

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Applications of Sprint Nextel Corporation, Transferor	)	IB Docket No. 12-343
	)	
SoftBank Corp., and Starburst II, Inc., Transferees	)	
	)	
Joint Applications for Consent to Transfer of Control of Licenses, Leases, and Authorizations; and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as amended	)	

To: The Commission

**COMMENTS OF EBS LICENSEE  
HISPANIC INFORMATION AND TELCOMMUNICATIONS NETWORK, INC.**

**IN OPPOSITION TO  
PETITION TO DENY OF  
THE CONSORTIUM FOR PUBLIC EDUCATION AND  
THE ROMAN CATHOLIC DIOCESE OF ERIE, PENNSYLVANIA**

Hispanic Information and Telecommunications Network, Inc. ("HITN") hereby submits comments in opposition to a Petition to Deny filed against the above referenced applications by The Consortium for Public Education ("CFPE"), and The Roman Catholic Diocese of Erie, Pennsylvania ("Erie Diocese," and together with CFPE, "Petitioners").

**SUMMARY**

Petitioners' alleged experience with Clearwire is not reflective of HITN's, which holds more than twelve times the number of EBS spectrum licenses held by Petitioners. Petitioners' alternative prayers for relief are overbroad in that they seek either (a) to bar a combination of Sprint and Softbank that could benefit HITN and other holders of EBS licensees, or (b) the

divestiture by Clearwire of all of its access rights with all EBS licensees as a condition to such combination, which would cause a significant and undue expense to and burden on HITN, and deprive HITN of the benefit of its negotiated agreements with Clearwire that would otherwise be undisturbed in the combination.

Separately, the relief sought by Petitioners in the form of a review of the substantial service showings of HITN and other EBS license holders is an inappropriate attempt by Petitioners to circumvent the rules of the Commission that clearly deny Petitioners standing to assert such a review.

Finally, Petitioners have wrapped their requests for relief in spurious policy arguments in a thinly veiled and xenophobic attempt to secure a private, commercial advantage that they have been unable to achieve through contract negotiations with Clearwire.

#### **I. Petitioners Alleged Experience With Clearwire is Atypical.**

HITN is the largest single holder of EBS spectrum licenses in the country, with some 90 licensed stations throughout the United States and Puerto Rico. Petitioners, by contrast, together have 7 licensed stations in a narrow geography. Through individual lease agreements HITN provides Clearwire with access to the excess commercial capacity on most of its EBS licensed stations in exchange for monetary consideration and consideration in the form of services and equipment for the utilization of HITN's reserved capacity.

Petitioners' claims with respect to Clearwire are not representative of the experience of HITN and to HITN's knowledge of other EBS licensees. In HITN's experience, Clearwire is keenly aware of HITN's obligations to commit capacity for educational usage. HITN's contracts with Clearwire do not contain the "use it or lose it" allowances Petitioners' refer to and in most instances HITN has negotiated the right to obtain additional equipment at below market rates and increase the number of educational accounts available to it.

Far from the industry pariah described by Petitioners, in HITN's experience Clearwire has proved to be a good partner to educators, providing proactive assistance during both transition and the substantial service processes. Clearwire has gone above and beyond to help educators in pre-launch markets to establish educational uses for equipment operational in only a

portion of the Licensee's service area. For example, pursuant to a plan by HITN to interconnect and provide wireless broadband to over 20 schools in Puerto Rico (some in very rural areas), Clearwire erected several point-to-point "backhaul" links in a matter of weeks that are now providing those schools with internet connectivity they would otherwise not have.

Thus, HITN's experience with Clearwire belies Petitioners' broad allegations regarding Clearwire blanket use of the offending contract clauses and practices with educational partners.

## **II. Burdensome, Duplicative Review of Substantial Service Showings Unwarranted**

### **a. Petitioners Do Not Have Standing to Request FCC Review of Final Substantial Service Compliance Showings.**

Petitioners seek to have the FCC authorize an untimely, wasteful and pointless fishing expedition into the educational service usage of dozens of EBS Licensees, including HITN<sup>1</sup> and justify the foregoing through a confusing, tortured and misleading summary of substantial service compliance showings<sup>2</sup> filed in several partially or fully launched markets where neither Petitioner holds a license. The substantial service showings completed in the fall of 2011 fully demonstrated compliance with various FCC established guidelines and safe harbors. All of the showings analyzed by Petitioners were duly reviewed by the FCC in 2011 and accepted.

By operation of the FCC's rules, all of those acceptances became final actions more than a year ago and are not subject to reconsideration or review. Even were a request for review permitted, Petitioners have no standing to request one. Petitioners have no connection with the markets they purported to examine, and were not affected in any manner by the showings for which they seek FCC review. It would be highly prejudicial and wholly improper to require the licensees in the twenty analyzed Clearwire markets to undergo an impromptu audit based upon the unsupported and untimely allegations of petitioners that lack standing.

### **b. HITN's substantial service filings fully complied with Two FCC Safe Harbors**

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<sup>1</sup> The data summarized by Petitioners includes data provided for HITN stations in 14 Clearwire markets.

<sup>2</sup> The FCC, as part of 2005 rule changes facilitating cellularized broadband service, and a recently completed transition to geographic licensing and a new band plan, required that EBS Licensees file a one-time snapshot in 2011 of their resumed educational usage on their EBS stations.

In the markets analyzed by Petitioners, HITN's stations fully complied with the FCC's safe harbor requirements to satisfy substantial service. In each analyzed market, HITN demonstrated compliance with one safe harbor based on an educational usage certification and its operator's coverage of thirty percent of its licensed service area. In addition, HITN included examples of its educational usage within those markets to demonstrate that it was engaged in launching educational services and that it could also fully satisfy a different safe harbor based solely on educational usage.<sup>3</sup> The FCC accepted these submissions and neither the Commission nor the staff thought it appropriate to make further inquiry or take further action and no party filed any challenge to HITN's showings within the time period provided for under the Commission's rules.

The FCC should not permit Petitioners to circumvent the FCC's rules to the detriment of HITN and other EBS license holders by making unfounded allegations in an effort to secure a commercial end that it was unable to negotiate privately with Clearwire.<sup>4</sup>

**III. Petitioners' Request to Require Clearwire/Sprint to Divest All of its EBS Spectrum Access Rights is Inappropriate, Overbroad and Would Cause Substantial Harm HITN and Educators.**

a. *The requested relief would detrimentally impact HITN's educational mission.*

The relief requested by Petitioners is overbroad, disproportionate to the alleged harm and if granted would materially hamper the ability of HITN and other EBS licenses to provide the quality and breadth of service to the educational and other communities intended to be served by the reserved capacity on EBS spectrum. An unsuccessful divestiture or invalidation of its leases would not only remove a valuable source of funding used by HITN to fund production of programming for broadband and satellite distribution, but loss of network access would impede HITN's plans to use its reserved capacity in Clearwire markets to provide educational content currently in development: HITN Learning and Early Learning Collaborative Playsets. HITN Learning, funded in part by a contribution from Clearwire, is offered in both English and Spanish

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<sup>3</sup> See 47 C.F.R. § 27.14(o)(1)&(3) and (o)(2).

<sup>4</sup> Petitioners attempt to use HITN's careful dual compliance methodology to incorrectly infer that other area EBS licensees provided no educational usage whatsoever.

and focuses on Common Core State Standards and provides students with practice in English Language Arts and Mathematics.<sup>5</sup> The Playsets are being designed to leverage the power of technology and transmedia content to promote school readiness among three to five year olds.<sup>6</sup> Granting Petitioners' requests would significantly impact HITN's plans to distribute the foregoing educational content to educational institutions, and it would significantly impact other licensees' efforts or planned efforts to distribute educational content.

b. *Proposed Relief Would Further Burden HITN by Forcing it to Locate and Negotiate With New Operators*

HITN's spectrum relationships with Clearwire permit HITN to provide digital broadband services, and transmit educational programming beyond the service area covered by HITN's EBS stations. Were Clearwire/Sprint forced to terminate its EBS arrangements with HITN, HITN would be required to devote substantial resources to locating, negotiating and securing access to a similar national platform. Imposing such a burden on HITN is unconscionable and would not advance any FCC policy objective.

c. *Proposed Relief would unfairly Burden Educators*

Divestiture would certainly delay and cast uncertainty on broadband deployment over leased educational spectrum and therefore would further delay educational access to the educational use of broadband services on mature operational networks. Since Clearwire would not be required to divest its commercial spectrum, or provide access to operational networks in launched markets, issues of interference and discontinuance of launched service on EBS spectrum would likely occur and educators receiving services would be adversely affected.

**IV. FCC is not the proper forum to adjudicate private contractual disputes.**

The Petitioners, who collectively hold only seven EBS licenses, appear to be two small entities seeking to gain leverage over a commercial operator in insular EBS leasing matters. As

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<sup>5</sup> HITN Learning motivates students to learn and succeed by using interactive lessons guided by friendly characters and rewards efforts through increased and progressive access to exciting online activities.

<sup>6</sup> Playsets are being developed by HITN's Early Learning Collaborative funded by a U.S. Department of Education Office of Innovation and Improvement "Ready-To-Learn" Television Grant: CFDA#84.295A, Grant Award Notification U295A100016, dated September 28, 2010

a solution to those matters, Petitioners urge the FCC to invalidate the transfer of such leases, force Clearwire to assign such leases, and if unsuccessful, allow Clearwire to simply opt out of them or declare such leases terminated by operation of law. The Commission has repeatedly stated that it is not the proper forum to adjudicate private contractual disputes and that it does not have the authority to void contracts executed by two private parties under the laws of individual states, and that even if it could, such an action would generally deter private parties from entering into spectrum leasing agreements.<sup>7</sup> Accordingly, even had these objections been raised by a party to such an agreement, the Commission has previously stated that it cannot and should not provide the relief requested.

#### **V. Fear of Foreign Control of EBS Spectrum Access is Misplaced.**

Finally, Petitioners' provide no foundation whatsoever for their broader policy assertion that harm to education objectives underlying the EBS spectrum will result from foreign control of the commercial capacity on EBS spectrum. Such suppositions at best suffer from a lack of evidence and at worse on reflect unbridled xenophobia. Present circumstances clearly demonstrate that change in control will in fact facilitate construction of stations and further secure the educational objectives underlying the EBS spectrum.

It has become readily apparent that in order to maximize the interests of EBS spectrum licensees, their stations must be operated by professional wireless network operators that are both capable of raising the required capital and operating complex digital networks providing competitive two-way digital services. During a cataclysmic downturn in the Nation's economy, resulting in scarce funding resources, operators like Clearwire were asked to continue building out their nationwide broadband network in order to meet benchmark requirements. As other operators went into bankruptcy or abandoned their networks, Clearwire struggled to raise capital and achieve what it could in that environment to meet its requirements.

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<sup>7</sup> *Third Order On Reconsideration And Sixth Memorandum Opinion And Order And Fourth Memorandum Opinion And Order And Second Further Notice Of Proposed Rulemaking and Declaratory Ruling*, WT Docket 03-66, FCC 08-83 (rel. March 20, 2008) at ¶ 137; *Antiles Wireless, LLC d/b/a USA Digital*, DA-09-863 (Rel. April 17, 2009) *Hazel-Tone Communications, Inc.*, 16 FCC Rcd 21211, 21213 (2001); *Airtouch Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 9430 (1999); *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987).

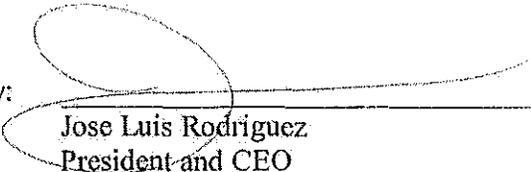
Requiring Clearwire's divestiture of a substantial portion of the spectrum underlying this broadband service five years into its development would be absurd as such a solution would not further the Commission's goals of promoting growth and rapid deployment of innovative and efficient communications services and broadband access for educational institutions.<sup>8</sup> Softbank has expressed great interest in funding Clearwire and the completion of the Broadband rollout, in part on channels accessed through the very leases Petitioners are now asking the Commission to pull the plug on. Such a "start over" solution with another operator would not resolve the issues of which Petitioner's complain, and would undermine the Broadband network that Clearwire has been developing and that educators have been utilizing.

Accordingly, for the reasons outlined above, HITN respectfully requests that the Commission dismiss the Petition submitted by the Consortium for Public Education, and The Roman Catholic Diocese of Erie, Pennsylvania, as lacking merit.

Respectfully submitted,

HISPANIC INFORMATION AND  
TELECOMMUNICATIONS NETWORK, INC.

By:



Jose Luis Rodriguez  
President and CEO

February 12, 2013

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<sup>8</sup> See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 03-66, 19 FCC Red 14165, 14167 ¶ 1 & 3 (2004); citing Federal Communications Commission, Strategic Plan FY 2003-FY 2008 at 5 & 14 (2002).

## Certificate of Service

I, Evan Carb, hereby certify that on this 12th day of February, 2013, I caused true and correct copies of the foregoing Comments of EBS Licensee Hispanic Information and Telecommunications Network, Inc. in Opposition to Petition to Deny of the Consortium for Public Education and the Roman Catholic Diocese of Erie, Pennsylvania to be served on the following parties via email (except as indicated):

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