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Sprint-Nextel/Clearwire Merger

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As expected, the Commission granted the application to merge the 2.5 GHz interests of Sprint-Nextel and Clearwire into a new entity - New Clearwire - of which Sprint will have a controlling interest. The merger was pushed through with surprising swiftness given the amount of spectrum to be consolidated in one company and the ongoing transition of the underlying spectrum.

The spectrum in question is in the 2.5 GHz band, which is separated into the Educational Broadband Service, which is set aside for noncommercial, educational uses, and the Broadband Radio Service, the latest incarnation of the old wireless cable licenses. Over the past ten years, this band has seen several revisions of the underlying authorized uses, first from analog to digital, then from one-way to two-way, and now from fixed to fixed and mobile broadband uses. Over the years, several companies have tried to cobble the spectrum together, and have failed. Try as they might, the licensees in this band have never been able to implement a successful business model on a national scale.

With the latest revisions in 2006 to the rules which authorize the introduction of mobile broadband uses, the industry has now hitched its wagon to the WiMAX platform. Joining in the wagon train are Intel, Google, Comcast, Time Warner and Bright House Networks, which are investing \$3.2 billion in the merged entity, and the resulting combination is valued at \$14.5 billion.

The Commission reviewed the merger in the context of the potential competitive considerations in both the mobile telephone/broadband service market, and in the fixed broadcast market. Despite finding that the merger of the entities would foreclose future competition between the two parties in these markets, the Commission determined that the anti-competitive concerns raised by the merger were outweighed by the merger's facilitation of the build-out of this valuable spectrum.

In doing so, the Commission made several critical determinations that underscore the overarching goals of the Commission in granting this merger. Specifically, the Commission determined that it would not include in its analysis the spectrum under lease to these two entities from the educational licensees when determining if the merger

would be anti-competitive. While the Commission noted that long-term 30-year leases were in use, the Commission agreed with the applicants that the special educational purpose of the spectrum, along with the right of the educational institutions to recover a portion of the spectrum after 15 years, “complicate use of this spectrum for commercial purposes.”

Further, in determining the size of the market to measure the impact of the merged entity, the Commission used the Cellular Marketing Area and Component Economic Area, rather than the Basic Trading Area by which the commercial spectrum has been auctioned in the past. In doing so, the Commission considered both the urban and rural service provided by other mobile telephone providers, rather than just looking at the impact that the merger would have in the 2.5 GHz market.

Thus, by reducing the size of the 2.5 GHz spectrum slice under review, and increasing the size of the spectrum pie by expanding the defined market, the Commission ultimately found that the merger would not raise anti-competitive concerns. It is a classic case of setting the definitions for the analysis in a way that would ultimately support the conclusion. Clearly, when compared against the larger mobile telephone/broadband service industry, the consolidation of the unbuilt WiMAX systems will have very little impact on the industry in the near future.

However, when looking at those which hold licenses, either commercial or educational, the only game in town is the New Clearwire. If a commercial entity seeks to acquire equipment, or build-out services, it must now deal with the elephant in the room for cost and competition for resources. Further, if educational institutions seek to lease a portion of their spectrum to raise money for their educational programs, there is now only one fish in the sea. There was very little, if any, consideration raised by the Commission on these points. Further, in the future, when the Commission seeks to license the “white spaces” of this spectrum to educational institutions, one can be sure that the puppeteer behind the curtain will be New Clearwire.

Also, while parties pressed the Commission to require the combined entity to forsake exclusive handset agreements and promote network openness, the actual order granting the merger did neither. Instead, the merged entity pledged to enter into negotiations for “commercially reasonable terms and conditions” for network openness and roaming agreements, and the Commission delayed the handset agreement issue for consideration in a different rulemaking proceeding.

Finally, the Commission accepted the voluntary commitment of New Clearwire both (a) to phase out its pursuit of universal service high cost support over the next five years, and (b) to implement E911 requirements on location accuracy and reliability. Under the

terms of its commitment, New Clearwire will ensure that, within two years after the merger, 2/3 of the E911 calls will be accurate to within 50 meters in all counties, 80% of the E911 calls will be accurate within 150 meters in all counties, and within eight years, 90% of the E911 calls will be accurate within 150 meters.

With the concurrent merger of Alltel and Verizon (*see* article, page 1), along with the recently approved merger of Sirius and XM, it is clear that the Commission has not found a merger it doesn't like. While some consolidation in the industry may have been foreseeable, it is nearly impossible to conceive of a merger the current Commission would not approve. With the new Administration coming into office in January, 2009, it will be interesting to see if the new Commission will take a more pro-competitive, anti-consolidation perspective on the consolidation of the telecommunications industry. President-elect Obama has pledged to reinvigorate antitrust review of telecommunications mergers, so we may see a more thorough review of potential mergers in the future, perhaps telling future consolidators, "No, You Can't!"