House owns approximately 4.5% of SpectrumCo.[212] We also note, however, that the Applicants have indicated that none of these particular investors would hold a 10% or greater interest in New Clearwire.[213] Comcast would hold a 7.2% ownership interest in New Clearwire, while Time Warner would hold a 3.8% interest and Bright House would hold a 0.7% interest.[214] In addition, as mentioned above, New Clearwire's "strategic investors," which include Intel, Comcast, Time Warner, Bright House Networks, and Trilogy Equity Partners, have the right to name four members of New Clearwire's Board of Directors. Because none of the investors in SpectrumCo AWS holds a 10 percent or greater interest in New Clearwire, we decline to attribute the AWS spectrum when evaluating the transaction, consistent with the Commission's practice with regard to previous wireless merger transactions.[215]

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[208] Public Interest Statement at 4.

[209] *See* Sprint Clearwire Joint Opposition at 22-23 (*citing AT&T-Dobson Order* ¶ 32 and *Verizon-RCC Order* ¶¶ 44-47). *See also* Google Opposition at 3-5; Source for Learning Opposition at 2-3; HITN Opposition at 8-10; WCA Reply at 7-9.

[210] *See* AT&T. Reply at 4.

[211] *See* AT&T Reply at 4.

[212] *See* SpectrumCo's FCC Form 602 Ownership Chart, FRN 0015028434 (dated December 7, 2006).

[213] Public Interest Statement at 12.

[214] Clearwire Proxy Statement at 13.

[215] We need not address further AT&T's assertion that Eagle River's holdings of MSS spectrum should be attributed because that can be used to provide ATC-based services. *See* AT&T Reply at 4. As discussed above, we do not include MSS spectrum when evaluating spectrum aggregation.

C. Market-by-Market Analysis

1. Analytical Standard

79. In this section, we examine the 43 CMAs identified by the Commission's initial spectrum aggregation screen, consistent with the approach the Commission has applied in previous wireless transaction orders.[216] In undertaking this market-by-market analysis, we consider variables that the general analyses in these orders have shown are important for evaluating competitive harms associated with spectrum aggregation.[217] These include: the total number of rival service providers; the number of rival firms that can offer competitive nationwide service plans; the coverage of the firms' respective networks; the amount of spectrum suitable for the provision of mobile telephony services controlled by the combined entity; and the spectrum holdings of each of the rival service providers. In reaching determinations, we balance these factors on a market-specific basis, and consider the totality of the circumstances in each market.

80. Thus, for example, if our count of the number of rival service providers and our scrutiny of their spectrum holdings and network coverage indicates that the response of rival service providers will likely be sufficient to limit the ability and incentive of the combined entity to behave in an anti-competitive manner, we would find that the transaction is not harmful to competition in a specific market even in the presence of a relatively high post-transaction market share of the combined entity.[218] We also scrutinize, and base our determinations on, the uniformity of competitive conditions in local markets. Thus, in some instances, we may find that the transaction is not harmful to competition in a particular market if the potential harm from the transaction is confined to a small enclave within the market, and this harm is likely to be ameliorated by the more favorable competitive conditions in most of the market.[219]

2. Results of Analysis

81. Our market-by-market analysis finds that there would not be a significant likelihood of harm for the relevant product markets resulting from the proposed transaction from the aggregation of spectrum by Sprint Nextel in any of the 43 markets caught by the initial screen. Our market analysis looks at spectrum holdings of not only Sprint Nextel but also the other licensees in the market and considers multiple factors. Specifically, consideration is given to the relationship of Sprint Nextel's and other market service providers' NRUF-based market share, network coverage, and the amount of licensed spectrum. Also, the analysis considers if there is additional licensed spectrum that is not currently being

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[216] *See, e.g.*, *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 70; *AT&T-Dobson Order*, 22 FCC Rcd at 20322 ¶ 51; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555, 11574-75 ¶ 63, App.; *Sprint-Nextel Order*, 20 FCC Rcd at 14046-14053 App. C; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13120-36 App. C, App. D; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21649 App. D.

[217] *See, e.g.*, *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 70; *AT&T-Dobson Order*, 22 FCC Rcd at 20322 ¶ 51; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555 ¶ 63; *Sprint-Nextel Order*, 20 FCC Rcd at 13995-14009 ¶¶ 68-116; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13075-87 ¶¶ 54-93; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570-86 ¶¶ 115-164.

[218] *See, e.g.*, *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 71; *AT&T-Dobson Order*, 22 FCC Rcd at 20322-23 ¶ 52; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555 ¶ 64; *Sprint-Nextel Order*, 20 FCC Rcd at 14010 ¶ 118; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13096 ¶ 118; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21595 ¶ 190.

[219] *See, e.g.*, *Verizon Wireless-RCC Order*, FCC 08-181, at ¶ 71; *AT&T-Dobson Order*, 22 FCC Rcd at 20322-3 ¶ 52; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11555 ¶ 64; *Sprint-Nextel Order*, 20 FCC Rcd at 14010 ¶ 118; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13095-96 ¶ 117; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21595 ¶ 190.

used for the provision of mobile telephony/broadband services that can be acquired by the other service providers in the market or by a new entrant. As the Commission determined in its previous wireless transaction orders, this multi-factor, market-specific analysis, which employs a combination of data sources, provides a reliable basis for making our determinations herein.

82. Specifically, with respect to a combined market for mobile telephony/broadband services, upon evaluation of the data, we find that there would be a sufficient number of competitors present post-transaction with thoroughly built-out networks, adequate bandwidth, and the ability to offer competitive nationwide services which would make competitive harm highly unlikely. In each of these markets, there is not a reduction in the number of competitors with sufficient network coverage[220] or market share[221] because Clearwire is an emerging service provider in a combined market for mobile/telephony broadband services. Generally in all of these markets, there are at least two, and as many as four, providers other than Sprint Nextel that currently have sufficient network coverage or market share as well as adequate capacity throughout the CMA to compete in the provision of mobile telephony/broadband services. Also, in each market several additional licensees currently hold sufficient spectrum that would enable either new entry or allow a current service provider that is capacity constrained, to acquire additional spectrum in the secondary market. In all but one of these markets Sprint Nextel would be attributed with no more than 34 percent of the available spectrum suitable for mobile/telephony broadband services. In these 50 markets, there is at least 40 megahertz and up to 90 megahertz of spectrum that is not being used by a service provider with either market share or network coverage,[222] and therefore could be acquired by a current service provider in the secondary market or by a new entrant. Our analysis indicates that, in the majority of these markets, Sprint Nextel's current market share is generally less than 20 percent, thus indicating it is not the dominant provider in the market.

83. The market in which Sprint Nextel would be attributed with more than 34 percent of the available spectrum suitable for mobile telephony/broadband services is CMA050 Honolulu, HI where they would be attributed with approximately 37 percent of the cellular, PCS, SMR and BRS spectrum. In this CMA, there are five wireless service providers, including Sprint Nextel with sufficient market share[223] and population coverage, although none of these providers cover 50 percent or more of the land area of the CMA. The four other service providers each hold at least 30 megahertz of spectrum, and there would be at least 24 megahertz of spectrum that would be available to either a current service provider or a new entrant on the secondary market.[224] Therefore, it is unlikely that Sprint Nextel would be able to behave in an anticompetitive manner in this CMA.

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[220] American Roamer provides data on network deployment by service provider. Combining American Roamer data with Census Bureau data provides the percent of land area and population covered within a CMA. The Commission has considered coverage of 70 percent of the population and 50 percent of the land area to be sufficient coverage. *See* Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-153, *Memorandum Opinion and Order*, 22 FCC Rcd 20295, 20324 n.170 (2007).

[221] *See, e.g.*, *Verizon Wireless-RCC Order*, FCC 08-181, at Appendix B (stating standard to identify service providers with sufficient market share to be counted as actual competitors in the market); *AT&T-Dobson Order*, 22 FCC Rcd at 20342 Appendix A (same).

[222] In each of these 43 CMAs, AWS-1 spectrum has not been transitioned and is therefore not included in the initial screen or calculations of spectrum available in the market.

[223] *Id.*

[224] AWS-1 is not included in the initial screen because there are transmitters/receivers with relocation times of 33 months. However, when the relocation is complete there will be an additional 20 MHz of spectrum available that is not licensed to a firm currently providing mobile telephony/broadband service in this CMA.

84. In addition, we believe that the nationwide mobile WiMAX network that New Clearwire plans to deploy in the 2.5 GHz band may serve as an alternative service platform for the provision of last mile fixed broadband services or mobile broadband services, or both, to residential and business customers. Consequently, regardless of whether the broadband services provided by the combined New Clearwire entity over its planned nationwide WiMAX network ultimately prove to be fixed, mobile, or both, the proposed Sprint Nextel-Clearwire transaction has the potential to promote competition by facilitating the emergence of a new market entrant.

VI. OTHER ISSUES

A. Roaming

1. Background

85. RCA and SouthernLINC raise concerns about the potential for the transaction to have an adverse impact on roaming arrangements and request that the Commission prevent such adverse outcomes by imposing certain conditions on the transaction.

86. Roaming occurs when the subscriber of one CMRS provider travels beyond the service area of that provider and utilizes the facilities of another CMRS provider to place an outgoing call, to receive an incoming call, or to continue an in-progress call.[225] Subscribers can roam manually by providing a credit card number to the host carrier, while automatic roaming allows mobile telephone subscribers to place calls while roaming as they do in their home coverage area, by simply entering a phone number and pressing "send." The provision of roaming is subject to the requirements of sections 201, 202, and 208 of the Communications Act.[226] In August 2007, the Commission determined that when "a reasonable request is made by a technologically compatible [commercial mobile radio service] carrier, a host [commercial mobile radio service] carrier must provide automatic roaming to the requesting carrier outside of the requesting carrier's home market . . ."[227] on reasonable and non-discriminatory terms and conditions.[228] The Commission also said that if a carrier makes a reasonable request for automatic roaming, "then the would-be host carrier cannot refuse to negotiate an automatic roaming agreement with the requesting carrier."[229] At the same time, the Commission maintained its existing manual roaming requirement, which imposes on CMRS providers the obligation to permit customers of other service providers to roam manually on their networks.[230]

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[225] *See AT&T Dobson Order*, 22 FCC Rcd at 20324 ¶ 59; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11561-62 ¶ 98; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13090 ¶ 101; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21586 ¶ 166; *see also* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Service, WT Docket No. 05-265, 00-193, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) ("*Roaming Notice*").

[226] *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15818 ¶ 1 (2007) ("*Roaming Report and Order*").

[227] *See Id.* at 15818 ¶ 2; *see also id.* at 15831 ¶ 33.

[228] *See Id.* at 15826 ¶ 23.

[229] *See Id.* at 15828 ¶ 28.

[230] 47 C.F.R. § 20.12(c) provides:

(continued....)

87. RCA notes that in light of the multiple mergers pending before the Commission, RCA believes it is necessary for the Commission to promote carrier-to-carrier network interoperability by means of a condition to its consent to the applications or to deny the applications. RCA states that "automatic roaming alone does not do enough to provide consumers with continuous service as they travel between wireless carriers' service areas"[231] and therefore, interoperability should also be required so that calls in progress are handed off from one network to the other seamlessly and ensure that data is not lost or delayed when a consumer leaves a license area and wireless broadband services are not interrupted.[232]

88. SouthernLINC is interested in the potential service described by Applicants.[233] As a small regional carrier in an environment where there is continuing consolidation of carriers SouthernLINC would like greater clarity regarding the actual extent of Sprint Nextel and Clearwire's commitments before the Commission approves the transaction. [234] SouthernLINC points out that it took multiple years of negotiation before Sprint Nextel agreed to provide automatic roaming services and thus, questions the Applicants assertion that this merger would further competition.[235] SouthernLINC would like the Commission to put mandatory data roaming obligations on New Clearwire to redress the market concentration in the wireless sector.[236]

89. In response to SouthernLINC, Sprint Nextel and Clearwire state that New Clearwire will provide wholesale access to its network "to other entities that are willing to negotiate commercially reasonable terms and conditions for this access."[237] Sprint Nextel and Clearwire accuse RCA of not understanding the fact that any WiMAX-compliant device that does not harm the network may operate on New Clearwire's proposed network.[238] They note that the Commission is considering the issue of wireless broadband roaming in a separate proceeding.[239] Applicants argue that it would be inappropriate to impose special requirements on a company to a new wireless broadband competitor that would not apply to existing operators.[240] RCA responds that it is "easily foreseeable" that Sprint Nextel could offer a mobile handset that offered both CMRS and WiMAX service.[241] RCA suggests that, at a minimum, the Commission note the pending rulemaking proceeding and state that Sprint Nextel would be required to

(Continued from previous page)

> Each carrier subject to this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, including roamers, while such subscribers are located within any portion of the licensee's licensed service area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations.

[231] *See* RCA Petition to Deny at 7.

[232] *See Id.* at 7-8.

[233] *See* SouthernLINC Comments at 2-3.

[234] *See Id.* at 3-4.

[235] *See Id.* at 4-5.

[236] *See Id.* at 5-6.

[237] *See* Sprint Clearwire Joint Opposition at 15.

[238] *See Id.* at 16.

[239] *See Id.* at 17.

[240] *See Id.*

[241] *See* RCA Reply at 3.

comply with those rules regardless of whether Sprint Nextel uses its own spectrum or New Clearwire spectrum.[242]

2. Discussion

90. In response to SouthernLINC, Sprint Nextel and Clearwire commit that New Clearwire will provide wholesale access to its network "to other entities that are willing to negotiate commercially reasonable terms and conditions for this access." SouthernLINC does not respond to that offer. We therefore see no need to impose additional commitments at this time.

91. With respect to RCA's requested conditions, the Commission has previously found that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices.[243] We conclude that the transaction will not alter competitive market conditions in such a way as to harm consumers of mobile telephony/broadband services, including roaming services. Accordingly, we decline to condition our approval of the transaction on any special requirements relating to roaming rates or arrangements.

92. Furthermore, we note that we are considering, in the context of the Roaming Further Notice, whether to extend the automatic roaming obligation to non-interconnected services or features, including services that have been classified as information services, such as wireless broadband Internet access service, or other non-CMRS services offered by CMRS carriers. Any decisions reached or rules adopted in either of those proceedings will apply with equal force to New Clearwire. Accordingly, we decline to condition our approval of the transaction on any special requirements relating to data roaming as those issues will be fully addressed in the proceedings pending before the Commission. Given that the roaming-related concerns raised in this transaction fall within the scope of the Commission's pending roaming proceedings, we find that addressing those concerns in the context of the larger proceedings would be more appropriate than requiring roaming-related conditions in this transaction.

B. Exclusive Handset Agreements

1. Background

93. RCA argues that exclusive handset agreements with supplier must be prohibited, stating that "the proposed Sprint Nextel-Clearwire transaction and the contemporaneous Alltel-Verizon merger proposal bring to the forefront an urgent need for the Commission to act promptly so that millions of consumers are not denied the benefits of latest innovations in handset technology."[244] RCA concludes that for many consumers, the end result of such exclusive arrangements "is that customers are being channeled to purchase wireless service from a carrier that has monopolistic control over the desired handset, and therefore those consumers are paying higher prices for the services and accessories available with the desired handset, as well as, having to agree to unusual (and undesirable) terms and conditions of service, and having to pay a premium price for the handset because the market is void of any competition for the particular handset."[245] RCA argues further that harms will result from exclusive handset agreements that will only get worse if the proposed transaction is permitted to proceed "without a solution

[242] *See Id.* at 4.

[243] *See Verizon-RCC Order*, 23 FCC Rcd at ¶ 88; Cingular-*AT&T Wireless Order*, 19 FCC Rcd at 21591 ¶ 180; *Roaming Report and Order*, 22 FCC Rcd at 15822 ¶ 13; *see also ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11563-64 ¶ 104.

[244] *See* RCA Petition to Deny at 10-11.

[245] *See Id.* at 11.

that allows millions of rural Americans to obtain the latest models of handsets that New Clearwire and Sprint Nextel will offer."[246]

94. Sprint Nextel and Clearwire contend that RCA's request should be addressed in the context of RCA's pending petition for rulemaking asking for rules banning exclusive handsets instead of in the context of this transaction.[247] They state that any factual findings by the Commission will not occur soon because RCA's petition for rulemaking asks that the Commission first investigate exclusive handset arrangements.[248] They also argue that New Clearwire's use of the open, non-proprietary WiMAX standard will promote a more open equipment market that would eliminate concerns about exclusive handset arrangements.[249] Applicants object to "singling out New Clearwire for government regulation."[250] RCA responds that if the New Clearwire system is as described, Applicants "should not object to a condition that allows the public to purchase all compatible handsets from sources other than Sprint Nextel and its affiliates."[251]

2. Discussion

95. RCA's claim that exclusive handset agreements harm consumers is improperly placed in an opposition to approval of this transaction. RCA proposed conditions prohibiting exclusive handset contracts are not narrowly tailored to prevent a transaction-specific harm and are more appropriate for a rulemaking proceeding when all interested parties have an opportunity to file comments. Additionally, RCA makes no attempt to show that the creation of New Clearwire will increase the proliferation of exclusive handset agreements or harm consumers in the ways RCA's proposal seeks to address. Indeed, Applicants allege that New Clearwire use of an open standard will lead to a greater diversity of equipment and will alleviate some of the harms caused by exclusive handset arrangements. While we do not adopt that argument, we conclude that RCA has failed to demonstrate any nexus between the instant transaction and the harms it seeks to address. We therefore decline to impose the conditions requested by RCA. Our action herein is without prejudice to action on RCA's pending petition for rulemaking on this issue, for which the Wireless Telecommunications Bureau has issued a Public Notice establishing a pleading cycle.[252]

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[246] *See Id.* at 13.

[247] *See* Sprint Clearwire Joint Opposition at 18, *citing* Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, Rural Cellular Association (filed May 20, 2008).

[248] *See* Sprint Clearwire Joint Opposition at 18.

[249] *See Id.* at 18-19.

[250] *See Id* at 19.

[251] *See* RCA Reply at 4.

[252] In light of our conclusion that the issues raised by RCA are not germane to this transaction, we need not resolve the dispute between HITN and RCA concerning whether RCA has standing to file a petition to deny. *Compare* HITN Opposition at 12 and RCA Reply at 1-3. *See also see* Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM No. 11497, *Public Notice*, DA 08-2278 (WTB rel. Oct. 10, 2008).

C. Network Openness

1. Background

96. Sprint Nextel and Clearwire also describe New Clearwire's commitment to provide for an open network. Specifically:

> New Clearwire will permit consumers to use any lawful device that they want so long as it is compatible with and not harmful to the WiMAX network. New Clearwire also will permit consumers to download and use any software applications, content, or services they desire, subject to reasonable network management practices and law enforcement and public safety considerations.[253]

97. According to Applicants, New Clearwire's open network will provide incentives for manufacturers to embed WiMAX chips in all types of consumer electronic devices, which will generate competition among software applications providers, content providers, device manufacturers, and resellers.[254] They claim, "The resulting innovation and improved broadband service will benefit consumers and will help the U.S. gain a global leadership position in wireless broadband technology and deployment."[255]

98. Vonage and PISC give only qualified support to the proposed transaction.[256] Vonage and PISC both generally support Applicants' proposal to open up the New Clearwire network.[257] Vonage expresses concern, however, that Clearwire customers had problems using Vonage's service.[258] Vonage alleges, based on a trade press article, that a Clearwire representative told a customer that Vonage could not be used over Clearwire.[259] Vonage also notes a report from a Sprint Nextel official that "New Clearwire will charge third party service providers for access to a "service quality API" that lets them set up their service to get priority over others," and it seeks clarification as to how that feature will work.[260] PISC similarly argues that too many details about Sprint Nextel's and Clearwire's commitments to network neutrality, non-exclusive wholesale access and an open device network remain unclear, thereby making the record too incomplete for the Commission to make a determination as to the strength of such commitments.[261] Vonage argues that the Commission should condition any grant of the Applications to ensure that the open network proposals are made enforceable through adoption as a merger commitment, a suggestion that is also supported by *ex parte* filers Bella Mia and PDQLink.[262] Specifically, Vonage seeks to have the Commission require New Clearwire to comply with the Commission's *Internet Policy Statement*, and offer its new WiMAX service on an unbundled basis, not tied to New Clearwire voice

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[253] *See Id.* at 26.

[254] *See Id.* at 27-28.

[255] *See Id.* at 27.

[256] *See* PISC Comments at 2; Vonage Comments at 3-4.

[257] *See* PISC Comments at 6; Vonage Comments at 3-4.

[258] *See* Vonage Comments at 4.

[259] *See Id.*

[260] *See Id.*

[261] *See* PISC Comments at 2-3.

[262] *See* Vonage Comments at 5; *also see* Bella Mia *Ex Parte* Request to Deny at 11 and PDQLink *Ex Parte* Request to Deny at 12.

service."[263] PISC suggests that the Commission require as a mandatory condition, that any changes in the underlying contracts with entities providing financial backing that would substantially change the open network commitments must be submitted to the Commission.[264] PISC further advocates that such contract changes be placed on notice and comment as if they were contained in an application for major modification under Section 308, and allowed only if approval of the change would serve the public interest.[265]

99. Sprint Nextel and Clearwire respond that Vonage's proposed conditions are unnecessary because New Clearwire's WiMAX network will be inherently open.[266] They argue that Vonage has failed to show any connection between the relief they seek and the conditions Vonage wants imposed.[267] Applicants argue that the Commission has never imposed compliance with the *Internet Policy Statement* as a condition of approving a transaction except where the applicants made a voluntary commitment of compliance.[268] Clearwire represents that it provides its broadband internet access on a stand-alone basis and asserts that New Clearwire customers "will have unimpaired access over New Clearwire's network to any service provider, application or WiMAX–compatible device they desire."[269] Sprint Nextel and Clearwire have not responded to PISC's late-filed ex parte filing.

2. Discussion

100. In response to SouthernLINC's arguments, Sprint Nextel and Clearwire commit that New Clearwire will provide wholesale access to its network "to other entities that are willing to negotiate commercially reasonable terms and conditions for this access." SouthernLINC did not respond. In these circumstances, we see no need for further Commission action at this time.

101. We decline to impose the conditions requested by Vonage and PISC and supported by Bella Mia and PDQLink. In those cases where compliance with the *Internet Policy Statement* was made a condition for approval of transaction, the transactions involved Incumbent Local Exchange Carriers with substantial market power who had voluntarily agreed to the condition in question.[270] In contrast, the Commission has declined to impose such a condition when the transaction is not likely to increase the incentives to engage in conduct harmful to consumers and there is no history of violations.[271] In this case, Vonage, PISC, Bella Mia and PDQLink have failed to show how the transaction could create economic incentives for New Clearwire to harm consumers. Furthermore, we believe that PISC's proposal to require Commission review of all contracts regarding financial backing that would potentially affect network openness would be burdensome on the parties and on New Clearwire. PISC also fails to cite any

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[263] *See Id.* at 5, citing *Internet Policy Statement.*

[264] *See* PISC Comments at 6.

[265] *See* PISC Comments at 6.

[266] *See* Sprint Clearwire Joint Opposition at 11.

[267] *See Id.*

[268] *See Id.* at 12.

[269] *See Id.* at 13.

[270] *See Verizon-MCI Order*, 20 FCC Rcd at 18509 ¶ 143; *SBC-AT&T Order*, 20 FCC Rcd at 18368 ¶ 144.

[271] *See* Adelphia Communications Corporation, *et al.*, MB Docket No. 05-192, *Memorandum Opinion and Order*, 21 FCC Rcd 8203, 8295-8299 ¶¶ 212-223 (2006) (Commission declines to impose condition requiring compliance with *Internet Policy Statement* where there was no history of violations by the parties and there was no evidence that the transaction "would create economic incentives that are likely to lead to violations.")

precedent for such a potentially sweeping review requirement. Furthermore, as network openness is now required as a condition of approval of this transaction, New Clearwire will be prevented from entering into any financial contracts that would diminish the openness of its network. We therefore decline to adopt a condition that requires Commission review of all contracts between New Clearwire and entities providing financial backing.

D. Defective and Incomplete Applications

1. Background

102. AT&T argues that the Applications are defective because they have omitted any information relevant to the traditional public interest analysis.[272]

2. Discussion

103. We reject AT&T's argument that the applications are defective. An application is defective if it is "incomplete with respect to required answers to questions, informational showings, or other matters of a formal character . . ."[273] While AT&T argues that the application is defective because it did not contain the type of analysis AT&T believes is appropriate, the important consideration under the rule is whether the Applicants provided the information needed for the Commission to conduct an analysis. Based on that standard, the application is not defective under Section 1.934(d)(1) of the Commission's Rules because the Applicants provided all necessary and requested information for us to conduct our analysis. We therefore decline to dismiss the Applications as defective.[274]

E. Request for Procedural Relief

1. Background

104. Sprint Nextel and Clearwire ask that the Commission grant approval of the transfer applications that may include any facilities or lease arrangements that may have been inadvertently omitted.[275] In addition, Applicants request a blanket exemption from sections 1.927(h) and 1.933(b) of the

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[272] *See* AT&T Petition to Deny at 2.

[273] *See* 47 C.F.R. § 1.934(d)(1).

[274] Two other arguments made by AT&T warrant brief discussion. First, AT&T and Applicants debate whether incumbent Local Exchange carriers are dominant in the provision of special access services and the availability of alternatives to such services. *See* AT&T Petition at 14 n.37; Sprint Clearwire Joint Opposition at 41-42; AT&T Reply at 11. We view this discussion as having no bearing on the question of whether this transaction should be approved, and we decline to consider those arguments further. Second, in its reply, AT&T alleges that a pattern of inconsistent statements by Applicants raises questions about their candor. *See* AT&T Reply at 6-12. We strike these allegations as improperly made in a reply pleading. Under 47 C.F.R. § 1.45(c), replies shall be limited to matters raised in the oppositions, and new allegations may not be made in reply pleadings. *See* Paging Systems, Inc., *Order*, 21 FCC Rcd 7225, 7229 ¶ 12 (WTB PS&PWD 2006). In any event, we have reviewed AT&T's allegations, and AT&T has failed to provide any evidence of intent to deceive the Commission that is the *sine qua non* of misrepresentation or lack of candor. *See* Fox River Broadcasting, Inc., *Memorandum Opinion and Order*, 93 FCC 2d 127, 129 (1983).

[275] See *Id.* at 63.

Commission's rules,[276] which require that amendments reporting a change in ownership be treated as major amendments that require a second public notice for still-pending applications.[277]

2. Discussion

105. The request for relief where the transfer applications may include facilities that have been inadvertently omitted is granted based on previous Commission precedent.[278] Likewise, the exemption request from sections 1.927(h) and 1.933(b) of the Commission rules is also consistent with Commission precedent that finds that the ownership changes with respect to the pending applications are part of a larger transaction and are taken for legitimate business purposes.[279]

F. Universal Service Fund Receipts

1. Background

106. The Federal-State Joint Board on Universal Service ("Joint Board") and the Commission have each recognized and addressed the need to control the explosive growth in high-cost universal service support disbursements to competitive eligible telecommunications carriers ("ETCs").[280] Based on the recommendations of the Joint Board, on May 1, 2008, the Commission adopted an interim, emergency cap on the amount of high-cost support that competitive ETCs may receive.[281] Specifically, as of August 1, 2008, total annual high-cost competitive ETC support for each state is capped at the level of support that competitive ETCs in that state were eligible to receive during March 2008 on an annualized basis.[282] The Commission also adopted two limited exceptions from the specific application of the interim cap.[283] First, a competitive ETC will not be subject to the interim cap to the extent it files cost data demonstrating that its costs meet the support threshold in the same manner as the incumbent local exchange carrier.[284] Second, the Commission adopted a limited exception to competitive ETCs serving tribal lands or Alaska

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[276] 47 C.F.R. §§ 1.927(h), 1.933(b).

[277] *See Id.* at 64.

[278] *See, e.g., Cingular Order* ¶ 275; *MCI-WorldCom Order* ¶ 226; Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, *Memorandum Opinion and Order*, 12 FCC Rcd 19985 ¶ 247 (1997); Applications of Craig O. McCaw and AT&T for Consent to Transfer of Control of McCaw Cellular Communications, Inc. and Its Subsidiaries, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, ¶ 137 n.300 (1994) (*McCaw-AT&T Order*).

[279] *See, e.g.*, Applications of PacifiCorp Holdings, Inc., Transferor, and Century Telephone Enterprises, Inc., Transferee, For Consent to Transfer Control of PacificTelecom, Inc., a Subsidiary of PacifiCorp Holdings, Inc., *Memorandum Opinion and Order*, 13 FCC Rcd 8891, ¶ 45 (1997); *McCaw-AT&T Order* ¶ 137 n.300.

[280] *See* Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Recommended Decision*, 22 FCC Rcd 8998, 8998 ¶ 1 (Fed.-State Jt. Bd. 2007) ; *see also ALLTEL-Atlantis Order*, 22 FCC Rcd at 19520 ¶ 8.

[281] High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Order*, 23 FCC Rcd 8834 (2008) ("*USF Interim Cap Order*").

[282] A summary was published in the Federal Register on July 2, 2008, establishing an effective date of August 1, 2008. *See* 73 Fed. Reg. 37882 (July 2, 2008).

[283] *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1.

[284] *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1.

Native regions.[285] The interim cap will remain in place only until the Commission adopts comprehensive high-cost universal service reform, which is currently being considered in a pending rulemaking.[286]

107. On November 3, 2008, Sprint Nextel filed a letter offering a voluntary commitment whereby, at the end of a five-year transition, it would not seek USF support for its wireless service unless such request is supported by an actual cost analysis or by whatever mechanism the Commission may subsequently adopt.[287] Specifically, Sprint Nextel commits that effective 30 days after the date of consummation of the transaction, but no later than December 31, 2008, its total federal high-cost support would be reduced by 20%, and by an additional 20% per year for the subsequent four years.[288] Sprint Nextel states that if the Commission adopts a different transition mechanism or a successor mechanism to the current equal support rule under which support is currently capped in a rulemaking of general applicability, then that rule of general applicability would apply instead.[289]

2. Discussion

108. The issue concerns the growth of the high-cost fund. Based on our view that it would be beneficial to control the growth of the high-cost fund, we condition our approval of the transaction on Sprint Nextel's compliance with its voluntary commitment to phase out its pursuit of universal service high cost support over the next five years, unless specifically supported by an actual cost analysis. We find that such condition will further ensure that consummation of the proposed merger serves the public interest, convenience and necessity. We note that the Commission is currently considering this issue, along with others, in a rulemaking on a comprehensive high-cost universal service reform.[290]

G. E-911

1. Background

109. On November 20, 2007, the Commission released a Report and Order ("*Location Accuracy Order*") requiring wireless licensees subject to section 20.18(h) of the Commission's rules,[291] which

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[285] *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1.

[286] *USF Interim Cap Order*, 23 FCC Rcd at 8834 ¶ 1. The Commission is required by statute to act within one year after receiving a recommendation from the Joint Board. 47 U.S.C. § 254(a)(2). *See also* High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Notice of Proposed Rule Making*, 23 FCC Rcd 1531 (2008) ("*Joint Board Recommended Decision NPRM*"); High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Notice of Proposed Rule Making*, 23 FCC Rcd 1467 (2008) ("*Identical Support NPRM*"); High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, WC Docket No. 05-337, CC Docket No. 96-45, *Notice of Proposed Rule Making*, 23 FCC Rcd 1495 (2008) ("*Reverse Auctions NPRM*") (collectively "*USF Reform NPRMs*").

[287] *Ex Parte* Letter from Lawrence M. Krevor, Vice President, Spectrum, Sprint Nextel Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 3, 2008) at 1. ("Sprint Nextel USF *Ex Parte* Letter").

[288] *Id.*

[289] *Id.*

[290] *See USF Reform NPRM*, 23 FCC Rcd at 1531 ¶ 1. We also acknowledge that currently there is an interim cap imposed on ETC support for all USF recipients, including Verizon Wireless and ALLTEL, which superseded the interim cap adopted in the *ALLTEL-Atlantis Order*. *USF Interim Cap Order*, 23 FCC Rcd at 8837 n.21 (2008).

[291] 47 C.F.R. § 20.18(h).

specifies the standards for wireless Enhanced 911 (E911) Phase II location accuracy and reliability, to satisfy these standards at a geographical level defined by the coverage area of a Public Safety Answering Point ("PSAP").[292] On March 25, 2008, the United States Court of Appeals for the District of Columbia Circuit (Court) stayed the *Location Accuracy Order*.[293]

110. On July 14, 2008, the Association of Public-Safety Communications Officials – International ("APCO") and the National Emergency Number Association ("NENA") filed an *ex parte* letter addressing handset-based and network-based location accuracy criteria, stating that they "are now willing to accept compliance measurements at the county level" rather than at the PSAP level, and that "[p]ublic safety and wireless carriers are in current discussions on a number of other issues associated with E-911."[294] On July 31, 2008, the Commission filed with the Court a Motion for Voluntary Remand and Vacatur, which requested remand based on the proposals contained in the July 14, 2008 *Ex Parte* Letter and "[i]n light of the public safety community's support for revised rules."[295] Following this filing with the Court, NENA, APCO, and Verizon Wireless submitted a written *ex parte* letter with the Commission with proposed new wireless E911 rules.[296] Taken together, these proposals reflect agreement among those parties for new E911 accuracy requirements for both handset-based and network-based technologies, in order to achieve E911 accuracy compliance at the county-level.

111. On October 29, 2008, Sprint Nextel filed a letter in this proceeding affirming its commitment to providing E911 with its current two-way interconnected CMRS voice offerings, as well as future interconnected two-way VoIP service it may offer over the New Clearwire network.[297] It made a voluntary commitment, as a condition for approval of this transaction, to meet the standards set forth in the August 20, 2008 E911 *Ex Parte* Letter.[298] Specifically, Sprint Nextel voluntarily agreed as follows:

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[292] Wireless E911 Location Accuracy Requirements, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling, 911 Requirements for IP-Enabled Service Providers, PS Docket No. 07-114, CC Docket No. 94-102, WC Docket No. 05-196, *Report and Order*, 22 FCC Rcd 20105 (2007) (*Location Accuracy Order*).

[293] *Rural Cellular Association and T-Mobile USA, Inc. v. Federal Communications Commission and the United States of America*, No. 08-1069, slip op. at 1 (DC Cir. Mar. 25, 2008) (per curiam).

[294] *Ex Parte* Letter from Willis Carter, President, APCO, and Ronald Bonneau, President, NENA, to Derek Poarch, Chief, Public Safety and Homeland Security Bureau, FCC, PS Docket No. 07-114, (July 14, 2008), at 1-2 ("July 14, 2008 E911 *Ex Parte* Letter").

[295] Motion of Federal Communications Commission for Voluntary Remand and Vacatur, Rural Cellular Association and T-Mobile et al v. Federal Communications Commission and United States of America, No. 08-1069 (D.C. Cir. July 31, 2008). On September 17, 2008, the Court granted the Commission's request. Order Granting Mot. Rem. (Sept. 17, 2008).

[296] *Ex Parte* Letter from Brian Fontes, CEO, NENA, Robert M. Gurss, Director, Legal and Government Affairs, APCO, and John T. Scott, II, VP and Deputy General Counsel, Verizon Wireless to The Honorable Kevin Martin, Chairman, Federal Communications Commission, PS Docket No. 07-114, (Aug. 20, 2008), at 1 ("August 20, 2008 E911 *Ex Parte* Letter"). In addition, the parties pledged to convene, "within 180 days of the Commission's order [adopting new location accuracy standards], an industry group to evaluate methodologies for assessing wireless E9-1-1 location accuracy for calls originating indoors and report back to the Commission within one year." *Id.*

[297] *Ex Parte* Letter from Lawrence M. Krevor, Vice President, Spectrum, Sprint Nextel Corporation to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 29, 2008) at 1. ("Sprint Nextel E911 *Ex Parte* Letter").

[298] *Id.*

- Two years after consummation of the New Clearwire transaction, on a county-by-county basis, 67% of Phase II calls must be accurate to within 50 meters in all counties; 80% of Phase II calls must be accurate to within 150 meters in all counties, provided, however, that Sprint Nextel may exclude up to 15% of counties from the 150 meter requirement based upon heavy forestation that limits handset-based technology accuracy in those counties.

- Eight years after consummation of the New Clearwire transaction, on a county-by-county basis, 67% for Phase II calls must be accurate to within 50 meters in all counties; 90% of Phase II calls must be accurate to within 150 meters in all counties, provided, however, that Sprint Nextel may exclude up to 15% of counties from the 150 meter requirement based upon heavy forestation that limits handset-based technology accuracy in those counties."[299]

2. Discussion

112. In light of the important public safety benefits to be derived from improved E911 location accuracy requirements, and Sprint Nextel's voluntary commitments in this proceeding, we condition our approval of this transaction on Sprint Nextel's compliance with the E911 location accuracy proposal set forth in the Sprint Nextel E911 *Ex Parte* Letter.[300] We find that such condition will further ensure that consummation of the proposed merger serves the public interest, convenience and necessity.

VII. PUBLIC INTEREST BENEFITS

A. Background

113. In addition to assessing the potential competitive harms of the proposed Sprint Nextel-Clearwire transaction, we also consider whether the respective combination of these companies' wireless operations is likely to generate verifiable, merger-specific public interest benefits.[301] In doing so, we ask whether the resulting combined entity would be able, and would be likely, to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that would not be pursued but for the combination.[302]

114. As discussed below, we conclude that the proposed transaction will result in major merger-specific public interest benefits. Because we have concluded that the merger will not result in any competitive harm in a market, we easily conclude that approval of the transaction would be in the public interest.

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[299] *Id.* at 1-2.

[300] *Id.*

[301] *See, e.g., Verizon-RCC Order*, 23 FCC Rcd at 12504 ¶ 91; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760 ¶ 200; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 105; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

[302] *See, e.g., Verizon-RCC Order*, 23 FCC Rcd at 12504 ¶ 91; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760 ¶ 200; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 105; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

115. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."[303] Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms.[304]

116. The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction- or merger-specific. This means that the claimed benefit "must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects."[305] Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude.[306] In addition, as the Commission has noted, "the magnitude of benefits must be calculated net of the cost of achieving them."[307] Furthermore, as the Commission has previously explained, "benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than

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[303] *E.g., Verizon-RCC Order*, 23 FCC Rcd at 12504-12505 ¶ 93; *AT&T-Dobson Order*, 22 FCC Rcd at 20330 ¶ 75; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760 ¶ 201; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 107; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204; *see also DOJ/FTC Merger Guidelines* § 4.

[304] *See, e.g., Verizon-RCC Order*, 23 FCC Rcd at 12504-12505 ¶ 93; *AT&T-Dobson Order*, 22 FCC Rcd at 20330-31 ¶ 75; *AT&T-BellSouth Order*, 22 FCC Rcd at 5760-61 ¶ 201; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 107; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204.

[305] *See XM-Sirius Order*, 23 FCC Rcd at 12383 ¶ 75; *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599-600 ¶ 205; *accord EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 189; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20063-64 ¶ 158 ("Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger."); Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14825 ¶ 255 ("Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger . . . ."). *Cf. DOJ/FTC Merger Guidelines* § 4.

[306] *See XM-Sirius Order*, 23 FCC Rcd at 12383 ¶ 75; *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11564-65 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

[307] *See XM-Sirius Order*, 23 FCC Rcd at 12383 ¶ 75; *Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

predictions about events that are expected to occur closer to the present."[308] Third, the Commission has stated that it "will more likely find marginal cost reductions to be cognizable than reductions in fixed cost."[309] The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.[310]

117. Finally, the Commission applies a "sliding scale approach" to evaluating benefit claims.[311] Under this sliding scale approach, where potential harms appear "both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand."[312] On the other hand, where potential harms appear less likely and less substantial, as in this case, we will accept a lesser showing to approve the transaction.[313]

118. Applicants cite a series of public interest benefits that they claim will flow from the transaction. They claim that the transaction will provide a new nationwide broadband platform and will lead to deployment of the world's first nationwide WiMAX network.[314] New Clearwire's WiMAX network will allegedly deliver customers speeds of up to 6 Mbps across the country.[315] Applicants claim that they cannot create such a network without this transaction because they lacked the necessary funding and the nationwide footprint.[316] In that regard, New Clearwire will receive $3.2 billion from a series of

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[308] *See Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190).

[309] *See Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20331-32 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205. *See also DOJ/FTC Merger Guidelines* § 4.

[310] *See Verizon-RCC Order*, 23 FCC Rcd at 12505-12506 ¶ 94; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 76; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 202; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206; *see also DOJ/FTC Merger Guidelines* § 4.

[311] *See XM-Sirius Order*, 23 FCC Rcd at 12384 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12506 ¶95; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 77; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671 ¶ 203; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565 ¶ 109; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206.

[312] *See XM-Sirius Order*, 23 FCC Rcd at 12384 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12506 ¶ 95; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 77; *AT&T-BellSouth Order*, 22 FCC Rcd at 5671-72 ¶ 203; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11565-66 ¶ 109; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206. *Cf. DOJ/FTC Merger Guidelines* § 4 ("The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.").

[313] *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12384 ¶ 76; *Verizon-RCC Order*, 23 FCC Rcd at 12506 ¶ 95; *AT&T-Dobson Order*, 22 FCC Rcd at 20332 ¶ 77; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 203; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11566 ¶ 109.

[314] *See* Public Interest Statement at 16-17.

[315] *See Id.* at 17.

[316] *See Id.* at 23.

investors upon closing.[317] Applicants also claim that the transaction will result in various operational efficiencies by allowing the parties to share equipment, transmitter sites, and back office systems, and obtain volume discounts on equipment.[318] They also cite their commitment to an open network.[319]

119. Sprint Nextel and Clearwire also claim that the transaction will allow them to make more intensive use of the 2.5 GHz band. They claim they will exceed the buildout obligations imposed in the *Sprint-Nextel Merger Order* and cover 140 million people by the end of 2010.[320] They contend that the irregular shape of many BRS and EBS licensing areas, together with a requirement that can cause a licensee to reduce power at transmitter sites if the transmitters have line-of-sight to adjacent license areas,[321] can create large "exclusion zones" which it make it difficult or impossible for operators to provide service.[322] Sprint Nextel and Clearwire contend that the transaction will allow them to provide service without having exclusion zones between their operations.[323] They also argue that the transaction will make it easier for them to have enough contiguous spectrum for the 10 and 20 megahertz channels they need to meet consumer demand.[324]

120. Another benefit claimed by Sprint Nextel and Clearwire is New Clearwire's proposal to "permit a number of unaffiliated firms to purchase access to its advanced wireless broadband service on a non-exclusive wholesale basis and resell that service directly to consumers."[325] Several investors in New Clearwire will become mobile virtual network operators (MVNOs) that will compete with New Clearwire and enhance their products and services with wireless broadband mobility.[326] Applicants claim that New

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[317] *See Id.* at 24.

[318] *See Id.* at 24-25.

[319] *See Id.* at 26-28.

[320] *See Id.* at 20. In the *Sprint Nextel Merger Order* the Commission conditioned our grant of the Application on Sprint Nextel's commitment to meet the following two milestones. "First, within four years from the effective date of [the *Sprint/ Nextel Merger Order*], the merged company will offer service in the 2.5 GHz band to a population of no less than 15 million Americans. This deployment will include areas within a minimum of nine of the nation's most populous 100 BTAs and at least one BTA less populous than the nation's 200th most populous BTA. In these ten BTAs, the deployment will cover at least one-third of each BTA's population. Second, within six years from the effective date of [the *Sprint Nextel Merger Order*], the merged company will offer service in the 2.5 GHz band to at least 15 million more Americans in areas within a minimum of nine additional BTAs in the 100 most populous BTAs, and at least one additional BTA less populous than the nation's 200th most populous BTA. In these additional ten BTAs, the deployment will cover at least one-third of each BTA's population. Accordingly, based on the four and six year commitments, within six years of the effective date of this Order applicants will offer service in the 2.5 GHz band to at least 30 million American in at least 20 BTAs, at least two of which are rural communities outside of the nation's top 200 most populous BTAs. The deployment in each of the twenty BTAs will cover at least one-third of each BTA's population." *Sprint Nextel Merger Order*, 20 FCC Rcd 14028-14029 ¶¶ 164-166.

[321] *See* 47 C.F.R. § 27.1221.

[322] See Public Interest Statement at 30-34.

[323] *See Id.* at 33.

[324] *See Id.* at 34.

[325] *See Id.* at 21.

[326] *See Id.*

Clearwire's commitment to allow MVNOs on its network will enhance competition and consumer choice.[327]

121. Finally, Sprint Nextel and Clearwire argue that the transaction will benefit EBS licensees by providing them with a lessee with a stronger financial footing.[328] They also allege that the transaction will make it easier for EBS licensees to provide traditional video services and offer EBS licensees new tools for learning and development.[329]

122. EBS licensees that filed comments in the proceeding largely support the arguments made by Sprint Nextel and Clearwire. They contend that current leases with Sprint Nextel and Clearwire offer EBS licensees the financial freedom to offer more quality programming in local communities.[330] Supporting commenters contend that New Clearwire will accelerate the deployment of the first nationwide mobile WiMAX broadband network creating a unique opportunity to deliver new broadband products and services in the 2.5 GHz band that will enhance the way the EBS community can access the Internet – combining mobility and speed.[331] They also allege that the transaction enables New Clearwire to receive essential funding to build and operate the critical broadband infrastructure needed to deploy the next generation nationwide mobile wireless broadband services that will benefit the community and for which neither entity alone possesses sufficient spectrum and financial resources to deploy alone.[332] According to Northeast Georgia Regional Educational Service and Clarke County School District, New Clearwire will have the capacity, scale and money necessary to unleash the promise of the historically underutilized 2.5 GHz band to the benefit of the educational community, consumers and businesses.[333] They also believe that combining Sprint Nextel and Clearwire's 2.5 GHz spectrum licenses maximizes spectrum buildout capability.[334] Clarendon Foundation and Shekinah Network suggest that the merger would speed arrival of a wireless broadband pipe by advancing the core public interest objectives of the

[327] *See Id.* at 21-22.

[328] *See Id.* at 35-36.

[329] *See Id.* at 36.

[330] *See, e.g.*, Letter from Henry S. Smith, Supervisor, St. Bernard Parish School Board to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from John Primeau, President, North American Catholic Educational Programming Foundation, Inc. to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

[331] *See, e.g.*, Comments of Atlanta Interfaith Broadcasters, Inc. (filed Jul. 24, 2008); Letter from Frank T. Brogan, President, Florida Atlantic University to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

[332] *See, e.g.*, Letter from Mike Wooten, Director of Public Relations and Communications, Clarke County School District to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from Monsignor John P. Caulfield, Pastor, St. Joseph's Church, Diocese of Orlando to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

[333] *See, e.g.*, Letter from Russell W. Cook, Executive Director, Northeast Georgia Regional Educational Service to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from Mike Wooten, Director of Public Relations and Communications, Clarke County School District to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

[334] *See, e.g.*, Letter from Kemp R. Harshman, President, Clarendon Foundation to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008); Letter from Charles McKee, President, Shekinah Network to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).