

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Applications of Sprint Nextel Corporation,	)	
Transferor,	)	
	)	
SoftBank Corp., and Starburst II, Inc.,	)	IB Docket No. 12-343
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	)	

**REPLY COMMENTS OF DISH NETWORK L.L.C.**

February 25, 2013

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**REPLY COMMENTS OF DISH NETWORK L.L.C.**

**I. INTRODUCTION AND SUMMARY**

DISH Network L.L.C. (“DISH”) submits these reply comments in the above-referenced proceeding concerning the applications (“Applications”) for Federal Communications Commission (“Commission” or “FCC”) consent to the transfer of control of various licenses, leases, and authorizations held by Sprint Nextel Corporation and its subsidiaries (collectively, “Sprint”), and by Clearwire Corporation (“Clearwire”), to SoftBank Corp. and its indirect subsidiary Starburst II, Inc. (collectively, “SoftBank” and, together with Sprint and Clearwire, the “Applicants”).<sup>1</sup>

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<sup>1</sup> See Joint Applications of Sprint Nextel Corp., Transferor, SoftBank Corp., and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, IB Docket No. 12-343 (filed Nov. 15, 2012) (“Applications”). The Applicants subsequently amended the Applications to account for Sprint’s proposal to acquire control of Clearwire. See Applications of Sprint Nextel Corp., Transferor, SoftBank Corp., and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, IB Docket No. 12-343, Amendment at 7 (filed Dec. 20, 2012) (“Amendment”).

These reply comments are specifically offered in response to the Opposition filed by some of the Applicants—SoftBank, Starburst, and Sprint—on February 12, 2013.<sup>2</sup> Curiously, the Opposition is not joined by a key applicant. Reportedly, Clearwire has merely communicated the message that it, too, opposes the petitions to deny,<sup>3</sup> but it stops short of endorsing the Opposition’s factual assertions, in apparent violation of the Communications Act’s requirement that all “allegations of fact or denials thereof” in such oppositions must “be supported by affidavit.”<sup>4</sup>

Given the fluidity related to the underlying transactions under review,<sup>5</sup> DISH continues to believe that it is still too early to even gather a full record for a proper public interest review. Nevertheless, DISH provides its initial input here based on the current state of the transactions.

***Foreign Ownership Showing.*** First and foremost, the transaction puts more U.S. spectrum than anyone else holds not only in the hands of one company, but in the hands of a foreign company. To the extent the Applicants have used, or plan to use, licenses that are subject to the statutory alien ownership restriction for broadcast-type services,<sup>6</sup> it is questionable

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<sup>2</sup> Sprint Nextel Corporation, SoftBank Corp., and Starburst II, Inc. Joint Opposition to Petitions to Deny and Reply to Comments, IB Docket No. 12-343 (Feb. 12, 2013) (“Opposition”).

<sup>3</sup> In the Opposition’s words: “Clearwire has authorized the Applicants to state that Clearwire also opposes the petitions to deny and the conditions proposed in the comments.” *Id.* at 1.

<sup>4</sup> 47 U.S.C. § 309(d)(1). In fact, only SoftBank attested to any fact presented in the Opposition and even SoftBank’s attestation was limited to a declaration on SoftBank’s use of Huawei equipment. *See* Declaration of Tadashi Iida, Sprint-SoftBank Opposition at Exhibit 1.

<sup>5</sup> *See* Letter from Jeffrey H. Blum, DISH Network Corporation, to Marlene H. Dortch, FCC, IB Docket No. 12-343 (Jan. 28, 2013); DISH Request to Hold Proceeding in Abeyance, IB Docket No. 12-343 (Jan. 16, 2013).

<sup>6</sup> LTE enables broadcasting through use of the evolved Multimedia Broadcast Multicast Service (“eMBMS”). The eMBMS platform is expected to replace existing mobile broadcasting systems such as Digital Multimedia Broadcasting (“DMB”) and Integrated Services Digital Broadcasting (“ISDB-T”). Jason Jiang, *Qualcomm Grapples With a Way to Make the Most Use of LTE Network*, iTers News, May 3, 2012, <http://itersnews.com/?p=2508>.

whether they can take advantage of the World Trade Organization presumption in favor of foreign entities investing in the U.S. telecommunications industry. The evolution in the type of services for which this spectrum can be used is just one of the factors distinguishing this transaction from Deutsche Telekom's acquisition of T-Mobile, approved by the Commission in 2001, on which the Opposition heavily relies.<sup>7</sup>

Nevertheless, even if the presumption does apply, it would be rebutted by the exceptional circumstances present here: the sheer amount of spectrum being accumulated; the questions over SoftBank's spectrum-use plan; the unproven public interest benefits from the combination; and the windfall that SoftBank would enjoy if Sprint still owes the U.S. Treasury an anti-windfall payment. All of these are additional factors distinguishing this transaction from the Deutsche Telekom/T-Mobile acquisition. Standing alone, each of them is not necessarily debilitating. But seen through the prism of the proposed alien ownership, their combination is especially troubling.

***Spectrum Aggregation.*** The Applicants' primary answer to concerns regarding spectrum aggregation is that those concerns were addressed back in 2008 when Sprint acquired its since-relinquished *de jure* control over Clearwire. But that 5-year-old finding does not make the Commission's public interest determination a foregone conclusion, especially since the spectrum would now be aggregated in the hands of a foreign entity, and the relevant circumstances have changed materially in the intervening years. The combined SoftBank-Sprint would hold more than 200 MHz of spectrum in the largest markets, making it the nation's single largest owner of

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<sup>7</sup> See Applications of Voicestream Wireless Corporation, Powertel Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779 (2001).

electromagnetic “real estate” suitable for mobile broadband service. Sprint currently holds over 50 MHz of spectrum. Clearwire holds, by its own estimation, “approximately 160 MHz of spectrum on average in the 100 largest markets in the United States,” and its “deep spectrum position in most of [its] markets enables [it] to offer [its] subscribers significant mobile data bandwidth, with potentially higher capacity than is currently available from other carriers.”<sup>8</sup> SoftBank has failed to demonstrate its need for such a large amount of spectrum, has not presented a timeline for use of all of the spectrum being aggregated, and has not shown how its equipment will incorporate so many different bands as a technical matter.

The Commission should evaluate SoftBank’s combined spectrum holdings by taking into account all spectrum “suitable” and “available” for mobile telephony/broadband services. While the Commission’s previous spectrum screen calculations have excluded the majority of Clearwire’s spectrum, such exclusion is no longer warranted where the 2.5 GHz spectrum is itself being transferred in light of a number of technological and marketplace changes. Today, virtually all of Clearwire’s spectrum is suitable for mobile broadband service. Sprint and Clearwire themselves publicly tout its suitability. Moreover, this is the first Commercial Mobile Radio Service (“CMRS”) transaction proceeding since 2008 that involves the 2.5 GHz frequencies on both sides of the spectrum concentration ledger. In other words, these frequencies matter both for the purpose of determining the universe of available CMRS spectrum *and* because they are themselves the frequencies being aggregated.

In these circumstances, the Commission should not ignore any of the 2.5 GHz frequencies. This in turn means that, after Sprint submits the necessary information, the SoftBank-Sprint-Clearwire combination will likely be shown to exceed the spectrum screen in

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<sup>8</sup> Clearwire Corp., Annual Report (Form 10-K), at 14 (Feb. 16, 2012).

many markets. Divestiture of Sprint's stake in Clearwire to new entrants should be required in markets where the appropriate spectrum screen is exceeded.

*Spectrum Use.* Even if the spectrum concentration levels resulting from the transaction turn out to pose no concern standing alone, they may be more troubling when there are indications that the spectrum being concentrated may not be fully or timely used. The Applicants should be required to detail how all Sprint-Clearwire spectrum is used today and provide engineering analysis showing why SoftBank requires more than 200 MHz of spectrum. Any spectrum that cannot be used by the combined entities in a reasonable timeframe should be subject to divestiture or enforceable buildout conditions similar to those imposed in recent proceedings.<sup>9</sup> Sprint has been highly critical of other providers' engineering showings, and should be required to satisfy its own standards for documentation in this transaction.

In 2008, Clearwire and Sprint promised that they would exceed the BRS/EBS buildout requirements adopted in the *Sprint Nextel Order*<sup>10</sup> and would cover 140 million people by the end of 2010.<sup>11</sup> The Opposition attempts to demote this commitment by characterizing it as a mere "business plan," and then claims to have met it through a network covering "well over 100 million people."<sup>12</sup> The difference between "140 million" and "well over 100 million" is potentially large. The Applicants should be asked to demonstrate that these promises have been

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<sup>9</sup> See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, *Memorandum Opinion and Order and Declaratory Ruling*, 27 FCC Rcd. 10698, 10743-44 ¶ 121 (2012) ("*Verizon-SpectrumCo Order*").

<sup>10</sup> See Applications of Nextel Communications, Inc. and Sprint Corporation, *Memorandum Opinion and Order*, 20 FCC Rcd. 13967, 14028-29 ¶¶ 164-166 (2005) ("*Sprint-Nextel Order*").

<sup>11</sup> See Sprint Nextel Corporation and Clearwire Corporation, *Memorandum Opinion and Order*, 23 FCC Rcd. 17570, 17617 ¶ 119 (2008) ("*Sprint-Clearwire Order*").

<sup>12</sup> See Opposition at 16 & n.54.

fulfilled, especially since Clearwire has previously slowed its deployment,<sup>13</sup> and recently stated that it may incur further delays.<sup>14</sup> Similarly, despite receiving its G Block license more than eight years ago,<sup>15</sup> Sprint did not launch service in the G Block until July 2012 and now offers service in only 49 markets.<sup>16</sup> The Commission should consider any underuse of spectrum in evaluating any claims by the Applicants that they need yet more spectrum.

***Questionable Benefits.*** The Applicants' main argument in support of the transactions' public benefits relies on SoftBank's alleged record of strengthening competition and lowering prices in Japan. The Applicants ask the Commission to accept that the same will happen here. But densely populated Japan is a poor basis for comparison for the build-out challenges that wireless carriers face in a much larger geographic area such as the United States. In addition, the Opposition, like the Application before it, is silent on any concrete ways for transmitting SoftBank's claimed acumen to Sprint and the U.S. market. SoftBank has offered no public interest commitments and no detailed analysis of the consumer benefits that would result from the transaction.

***Sprint's Unfulfilled Obligations.*** The policy in favor of foreign entry into the United States does not mean that foreign investors are entitled to regulatory advantages not available to

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<sup>13</sup> Sue Marek, *Clearwire Delays, Denver, Miami Retail Market Launches*, Fierce Wireless, Oct. 5, 2010, <http://www.fiercewireless.com/story/exclusive-clearwire-delays-denver-market-launch/2010-10-05>.

<sup>14</sup> Clearwire Corp., Prospectus (Form 424B2), at S-7 (Sept. 27, 2012) ("As such, in order to better align our capital expenditures with the receipt of expected LTE revenues, we are currently evaluating our plans and may elect to delay a portion of our deployment schedule accordingly.").

<sup>15</sup> See Improving Public Safety Communications in the 800 MHz Band, *Fifth Report and Order, Eleventh Report and Order, Sixth Report and Order, and Declaratory Ruling*, 25 FCC Rcd. 13874, 13875 ¶ 1 n.1 (2010).

<sup>16</sup> See News Releases, Sprint Nextel Corp., Ring in the Holidays with Sprint 4G LTE, Dec. 18, 2012, available at [http://newsroom.sprint.com/article\\_display.cfm?article\\_id=2479](http://newsroom.sprint.com/article_display.cfm?article_id=2479).

other U.S. companies. When it received 10 MHz of nationwide spectrum in the 1.9 GHz band from the Commission in 2004, Sprint struck a bargain with the Commission; Sprint has yet to keep its end of that bargain. Sprint undertook the following obligations:

- Sprint had to complete reconfiguration of the 800 MHz band in three years—by 2008. Sprint has requested and received nine extensions of this transition period. The transition is still incomplete. It should be completed before SoftBank takes on Sprint and Sprint takes on Clearwire.
- Sprint was required to pay the U.S. Treasury \$2.8 billion minus the cost of relocation of Broadcast Auxiliary Service (“BAS”) incumbents from its new spectrum and of public safety operations into its old spectrum. While Sprint has claimed that its relocation expenditure is so vast that it has eclipsed the \$2.8 billion, nullifying its obligation to the United States, this claim is questionable on a number of counts. The Applicants should submit to a full audit, imprudent or otherwise improper expenditures should be disallowed, and Sprint should make the U.S. taxpayers whole for any amount they are found to owe before these transactions are approved.

*Minority Shareholders.* The Applicants’ facile dismissal of the Crest and Taran petitions as “contrary to the Commission’s well-established policy of not intervening in disputes over corporate control” ignores a fundamental fact that distinguished these petitions from other minority shareholder filings in the past: DISH has made a competing offer to purchase Clearwire for a significant premium over Sprint’s offer, and that offer is currently under serious consideration by Clearwire.

## **II. THE APPLICANTS HAVE FAILED TO SUPPORT THEIR FOREIGN OWNERSHIP SHOWING**

Under Section 310(b)(4) of the Communications Act, the Commission must make a public interest determination before issuing certain types of licenses, including broadcast and common carrier licenses, to “any corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or

representative thereof, or by any corporation organized under the laws of a foreign country.”<sup>17</sup> If the Commission finds that the public interest would be served by the refusal of such a license, it may not grant the license.<sup>18</sup> The Opposition asserts that the Applicants have met this standard because, under “controlling precedent,” they are entitled to a presumption in favor of foreign entry.<sup>19</sup> This is questionable, however. And, even if the presumption applies, this transaction presents the type of exceptional circumstance that warrants its rebuttal.

**A. The Presumption in Favor of Entry by Foreign WTO Country Investors Does Not Necessarily Apply Here**

In November 1997, the Commission released the *Foreign Participation Order*<sup>20</sup> to implement the commitments undertaken by the United States and 69 other nations in February 1997, through the WTO Basic Telecommunications Agreement.<sup>21</sup> The *Foreign Participation Order* and WTO Basic Telecommunications Agreement apply to “basic telecommunications,” defined as private and public services that involve end-to-end transmission of information and are provided through a network infrastructure.<sup>22</sup>

On the other hand, neither the WTO Basic Telecommunications Agreement nor the *Foreign Participation Order* applies to broadcasting service or subscription television.<sup>23</sup> This

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<sup>17</sup> 47 U.S.C. § 310(b)(4).

<sup>18</sup> *Id.*

<sup>19</sup> Opposition at 19.

<sup>20</sup> See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891 (1997) (“*Foreign Participation Order*”).

<sup>21</sup> *Id.* at 23893-94 ¶ 2.

<sup>22</sup> World Trade Organization, Coverage of Basic Telecommunications and Value-Added Services, [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_coverage\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_coverage_e.htm).

<sup>23</sup> See Rules and Policies in the U.S. Telecommunications Market, *Order on Reconsideration*, 15 FCC Rcd. 18158, 18184-85 ¶¶ 62-64 (2000); Amendment of the Commission’s Regulatory

means that the presumption in favor of foreign entry is not available to the extent that Sprint or Clearwire provides (or plans to provide) broadcast-type services by using licenses that are subject to Section 310(b) of the Communications Act.<sup>24</sup> This is particularly relevant here because today the spectrum held by the Applicants is suitable for the provision of such services. Under the Commission’s flexible use policy, the wireless frequencies at issue here can be used for a multitude of services, including point-to-multipoint services. Indeed, LTE enables broadcast-type services through the use of eMBMS—a platform that is expected to replace and improve upon existing mobile broadcast-type systems such as DMB and ISDB-T.<sup>25</sup> And Sprint’s offerings today include Sprint TV, which appears to be a broadcast-type or subscription television service.<sup>26</sup>

The Commission should inquire into the nature of the Applicants’ current and planned services for purposes of determining whether any of these services qualify as broadcast-type or subscription television services that are not covered by the presumption in favor of foreign entry.

**B. The Applicants Have Not Shown that Japan Affords Broadcast-Type Video Effective Competitive Opportunities**

For foreign investment in broadcast-type services, the Commission should, among other things, evaluate the effective competitive opportunities afforded U.S. companies by the relevant foreign country. This is an evaluation akin to the Effective Competitive Opportunities (“ECO”)

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Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, *Report and Order*, 12 FCC Rcd. 24094, 24138-39 ¶ 101 (1997) (“*DISCO II Order*”).

<sup>24</sup> 47 U.S.C. § 310(b).

<sup>25</sup> Jason Jiang, *Qualcomm Grapples With a Way to Make the Most Use of LTE Network*, iTers News, May 3, 2012, <http://itersnews.com/?p=2508>.

<sup>26</sup> Sprint Nextel, TV That’s Out of the Box—And on Your Phone, [http://shop.sprint.com/myprint/services\\_solutions/details.jsp?detId=tv&catId=service\\_entertainment&catName=Entertainment&detName=Sprint%20TV&specialCat=](http://shop.sprint.com/myprint/services_solutions/details.jsp?detId=tv&catId=service_entertainment&catName=Entertainment&detName=Sprint%20TV&specialCat=).

test applicable to investors from non-WTO countries and to requests for landing rights by foreign Direct Broadcast Satellite operators.<sup>27</sup> The ECO Test factors are: (1) the legal ability of U.S. entities to enter the foreign market, (2) the existence of reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities, (3) the existence of competitive safeguards in the foreign country to protect against anticompetitive practices, (4) the existence of an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, and (5) any other relevant public interest factors.<sup>28</sup> Under the ECO Test, the burden of showing that effective competitive opportunities are available resides with the applicants.<sup>29</sup> Sprint and SoftBank did not attempt to even show that Japan's broadcast-type video markets are effectively open to U.S. companies.

**C. Even If the Presumption in Favor of Entry Applies, This Transaction Presents Exceptional Circumstances**

Under the more lenient WTO standard, too, the Commission will only grant petitions for declaratory ruling under Section 310(b)(4) if certain thresholds are met and there are no "exceptional circumstances."<sup>30</sup> This transaction presents exceptional circumstances that differentiate it from the Commission's past precedent on foreign ownership and warrant denial of the Applicants' Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act. They include: an unprecedented spectrum aggregation in the hands of a foreign company;

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<sup>27</sup> *DISCO II Order*, 12 FCC Rcd. at 24137 ¶ 99.

<sup>28</sup> See Reform of Rules and Politics on Foreign Carrier Entry into the U.S. Telecommunications Market, IB Docket No. 12-299, *Notice of Proposed Rulemaking*, FCC 12-125 (rel. Oct. 11, 2012) ("*ECO Test NPRM*").

<sup>29</sup> See Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 FCC Rcd. 3873, 3891 ¶ 46 (1995); *ECO Test NPRM* ¶ 6.

<sup>30</sup> *Foreign Participation Order*, 12 FCC Rcd. at 23913-14 ¶¶ 50-51.

the uncertainty over SoftBank’s spectrum-use plan; the questionable benefits to flow from the combination; and the regulatory windfall that SoftBank potentially stands to reap.

**1. The Transaction Would Put an Unprecedented Spectrum Aggregation in a Foreign Buyer’s Hands**

The Applicants assert that the Applications do not raise any spectrum aggregation concerns.<sup>31</sup> Yet, SoftBank would hold more than 200 MHz of spectrum, including 55 MHz of Sprint spectrum,<sup>32</sup> and approximately 160 MHz of Clearwire spectrum on average in the 100 largest markets in the United States.<sup>33</sup> This would make Sprint the nation’s number one owner of below-3 GHz frequencies.

The Applicants attempt to abridge Commission review of this first-of-its kind spectrum accumulation by effectively claiming “res judicata.” They argue that the public interest would be served by Softbank-Sprint’s control over Clearwire now because the Commission decided so in 2008.<sup>34</sup> The Applicants gloss over the fact that the control over Clearwire that Sprint acquired in 2008 was relinquished by Sprint, requiring a fresh examination now that Sprint wants it back—an approval cannot be banked for a later date. Furthermore, back in 2008, it may have been appropriate to include only some of the BRS spectrum being transferred in a market-specific initial spectrum screen analysis and to exclude the EBS spectrum being transferred altogether.<sup>35</sup> But this is no longer appropriate.

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<sup>31</sup> Opposition at 24-32.

<sup>32</sup> See Sprint Nextel Petition to Deny, WT Docket No. 11-65, at 90 (May 31, 2011).

<sup>33</sup> Clearwire Corp., Annual Report (Form 10-K), at 14 (Feb. 16, 2012).

<sup>34</sup> See Opposition at 24-28.

<sup>35</sup> See *Sprint-Clearwire Order*, 23 FCC Rcd. at 17596 ¶ 62.

a) **The BRS/EBS Spectrum Is Suitable for Mobile Broadband Services**

To ensure that the mobile services market remains diverse and competitive, the Commission uses a spectrum screen “to help identify markets where the acquisition of spectrum provides particular reason for further competitive analysis” in a given transaction.<sup>36</sup> The screen is determined by taking the total amount of spectrum suitable for providing mobile service and dividing it by three.<sup>37</sup> And, as the Commission has said, suitability “is determined by the physical properties of the spectrum, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony.”<sup>38</sup>

The question, then, is whether it is appropriate in this case to ignore the very frequencies being transferred for purposes of the Commission’s spectrum concentration analysis. Sprint answers yes, hoping that the Commission will simply maintain the spectrum screen it used in 2008.<sup>39</sup> But the correct answer is: not any longer and certainly not in this case.

As a threshold matter, the Commission should not be dissuaded from the fear cited by Sprint that such a conclusion will provide Verizon Wireless and AT&T with “headroom” to acquire more spectrum.<sup>40</sup> The Commission need not, and will not, create such headroom if it

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<sup>36</sup> *Verizon-SpectrumCo Order*, 27 FCC Rcd. at 10716 ¶ 48; *see also* Policies Regarding Mobile Spectrum Holdings, *Notice of Proposed Rulemaking*, 27 FCC Rcd. 11710, 11713 ¶ 7 (2012) (“*Spectrum Screen NPRM*”).

<sup>37</sup> *Verizon-SpectrumCo Order*, 27 FCC Rcd. at 10719 ¶ 59.

<sup>38</sup> *Sprint-Clearwire Order*, 23 FCC Rcd. at 17596 ¶ 61.

<sup>39</sup> *See* Opposition at 28-32.

<sup>40</sup> *See id.* at 30.

simply rules that none of the BRS/EBS spectrum can be ignored when the BRS/EBS spectrum is itself being acquired.

When the Commission authorized Sprint's acquisition of Clearwire's EBS/BRS spectrum in 2008, it reasoned that, even though "the 2.5 GHz Band may be used, and [is] being used, for the provision of mobile telephony/broadband services," various circumstances in 2008 conspired to make only 55.5 MHz of BRS spectrum suitable for mobile broadband. These circumstances have changed, and the difficulties cited in the Opposition<sup>41</sup> have been significantly mitigated. Virtually all of the 2.5 GHz frequencies under Clearwire's control are now suitable for mobile broadband today, and all have already been transitioned to broadband use.<sup>42</sup> Indeed, they enjoy advantages over other bands in some respects, for four reasons.

***Global Adoption Trend.*** The EBS/BRS spectrum, including the Middle Band Segment ("MBS") portion, 2572-2614 MHz, is being adopted globally for mobile services and could be the only band that is harmonized around the world.<sup>43</sup> As Clearwire's Chief Executive Officer, Erik E. Prusch, told investors recently, Clearwire is:

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<sup>41</sup> See Opposition at 31 ("These factors include: the 2.5 GHz band's shorter propagation relative to 700, 800 and 1900 MHz spectrum (resulting in considerably higher network coverage costs); the assignment of 60 percent of the 2.5 GHz band to educational entities, which must serve their educational mission before excess capacity can be leased to commercial carriers; rules that make mobile broadband services secondary to high-power video services in portions of this band; the EBS license scheme that creates a patchwork of small, irregular licenses; and the varying availability of 2.5 GHz channels in major metropolitan areas.").

<sup>42</sup> Post-Transition Notifications Filed in WT Docket No. 06-136, Public Notice, DA 12-970 (rel. June 20, 2012).

<sup>43</sup> See Dr. Martyn Roetter, Spectrum for Mobile Broadband in the Americas: Policy Issues for Growth and Competition, at 11 (Jan. 2011), <http://www.gsma.com/spectrum/wp-content/uploads/2012/03/gsmaamericasmbspectrumpaperjan2011-1.pdf>; David Goldman, *Sprint Would Be Spectrum King with Clearwire Deal*, CNN Money, Dec. 13, 2012, <http://money.cnn.com/2012/12/13/technology/mobile/sprint-clearwire/>.

even more certain that our band is in the sweet spot of global mobile broadband data, which against the backdrop of recent high advanced spectrum valuations in the U.S. as well as increasing forecast for demand of data with no near-term sources of meaningful spectrum, suggests our spectrum portfolio will only increase in value.<sup>44</sup>

***TDD Suitability.*** In a related vein, the 2.5 GHz band is most suitable for Time Division Duplex (“TDD”) technology (as it is being used by Clearwire today). The global Band 41 in 3GPP will provide economies of scale to operators and reduce cost, therefore making the spectrum more valuable in time. Recent industry analysis demonstrates that the use of TDD could be more efficient than Frequency Division Duplex (“FDD”) for LTE broadband networks in terms of better accommodating the asymmetrical nature of data usage. TDD provides flexibility to operators in adjusting the downlink to uplink ratio to suit the data traffic ratio on their networks. As Motorola illustrates in its TD-LTE white paper, this ensures more efficient use of available bandwidth compared to FDD, and TDD’s “emphasis on simplicity, spectrum flexibility, uplink/downlink flexibility, added capacity, and lower cost per bit, TD-LTE is destined to provide many benefits.”<sup>45</sup> Motorola further states that the benefits would result in a “greatly improved user experience, exciting new revenue generating mobile services, and a strong and viable option for mobile broadband technology in the next decade for both developed and emerging markets.”<sup>46</sup>

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<sup>44</sup> Seeking Alpha, Clearwire Management Discusses Q3 2012 Results (Oct. 25, 2012), *available at* <http://seekingalpha.com/article/952651-clearwire-management-discusses-q3-2012-results-earnings-call-transcript?part=single>.

<sup>45</sup> Motorola, Inc., White Paper: TD-LTE: Exciting Alternative, Global Momentum, at 4 fig. 1, 11 (2010), *available at* [http://www.3gamericas.org/documents/Moto\\_TD-LTE\\_WP.pdf](http://www.3gamericas.org/documents/Moto_TD-LTE_WP.pdf).

<sup>46</sup> *Id.*

The global momentum of TDD thus further increases the utility of the EBS/BRS spectrum for mobile broadband service. Clearwire itself boasts that “the 2.5 GHz band is optimal for delivering our 4G mobile broadband services.”<sup>47</sup>

***Interoperability Between FDD-LTE and TD-LTE Networks.*** Technological change has also meant that TD-LTE systems and networks such as the ones being developed for use on the 2.5 GHz frequencies (BRS/EBS) can be integrated into the same infrastructure and chipsets as FDD-LTE networks, subject to the important limitations on the number of supported bands, discussed below. Indeed, one efficient network deployment scenario would be to operate a TD-LTE network over the 2.5 GHz frequencies, augmented by a FDD-LTE network operating over PCS frequencies. This has made the 2.5 GHz frequencies more useful for networks looking to expand their data and broadband services.

The viability of this integrated approach has been endorsed by the world’s largest carriers, including Vodafone, who have been participating in a cooperative association known as the Global TDD Initiative. That Initiative’s purpose is to promote this type of interoperability as international regulators begin allocating 2.5 GHz spectrum for broadband. Furthermore, Ericsson recently announced that it had successfully demonstrated the seamless operation of both modes of LTE.<sup>48</sup>

***Capacity.*** Consolidation of spectrum optimized for adding capacity is a critical component of any next-generation mobile broadband network. To best meet customer data demands, a carrier needs both low- and high-frequency spectrum. There is no denying the

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<sup>47</sup> Clearwire Corp., Annual Report (Form 10-K), at 14 (Feb. 16, 2012).

<sup>48</sup> Press Release, Ericsson, Ericsson and China Mobile Hong Kong Perform First TD-LTE Handover in Live FDD Network (June 20, 2012), *available at* [http://www.ericsson.com/news/120620\\_ericsson\\_and\\_china\\_mobile\\_hong\\_kong\\_perform\\_first\\_td\\_lte\\_handover\\_in\\_live\\_fdd\\_network\\_244159019\\_c](http://www.ericsson.com/news/120620_ericsson_and_china_mobile_hong_kong_perform_first_td_lte_handover_in_live_fdd_network_244159019_c).

propagation advantages of the waterfront 700 MHz spectrum. At the same time, in dense urban areas where more capacity is needed, a network operator will build additional towers to meet the capacity demand, and therefore spectrum that propagates over long distances is less of an advantage. What is needed there is a combination of high-propagation, low-frequency spectrum and large-block, high-frequency spectrum. For the high-frequency part of this mix, no other available band provides larger contiguous spectrum blocks than EBS/BRS. As consumer data demand increases, higher frequency large-block spectrum will be a necessary component of next-generation LTE networks.

### **b) Market Conditions Have Changed**

In addition, the wireless landscape has changed significantly since 2008, with markets becoming much more concentrated now than they were then. For example, the Commission approved Verizon's acquisition of ALLTEL shortly after it issued its Sprint-Clearwire decision.<sup>49</sup> The Commission has more recently approved AT&T's acquisition of Qualcomm's spectrum holdings<sup>50</sup> and several other spectrum transactions involving a number of AWS-1 and WCS licenses.<sup>51</sup> Notably, in 2012, Verizon acquired control over SpectrumCo's AWS-1 licenses.<sup>52</sup>

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<sup>49</sup> See Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd. 17444 (2008).

<sup>50</sup> Applications of AT&T Inc. and Qualcomm Incorporated, for Consent to Assign Licenses and Authorizations, *Order*, 26 FCC Rcd. 17589 (2011).

<sup>51</sup> See, e.g., Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company, for Consent to Assign and Transfer Licenses, WT Docket No. 12-240, *Memorandum Opinion and Order*, FCC 12-156 (rel. Dec. 18, 2012); Application of New Cingular Wireless PCS, LLC and NEATT Wireless, LLC, for Consent to Assign Licenses, *Memorandum Opinion and Order*, 27 FCC Rcd. 8841 (2012).

And the Commission is now reviewing T-Mobile's acquisition of MetroPCS.<sup>53</sup> These series of transactions have resulted in an increasingly consolidated market controlled by AT&T, Verizon and Sprint, and the supply of broadband spectrum has not kept pace, meaning that new entrants, like DISH, have to vie for scarcer spectrum than was the case in 2008.

Furthermore, the other circumstances that the Commission previously cited as limiting the use of much of the BRS/EBS spectrum have now evaporated as well. The transition of legacy video operators has been completed;<sup>54</sup> EBS spectrum is no longer primarily used for educational purposes, and, indeed, the bulk of it, including spectrum leased to Clearwire, is used entirely for mobile broadband; and technical advances have made the 2.5 GHz band more usable for next-generation mobile broadband service.

**c) Clearwire Appears to Be Independent from Sprint Today**

Clearwire today presents itself as an independent company, at least according to Clearwire's and Sprint's own public statements.<sup>55</sup> During the AT&T/T-Mobile proceeding, Clearwire stated: "To be accurate, Clearwire is an independent company with operations and customers entirely separate from Sprint and which in the last year has increasingly distinguished

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<sup>52</sup> See *Verizon-SpectrumCo Order*, 27 FCC Rcd. at 10700 ¶ 6.

<sup>53</sup> Commission Opens Docket for Proposed Transfer of Control of MetroPCS Communications Inc. to Deutsche Telekom AG, WT Docket No. 12-130, Public Notice, DA 12-1663 (rel. Oct. 17, 2012).

<sup>54</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at 83 (Recommendation 5.7) ("National Broadband Plan"); see also *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Rcd. 9664, 9718-19 ¶¶ 67-68 (2011).

<sup>55</sup> See *Sprint Nextel Corp., Current Report (Form 8-K)*, at Exhibit 2.1 (Dec. 18, 2012) ("Merger Agreement"); *Sprint Nextel Corp. Comments*, WT Docket No. 11-65 (May 31, 2011); *Sprint Nextel Corp. Comments*, WT Docket No. 12-4, at 7 n.21 (Mar. 26, 2012); *Clearwire Corp. Comments*, WT Docket No. 11-65, at 4 (May 31, 2011).

itself as a wholesale provider.”<sup>56</sup> And, as Sprint explained during the Verizon-SpectrumCo proceeding:

[First], while Sprint does purchase wholesale capacity from Clearwire and holds an ownership stake in the company, it does not control Clearwire’s board of directors or management and does not manage Clearwire’s operations. Second, Clearwire operates as a wholesale carrier that sells 4G wireless broadband capacity to any carrier that desires to purchase it, including Verizon and AT&T.<sup>57</sup>

Clearwire is currently free to pursue competitive and spectrum strategies that may be counter to Sprint’s own commercial interests. The proposed transactions would alter the structure fundamentally, eliminate Clearwire as an independent force, and consolidate power over 200 MHz of spectrum in the hands of SoftBank.

**d) The Commission Should Require Market Data, Compare the Data to a Properly Configured Screen, and Consider Divestitures in Appropriate Cases**

In this case, therefore, the Commission should include all of the frequencies being transferred in its concentration analysis. The spectrum screen in this case should be calculated based on the following bands: Cellular, PCS, Enhanced Specialized Mobile Radio (“ESMR”) in 800 and 900 MHz, 700 MHz band spectrum, AWS-1, and the BRS/EBS spectrum in its entirety.

In its pending spectrum aggregation rulemaking, the Commission is, among other things, considering how to account for the differing characteristics of spectrum bands when evaluating a licensee’s mobile spectrum holdings.<sup>58</sup> Certainly, the Commission should not countenance the

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<sup>56</sup> Clearwire Corp. Comments, WT Docket No. 11-65, at 4 (May 31, 2011).

<sup>57</sup> Sprint Nextel Corp., Reply Comments, WT Docket No. 12-4, at 7 n.21 (Mar. 26, 2012).

<sup>58</sup> *Spectrum Screen NPRM*, 27 FCC Rcd. at 11725 ¶ 35. As the Commission has noted, while providers have historically purchased additional spectrum to address capacity constraints, the increasingly limited spectrum resources necessitate a reconsideration of Commission policies to ensure access to spectrum. *Id.* at 11717 ¶ 13. To combat the spectrum crunch, providers have

risk of excluding most of Clearwire's spectrum in this proceeding, and then holding it should be included after all in the spectrum aggregation rulemaking. But, whatever the Commission does in the spectrum aggregation rulemaking, including all of the 2.5 GHz spectrum (both EBS and BRS) is doubly appropriate here. This is the first proceeding since 2008 to implicate the 2.5 GHz frequencies on both sides of the ledger. Not only are these frequencies relevant for defining the universe of spectrum and hence deriving the screen (which is set at one-third of the total amount); they are themselves the frequencies being aggregated. In these circumstances, the Commission should not ignore any of the 2.5 GHz frequencies in its evaluation.

The initial hurdle to the appropriate analysis is that the Applicants have failed to provide any of the market-by-market data that are needed. Submission of such data has been the prerequisite for proper Commission evaluation of the potential for competitive harm in similar transactions since the screen was originally developed.<sup>59</sup> Consistent with that precedent, SoftBank should be required to provide the Commission, and the parties in the proceeding, with a comprehensive breakdown of all spectrum to be held by the Applicants as soon as practicable.

When the Commission receives and analyzes the missing data, the concentration of spectrum resulting from these transactions may well be shown to be greater than the properly configured screen by a significant amount in many markets. This means that divestitures may be

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been incorporating additional spectrum bands into their networks. The Commission is thus seeking comment on which additional bands to add to the spectrum screen. *Id.* at 11722 ¶ 28.

<sup>59</sup> See, e.g., *Verizon-SpectrumCo Order*, 27 FCC Rcd. at 10721-22 ¶ 64; Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations, *Order*, 26 FCC Rcd. 17589, 17602 ¶ 31 (2011); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 19 FCC Rcd. 21522, 21552 ¶ 58 (2004).

warranted if additional indications of competitive concern, such as the potential for spectrum warehousing (*see below*), are present.<sup>60</sup>

## 2. SoftBank's Spectrum-Use Plans Are Uncertain

The policy in favor of foreign entry, even if it applies here, does not mean that foreign investors should be afforded more leniency with respect to the important matter of licensed spectrum buildout than other U.S. companies. Likewise, spectrum concentration is particularly troubling when there are indications that the spectrum being aggregated may not be fully or timely used. The Applicants claim that the transactions will lead to greater wireless broadband deployment,<sup>61</sup> but fail to provide any hard data or business plan that would allow for an accurate assessment of their assertion. To assess fully the competitive implications of the spectrum concentration levels resulting from these transactions, the Commission must have the chance to review and analyze spectrum utilization data provided by the Applicants. Sprint has failed to provide such data here, despite having been critical of AT&T for failing to do the exact same thing in the AT&T/T-Mobile transaction proceeding. There, AT&T asserted that it faced unique demands on its network that would lead to spectrum exhaustion. Sprint responded that AT&T did not face any unique demands and commented that “the Applicants *still* have not provided data to verify their spectrum exhaust projections,” and that AT&T “fails to provide the

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<sup>60</sup> In the *Verizon-SpectrumCo Order*, the Commission evaluated the competitive effects of Verizon Wireless's post-transaction spectrum holdings “through the lenses of the company's overall spectrum aggregation *as well as within the AWS-1 band.*” *Verizon-SpectrumCo Order*, 27 FCC Rcd. at 10717 ¶ 50 (emphasis added). The Commission should extend a similar approach of evaluating the effects of the proposed transactions here through the lens of the Applicants' spectrum aggregation within the BRS/EBS band, as Clearwire clearly dominates the 2.5 GHz band.

<sup>61</sup> Opposition at 10-11.

underlying data to back up these assertions.”<sup>62</sup> Moreover, Sprint claimed that AT&T could overcome its capacity constraints by “investing in a range of network management practices and technologies.”<sup>63</sup> Here, Sprint has similarly failed to provide the type of engineering analysis it requested from AT&T, and should be asked to do so.

Similarly, the spectral efficiency mechanisms that Sprint suggested AT&T incorporate into its network are also at Sprint’s disposal. In fact, including its use of Clearwire’s spectrum, Sprint appears to be the most inefficient national carrier, with only 287,000 customers per MHz per million population<sup>64</sup> compared to Verizon’s 895,000<sup>65</sup> and AT&T’s 898,000.<sup>66</sup> The efficiency gap, combined with the lack of data, raises concern that the spectrum will continue to be underutilized.

Since past is prologue, close Commission review of the Applicants’ record of buildout and spectrum use is also appropriate. In 2004, Sprint won the right for a nationwide license for the G Block in exchange for relocating, among other things, its own operations in the 800 MHz

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<sup>62</sup> Sprint Nextel Corp., Reply Comments, WT Docket No. 11-65, at 58 (June 20, 2011).

<sup>63</sup> Sprint Nextel Corp., Petition to Deny, WT Docket No. 11-65, at 98-99, 109 (May 31, 2011).

<sup>64</sup> Sprint’s most recent 10-Q reveals that it serves approximately 56 million customers. Sprint Nextel Corp., Quarterly Report (Form 10-Q), at 32 (Nov. 7, 2012). The total MHz figure is taken from AT&T’s comments in the *Spectrum Screen* Proceeding. AT&T, Comments, WT Docket No. 12-269, at 3 (Nov. 28, 2012).

<sup>65</sup> Verizon’s second quarter 2012 10-Q reveals that it serves approximately 94 million customers. Verizon Communications Inc., Quarterly Report (Form 10-Q), at 27 (July 30, 2012). The total MHz figure is taken from AT&T’s comments in the *Spectrum Screen* Proceeding. AT&T, Comments, WT Docket No. 12-269, at 3 (Nov. 28, 2012).

<sup>66</sup> AT&T’s most recent 10-Q reveals that it serves approximately 106 million customers. AT&T Inc., Quarterly Report (Form 10-Q), at 20 (Nov. 2, 2012). The total MHz figure is taken from AT&T’s comments in the *Spectrum Screen* Proceeding. AT&T, Comments, WT Docket No. 12-269, at 3 (Nov. 28, 2012).

and 1.9 GHz bands within 36 and 30 months, respectively.<sup>67</sup> The Applicants boldly proclaim that “Sprint has complied with all of its [800 MHz band reconfiguration] obligations and taken all steps within its control to complete 800 MHz rebanding as expeditiously as possible.”<sup>68</sup> But reality does not comport with Sprint’s assertion; the latter relocation took twice as long as Sprint promised,<sup>69</sup> and the former is still ongoing, almost five years after its original three-year deadline.<sup>70</sup> Because of the delay in relocating BAS incumbents from the 1.9 GHz band, among other reasons, Sprint did not launch service in the G Block until July 2012, and now offers service in only 49 markets.<sup>71</sup> In a similar vein, Clearwire and Sprint promised in 2008 that they would exceed the BRS/EBS buildout requirements adopted in the *Sprint Nextel Order*<sup>72</sup> and would cover 140 million people by the end of 2010.<sup>73</sup> The Applicants’ demotion of that promise to a mere “business plan” and their mention of the number “well over 100 million” are not enough to demonstrate that this promise has been fulfilled.<sup>74</sup> They should be asked to make that

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<sup>67</sup> Improving Public Safety Communications in the 800 MHz Band, Report and Order, *Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969, 15122 ¶ 326 (2004).

<sup>68</sup> Opposition at 17.

<sup>69</sup> Letter from Robert H. McNamara, Sprint Nextel, Inc., to Marlene H. Dortch, Federal Communications Commission, WT Docket No. 02-55, ET Docket Nos. 00-258, 95-18, (filed Jul. 15, 2010).

<sup>70</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order*, DA 12-2070 (rel. Dec. 21, 2012) (extending the true-up date for a ninth time because Sprint had not yet finished its 800 MHz rebanding effort).

<sup>71</sup> See News Releases, Sprint Nextel Corp., Ring in the Holidays with Sprint 4G LTE (Dec. 18, 2012), available at [http://newsroom.sprint.com/article\\_display.cfm?article\\_id=2479](http://newsroom.sprint.com/article_display.cfm?article_id=2479).

<sup>72</sup> See *Sprint Nextel Order*, 20 FCC Rcd. at 14028-29 ¶¶ 164-166.

<sup>73</sup> See *Sprint-Clearwire Order*, 23 FCC Rcd. at 17617 ¶ 119.

<sup>74</sup> See Opposition at 16 & n.54.

showing, especially since Clearwire recently stated that it may slow its deployment.<sup>75</sup> To ensure rapid deployment of service in the 2.5 GHz and 1.9 GHz bands, the Commission should at a minimum require buildout commitments consistent with those adopted for other broadband services.<sup>76</sup>

It is also not clear how the Applicants plan to use the acquired spectrum, because there is scant discussion of any such business plans or buildout timeline in their filings. This lack of information is troubling in light of the existing technological limits to the number of bands any currently available chipset could support. This in turn limits how many spectrum bands that single-chipset handsets (which have replaced multi-chipset handsets in today's prevalent model for obvious efficiency reasons) can use. Sprint's ability to even incorporate all of its existing spectrum licenses into a single-chipset device is somewhat dubious, raising the question of why additional Clearwire spectrum is needed and how it will be used. Currently, Sprint devices, such as the iPhone 5, do not even support LTE on one of the existing Sprint 3GPP bands (Band 26).<sup>77</sup> And, if Sprint were to fulfill its stated plan to acquire the H Block in a future Commission auction, integrating the H Block into its devices would require yet another 3GPP band.

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<sup>75</sup> Clearwire Corp., Prospectus (Form 424B2), at S-7 (Sept. 27, 2012) (“As such, in order to better align our capital expenditures with the receipt of expected LTE revenues, we are currently evaluating our plans and may elect to delay a portion of our deployment schedule accordingly.”).

<sup>76</sup> See, e.g., Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, WT Docket No. 12-70, *Report and Order and Order of Proposed Modification*, FCC 12-151 ¶¶ 195-99 (rel. Dec. 17, 2012); Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Second Report and Order*, 22 FCC Rcd. 15289, 15351-52 ¶¶ 163-64 (2007).

<sup>77</sup> Apple, Inc., iPhone Specifications, <http://www.apple.com/iphone/specs.html>. The current iPhone 5 supports the following bands: CDMA EV-DO Rev. A and Rev. B (800, 1900, 2100 MHz); UMTS/HSPA+/DC-HSDPA (850, 900, 1900, 2100 MHz); GSM/EDGE (850, 900, 1800, 1900 MHz); LTE (Bands 1, 3, 5, 13, 25). *Id.*

To these two bands, and the other existing iPhone 5 bands, three more would need to be added to integrate the 2.5 GHz spectrum; not only the entire TDD-LTE 2.5 GHz spectrum (Band 41), but also 3GPP Bands 7 and 38 are needed to ensure global use. Indeed, inclusion of these bands seems to be consistent with Clearwire's strategic direction. One of Clearwire's justifications for its request to relax the out-of-band emissions ("OOBE") limits on the BRS/EBS spectrum is precisely to support the global momentum of the spectrum by harmonizing the requirements.<sup>78</sup> Support for all three 3GPP bands defined for the 2.5 GHz spectrum is what enables its global advantage.

Incorporating the Clearwire spectrum into Sprint's LTE devices on top of Band 26 and the H Block would thus mean a total of five bands vying for space on these devices, in addition to the existing bands needed for local and international roaming. Sprint has not provided a technical justification for how it intends to continue to support its current spectrum holdings in Band 26, while adding Bands 7, 38, 41 and the H Block. Realizing the synergies claimed in the Applicants' filings will be very difficult to achieve in light of these technical limitations. The Commission should require that Sprint provide sufficient evidence that it will be able to do so.

### **3. The Benefits from the Consolidation Have Not Been Proven**

The purported benefits of this transaction are unpersuasive. In essence, the Applicants are asking the Commission to assume that SoftBank's success in Japan will be automatically replicated here.<sup>79</sup> Yet Japan presents a vastly different wireless environment than the United States. Where the United States has a great diversity of urban, exurban, suburban and rural populations across a continent, the Japanese market appears to comprise a fairly homogeneous

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<sup>78</sup> See Letter from Cathleen A. Massey, Clearwire Corp., to Marlene H. Dortch, FCC, WT Docket No. 03-66, RM-11614, at Slide 5 (Oct. 19, 2012).

<sup>79</sup> Opposition at 9-10.

urban population densely packed onto an island. When SoftBank was breaking into the Japanese market, it also had the advantage of being the first mover with the marketplace-disrupting iPhone; it will not have that unique advantage here.

Nor is there any concrete information about how SoftBank proposes to transmit this asserted acumen to the U.S. market. Indeed, the illusory nature of the transaction's benefits is highlighted by the lack of information provided by the Applicants. The Applicants are unwilling to commit to any public interest objectives; they offer no commitment to building out heretofore unused spectrum, incorporating any new technologies, or initiating price plans that would benefit consumers. And, as discussed, they submit no engineering analysis or spectrum-use plan showing how SoftBank will use its vast spectrum holdings.

This lack of information has the net effect of leaving the record barren of the material needed for the Commission to make its required foreign-ownership, public-interest determination.<sup>80</sup>

#### **4. SoftBank Would Benefit from Sprint's Failure to Fulfill Its 800 MHz Transition Obligations**

Sprint has been the recipient of a spectrum grant in the 1.9 GHz band for which it has not yet paid or fulfilled its responsibilities. The presumption in the *Foreign Participation Order* was intended to place foreign investors on a comparable footing to the treatment generally available to U.S. companies.<sup>81</sup> It was not intended to allow a foreign company to obtain one side of the

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<sup>80</sup> 47 U.S.C. § 310(d) (requiring the Commission to make a finding that a transfer of control will serve the public interest before granting approval).

<sup>81</sup> See *Foreign Participation Order*, 12 FCC Rcd. at 23915 ¶ 53 (noting that the approvals for foreign licenses should be consistent with the treatment of domestic applicants).

bargain struck by Sprint, which would be an “undue windfall”<sup>82</sup> not available to any other U.S. company.<sup>83</sup>

Sprint essentially claims that it has done everything right regarding the 800 MHz transition.<sup>84</sup> The truth is different. Sprint has failed to live up to its end of the bargain struck with the Commission regarding its 1.9 GHz license and the 800 MHz band reconfiguration and should be required to honor those commitments before consummating the proposed transactions. Until it does so, the continued validity of its 1.9 GHz licenses remains under a cloud, and their transfer would be of doubtful propriety.<sup>85</sup>

In 2004, the Commission adopted, with some modifications, a plan originally proposed by Nextel (Sprint’s predecessor-in-interest) that granted Sprint exclusive use of prime, nationwide spectrum in the 1.9 GHz band in exchange for, among other things, its promise to cure the 800 MHz band of certain interference issues that had impeded use of the 800 MHz spectrum by the public safety community. Specifically, in exchange for immediate access to the PCS G Block’s 10 MHz of prime spectrum in the 1.9 GHz band (specifically, 1910-1915 MHz and 1990-1995 MHz), Sprint agreed to: (i) relocate public safety services in the 800 MHz band, and its own services in the 800 and 900 MHz bands, within 36 months; and (ii) relocate BAS licensees in the 1.9 and 2 GHz bands within 30 months.<sup>86</sup> Sprint was also required to make an anti-windfall payment to the U.S. Treasury for its receipt of the G Block, in the amount by which

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<sup>82</sup> See Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd. 14969, 15123-24 ¶ 329 (2004) (“800 MHz Order”).

<sup>83</sup> *Id.*

<sup>84</sup> Opposition at 17.

<sup>85</sup> See *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

<sup>86</sup> See *800 MHz Order*, 19 FCC Rcd. at 14976, 14978 ¶¶ 8, 12.

the value of the new 1.9 GHz spectrum exceeded the value of the 800 MHz spectrum relinquished (with offsets discussed below). This difference amounted to approximately \$2.8 billion.<sup>87</sup>

Sprint was allowed to use its eligible 800 MHz reconfiguration and BAS relocation expenses as credits to offset the \$2.8 billion payment obligation. Sprint was also allowed to recover its relocation expenses from other licensees benefitting from the relocation, but it could not use sums recovered from others as credits to offset its obligation to the Treasury, unless the total eligible relocation expenditures exceeded \$2.8 billion. This regime had an unintended consequence—it eliminated Sprint’s moral hazard. The higher Sprint’s costs, the lower its payment to the Treasury, and the greater the chance that Sprint could recover from others. In any event, Sprint was required to pay any amounts found owing to the U.S. Treasury as part of a true-up. The true-up has not occurred yet.

Sprint announced on July 15, 2010, that it had completed relocating BAS incumbents in the 1.9 and 2 GHz bands, some 30 months after the original January 26, 2008, 30-month deadline. Meanwhile, Sprint’s relocation of public safety services in the 800 MHz band, required by June 26, 2008, still continues—now almost five years late. The true-up process originally scheduled for December 31, 2008 has been postponed nine times to its current date of July 1, 2013.<sup>88</sup>

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<sup>87</sup> *Id.* at 15112 ¶ 297; Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd. 25120, 25136 ¶ 36 (2004).

<sup>88</sup> See Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order*, DA 12-2070 (rel. Dec. 21, 2012) (granting extension to July 1, 2013); Improving Public Safety Communications in the 800 MHz Band, *Order*, 27 FCC Rcd. 7308 (2012) (granting extension to December 31, 2012); Improving Public Safety Communications in the 800 MHz Band, *Order*, 26 FCC Rcd. 16506 (2011) (granting extension to July 2, 2012); Improving Public Safety Communications in the 800 MHz Band, *Order*, 26 FCC Rcd. 8572 (2011) (granting

According to Sprint, its eligible relocation costs have ballooned to exceed the \$2.8 billion high water mark,<sup>89</sup> beyond which Sprint no longer owes anything to the U.S. Treasury. Moreover, the costs have purportedly grown to \$3.1 billion so that Sprint can *both* be entirely relieved of its obligations to the Treasury *and* be able to recover from other licensees (as it has already done from DISH).<sup>90</sup>

Sprint now claims that it has complied with all of its rebanding obligations—a claim belied by its missing a number of deadlines by large margins. In addition, Sprint has recently filed a Petition for Declaratory Ruling asking to be relieved from the anti-windfall payment requirement based on its claim that its costs have already exceeded the threshold amount.<sup>91</sup> In support of that claim, Sprint claims that it has spent over \$3.4 billion in the 800 MHz and 1.9 GHz relocations and owes an additional \$310 million in existing but unpaid obligations under its agreements with 800 MHz incumbents. Sprint also invokes the imprimatur of the 800 MHz Transition Administrator. According to Sprint, the Administrator already reviewed and

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extension to December 31, 2011); Improving Public Safety Communications in the 800 MHz Band, *Order*, 25 FCC Rcd. 17794 (2010) (granting extension to June 30, 2011); Improving Public Safety Communications in the 800 MHz Band, *Order*, 25 FCC Rcd. 8217 (2010) (granting extension to December 31, 2010); Improving Public Safety Communications in the 800 MHz Band, *Order*, 24 FCC Rcd. 14642 (2009) (granting extension to June 30, 2010); Improving Public Safety Communications in the 800 MHz Band, *Order*, 24 FCC Rcd. 8410 (2009) (granting extension to December 31, 2009); Sprint Nextel Request for Waiver of June 26, 2008 Rebanding Deadline With Respect to Channels 1-120, *Order*, 23 FCC Rcd. 9558 (2008) (granting Sprint extension to July 1, 2009).

<sup>89</sup> See Sprint Nextel Corp., Petition for Declaratory Ruling, WT Docket No. 02-55, at 8 (Jan. 22, 2013).

<sup>90</sup> *Id.* at Appendix A.

<sup>91</sup> *Id.* at 4.

approved Sprint's agreements with the 800 MHz incumbents that resulted in those payments and obligations.<sup>92</sup>

Sprint's Petition calls on the Commission to put the issue of an anti-windfall payment to rest. That determination, however, cannot be made without a careful government audit. And there are several indications that the figures on which Sprint's request relies may not be correct or properly cognizable to offset Sprint's obligations to reimburse the U.S. Treasury. First, the Transition Administrator so far has only determined \$924.3 million to be "Creditable Costs," pending a final accounting.<sup>93</sup> In addition, \$147.7 million of Sprint's reimbursement requests for the 800 MHz claims have had to be sent back for additional documentation because the Transition Administrator has been unable to determine the alleged claims creditable.<sup>94</sup> While some of these claims may have been resubmitted, Sprint has yet to proffer evidence on how many have been resubmitted and to what extent they have been approved or disallowed.

Even assuming that all these claims have been, or are, approved, the 800 MHz Transition Administrator's job is confined to the 800 MHz band; it does not extend to reviewing a large part of Sprint's claimed costs—those allegedly incurred in relocating BAS incumbents from the 1.9 GHz band. Sprint's claims of some \$729.9 million for the BAS relocation should not be accepted without verification by the U.S. government. These claims were subject to significant objections raised by DBSD, TerreStar, ICO Global, and DISH in a number of proceedings, since Sprint demanded partial payment for its BAS relocation activities from these entities, too, in addition to claiming offsets against the U.S. government.

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<sup>92</sup> *Id.* at 7-8.

<sup>93</sup> *See* 800 MHz Transition Administrator, LLC Quarterly Progress Report for the Quarter Ended Sept. 30, 2012, WT Docket No. 02-55, at 33 (Jan. 2, 2013).

<sup>94</sup> *Id.*

In particular, there appears to be significant doubt over the propriety of several categories of these claimed expenses (overhead, indirect costs far in excess of the cap set forth in the Commission’s emerging technologies principles on so-called “soft” costs,<sup>95</sup> etc.). Ultimately, Sprint settled with DISH for a little more than half of its claim,<sup>96</sup> which raises serious questions regarding whether Sprint claims could survive the scrutiny that the taxpayers deserve.

The U.S. government should also evaluate whether the expenditures in question were prudently incurred. In light of Sprint’s record of writing down its acquisitions of Nextel and Nextel Partners to the tune of \$33.5 billion,<sup>97</sup> it is important to ensure that no similar waste falls on the U.S. taxpayers’ shoulders.

If Sprint were to fail to complete the 800 MHz transition, the validity of its 800 MHz and 1.9 GHz licenses would be in question.<sup>98</sup> Under *Jefferson Radio*, the Commission may not approve a transfer of control if there is nothing to transfer. In the court’s words: “It is the recognized policy of the Commission that assignment of [an] authorization will not be

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<sup>95</sup> The Commission has found that, while the emerging technologies principles do not apply to Sprint’s relocation exercise directly, they are useful guideposts by analogy. Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd. 25120, 25150-51 ¶ 70 (2005).

<sup>96</sup> See DISH Network Corp., Quarterly Report (Form 10-Q), at 17 (Nov. 6, 2012) (“Pursuant to the Sprint Settlement Agreement, we made a net payment of approximately \$114 million to Sprint.”).

<sup>97</sup> See, e.g., Sprint-Nextel Corporation, Quarterly Report (Form 10-Q), at 23 (Aug. 2, 2012); Sprint-Nextel Corporation, Quarterly Report (Form 10-Q), at 24 (May 3, 2012); Sprint-Nextel Corporation, Annual Report (Form 10-K), at 28 (Feb. 27, 2009); Sprint-Nextel Corporation, Annual Report (Form 10-K), at 30 (Feb. 27, 2012); see also David Goldman, *Sprint’s Nextel Network Gets its Death Date: June 30, 2013*, CNN Money, May 29, 2012, <http://money.cnn.com/2012/05/29/technology/sprint-nextel-shutdown/index.htm>.

<sup>98</sup> See *800 MHz Order*, 19 FCC Rcd. at 15082 ¶ 214 (“Nextel must complete band reconfiguration within thirty-six months. If Nextel fails to meet this benchmark, for reasons that Nextel could reasonably have avoided, the Commission will determine whether forfeitures should be imposed and/or whether Nextel licenses, including, but not limited to, its 1.9 GHz licenses, should be revoked.”).

considered until the Commission has determined that the assignor has not forfeited the authorization.”<sup>99</sup> The propriety of transferring the Sprint licenses in question is in doubt until Sprint completes the transition and makes any required true-up payment.

Finally, requiring SoftBank-Sprint to complete the true-up prior to closing would be wholly consistent with the demands Sprint made for reimbursement as a condition precedent in its comments filed in various proceedings in which TerreStar or DBSD participated,<sup>100</sup> the transfer of control of DBSD to DISH, and the assignment of TerreStar’s licenses to DISH’s subsidiary Gamma Acquisition L.L.C.<sup>101</sup> In those instances, Sprint believed it would serve the public interest to have a private company reimbursed before the Commission approved the applications. By that logic, the public interest would be served even more so by ensuring that the public is reimbursed before the Commission approves Sprint’s pending Applications.

The Commission should, therefore, require SoftBank-Sprint to complete the transition and true up with the Treasury prior to the closing of SoftBank’s acquisition.<sup>102</sup> This is a reasonable requirement, given that Sprint is currently into year eight of what was supposed to be

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<sup>99</sup> *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964).

<sup>100</sup> *See, e.g.*, Sprint Nextel Corp., Motion for Partial Summary Judgment, No. 09-13061 (REG) (Bankr. S.D.N.Y. Sept. 14, 2011) (asking for reimbursement as a condition for DBSD’s exiting from bankruptcy); Sprint Nextel Corp., Comments, ET Docket No. 10-142, at 5-9 (July 8, 2011) (“The Commission should ensure that these policies are maintained and enforced by confirming that any new entrants seeking to obtain the spectrum through acquisitions of the MSS entrants or their assets cannot avoid repaying Sprint Nextel for unpaid reimbursement amounts tied to that spectrum.”); Sprint Nextel Corp., Comments, WT Docket No. 02-55, at 19-20 (July 14, 2009) (seeking to hold TerreStar and DBSD jointly and severally liable).

<sup>101</sup> Sprint Nextel Corp., Petition to Condition Approval or to Deny, IB Docket No. 11-150, at 12 (Oct. 17, 2011).

<sup>102</sup> As part of these efforts, and given the significant disputes over Sprint’s costs, the Commission should consider the need for an audit of 800 MHz reconfiguration and BAS relocation conducted by a truly independent entity like the Government Accountability Office (“GAO”) and Sprint’s payment of any amount found outstanding in the audit.

a three-year task—and the current deadline is July 1, 2013.<sup>103</sup> As part of this condition, the Commission also should require SoftBank-Sprint to waive the right to receive any further reimbursement for clearing the H and J Blocks (at 1995-2000 MHz and 2020-2025 MHz). Not only are there serious questions regarding the validity of Sprint’s reimbursement claims, but Sprint’s claims will serve as a disincentive on potential H and J Block auction bidders. Removing this encumbrance will serve the public interest by ensuring the broadest possible participation in any future auction.

### **5. SoftBank/Sprint Is Different Than Deutsche Telekom/T-Mobile**

Spectrum is an important sovereign natural resource, and spectrum suitable for mobile broadband is particularly scarce.<sup>104</sup> Handing over a large spectrum aggregation to a foreign company raises concerns that materially differentiate this transaction from the Commission’s decision approving Deutsche Telekom’s acquisition of T-Mobile.<sup>105</sup> T-Mobile’s spectrum holdings were smaller than those of Sprint. The other exceptional circumstances—spectrum-use questions, unproven benefits, and unfinished transition business—only enlarge the differences. Just as important, the nearly 12 years that have elapsed since that decision have witnessed significant changes in circumstances—principally, the emergence of spectrum-intensive mobile

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<sup>103</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order*, DA 12-2070 (rel. Dec. 21, 2012).

<sup>104</sup> See Prepared Remarks of Chairman Julius Genachowski, Unleashing America’s Invisible Infrastructure, FCC Spectrum Summit (Oct. 21, 2010).

<sup>105</sup> Applications of Voicestream Wireless Corporation, Powertel Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779 (2001).

broadband rather than voice as the chief use for the spectrum involved.<sup>106</sup> Consequently, the Sprint-SoftBank transaction would have the effect of limiting potential new entry by U.S. companies to a far greater extent than the acquisition of T-Mobile by Deutsche Telekom.

**D. The Identity of SoftBank’s Non-WTO Shareholders Is Not Known**

SoftBank attests that no more than 7.54 percent of its equity of voting rights may be held by non-WTO countries and investors.<sup>107</sup> While 25 percent is often used as a threshold percentage of non-WTO attribution, the characteristics of this transaction, with its large amount of spectrum at stake and other potential issues, combine to require greater scrutiny than would otherwise be the case. In addition to the shareholder information already requested by the Commission,<sup>108</sup> SoftBank should be asked to identify and report all of its non-WTO shareholders holding more than 0.1 percent or greater equity, and the Commission should evaluate these investments before it determines whether the Petition for Declaratory Ruling is in the public interest.

**E. Overseas NOCs Raise National Security Concerns**

The Applicants suggest that the Commission should ignore national security considerations and simply leave the review of those issues to the Team Telecom and CFIUS processes.<sup>109</sup> While those processes are important, national security is an important

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<sup>106</sup> Compare *id.* at 9842 ¶ 116, with discussion *supra*, Part II.C.1-.4.

<sup>107</sup> Applications of Sprint Nextel Corp., Transferor, SoftBank Corp., and Starburst II, Inc., Transferees, for Consent to Transfer of Control of Licenses and Authorizations, IB Docket No. 12-343, Attachment 5, Petition for Declaratory Ruling, at 11 (“Petition for Declaratory Ruling”).

<sup>108</sup> Letter from James L. Ball, Chief, Policy Division, International Bureau, to John R. Feore, Counsel for SoftBank Corp., and Regina M. Keeney, Counsel for Sprint Nextel Corp., IB Docket No. 12-343 (Jan. 24, 2013). The Applicants have not yet responded to this information request.

<sup>109</sup> See Sprint-SoftBank Opposition at 22.

consideration for the Commission to examine when evaluating foreign ownership as well.<sup>110</sup> This transaction makes Sprint's Network Operations Centers ("NOCs") non-U.S.-controlled (including NOCs that Sprint may have already deployed overseas). While locating NOCs in the United States is always preferable for ease of Communications Assistance for Law Enforcement Act enforcement and economic considerations, it is all the more important when the service provider is a foreign-controlled company providing service in the United States. The Commission should condition the transaction on all of Sprint's NOCs being located in the United States.

### **III. THE CREST AND TARAN PETITIONS SHOULD BE HEARD**

The Commission should not dismiss the Crest and Taran petitions out of hand, as the Opposition proposes.<sup>111</sup> This case presents an important fact that distinguishes these petitions from minority shareholder grievances summarily dismissed by the Commission in the past, and militates in favor of careful review: Clearwire is currently entertaining an offer from DISH that values Clearwire's shares at a significant premium over Sprint's offer. Specifically, DISH has made a competing offer to purchase all of the shares of Clearwire for \$3.30 a share,<sup>112</sup> and as a result, "[t]he Special Committee of the Clearwire Board of Directors . . . determined that its fiduciary duties require it to engage with DISH to discuss, negotiate and/or provide information in connection with the DISH proposal."<sup>113</sup>

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<sup>110</sup> See *Foreign Participation Order*, 12 FCC Rcd. at 23919 ¶¶ 61-62.

<sup>111</sup> Opposition at 32-38.

<sup>112</sup> Press Release, Clearwire Corporation, Clearwire Corporation Provides Transaction Update (Jan. 8, 2013), available at <http://corporate.clearwire.com/releasedetail.cfm?ReleaseID=732316> ("January 8 Clearwire Press Release"); see also DISH Network Corporation, DISH Statement Regarding Clearwire, Press Release (Jan. 8, 2013).

<sup>113</sup> See January 8 Clearwire Press Release.



## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of February, 2013, I caused a true and correct copy of the foregoing Reply Comments to be sent by electronic mail to:

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