

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

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

MEMORANDUM OPINION AND ORDER

Adopted: November 4, 2008

Released: November 7, 2008

By the Commission: Chairman Martin and Commissioners Copps, Adelstein and Tate issuing separate statements; Commissioner McDowell approving in part, concurring in part and issuing a statement.

TABLE OF CONTENTS

Table with 2 columns: Heading and Paragraph #. Includes sections I. INTRODUCTION, II. BACKGROUND, III. STANDARD OF REVIEW, IV. QUALIFICATIONS OF APPLICANTS, V. COMPETITIVE ANALYSIS, and VI. OTHER ISSUES.

1. Background.....	85
2. Discussion.....	90
B. Exclusive Handset Agreements.....	93
1. Background.....	93
2. Discussion.....	95
C. Network Openness	96
1. Background.....	96
2. Discussion.....	100
D. Defective and Incomplete Applications	102
1. Background.....	102
2. Discussion.....	103
E. Request for Procedural Relief	104
1. Background.....	104
2. Discussion.....	105
F. Universal Service Fund Receipts	106
1. Background.....	106
2. Discussion.....	108
G. E-911	109
1. Background.....	109
2. Discussion.....	112
VII. PUBLIC INTEREST BENEFITS.....	113
A. Background	113
B. Discussion	123
VIII. CONCLUSION	128
IX. ORDERING CLAUSES	129

APPENDIX – COMMENTING PARTIES AND PETITIONERS

I. INTRODUCTION

1. In this order, we consider applications filed by Sprint Nextel Corporation (“Sprint Nextel”) and Clearwire Corporation (“Clearwire”). In these applications, Sprint Nextel, Clearwire and certain of their subsidiaries (all together “the Applicants”) seek Commission approval of the transfer of control of licenses, authorizations and *de facto* transfer spectrum leases in the 2.5 GHz Band and certain associated bands to New Clearwire Corporation, a new corporation.¹ Under the proposed merger, all of Clearwire’s current Commission-authorized license and lease holding subsidiaries will become directly held by Clearwire MergerSub LLC (“Clearwire MergerSub”) and indirectly held by Clearwire Venture LLC, a direct wholly-owned subsidiary of New Clearwire.² The surviving Clearwire company, New Clearwire, will continue to own the stock of its subsidiaries, and its subsidiaries will continue to hold all of the FCC authorizations and spectrum leases that they held prior to the merger.³ Sprint Nextel will transfer control

¹ See Clearwire Corporation, Form 603, File No. 0003462540 (amended Jun. 24, 2008) (Application). For a complete list of applications involved in this transaction, see Sprint Nextel Corporation and Clearwire Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 08-94, *Public Notice*, 23 FCC Rcd 9988 (WTB rel. June 24, 2008) (“Comment Public Notice”). File No. 0003462540 has been designated the lead application. The other applications contain an exhibit referring to the exhibits attached to File No. 0003462540. Thus, for convenience, when referring to these applications, we only cite to the lead Application.

² See Application, Description of the Transaction and Public Interest Statement (filed Jun. 24, 2008) (Public Interest Statement) at 7-8.

³ See *Id.*

of its wholly-owned subsidiaries that hold all of Sprint Nextel's respective 2.5 GHz related assets to Clearwire Venture LLC, the direct wholly-owned subsidiary of New Clearwire.⁴ Upon this transfer, Sprint Nextel will receive shares of New Clearwire amounting to an approximate 51 percent ownership, resulting in Sprint Nextel obtaining majority ownership of New Clearwire at the closing.⁵

2. These transfer of control applications pertain specifically to the Applicants' licenses and spectrum leases in the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") in the 2.5 GHz Band, point-to-point microwave and Local Multipoint Distribution Service ("LMDS") stations licensed under Part 101 of the Commission's Rules, and Cable Television Relay Service ("CARS") licenses issued under Part 78 of the Commission's Rules. Not included as part of this proposed transaction are Sprint Nextel's various other wireless radio licenses and spectrum leasing arrangements in the 800 MHz, 900 MHz, 1.9 GHz broadband Personal Communications Service ("PCS"), and 2.3 GHz Wireless Radio Service bands.

3. Pursuant to Section 310(d) of the Communications Act of 1934, as amended ("Communications Act"),⁶ we must determine whether the Applicants have demonstrated that the proposed merger of Sprint Nextel and Clearwire, as discussed above, would serve the public interest, convenience, and necessity. Based on the record before us, we find that the Applicants have met that burden. We find that competitive harm is unlikely in any market, primarily because multiple other service providers in these markets would be an effective competitive constraint on the behavior of the merged entity. We also conclude that the transaction will result in major public interest benefits by facilitating the provision of a nationwide WiMAX-based network that will lead to increased competition, greater consumer choice, and new services. We also adopt a series of conditions designed to ensure that the benefits that can result from this transaction are in fact realized.

II. BACKGROUND

A. Description of Applicants

1. Sprint Nextel Corporation

4. Sprint Nextel is a communications holding company incorporated in the State of Kansas with its principal offices in Overland Park, Kansas.⁷ Through its subsidiaries and affiliates, Sprint Nextel is a provider of a comprehensive range of wireless and wireline communications services, including wireless mobile voice and data services, mobile and fixed data/broadband services and high-speed Internet access, Wi-Fi, and IP-based communications services to businesses.⁸ Sprint Nextel holds wireless licenses and spectrum leases in various spectrum bands, including 800/900 MHz Specialized Mobile Radio ("SMR"), 1.9 GHz broadband Personal Communications Service ("PCS"), 2.3 GHz band, and BRS and EBS in the 2.5 GHz band.

⁴ See *Id.*

⁵ See *Id.* at 8.

⁶ 47 U.S.C. § 310(d).

⁷ Sprint Nextel Corporation Form 10-K, at 1, 28 (February 29, 2008) ("Sprint Form 10-K"), available at <http://www.sec.gov/Archives/edgar/data/101830/000119312508043559/d10k.htm> (last visited Sep. 9, 2008). Also see Sprint Nextel Corporation, Form 602 (filed Jun. 5, 2008).

⁸ See Sprint Form 10-K at 5.

5. With regard to its wireless mobile service offerings, Sprint Nextel provides commercial mobile radio services primarily over its 1.9 GHz broadband PCS and its 800 and 900 MHz SMR spectrum. Specifically it provides these services over its Code Division Multiple Access ("CDMA") network in 360 metropolitan markets (including 341 of the 349 largest markets), operating on its broadband PCS spectrum and over its iDEN[®] network in 355 metropolitan markets (including 336 of the top 349 U.S. markets where approximately 266 million people live or work.⁹ In addition, Sprint Nextel offers wireless services that focus on the youth market, including its Boost Mobile[®] prepaid wireless service on its iDEN[®] network and Boost Unlimited, a local calling prepaid service on Sprint Nextel's CDMA network.¹⁰ Sprint Nextel also currently provides very limited fixed and mobile services using its 2.5 GHz BRS and EBS licenses and spectrum lease holdings. Specifically, Sprint Nextel offers a first-generation (pre-WiMAX) fixed wireless broadband service to a relatively small number of subscribers, but will be discontinuing this service by the Fall of 2008. Sprint Nextel recently has begun deploying a mobile broadband WiMAX network in selected metropolitan markets. In September 2008, it launched this WiMAX service in Baltimore, Maryland, and plans to launch service in Washington, D.C., and Chicago, Illinois in the fourth quarter of 2008.

6. In addition, Sprint Nextel provides Voice over Internet Protocol ("VoIP") services.¹¹ Sprint Nextel is also one of the largest providers of wireline-based long distance services and operates a nationwide high-capacity fiber optic network and "Tier 1 Internet Protocol network."¹² Sprint Nextel provides its customers the ability to make calls in multiple countries using internationally-enabled phones, with wireless portable data roaming for laptops, hand-held devices, and other data services.

2. Clearwire Corporation

7. Clearwire Corporation, which was incorporated in October 2003,¹³ currently provides fixed and portable wireless broadband internet services operating on licensed BRS and leased EBS spectrum in the 2.5 GHz Band. It currently provides this service to 394,000 subscribers in 46 markets in suburban and rural communities in the United States that include an estimated 13.6 million people.¹⁴ Clearwire launched its first market in August 2004 and currently offers its services to more than 16.3 million people in the United States and Europe.¹⁵ For this fixed broadband service, which was first launched in August 2004, Clearwire uses network infrastructure equipment that is based on non-line-of-sight (NLOS) Orthogonal Frequency Division Multiplexing (OFDM) Expedience technologies acquired from Motorola,

⁹ *See id.* Sprint Nextel offers these mobile wireless services in all 50 states, Puerto Rico and the U.S. Virgin Islands under the Sprint[®] brand name utilizing CDMA technology. *See id.* at 5. Sprint Nextel also provides service via third party affiliates. *See id.* at 1. Through commercial arrangements with Sprint Nextel, those affiliates provide wireless services mainly in and around smaller U.S. metropolitan areas on CDMA-based wireless networks built and operated at their expense, in most instances using spectrum licensed to and controlled by Sprint Nextel. *Id.* Sprint Nextel also offers these wireless services under the Nextel[®] brand name using integrated Digital Enhanced Network, or iDEN[®], technology.

¹⁰ *See id.*

¹¹ *See id.* at 15.

¹² *See id.* at 8.

¹³ Clearwire Corporation, Form 10-K, at 3 (Aug. 13, 2008) ("Clearwire Form 10-K"), available at <http://www.sec.gov/Archives/edgar/data/1285551/000089102008000056/v37333e10vk.htm> (last visited Sep. 9, 2008). Also see Clearwire Corporation Form 602 (filed Jun. 5, 2008).

¹⁴ *See id.*

¹⁵ *See id.*

Inc.¹⁶ Clearwire is also offering wireless broadband services in Ghent and Brussels, Belgium, Dublin, Ireland and Seville, Spain, where Clearwire's network covers approximately 2.7 million additional people.¹⁷ Clearwire further offers VoIP service in 41 U.S. markets and additional markets internationally through its subsidiaries in Belgium, Ireland and Spain.¹⁸

8. Recent reports indicate that Clearwire is planning to upgrade its existing fixed wireless network in the United States by deploying a mobile WiMAX network. In Portland, Oregon, Clearwire is in a beta trial to deploy this mobile network upgrade, which reportedly has gone well.¹⁹ Clearwire plans to accelerate the upgrading of its current fixed network to a mobile network in Atlanta, Georgia, Grand Rapids, Michigan and Las Vegas, Nevada.²⁰ It plans a commercial launch of the Portland WiMAX network in the fourth quarter of 2008, and indicates that the other three WiMAX markets also could be launched by the end of the fourth quarter.²¹

B. Description of Transaction

9. On May 7, 2008, Clearwire, Sprint Nextel, Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("Time Warner"), Bright House Networks, LLC ("BHN"), Google, Inc. ("Google"), and Intel Corporation ("Intel") (Comcast, Time Warner, BHN, Google and Intel together, the "Investors") entered into the definitive agreement ("the Agreement") at the heart of this transaction.²² Pursuant to the Agreement, Sprint Nextel and Clearwire will combine their 2.5 GHz 4G wireless broadband businesses, including associated spectrum licenses, to form a new wireless communications company.²³ As proposed, Sprint Nextel will transfer control of its wholly-owned subsidiaries that hold all of Sprint Nextel's respective 2.5 GHz-related assets to Clearwire Venture, LLC, the direct wholly-owned subsidiary of New Clearwire.²⁴ Upon this transfer, Sprint Nextel will receive shares of New Clearwire amounting to an approximate 51 percent ownership, resulting in Sprint Nextel obtaining majority ownership of New Clearwire at the closing.²⁵ Under the terms of the Agreement, Clearwire will merge into the newly created Clearwire Merger Sub, LLC an indirect subsidiary of the New Clearwire.²⁶ Each share of Clearwire's Class A common stock, options and warrants to purchase Clearwire stock will be converted into an equivalent number of new shares, options or warrants in New Clearwire.²⁷ In addition, Clearwire Class B common stock will be converted to Class A stock prior to the merger.²⁸ Immediately following

¹⁶ See *Id.*

¹⁷ See *Id.*

¹⁸ See *Id.* at 4.

¹⁹ See Clearwire sees Portland WiMAX, Sprint venture on target, Matt Hamblen, *Computerworld*, August 8, 2008.

²⁰ See Clearwire Corporation at Jefferies & Co. Communications Conference – Final FD (Fair Disclosure) Wire, September 9, 2008.

²¹ See *Id.*

²² See Public Interest Statement at 3.

²³ See *Id.*

²⁴ See *Id.* at 8.

²⁵ See *Id.* at 8 & n.4. This equity share is subject to a possible post-closing adjustment. *Id.* at 3-4 & n.4.

²⁶ See *Id.* at 4.

²⁷ See *Id.*

²⁸ See *Id.*

the consummation of the merger of Sprint Nextel's assets, Intel Corporation, Google, Inc., Comcast Corporation, Time Warner Cable, Inc. and Bright House Networks will provide an aggregate \$3.2 billion investment in New Clearwire.²⁹ The total value of the deal is approximately \$14.5 billion in cash.³⁰ At closing, the separate corporate existence of Clearwire Merger Sub will cease, and New Clearwire, the new publicly traded corporation will continue as the surviving corporation.³¹

10. As proposed in the application, New Clearwire's Board of Directors initially will be comprised of thirteen members: (1) seven of the directors will be named by Sprint Nextel; (2) four will be named by the "strategic investors," which include Intel Corporation ("Intel"), Comcast Corporation ("Comcast"), Time Warner Cable ("Time Warner"), Bright House Networks, and Trilogy Equity Partners; (3) one director will be named by Eagle River, the private investment company controlled by wireless pioneer Craig O. McCaw (an existing Clearwire investor); and (4) one independent member will be nominated by the new company's nominating board.³² Of the strategic investors, only Intel, with its existing ownership of Clearwire, will hold a ten percent or greater ownership interest in New Clearwire.³³

C. Application Review Process

1. Commission Review

11. On June 6, 2008, and amended on June 24, 2008, pursuant to Section 310(d) of the Communications Act,³⁴ the Applicants filed applications seeking consent to the proposed transfer of control of licenses held by subsidiaries of Clearwire and Sprint Nextel to New Clearwire.³⁵ On June 24, 2008, the Commission released a public notice seeking public comment on the proposed transaction.³⁶ In response, the Commission received two petitions to deny the applications, filed by the Rural Cellular Association ("RCA") and AT&T, Inc. ("AT&T"),³⁷ as well as comments filed by Vonage Holdings Corporation ("Vonage"), the Public Interest Spectrum Coalition ("PISC"), SouthernLINC Wireless ("SouthernLINC"), the National EBS Association ("NEBSA"), Catholic Television Network ("CTN"), as well as approximately 100 other entities that filed brief supportive comments.³⁸ The Applicants filed a

²⁹ *See Id.*

³⁰ *See Id.*

³¹ *See Id.*

³² *See Id.* at 1, 4. We also note that the October 2008 proxy statement filed by Clearwire with the Securities and Exchange Commission provides more specific information regarding New Clearwire's proposed 13-member board of directors. For instance, at least one of Sprint Nextel's nominees must qualify as an independent director and for service on New Clearwire's Audit Committee under NASDAQ rules and federal securities laws. *See* Clearwire Proxy Statement, Schedule 14A, filed by Clearwire Corporation (dated Oct. 9, 2008), at 114.

³³ Public Interest Statement at 12.

³⁴ 47 U.S.C. § 310(d).

³⁵ *See supra* note 1 and accompanying text.

³⁶ *See* Comment Public Notice at 1. The Comment Public Notice set due dates of July 24, 2008 for Petitions to Deny, August 4, 2008 for Oppositions, and August 11, 2008 for Replies. *See id.*

³⁷ *See* Petition to Deny, Rural Cellular Association (filed Jul. 24, 2008) ("RCA Petition to Deny"); Petition to Deny of AT&T, Inc. (filed Jul. 24, 2008) ("AT&T Petition to Deny"). All pleadings and comments are available on the Commission's Electronic Comment Filing System ("ECFS") at www.fcc.gov/cgb/ecfs/.

³⁸ *See* Comments of SouthernLINC Wireless (filed Jul. 24, 2008) ("SouthernLINC Comments"); Comments of Vonage Holdings Corporation (filed Jul. 24, 2008) ("Vonage Comments") (seeking conditions on the approval of the proposed transaction); *Ex Parte* Comments of the Public Interest Spectrum Coalition (filed Sep. 18, 2008) ("PISC Comments"); Letter from Lynn Rejniak, Chair, National EBS Association to Marlene H. Dortch, Secretary, (continued....)

Joint Opposition on August 4, 2008,³⁹ to which Rural Cellular Association, Wireless Communications Association International, Inc. ("WCA") and Motorola, Inc. ("Motorola") each filed a reply on August 11, 2008.⁴⁰ Oppositions to the RCA and AT&T petitions were also filed by Google,⁴¹ Intel,⁴² The Source for Learning and the Indiana Higher Education Telecommunication System,⁴³ NEBSA,⁴⁴ the Hispanic Information and Telecommunications Network, Inc. ("HITN")⁴⁵ as well as further comments of CTN.⁴⁶

12. On July 11, 2008, the Bureau issued a Protective Order to ensure that any confidential or proprietary documents submitted to the Commission would be adequately protected from public disclosure.⁴⁷ The Bureau received no requests to review the proprietary or confidential information that is in the record. Also on October 10, 2008, the Bureau released a public notice announcing that Numbering Resource Utilization and Forecast ("NRUF") reports and local number portability ("LNP") data for all wireless telecommunications carriers as of December 31, 2006, June 30, 2007, and December 31, 2007 would be placed into the record and adopted a protective order pursuant to which the Applicants and third parties would be allowed to review the specific NRUF reports and LNP data placed into the record.⁴⁸

2. Petitions to Deny and Comments Received

13. In its petition to deny, RCA argues that should the proposed transaction be approved, the transaction would occur simultaneously with the "elimination of the near-nationwide wireless network operated by Alltel upon its acquisition by what will become the nation's largest wireless carrier, Verizon Wireless."⁴⁹ RCA expresses its concern that such a consolidation of carriers in the 2.5 GHz service would

(Continued from previous page)

Federal Communications Commission (filed Jul. 24, 2008); Letter from Monsignor Michael J. Dempsey, President, Catholic Television Network to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Jul. 24, 2008).

³⁹ See Joint Opposition to Petitions to Deny and Reply to Comments, Sprint Nextel Corporation and Clearwire Corporation (filed Aug. 4, 2008) ("Sprint Clearwire Joint Opposition").

⁴⁰ See Reply to Oppositions, Rural Cellular Association (filed Aug. 11, 2008) ("RCA Reply"); Reply of the Wireless Communications Association International, Inc. (filed Aug. 11, 2008) ("WCA Reply"); Reply Comments of Motorola, Inc. (filed Aug. 11, 2008) ("Motorola Reply").

⁴¹ See Opposition of Google, Inc. (filed Aug. 4, 2008).

⁴² See Opposition to Petitions to Deny and Reply Comments, Intel Corporation (filed Aug. 4, 2008).

⁴³ See Joint Opposition to Petition to Deny of AT&T, Inc. of The Source for Learning, Inc. and Indiana Higher Education Telecommunication System (filed Aug. 4, 2008) (Source for Learning Opposition).

⁴⁴ See Opposition of National EBS Association (filed Aug. 4, 2008) (NEBSA Opposition).

⁴⁵ See Consolidated Opposition to Petitions to Deny of Hispanic Information and Telecommunications Network, Inc. (filed Aug. 4, 2008) (HITN Opposition).

⁴⁶ See Comments of Catholic Television Network (filed Aug. 4, 2008) (CTN Comments).

⁴⁷ Applications of Sprint Nextel Corporation Clearwire For Approval to Transfer Control, WT Docket No. 08-94, *Protective Order*, 23 FCC Rcd 10635 (WTB 2008).

⁴⁸ Applications of Sprint Nextel Corporation and Clearwire Corporation For Approval to Transfer Control Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports Placed into the Record, Subject to Protective Order, WT Docket No. 08-94, CC Docket No. 99-200, *Public Notice*, DA 08-2266 (WTB rel. Oct. 10, 2008); Applications of Sprint Nextel Corporation and Clearwire Corporation For Approval to Transfer Control, WT Docket No. 08-94, CC Docket No. 99-200, *Protective Order*, DA 08-2265 (WTB rel. Oct. 10, 2008).

⁴⁹ See RCA Petition to Deny at (i).

create a near-national service that “cannot be duplicated in the foreseeable future by any new entrant to the telecommunication industry.”⁵⁰ RCA argues that exclusive handset agreements with suppliers 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.”⁵¹ AT&T’s petition to deny states that it does not fundamentally object to the transaction,⁵² but instead seeks to ensure that the transaction does not go forward without proper competitive analysis, including the use of a revised and expanded spectrum aggregation screen, when attributing spectrum assets to New Clearwire.⁵³

14. SouthernLINC and Vonage both filed comments seeking conditions be placed on the approval of the Sprint Nextel-Clearwire transaction. Specifically, SouthernLINC says it would like greater clarity, before the Commission approves the transaction, regarding the actual extent of the Applicants’ commitments to make the New Clearwire network an “open” network.⁵⁴ Vonage’s concerns regarding the Applicants’ commitment to open access are shared by Bella Mia, Inc. and Prime Directive Quick Link (“PDQLink”).⁵⁵ SouthernLINC, which states that it took multiple years of negotiation before Sprint Nextel agreed to provide automatic roaming services, would like the Commission to put mandatory data roaming obligations on New Clearwire to address market concentration concerns in the wireless sector.⁵⁶

15. Vonage, which also does not oppose the Applications, submits 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.⁵⁷ Specifically, Vonage wants the Commission to require the Applicants to commit that: (1) New Clearwire will comply with the Commission’s *Internet Policy Statement*, and (2) New Clearwire will offer its new WiMAX service to other entities on an unbundled basis, not tied to Clearwire voice service.⁵⁸

16. In addition, there were over 100 other commenters who filed in full support of the Applications.⁵⁹ Those comments were primarily from BRS and EBS licensees that anticipate that the merger of Sprint Nextel’s and Clearwire’s 2.5 GHz assets will provide EBS licensees the financial

⁵⁰ See *Id.* at 6.

⁵¹ See RCA Petition to Deny at 10-11.

⁵² See AT&T Petition to Deny at 15.

⁵³ See *Id.* at 1-2.

⁵⁴ See SouthernLINC Comments at 3-4.

⁵⁵ See Bella Mia, Inc. *Ex Parte* Request to Deny at 11 (filed October 8, 2008) and Prime Directive Quick Link *Ex Parte* Request to Deny at 12 (filed September 30, 2008) (“PDQLink *Ex Parte* Request to Deny”).

⁵⁶ See SouthernLINC Comments at 5-6.

⁵⁷ See Vonage Comments at 5.

⁵⁸ See *Id.*, citing Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33, *et al.*, *Policy Statement*, 20 FCC Rcd 14986 (2005) (*Internet Policy Statement*).

⁵⁹ The entities that filed pleadings in this proceeding are listed in the Appendix. In addition, we have received informal comments through *ex parte* submissions. See Appendix.

freedom to offer more quality programming in local communities.⁶⁰ They express the view that the creation of New Clearwire will accelerate the deployment of the first nationwide mobile WiMAX broadband network, which will provide the opportunity to deliver new broadband products and services that combine mobility and speed in the 2.5 GHz band thereby enhancing the way the EBS community can access the Internet. These commenters regard the transaction as a means to provide New Clearwire 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.⁶¹

17. In their Joint Opposition, Sprint Nextel and Clearwire point to the more than 100 commenters that unconditionally support the proposed transaction. Sprint Nextel and Clearwire repeat their argument that the transaction will provide significant benefits to existing EBS licensees by stimulating the deployment of 2.5 GHz broadband services. They assert that any claims against the Applications lack merit and provide no basis for denying, delaying, or imposing conditions on the approval of the New Clearwire license transfers.⁶² Sprint Nextel and Clearwire argue that Vonage has failed to demonstrate any harm that would arise as a result of the proposed transaction, rendering its proposed network access condition unwarranted and unnecessary.⁶³ With respect to RCA's argument regarding "interoperability," Sprint Nextel and Clearwire point out that the issue is already being examined in an ongoing rulemaking proceeding regarding wireless broadband roaming and argue that, absent any merger specific harm, that issue should be dealt with in that proceeding.⁶⁴ They also argue that RCA's requested prohibition on exclusive handset agreements between wireless operators and equipment manufacturers would be better addressed in connection with the petition for rulemaking that RCA filed with the Commission on exclusive handset agreements in May 2008.⁶⁵ In opposing AT&T's petition, Sprint Nextel and Clearwire argue that contrary to AT&T's claims, they have demonstrated that combining their 2.5 GHz holdings will promote competition.⁶⁶

3. Department of Justice Review

18. The Antitrust Division of the Department of Justice ("DOJ") reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition.⁶⁷ The Antitrust Division's review is limited solely to an examination of the competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. The Antitrust Division has determined that it will not take enforcement action in connection with this transaction.

⁶⁰ See, e.g., Letter from William P. Rowland, President and CEO, Colorado Public Television, KBDI/Channel 12 (filed Jul. 23, 2008) at 1.

⁶¹ See Comments of Wireless Communications Association International, Inc., WT Docket 08-94, (filed Jul. 24, 2008) (WCA Comments) at 5-6.

⁶² See Sprint Clearwire Joint Opposition at 4-10.

⁶³ See *Id.* at 10-14, citing Vonage Comments at 3-4.

⁶⁴ See *Id.* at 17, referencing the Re-examination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15846 ¶ 79 (2007).

⁶⁵ See Sprint Clearwire Opposition at 18.

⁶⁶ See *Id.* at 19-21.

⁶⁷ 15 U.S.C. § 18. In addition, DOJ does not review mergers below certain statutorily mandated dollar thresholds, which are currently between \$50 and \$200 million. 15 U.S.C. § 18(a).

III. STANDARD OF REVIEW

19. Pursuant to Sections 214(a) and 310(d) of the Communications Act, we must determine *whether the Applicants have demonstrated that the proposed transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity.*⁶⁸ In making this assessment, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,⁶⁹ other applicable statutes, and the Commission's rules.⁷⁰ If the transaction does not violate a statute or rule, we next consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.⁷¹ We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.⁷² The Applicants bear the burden of

⁶⁸ 47 U.S.C. §§ 214(a), 310(d).

⁶⁹ Section 310(d), 47 U.S.C. § 310(d), requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See, e.g.,* Applications for Consent to the Transfer Control of Licenses XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57, *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12363 ¶ 30 (2008) ("*XM-Sirius Order*"); Applications of Celco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, WT Docket No. 07-208, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 12463, 12476-12477 ¶ 26 (2008) ("*Verizon-RCC Order*"); Applications of T-Mobile USA, Inc. and SunCom Wireless Holdings, Inc. For Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 07-237, *Memorandum Opinion and Order*, 23 FCC Rcd 2515, 2519 ¶ 9 (2008) ("*T-Mobile-SunCom Order*"); 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, 20301 ¶ 10 (2007) ("*AT&T-Dobson Order*"); Applications of ALLTEL Corporation, Transferor, and Atlantis Holdings LLC, Transferee, For Consent To Transfer Control of Licenses, Leases and Authorizations, WT Docket No. 07-128, *Memorandum Opinion and Order*, 22 FCC Rcd 19517, 19519-20 ¶ 7 (2007) ("*ALLTEL-Atlantis Order*"); AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, *Memorandum Opinion and Order*, 22 FCC Rcd 5662, 5672 ¶ 17 (2007) ("*AT&T-BellSouth Order*"); Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., WT Docket No. 05-339, *Memorandum Opinion and Order*, 21 FCC Rcd 11526, 11535 ¶ 16 (2006) ("*ALLTEL-Midwest Wireless Order*"); SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC-AT&T Order*"); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) ("*Sprint-Nextel Merger Order*"); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13062 ¶ 17 (2005) ("*ALLTEL-Western Wireless Order*"); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21542 ¶ 40 (2004) ("*Cingular-AT&T Wireless Order*").

⁷⁰ *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10; *ALLTEL-Atlantis Order*, 22 FCC Rcd at 19519-20 ¶ 7; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-43 ¶ 40.

⁷¹ *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *SBC-AT&T Order*, 20 FCC Rcd at 18300 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20.

⁷² *See, e.g., XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; (continued....)

proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.⁷³ If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the application for hearing under section 309(e) of the Communications Act.⁷⁴

20. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act," which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.⁷⁵ Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.⁷⁶ In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.⁷⁷

21. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.⁷⁸ The Commission and DOJ each have independent authority to examine the competitive impacts of proposed communications mergers and

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SBC-AT&T Order, 20 FCC Rcd at 18300 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13976 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13062-63 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

⁷³ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12363 ¶ 30; *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

⁷⁴ 47 U.S.C. § 309(e). See also *Verizon-RCC Order* 23 FCC Rcd at 12476-12477 ¶ 26; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 10; *AT&T-BellSouth Order*, 22 FCC Rcd at 5672-73 ¶ 19; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11535 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543-44 ¶ 40. Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, i.e., radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, see *ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

⁷⁵ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12364 ¶ 31; *Verizon-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20303 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁷⁶ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12364 ¶ 31; *Verizon-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20303-04 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064-65 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁷⁷ See, e.g., *XM-Sirius Order* 23 FCC Rcd 12348, 12364 ¶ 31; *Verizon-RCC Order*, 23 FCC Rcd at 12479 ¶ 28; *AT&T-Dobson Order*, 22 FCC Rcd at 20304 ¶ 12; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 20; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

⁷⁸ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12365 ¶ 32; *Verizon-RCC Order*, 23 FCC Rcd at 12479-1480 ¶ 29; *AT&T-Dobson Order*, 22 FCC Rcd at 20304 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5673 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13977-78 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42.

transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by DOJ.⁷⁹ Like DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The Antitrust Division of DOJ, however, reviews telecommunications mergers pursuant to section 7 of the Clayton Act, and if it wishes to block a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly.⁸⁰ Under the Commission's review, the Applicants must show that the transaction will serve the public interest; otherwise the application is set for hearing. The Antitrust Division's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations. The Commission's competitive analysis under the public interest standard is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant market.⁸¹

22. Our analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.⁸² For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.⁸³ Our public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.⁸⁴ Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent

⁷⁹ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12365 ¶ 32; *Verizon-RCC Order*, 23 FCC Rcd at 12479-1480 ¶ 29; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11537 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *Rainbow DBS Company LLC, Assignor, and EchoStar Satellite L.L.C., Assignee, Consolidated Application for Consent to Assignment of Space Station and Earth Station Licenses, and Related Special Temporary Authorization*, IB Docket No. 05-72, *Memorandum Opinion and Order*, 20 FCC Rcd 16868, 16874 ¶ 12 (2005); *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42.

⁸⁰ See 15 U.S.C. § 18.

⁸¹ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12365 ¶ 32; *Verizon-RCC Order*, 23 FCC Rcd at 12479-12480 ¶ 29; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd 11538 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

⁸² See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

⁸³ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 13; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

⁸⁴ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 14; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 22; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43 (conditioning approval on the divestiture of operating units in select markets).

with law that may be necessary to carry out the provisions of the Act.⁸⁵ Similarly, Section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."⁸⁶ Indeed; unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.⁸⁷ Despite this broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes.⁸⁸ Thus, we generally will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.⁸⁹

IV. QUALIFICATIONS OF APPLICANTS

23. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."⁹⁰ Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission's rules.⁹¹ In making this determination, the Commission does not, as a general rule, re-evaluate the qualifications of transferors unless issues related to basic

⁸⁵ 47 U.S.C. § 303(r). See also, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13978-79 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

⁸⁶ 47 U.S.C. § 214(c). See also, *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20305-06 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

⁸⁷ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674 ¶ 22; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11538-39 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43. See also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

⁸⁸ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *AT&T-BellSouth Order*, 22 FCC Rcd at 5674-75 ¶ 22; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11539 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

⁸⁹ See, e.g., *XM-Sirius Order*, 23 FCC Rcd at 12366 ¶ 33; *Verizon-RCC Order*, 23 FCC Rcd at 12480-12481 ¶ 30; *AT&T-Dobson Order*, 22 FCC Rcd at 20306 ¶ 14; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11539 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

⁹⁰ 47 U.S.C. §§ 308, 310(d). See also *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

⁹¹ See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; see also *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant designation for hearing.⁹² Conversely, Section 310(d) obligates the Commission to consider whether the proposed transferee is qualified to hold Commission licenses.⁹³ When evaluating the qualifications of a potential licensee, the Commission previously has stated that it will review allegations of misconduct directly before it,⁹⁴ as well as conduct that takes place outside of the Commission.⁹⁵ In this proceeding, no issues have been raised with respect to the basic qualifications of Sprint Nextel and Clearwire, both of which previously have been found qualified to hold Commission licenses.⁹⁶ Thus, we find that, at this time, there is no reason to re-evaluate the qualifications of these entities.

V. COMPETITIVE ANALYSIS

24. Consistent with our practice when reviewing proposed wireless transactions, we next consider the potential competitive effects that might result from the proposed Sprint Nextel-Clearwire transaction. Horizontal transactions raise competitive concerns when they reduce the availability of choices to the point that the resulting firm has the incentive and the ability, either by itself or in coordination with other firms, to raise prices. A fundamental tenet of the Commission's public interest

⁹² See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063-64 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44. See also Stephen F. Sewell, *Assignment and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. See *id.*

⁹³ See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20302-03 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

⁹⁴ See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20303 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission will consider any violation of any provision of the Act, or of the Commission's rules or policies, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47; Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees, Gen. Docket No. 81-500, *Report and Order and Policy Statement*, 100 F.C.C. 2d 1179, 1209-10 ¶ 57 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992).

⁹⁵ See, e.g., *Verizon-RCC Order*, 23 FCC Rcd at 12477-12478 ¶ 27; *AT&T-Dobson Order*, 22 FCC Rcd at 20303 ¶ 11; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11536 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission previously has determined that in its review of character issues, it will consider forms of adjudicated, non-Commission related misconduct that include: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. See, e.g., *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.86; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47.

⁹⁶ See, e.g., *Sprint Nextel Order*, 20 FCC Rcd 13967 (2005); Applications of Clearwire Spectrum Holdings, LLC for transfer of control of licenses held by BellSouth Wireless Cable, Inc. and South Florida Television, Inc., File Nos. 0002912776 and 0002916780 (Consented to Jul. 5, 2007).

review is that, absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest.⁹⁷

25. We begin our competitive analysis by determining the appropriate market definitions for this transaction.⁹⁸ This includes determination of the relevant product and geographic markets, as well as the identification of the market participants.

26. Because of the substantial ongoing developments in the evolution of the provision of wireless services, especially the increasing prominence of mobile broadband services in the wireless services being offered to consumers, we here revisit the product market definitions that the Commission has employed in the past. In particular, we analyze this transaction using two product markets: (1) a combined market for "mobile telephony/broadband" services (as defined and explained below) – comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services); and (2) the fixed broadband services market.

27. As discussed more fully below, we review the proposed Sprint Nextel-Clearwire transaction for potential competitive effects with regard to these product markets. Both Sprint Nextel and Clearwire are beginning the process of deploying next-generation technology networks based on WiMAX standards. These developments promise to further accelerate the increasing importance of mobile broadband services that we have seen in recent years with the extensive deployment of so-called 3G mobile wireless technologies. According to the Applicants, such WiMAX systems that they are beginning to deploy can deliver broadband speeds of up to 6 Mbps downlink and up to 3 Mbps uplink.⁹⁹ Sprint Nextel has just launched its commercial WiMAX network in one market, with services and prices intended to compete with mobile 3G services and with fixed broadband services, and has commercial rollouts of its WiMAX-based services planned in three other markets by year's end.¹⁰⁰ Meanwhile Clearwire's first WiMAX network is in the process of being built in another market, with plans announced for commercial rollout in four markets by the end of this year.¹⁰¹

28. In reviewing these developments, we conclude that the proposed Sprint Nextel-Clearwire transaction would not increase market concentration in a combined mobile telephony/broadband services market or in the fixed broadband services market, and that therefore no competitive harm would result with regard to market concentration in these product markets. In addition, as discussed more fully below, although significant uncertainties necessarily remain, we find potentially significant pro-competitive public interest benefits from this transaction.

⁹⁷ See *AT&T-Dobson Order*, 22 FCC Rcd at 20301 ¶ 10; *ALLTEL-Midwest Order*, 21 FCC Rcd at 11540 ¶ 22; *Sprint-Nextel Order*, 20 FCC Rcd at 13981 ¶ 30; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68; *DOJ/FTC Merger Guidelines* § 0.1, n.6. The ability to raise prices above competitive levels is generally referred to as "market power." Market power may also enable sellers to reduce competition on dimensions other than price, including innovation and service quality.

⁹⁸ See *AT&T-Dobson Order*, 22 FCC Rcd at 20307 ¶ 17; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11541 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 28; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

⁹⁹ Public Interest Statement at 3, 17 n.34.

¹⁰⁰ Public Interest Statement at 17 n.34.

¹⁰¹ Public Interest Statement at 17 n.34.

29. Since these recent developments and deployments establish that the 2.5 GHz Band may be used, and are being used, for the provision of mobile telephony/broadband services as well as fixed broadband services, which have traditionally been provided using this spectrum, we also examine the input market for spectrum in order to evaluate whether the proposed transaction raises any spectrum aggregation concerns that might harm competition. Given these changes, we determine in this proceeding to revise the Commission's initial spectrum aggregation screen to include the BRS and AWS-1 bands in those markets where spectrum in those bands is available for use in the provision of mobile telephony/broadband services. Thus, we are modifying the screen to apply it on a market-by-market basis, rather than on a nationwide basis. Unlike the 95-megahertz initial screen we adopted in the *AT&T/Dobson Order*, application of the screen and any necessary case-by-case review of individual markets will consider the same spectrum bands.¹⁰²

30. We then apply the Commission's new market-specific spectrum screen to each market involved in this transaction. As described below, through this process, we identify those markets that we subject to further case-by-case review while eliminating from further review those markets in which the level of spectrum aggregation resulting from the transaction does not raise competitive concerns. Then, we examine the markets identified by our initial screen by undertaking a granular market-by-market analysis. In this transaction, we identify 43 particular local markets identified by the screen and, after our additional analysis determine that in none of those markets does the level of spectrum aggregation resulting from the transaction raise competitive concerns.

31. Next, we address other concerns raised by the petitioners in response to this transaction, including the potential adverse impact of the transaction with regard to the provision of roaming services. Finally, we examine the public interest benefits of the proposed transaction and conclude that the transaction, subject to the conditions we impose, is likely to result in transaction-specific public interest benefits.

A. Market Definitions

32. We establish at the outset the appropriate market definitions for our evaluation of this proposed transaction. This includes establishing the product and geographic market definitions that we will apply. We also determine the appropriate input market for spectrum that we will examine in this proposed transaction. Finally, we identify the market participants.

1. Product Markets

33. We must assess the potential competitive effects of the proposed combination of Sprint Nextel's and Clearwire's respective spectrum holdings in the 2.5 GHz Band in New Clearwire in the product markets where this spectrum is most likely to be used. As described elsewhere, the substantial ongoing developments in the evolution of the provision of wireless services, especially the increasing prominence of mobile broadband services, lead us here to revisit the product market definitions that we have employed in the past. We evaluate the proposed Sprint Nextel-Clearwire transaction for the potential for competitive harm in the following product markets: (1) a combined market for mobile telephony/broadband services (as defined herein); and (2) the fixed broadband services market. We find that the proposed Sprint Nextel-Clearwire transaction would not increase market concentration in these product markets, and therefore no competitive harm would result due to market concentration.

¹⁰² Even though the proposed transaction only involves combining spectrum holdings and related assets associated with BRS and EBS spectrum in the 2.5 GHz Band, we employ our standard attribution procedures to combine these 2.5GHz spectrum holdings with relevant spectrum holdings of Sprint Nextel and Clearwire in other relevant bands for purposes of the Commission's competitive review process.

34. At the outset of our analysis, we note that Sprint Nextel currently is an established provider of mobile voice and broadband services, with significant network buildout and customers, while Clearwire is an emerging entrant in these markets that does not currently provide mobile voice services and has built out networks only in selected markets. This proposed transaction does not involve a merger of two well-established competitors, but instead generally involves the combining of an established provider with another entity that brings important resources, particularly the additional spectrum input, to the proposed new entity. Accordingly, in terms of the potential for competitive harm in this transaction, the proposed Sprint Nextel-Clearwire transaction differs in many respects from other wireless transactions in which two established providers with substantial spectrum holdings and facilities-based operations are merging.

35. Although the two companies do not appear to compete in the provision of current generation wireless services,¹⁰³ both are well along in the process of deploying next-generation technology networks based on WiMAX standards that promise to further accelerate the increasing importance of mobile broadband services that we have seen with the extensive deployment of so-called 3G mobile wireless technologies. Both Sprint Nextel and Clearwire have already constructed, or started to construct, mobile WiMAX networks and plan to provide mobile voice as well as high-speed mobile data services over these networks.¹⁰⁴ Sprint Nextel has recently launched commercial service based on a WiMAX network in Baltimore, Maryland, and has commercial rollouts planned in Chicago, Illinois and Washington, D.C., by year end.¹⁰⁵ Clearwire is developing mobile WiMAX markets in Atlanta, Georgia, Grand Rapids, Michigan, and Las Vegas, Nevada, and has indicated that the other three WiMAX markets could be launched by the end of the fourth quarter.

36. Given the nascent, although real, implementation of WiMAX networks by Sprint and Clearwire and absence of geographic overlap in those efforts, we find that the proposed Sprint Nextel-Clearwire transaction does not increase market concentration in markets for mobile telephony/broadband or fixed broadband services, and therefore no competitive harm would result due to concentration in these product markets. Indeed, as discussed elsewhere, we conclude that the transaction is likely to result in significant public interest benefits as the New Clearwire is likely to be a significant potential source for the provision of additional effective competition to the mobile broadband "3G" services already being offered by AT&T and Verizon Wireless, among other service providers, and to various fixed wireline and wireless broadband offerings.

37. Nevertheless, recognizing that mobile broadband data services is a rapidly evolving market, out of an abundance of caution we will analyze the markets for mobile telephony services and mobile broadband services as a combined market, similar to what we have done when evaluating other proposed wireless mergers. In transactions such as this one, we conclude that there are risks associated with defining product markets too narrowly, since doing so may thwart this and future pro-competitive deals that take place in the context of rapidly evolving markets and services. Furthermore, we assess the input market for spectrum available for the provision of mobile telephony/broadband services because of potential competitive concerns raised by the level of spectrum aggregation resulting from the transaction. Below we discuss these product markets in greater detail as they apply to this transaction.

¹⁰³ There is no significant geographic overlap between Sprint Nextel's first-generation fixed wireless broadband service and Clearwire's fixed broadband service, while Clearwire provides no mobile telephony services. Public Interest Statement at 4, 59-60; Clearwire Form 10-K at 3.

¹⁰⁴ Public Interest Statement 17 n.34.

¹⁰⁵ Public Interest Statement 17 n.34.

38. *Mobile Telephony/Broadband Services.* We analyze the markets for mobile voice services and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services), under a combined product market for mobile telephony/broadband services, as set forth herein.¹⁰⁶ Because of the substantial ongoing developments in the evolution of the provision of wireless services, especially the increasing prominence of mobile broadband services, we revisit the product market definition that we have employed in the past. Our combined product market for "mobile telephony/broadband services" encompasses the combined product market for "mobile telephony services" that we used in previous wireless transactions, while it also appropriately emphasizes the recent significant mobile broadband advances to better reflect this component of emerging, next-generation wireless services.

39. Specifically, we delineate the scope of a combined market for mobile telephony/broadband services broadly to include mobile voice and data services provided over wireless broadband networks (mobile broadband services), as well as mobile voice and data services provided over less advanced, earlier generation (e.g., 2G, 2.5G) legacy wireless networks. In addition, the market includes a wide array of mobile data services, ranging from handset-based mobile data services marketed primarily as an add-on to mobile voice services to standalone mobile Internet access services for laptop users. We find that analyzing the various older voice and data services as well as the emerging mobile broadband product markets under a combined market for mobile telephony/broadband services is appropriate in order to ensure a reasonable assessment of any potential competitive harm resulting from the proposed transaction under review. As we noted above, we conclude that there are risks associated with defining product markets too narrowly in the context of rapidly evolving markets and services such as those for mobile broadband services.

40. We treat the provision of mobile broadband services using more recent and advanced networks (e.g., 3G, 4G) and the provision of mobile voice and data services over earlier generations of wireless networks as part of a combined mobile telephony/broadband services market, rather than separate markets, based on consideration of various factors, including the nature of these services and their relationship with each other, and our finding that this approach provides a reasonable assessment of any potential competitive harm resulting from the mobile wireless transactions under review. This approach also recognizes that the mobile telecommunications industry is in the process of transitioning from the provision of interconnected mobile voice and add-on mobile data services over legacy wireless networks to the provision of mobile voice and data services over wireless broadband networks (e.g., EVDO, WCDMA/HSDPA, mobile WiMAX, and Long Term Evolution (LTE) networks).

41. Sprint Nextel currently provides mobile telephony/broadband services using its broadband PCS and SMR licenses.¹⁰⁷ Clearwire currently does not provide mobile broadband services over its existing networks, but has already constructed, or started to construct, mobile WiMAX networks in selected markets and plans to provide mobile voice as well as high-speed mobile broadband data services over these networks.¹⁰⁸ In its analysis of recent wireless transactions involving mobile telephony

¹⁰⁶ Previously, the Commission found that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services. It nevertheless analyzed all of these product markets under the combined market for "mobile telephony service." See *Verizon-RCC Order*, FCC 08-181, at ¶ 37; *AT&T-Dobson Order*, 22 FCC Rcd at 20308 ¶ 21; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11541 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 29; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

¹⁰⁷ See Sprint Form 10-K at 3-4.

¹⁰⁸ See Clearwire Form 10-K at 2-3; Public Interest Statement at 16 n.33; Clearwire Corporation at Jefferies & Co. Communications Conference – Final FD (Fair Disclosure) Wire, September 9, 2008.

services, the Commission has excluded providers of fixed broadband services, such as Clearwire, from its list of market participants in mobile telephony services market for the purpose of computing initial measures of market concentration.¹⁰⁹ The Commission's competitive analysis of previous wireless transactions involving mobile telephony services has proceeded from the premise that Sprint Nextel and Clearwire are not, and never have been, competitors in the provision of mobile telephony services. However, since recent developments and deployments establish that the 2.5 GHz band may be used for the provision of both fixed and mobile broadband services, we examine the mobile broadband segment of mobile telephony/broadband services to determine whether any service overlap arises to determine whether any further competitive review for a combined market for mobile telephony/broadband services is necessary.

42. The Applicants claim that the New Clearwire is planning to deploy a nationwide mobile WiMAX network that would offer broadband services at speeds up to 6 Mbps.¹¹⁰ The Applicants state that Sprint has already constructed WiMAX networks in Baltimore, Maryland, Washington, D.C. and Chicago Illinois, and that Clearwire's first WiMAX network is in the process of being built in Portland, Oregon.¹¹¹ In late September 2008, Sprint Nextel announced it had officially launched XOHM™ mobile broadband commercial WiMAX service in Baltimore.¹¹² In addition, Sprint is currently building out WiMAX infrastructure in five other markets, with launches in Chicago and Washington, D.C. planned later in the fourth quarter of 2008.¹¹³ In addition to the mobile WiMAX market in Portland, Oregon, Clearwire is developing mobile WiMAX markets in Atlanta, Grand Rapids, Michigan, and Las Vegas.¹¹⁴

¹⁰⁹ 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.

¹¹⁰ See Public Interest Statement at 3, 15.

¹¹¹ See Public Interest Statement at 16 n.33.

¹¹² See *XOHM WiMAX Broadband Service Debuts in Baltimore*, Press Release, Sprint, Sep. 29, 2008.

¹¹³ See "The Sidecut Interview: Xohm President Barry West," at www.wimax.com/commentary/blog/blog-2008/september/The-Sidecut-Interview-Xohm-President-Barry-West-0909, accessed 9/24/08); see also, Sprint lines up partners for WiMAX, *Baltimore Business Journal*, August 28, 2008.

¹¹⁴ See Clearwire Corporation at Jefferies & Co. Communications Conference – Final FD (Fair Disclosure) Wire, September 9, 2008.

Clearwire plans a commercial launch of the Portland WiMAX network in the fourth quarter of 2008, and indicates that the other three WiMAX markets could be launched by the end of the fourth quarter.¹¹⁵

43. The Applicants argue that the New Clearwire would compete directly with Verizon Wireless's and AT&T's soon-to-be-launched mobile broadband 4G services.¹¹⁶ Intel claims that the New Clearwire will compete with wireless broadband service offerings in the 700 MHz, AWS, WCS, PCS, MSS (where ATC is allowed), and other bands.¹¹⁷ In addition, Clearwire states on its web site that it anticipates being able to offer mobile voice services over its WiMAX network in the future.¹¹⁸ Meanwhile, Sprint announced that it will be offering customers a dual-mode device, expected to launch in the fourth quarter of 2008, that will operate on Sprint Nextel's existing 3G mobile broadband cellular network as well as the new WiMAX network in Baltimore and other markets as WiMAX service becomes available.¹¹⁹ Further, Clearwire stated on its web site that New Clearwire will be able to offer mobile voice and data services to its customers over the Sprint 3G network.¹²⁰

44. Similarly, AT&T claims that New Clearwire's launch of the WiMAX network would compete with traditional mobile services,¹²¹ and RCA notes that one of its members, Cellular South, will compete directly with the New Clearwire in data and mobile services.¹²² At this time, however, only Sprint currently is marketing a mobile WiMAX service, and this is limited to a single local market. Although Clearwire is currently not providing mobile broadband services, the WiMAX network that Clearwire is building in Portland, Oregon, would make Clearwire a potential competitor to Sprint Nextel in this market, and this would also be true of any other local market in which Clearwire has already started building a WiMAX network. In addition, Clearwire is a potential entrant into a combined market for mobile telephony/broadband services in all geographic markets where it has sufficient spectrum holdings to deploy a mobile WiMAX network. Similarly, although the New Clearwire intends to bundle mobile voice services initially using Sprint Nextel's 3G network, it is not certain when it would be able to provide facilities-based mobile voice service over its WiMAX network.

45. For all of these reasons, we conclude that the proposed transaction would not increase concentration in mobile telephony/broadband services market, and therefore no competitive harm would

¹¹⁵ See *Id.*

¹¹⁶ See Public Interest Statement at 16.

¹¹⁷ See Intel Opposition to Petitions to Deny and Reply Comments at 3 (stating "[t]his new broadband platform will compete with incumbents' robust wireline and cable broadband networks, as well as advanced wireless broadband networks in the 700 MHz, advanced wireless service ("AWS"), personal communications service ("PCS"), Wireless Communications Service ("WCS"), Mobile Satellite Service/Ancillary Terrestrial Components ("MSS/ATC"), and other bands).

¹¹⁸ See Clearwire, "Customers Frequently Asked Questions," available at <http://www.clearwireconnections.com/pr/customers/index.html> (stating that in the years to come, Clearwire will be able to offer mobile voice services over its WiMAX network).

¹¹⁹ See *XOHM WiMAX Broadband Service Debuts in Baltimore*, Press Release, Sprint, Sep. 29, 2008.

¹²⁰ See Clearwire, "Customers Frequently Asked Questions," available at <http://www.clearwireconnections.com/pr/customers/index.html> (stating that "after the transaction is completed, Clearwire will be able to offer mobile voice and data services to its customers over the Sprint 3G network. Clearwire's customers will also benefit from expanded 4G services as Clearwire launches new markets and converts existing markets to mobile WiMAX. We expect existing markets to be transitioned in 2009 and 2010").

¹²¹ See AT&T Petition to Deny at 2, 6, 12-13.

¹²² See RCA Petition to Deny at 3.

result due to concentration in this product market. As we discuss more fully below, however, the level of spectrum aggregation resulting from the proposed transaction raises potential competitive concerns. Therefore, we will continue our competitive analysis below to examine spectrum aggregation issues that arise with respect to this product market.

46. *Fixed Broadband Services.* In examining the proposed transaction for potential competitive harm in the provision of fixed broadband services, we generally apply the same product market definition for fixed broadband services as applied by the Commission in recent merger orders.¹²³ The Commission has defined the fixed broadband services market as the market for fixed advanced telecommunications capability, *i.e.*, "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications capability using any technology."¹²⁴

47. The Applicants assert that New Clearwire will enhance competition in fixed broadband services through the combination and more effective utilization of the 2.5 GHz spectrum.¹²⁵ Sprint Nextel and Clearwire assert that neither company has market power in the provision of fixed broadband services.¹²⁶ Sprint Nextel in fact has recently begun to discontinue its fixed wireless internet service to 12,000 subscribers in fourteen areas, and the company will no longer offer its first-generation broadband service by the fall of 2008.¹²⁷ Clearwire provides fixed wireless broadband service to approximately 443,000 subscribers using pre-WiMAX technology, which it contends must be upgraded to a mobile WiMAX platform in order for it to compete effectively.¹²⁸ The Applicants state that New Clearwire will continue to provide fixed broadband service. They assert, however, the company lacks the ability to acquire a dominant position in that market because of a wide variety of technologies that are available to provide broadband services to consumers and businesses, including fiber, broadband over powerline, and satellite technologies.¹²⁹

48. The Applicants state that New Clearwire's development of WiMAX as a new alternative broadband platform would enable it to compete head-to-head with the fixed broadband services offered by incumbent wireline broadband operators.¹³⁰ The Applicants contend that WiMAX will provide unparalleled flexibility to consumers who seek broadband services. Moreover, they state, New Clearwire's broadband services would have the beneficial attributes of both portability and mobility, supported by the development of innovative devices.¹³¹ Accordingly, Applicants assert that New Clearwire's service offerings will enhance competition in the provision of these services, thus greatly benefiting consumers.¹³²

¹²³ See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5749-5750 ¶ 179; *Sprint-Nextel Order*, 20 FCC Rcd at 14029 ¶ 167.

¹²⁴ See, e.g., *AT&T-BellSouth Order*, 22 FCC Rcd at 5749-5750 ¶ 179.

¹²⁵ See Public Interest Statement at 37.

¹²⁶ See *Id.* at 59.

¹²⁷ See *Id.* at 59-60.

¹²⁸ See *Id.*

¹²⁹ See *Id.* at 39.

¹³⁰ See *Id.* at 37-38.

¹³¹ See *Id.* at 38.

¹³² *Id.* at 37-40.

49. At this time, neither Sprint Nextel nor Clearwire is offering significant fixed broadband services in either the 2.5 GHz Band or other bands. In addition, the implementation by Sprint and Clearwire of WiMAX networks, which allow the provision of fixed wireless broadband services, is just beginning. Thus, neither is a dominant provider in the fixed broadband services market. We also note that there is little to no overlap in the fixed broadband services that Sprint Nextel and Clearwire provide. Thus, the proposed Sprint Nextel-Clearwire transaction would not substantially increase the level of market concentration in the fixed broadband services product market. Additionally, a wide variety of other technologies are available to provide broadband services to consumers and businesses, including fiber, broadband over power line, unlicensed wireless technologies, and satellite.¹³³ To the extent that the 2.5 GHz Band continues to evolve, and there is more extensive use of this band in the provision of a fixed broadband service, it will be just one of several broadband services.¹³⁴ Accordingly, we conclude that no competitive harm is likely to result from the proposed transaction with regard to this product market.

2. Geographic Market

50. Since we have determined that further competitive review is not necessary for the fixed broadband market, we will define a geographic market for mobile telephony/broadband services only in order to evaluate potential spectrum aggregation concerns.

51. In its recent wireless transaction orders, the Commission applied the “hypothetical monopolist test” and found that the relevant geographic markets are local, larger than counties, may encompass multiple counties, and, depending on the consumer’s location, may even include parts of more than one state.¹³⁵ The Commission in these orders identified two sets of geographic areas that effectively may be used to define local markets – CEAs and CMAs.¹³⁶ Because these two sets of geographic areas come from different sides of the equation – demand in one case, supply in the other – the Commission

¹³³ See *Sprint Nextel Order*, 20 FCC Rcd at 14029 ¶ 167; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, *Fifth Report*, 23 FCC Rcd 9615 (2008).

¹³⁴ See *Sprint Nextel Order*, 20 FCC Rcd at 14029 ¶ 167.

¹³⁵ See *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542-43 ¶¶ 29-30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21562-63 ¶¶ 89-90.

¹³⁶ We have chosen CEAs and CMAs for our data analysis because both are consistent in order of magnitude with the local market definition we have adopted and because each brings a different consideration to the analysis. CEAs are designed to represent consumers’ patterns of normal travel for personal and employment reasons and may therefore capture areas within which groups of consumers would be expected to shop for wireless service. See Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURVEY OF CURRENT BUSINESS, February 1995, at 75. In addition, CEAs should be areas within which any service providers present would have an incentive to market – and actually provide – service relatively ubiquitously. Conversely, CMAs are the areas in which the Commission initially granted licenses for the cellular service. Although partitioning has altered this structure in many license areas, CMAs represent the fact that the Commission’s licensing programs have to a certain degree shaped this market by defining the initial areas in which wireless providers had spectrum on which to base service offerings, and they may therefore serve as a reasonable proxy for where consumers face the same competitors. See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567-68 ¶ 105; see also *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542 ¶ 29; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 57; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072-73 ¶¶ 44-45.

found them to be useful cross-checks on each other and, together, they help ensure that the Commission's analysis does not overlook local areas that require more detailed analysis.¹³⁷

52. For the proposed transaction at issue here, we determine that the geographic market is the area within which a consumer is most likely to shop for mobile telephony/broadband services.¹³⁸ For most individuals, this will be a local area, as opposed to a larger regional or nationwide area.¹³⁹ This is because "in response to a small but not insignificant price increase by providers" that offer service where consumers live, work or travel, most consumers are unlikely to switch to alternative carriers that operate only outside of such a locality.¹⁴⁰

3. Input Market

53. In evaluating this transaction, we consider the aggregation of spectrum by New Clearwire. In previous Commission orders, the Commission made a determination to include, in its evaluation of potential competitive harm, spectrum in particular bands that is suitable for the provision of mobile telephony services. In connection with these transactions, consistent with our determination to evaluate a broader combined product market for mobile telephony/broadband services, we will include spectrum suitable for the provision of wireless broadband over broadband networks, in addition to spectrum suitable for mobile voice and data services. As previously explained by the Commission, suitability is determined by whether the spectrum is capable of supporting mobile service given its physical properties and 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/broadband services.¹⁴¹ For the purposes of evaluating spectrum aggregation issues associated with this transaction we include in both our updated market-specific spectrum screen as well as our market-by-market analysis those spectrum bands designated for cellular, PCS, SMR, and 700 MHz services, as well as AWS-1 and BRS spectrum where available.

a. Background.

54. In the *AT&T-Dobson Order*, we applied a 95 megahertz initial nationwide spectrum aggregation screen prior to our market-by-market review of the proposed transaction.¹⁴² In the *AT&T-Dobson Order*, adopted in November of 2007, the Commission found that, in light of recent developments, spectrum "suitable" for the provision of mobile telephony services includes not only

¹³⁷ See, e.g., *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11546 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567-68 ¶ 105.

¹³⁸ See *AT&T-Dobson Order*, 22 FCC Rcd at 20309 ¶ 23. See also *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542 ¶ 30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 89.

¹³⁹ See *AT&T-Dobson Order*, 22 FCC Rcd at 20310-11 ¶ 25; *ALLTEL-Midwest Wireless Order*, 21 FCC Rcd at 11542 ¶ 30; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 89. See also *Twelfth Competition Report*, 23 FCC Rcd at 2331-2332 ¶ 174 (indicating that the average person shops for mobile telephony services in markets that include place of work, place of residence, and surrounding areas that are economically related; such areas generally are larger than counties).

¹⁴⁰ See *DOJ/FTC Merger Guidelines* §§ 1.11, 1.12.

¹⁴¹ See *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶ 27.

¹⁴² See *AT&T-Dobson Order*, 22 FCC Rcd at 20311 ¶¶ 27-30.

approximately 200 megahertz of cellular, broadband PCS, and Specialized Mobile Radio ("SMR") spectrum, but also an additional 80 megahertz of 700 MHz band spectrum (in the 698-806 MHz band) throughout the nation, bringing the total amount of spectrum suitable for mobile telephony services on a nationwide basis to approximately 280 megahertz.¹⁴³ Applying the Commission's previous determination that a spectrum aggregation screen should be based approximately on one-third of the total bandwidth available for mobile telephony services, we revised the spectrum aggregation screen from 70 megahertz to 95 megahertz, approximately one-third of the 280 megahertz of the spectrum designated as being available for services.

55. At the time of the *AT&T-Dobson Order*, we did not find it appropriate to include certain other spectrum bands – particularly AWS-1 and BRS spectrum – in the initial spectrum screen.¹⁴⁴ We noted, however, that AWS-1 and BRS spectrum is capable of supporting mobile telephony services given its physical properties and the state of equipment technology, and the spectrum is licensed with allocation and service rules that allow mobile uses.¹⁴⁵ However, the Commission did consider the extent to which AWS-1 or BRS licenses were in fact available in specific markets, and included them in the local spectrum input market, in our detailed, case-by-case analysis of markets caught by the initial screen.¹⁴⁶

b. Spectrum to be Included in Screen

56. *Arguments against subjecting 2.5 GHz spectrum to a spectrum screen analysis.* Sprint Nextel, Clearwire, and supporting commenters argue, for purposes of this transaction, that 2.5 GHz spectrum should not be subject to a spectrum screen.¹⁴⁷ First, they argue that the Commission has not previously included 2.5 GHz in a spectrum screen and it has applied a spectrum screen only to the mobile telephony services market, and the screen it has used previously should not be applied to this transaction.¹⁴⁸ In that connection, they argue that including BRS and EBS in the spectrum screen would be inconsistent with the Commission's determination in the *Sprint-Nextel Merger Order*.¹⁴⁹ HITN and WCA also cite the fact that BRS spectrum was not included in the spectrum screen in the *Verizon-RCC Order*.¹⁵⁰ Second, they contend 2.5 GHz spectrum is different from other spectrum and there is sufficient spectrum for the provision of mobile broadband services. In that regard, they cite the band's less favorable propagation characteristics as opposed to the 700 MHz band¹⁵¹ and their claim that BRS spectrum "trades at prices that are a fraction of CMRS and 700 MHz spectrum."¹⁵² Finally, the

¹⁴³ See *Id.*

¹⁴⁴ See *Id.*, 22 FCC Rcd at 20314-20315 ¶¶ 33-34.

¹⁴⁵ See *Id.*, 22 FCC Rcd at 20314 ¶ 32.

¹⁴⁶ *Id.*, 22 FCC Rcd at 20315 ¶ 35.

¹⁴⁷ See Sprint Nextel Clearwire Joint Opposition at 21-35.

¹⁴⁸ See Sprint Nextel Clearwire Joint Opposition at 22-23 (citing *AT&T-Dobson Order* ¶32 and *Verizon-RCC Order* ¶¶44-47); Google Opposition at 3-5; Source for Learning Opposition at 2-3; HITN Opposition at 8-10; WCA Reply at 7-9.

¹⁴⁹ See Sprint Nextel-Clearwire Joint Opposition at 31-32.

¹⁵⁰ See HITN Opposition at 6; WCA Reply at 6.

¹⁵¹ See Sprint Nextel-Clearwire Joint Opposition at 23; HITN Opposition at 8-10; Source for Learning Opposition at 3; PISC Opposition to AT&T's Petition to Deny at 3; George Mason University Instructional Foundation Reply Comments at 2.

¹⁵² See Sprint Nextel-Clearwire Joint Opposition at 24; Intel Opposition at 4; Motorola Reply Comments at 1-2.

Applicants and supporting commenters claim that there are limitations to the 2.5 GHz band that further justify not applying a screen. The limitations they cite include the complicated nature of licensing in the band, which often includes irregular geographic areas with different areas in different channels,¹⁵³ and complicated interference protection rules.¹⁵⁴ Finally, they note that while applicants have made substantial progress in transitioning the 2.5 GHz band to a new band plan that facilitates the provision of broadband services,¹⁵⁵ they note that the transition is not complete.¹⁵⁶ Applicants also argue that counting BRS and EBS in the spectrum screen would distort the FCC's public interest analysis and would lead to "absurd results" and an "underinclusive and overinclusive" spectrum screen.¹⁵⁷ If a spectrum screen is used, Applicants argue that the screen should include Mobile Satellite Service (MSS) Auxiliary Terrestrial Component (ATC) spectrum.¹⁵⁸

57. *Arguments for adding BRS, EBS, AWS-1, and/or other spectrum to the screen.* In its Petition to Deny in the Sprint Nextel-Clearwire transaction, AT&T argues that the Commission should apply a revised spectrum screen to this proposed transaction that includes BRS and EBS spectrum.¹⁵⁹ AT&T says that the Commission has focused its competitive analysis by applying an initial spectrum screen to all markets affected by the transaction.¹⁶⁰ AT&T argues that BRS spectrum should be included in the screen in this transaction because they believe it is clear from the Application that New Clearwire intends to compete with mobile voice services using this spectrum.¹⁶¹ AT&T points out that now there have been substantial changes in the services in the 2.5 GHz band that warrant a change in this regard. Specifically, AT&T argues that this proposed merger will create a "near monopoly"¹⁶² and New Clearwire's spectrum position in the 2.5 GHz band will be so large it negates the previous argument that, "the availability of BRS spectrum for new mobile uses depends upon the ongoing transition process," but now the transition process is nearly complete.¹⁶³ AT&T says that such treatment would be "flatly inconsistent with the Commission's treatment of other spectrum bands."¹⁶⁴ With respect to the limitations of the 2.5 GHz band that Applicants cite, AT&T claims that their arguments are inconsistent with their claims that the transaction will serve the public interest because it will allow Applicants to overcome those limitations.¹⁶⁵

¹⁵³ See Sprint Nextel-Clearwire Joint Opposition at 29-30; Intel Opposition at 3-4.

¹⁵⁴ See *Id.* at 30. In particular, Sprint Nextel and Clearwire cite 47 C.F.R. § 27.1221, the "height benchmarking" rule.

¹⁵⁵ See Sprint Nextel-Clearwire Applications, Public Interest Statement at 29-30.

¹⁵⁶ See Sprint Nextel-Clearwire Joint Opposition at 22-23.

¹⁵⁷ See *Id.* at 39.

¹⁵⁸ See Sprint Nextel-Clearwire Applications, Public Interest Statement at 57-58.

¹⁵⁹ See AT&T Petition to Deny at 4.

¹⁶⁰ See *Id.* at 1-2.

¹⁶¹ See *Id.* at 2.

¹⁶² See *Id.* at 5.

¹⁶³ See *Id.* at 6, citing *AT&T Dobson Order*, 22 FCC Rcd at 20315 ¶ 34 and 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*, 21 FCC Rcd 5606 (2006).

¹⁶⁴ See AT&T Petition to Deny at 7.

¹⁶⁵ See AT&T Reply at 18.

PDQLink contends that BRS, EBS, and AWS spectrum should be included in the spectrum screen, although it states that EBS is different from the other bands.¹⁶⁶ AT&T also suggests that AWS-1 and MSS spectrum that can be used to provide ATC should be included.¹⁶⁷

58. *Arguments against adding BRS, EBS, AWS-1, and/or other spectrum to the screen.* With respect to EBS spectrum, Sprint Nextel and Clearwire argue that all EBS spectrum should not be included in any analysis. Sprint Nextel and Clearwire argue that EBS leases are materially different from other commercial mobile leases because of the 30 year limit with mandatory lessor "right of review" at 15 years and the fact that EBS leases are subject to educational programming requirements.¹⁶⁸ In addition, other obligations and restrictions affect the operational usability of this spectrum which AT&T's predecessor BellSouth acknowledged when it noted that allowing EBS licensees the right to recapture additional capacity for educational use during a lease lifetime would make EBS leases "inherently less valuable to the [commercial] operator than unencumbered capacity."¹⁶⁹ EBS commenters that uniformly support the transaction are nonetheless especially concerned about EBS spectrum being included in the screen because the spectrum involved includes non-commercial leases between BRS and EBS licensees which are crafted to ensure that EBS licensees can use their 2.5 GHz spectrum to further their educational mission.¹⁷⁰ They contend that EBS is primarily an educational service and that it would be inappropriate to include EBS in a screen designed to capture commercial spectrum.¹⁷¹ They also cite special restrictions on EBS spectrum leasing and the requirement that the EBS licensee reserve a certain amount of capacity for its educational purposes.¹⁷² EBS licensees express concern that including EBS in a spectrum cap would lead New Clearwire to terminate leases, which would harm educational licensees.¹⁷³ WCA explains that not all EBS licensees lease their spectrum to commercial 2.5 GHz operators, every EBS licensee must preserve capacity for education uses, and lease agreements provide EBS licensees with the right to recapture capacity during the course of the lease.¹⁷⁴

¹⁶⁶ See PDQLink *Ex Parte* Request to Deny at 6-7.

¹⁶⁷ AT&T Reply at 4 (suggesting that certain AWS and MSS band holdings should be attributed when evaluating spectrum aggregation in this proposed transaction).

¹⁶⁸ See Sprint Nextel-Clearwire Joint Opposition at 25.

¹⁶⁹ See *Id.* at 26, citing Reply Comments of BellSouth Corp., et al., WT Docket No. 03-66, at 26 (Oct. 23, 2003) (quoting Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112, 19158 ¶ 88 (1998), which quoted BellSouth's 1997 Reply Comments in MM Docket No. 99-217).

¹⁷⁰ See Letter from Leigh Spellman, Gryphon Wireless to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 11, 2008) at 1; CTN Comments at 2-3; Letter from Edwin N. Lavergne, Esq., Counsel for Catholic Television Network to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 27, 2008) ("CTN *ex parte*"); Letter from Todd D. Gary, Esq., Counsel for National EBS Association to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 27, 2008) ("NEBSA *ex parte*").

¹⁷¹ See NEBSA Opposition at 6-7.

¹⁷² See NEBSA Opposition at 3-5; CTN Comments at 2-3; The Source for Learning and the Indiana Higher Education Telecommunication System Opposition at 3 ("Source for Learning Opposition").

¹⁷³ See NEBSA Opposition at 7-9; CTN Comments at 3; Source for Learning Opposition at 4.

¹⁷⁴ See WCA Reply at 10.