In the Matter of Forty-One Late-Filed Applications for Renewal of Educational Broadband Service Stations

File Nos. 0002525897 et al.

To: Chief, Broadband Division, Wireless Telecommunications Bureau

CATHOLIC TELEVISION NETWORK AND NATIONAL ITFS ASSOCIATION

JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

The Catholic Television Network (“CTN”) and the National ITFS Association (“NIA”), by their attorneys, hereby oppose the Petition for Reconsideration (“Petition”) filed by Sprint Nextel Corporation (“Sprint Nextel”) on February 26, 2007. The Petition seeks reconsideration of the decision of the Wireless Telecommunications Bureau (the “Bureau”) to grant waivers and process forty-one Educational Broadband Service (“EBS”) renewal applications.

The Petition should be dismissed because it is procedurally defective and fails to demonstrate how Sprint Nextel is directly harmed by the Bureau’s action. Moreover, on its merits, the Petition should be denied because the Bureau’s decision was based on a thoughtful and reasoned analysis of all relevant facts and circumstances, including the potential adverse consequences to the public if the subject licenses were not reinstated.

CTN is an association of Roman Catholic archdioceses and dioceses that operate many of the largest parochial school systems in the United States. CTN’s members use EBS frequencies to distribute educational, instructional, inspirational, and other services to schools, colleges, parishes, community centers, hospitals, nursing homes, residences, and other locations. NIA,

1 Forty-one Late-Filed Applications for Renewal of Educational Broadband Service Stations, Memorandum Opinion and Order, DA 07-205 (rel. Jan. 25, 2007) (“Order”).
established in 1978, is a non-profit, professional organization of EBS licensees, applicants and others interested in EBS. The goals of the NIA are to gather and exchange information about EBS, to act as a conduit for those seeking information or assistance about EBS, and to represent the interests of EBS licensees and applicants. CTN and NIA are both active participants in WT Docket No. 03-66, which fundamentally restructured the 2.5 GHz band. As discussed below, the Petition essentially seeks to rewrite the rules adopted by the Commission in WT Docket No. 03-66. Accordingly, CTN and NIA have a direct interest in the issues raised by the Petition.

I. The Petition Should be Dismissed because it is Procedurally Defective

The Petition should be dismissed because it is procedurally defective. It appears that Sprint Nextel did not file a petition to deny or other objection to any of the forty-one renewal applications targeted by the Petition. Section 1.939 of the Commission’s rules provides that an interested party may object to an application by filing a petition to deny within thirty days of public notice listing the application as accepted for filing. Section 1.106 requires a party that enters a proceeding for the first time at the reconsideration, as opposed to the petition to deny, stage to show “good reason why it was not possible... to participate in the earlier stages of the proceeding.” Sprint Nextel makes no such showing and fails to address why it did not

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3 47 C.F.R. § 1.939(a).

4 47 C.F.R. § 1.106(b)(1).
participate in earlier stages of the proceeding. For this reason alone, the Commission should dismiss the Petition.\(^5\)

Separate and apart from the procedural infirmities discussed above, the Petition should be dismissed because Sprint Nextel fails to show how it has been harmed by the Bureau’s action. Section 1.106(b)(1) of the Commission’s rules requires Sprint Nextel to “state with particularity the manner in which [its] interests are adversely affected by the action taken.”\(^6\) To determine if a party has shown that it is adversely affected, the Commission frequently relies upon a three-pronged test under which a party must establish: (1) a distinct and palpable personal injury-in-fact that is (2) traceable to the respondent’s conduct and (3) redressable by the relief requested.\(^7\) Sprint Nextel fails to satisfy this three-prong test, and instead describes alleged general harms that may affect the EBS community as a whole by alleging that the Bureau’s action will harm “religious and educational institutions.”\(^8\)

\(^5\) It also appears that the Petition fails to comply with Sections 1.49(a), 1.49(f)(2) and 1.106(f) of the Commission’s rules regarding required font sizes and page limits. In addition, the Petition also should be dismissed for failure to comply with Section 1.106(c), which requires Sprint Nextel to rely on new facts that were not previously known or to show that the Commission committed a material error. See WWIZ, Inc., 37 FCC 685, 685 (1964), aff’d sub nom. Lorain Journal Co. v. FCC, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). The Petition raises no new facts that were unknown to the Bureau at the time of its decision. In addition, Sprint Nextel fails to show the Bureau committed a material error. Reconsideration is not an opportunity for parties to debate matters on which the Commission already has deliberated and ruled. See, e.g., Eagle Radio, Inc., 12 FCC Rcd 5105 (1997).

\(^6\) 47 C.F.R. § 1.106(b)(1).

\(^7\) See, e.g., AT&T Corp., Order on Reconsideration, 16 FCC Rcd 21750, 21753-21754 (2001).

\(^8\) See, e.g., Petition at 1 (The reinstated applications will “directly [harm] scores of legitimate educational and religious institutions, creating uncertainty about the validity of hundreds of additional licenses by educational and religious institutions...”); Petition at 9 (The forty-one licensees “hijack more than 225 million MHz-POPs of valuable spectrum in part from legitimate educational and religious institution [sic] and in part from the United States Treasury...”) [Emphasis omitted]; Petition at 10 (The reinstated applications will “harm scores of educational and religious institutions across the country...”); and Petition at 10-14 and
Sprint Nextel does not speak for the educational community and is not eligible to be licensed on EBS channels.\textsuperscript{9} Indeed, the Commission has ruled that Sprint Nextel lacks standing to participate in an EBS licensing matter when it has no connection to the EBS license.\textsuperscript{10}

At most, Sprint Nextel asserts that it has a connection to two EBS licenses that are apparently adjacent to some of the reinstated EBS licenses.\textsuperscript{11} But, even if standing for a couple of the licenses could be established based on a leasing relationship with a neighboring licensee, there is no injury to Sprint Nextel because the renewal of the EBS licenses at issue will not “hijack” territory from neighboring EBS licensees as Sprint Nextel alleges.\textsuperscript{12}

On January 10, 2005, all overlapping EBS coverage areas were bisected pursuant to Section 27.1209 of the Commission’s rules.\textsuperscript{13} Contrary to Sprint Nextel’s assertion – which incredibly is based on a dissenting statement in a case that was later upheld on appeal – the licenses at issue were in existence on January 10, 2005, when the bisection of overlaps occurred, because the Commission had not terminated those licenses.\textsuperscript{14} Thus, even if the Commission had

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\textsuperscript{9} See 47 C.F.R. § 27.1201.

\textsuperscript{10} School Board of Palm Beach County, Florida, Memorandum Opinion and Order, DA 07-298 (rel. Jan. 29, 2007) (“Palm Beach Order”) at ¶ 10 (“Although [Sprint Nextel] holds the BRS BTA authorization for the area in question, [it] does not hold a cognizable interest in the frequencies licensed under Station KZB28 because [Sprint Nextel] is not eligible to be licensed on these EBS channels.”).

\textsuperscript{11} See Petition at 3 and 19, fn. 62.

\textsuperscript{12} See Petition at 1 (“All told, the forty-one former licensees attempt to hijack more than 225 million MHz-POPs of valuable spectrum from legitimate educational and religious institution [sic] ...”).

\textsuperscript{13} See 47 C.F.R. § 27.1209.

\textsuperscript{14} See, e.g., Savannah College of Art and Design, Memorandum Opinion and Order, FCC 03-266, 18 FCC Rcd 26345 (2003), aff’d sub nom. Savannah College of Art and Design and
denied the subject renewal applications, the geographic service areas covered by the forty-one licenses would revert to white space, not to any neighboring EBS licensees.\textsuperscript{15} Again, Sprint Nextel is not eligible to bid for EBS white space.\textsuperscript{16}

Finally, Sprint Nextel attempts to make a standing claim based on “new barriers to market entry” and “new obstacles to timely band transition.”\textsuperscript{17} With respect to both arguments, which are vague, Sprint Nextel fails to show how the grant of the EBS renewal applications directly injures its ability to compete in the broadband market or transition markets. The subject licenses were in the Commission’s Universal Licensing System and Sprint Nextel should have considered them in any deployment or transition plans.\textsuperscript{18} Moreover, the Commission already has considered and rejected Sprint Nextel’s bare assertion that granting EBS waiver requests will undermine the 2.5 GHz band plan transition.\textsuperscript{19}

\textit{Diocese of Savannah}, 04-1024 (D.C. Cir. 2004) (unpublished disposition). \textit{See also} Section II (The Petition is a Belated Attempt to Rewrite Commission Rules Outside of a Rulemaking) \textit{infra.}

\textsuperscript{15} \textit{See 2006 Order} at \textsuperscript{p} 206, 208. It also is specious for Sprint Nextel to argue that the renewed licenses will cause harmful interference to adjacent markets. As the Commission is well aware, the entire 2.5 GHz allocation, including almost all of Sprint Nextel’s lease and license rights, are based on geographic service areas that are adjacent to one another. Given the Commission’s intent to auction EBS white space, Sprint Nextel should not expect those adjacent areas to remain unlicensed in perpetuity.

\textsuperscript{16} \textit{See Palm Beach Order} at \textsuperscript{p} 10.

\textsuperscript{17} Petition at 4.

\textsuperscript{18} \textit{See Palm Beach Order} at \textsuperscript{p} 9 (“While [Sprint Nextel] claims that granting School Board’s waiver requests ‘will only complicate’ the transition of the BRS/EBS band to the new band plan, [Sprint Nextel] provides no specifics to justify this broad claim.”).

\textsuperscript{19} \textit{Id.} at \textsuperscript{p} 11 (Commission rejected Sprint Nextel’s claim that the granted Palm Beach waiver requests would undermine the transition, noting that even if Sprint Nextel were the proponent of the market, it had not demonstrated a direct injury from the grant of the waivers).
II. The Petition is a Belated Attempt to Rewrite Commission Rules Outside of a Rulemaking

Sprint Nextel’s true complaint is that it does not like the rules adopted in the 2004 Order with respect to license renewals. In the 2004 Order, the Commission determined, after the requisite notice and comment period, that EBS license renewals should be subject to the late-filed renewal policy that governs other wireless services.\(^{20}\) Pursuant to that policy, renewal applications filed within thirty days of the license expiration date are granted \textit{nunc pro tunc}.\(^{21}\) Applications filed more than thirty days after the expiration date are considered on a case-by-case basis.\(^{22}\) Sprint Nextel did not object to this decision. However, now that the Commission has applied its renewal policy, Sprint Nextel objects to the policy and its outcome.

If, as Sprint Nextel claims, the licenses ceased to exist on their expiration date and could not be renewed, then the Commission’s policy of granting renewal applications filed within thirty days of the license expiration date, and reviewing applications filed after that time to determine whether they should be granted, would make no sense. If Sprint Nextel believes that EBS licenses should cease to exist on the date of expiration if no renewal application is filed by that date, then Sprint Nextel should have taken the opportunity in WT Docket No. 03-66 to convince the Commission to adopt such a rule.\(^{23}\) However, having failed to do so at the appropriate time, Sprint Nextel should not now be permitted to launch multiple attacks on EBS

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\(^{20}\) See \textit{2004 Order} at ¶ 220.

\(^{21}\) See \textit{Order} at ¶¶ 4-5.

\(^{22}\) \textit{Id.}

\(^{23}\) Sprint Nextel did not file a petition for reconsideration of the Commission’s adoption of the late-filed renewal policy in the \textit{2004 Order}. Sprint Nextel did oppose Clearwire Corporation’s suggestion that the Commission grant EBS licensees a general opportunity to reinstate licenses \textit{outside of the late-filed renewal policy} in connection with the \textit{2006 Order}, but never objected to the adoption of the policy itself.
licensees, including those with which Sprint Nextel has no connection to whatsoever, in an attempt to modify the Commission’s existing rules and policies.\(^{24}\)

III. The Bureau’s Decision was Reasoned and Rational

The Bureau’s decision to waive its rules and process the subject renewal applications was based on a thoughtful and reasoned analysis of all relevant facts and circumstances, including the potential adverse consequences to the public if the subject licenses were not reinstated. After weighing the relevant facts and circumstances, the Bureau reasonably determined that its action would be in the public interest.

As discussed above, if the subject licenses were not renewed, their geographic service areas would become white space, subject to future auction. However, an EBS white space auction will not likely occur for years. As previously explained by CTN and NIA:

> While there likely will be substantial demand for vacant EBS spectrum in some areas, the Commission should wait until at least 2008 to conduct an EBS auction. EBS licensees will be significantly occupied with other matters over the next few years, including transitions to the new band plan, spectrum lease negotiations, and critically, the development of educational service plans that focus on new technologies tailored to the revised band plan and rules.\(^{25}\)

The Commission agreed in principle and determined that the auction should not occur until the transition is completed.\(^{26}\)

In connection with future EBS white space auctions, the Commission will need to issue proposed rules pursuant to its notice and comment procedures. Among other things, the

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\(^{24}\) See also petitions to deny filed by Sprint Nextel against renewal applications for EBS call signs WLX865, WNC414, WNC211, WNC535, WHR507, WLX617, WLX618 and WNC201.

\(^{25}\) Catholic Television Network and National ITFS Association, Opposition to Petitions for Reconsideration, WT Docket No. 03-66 (Aug. 18, 2006). This statement was made when it was believed that 2008 would be the transition deadline. The Commission subsequently extended the transition deadline to 2010. See 2006 Order at ¶¶ 106, 141.

\(^{26}\) 2006 Order at ¶ 320.
Commission must decide how the white space will be licensed (e.g., the geographic size of the license areas, the channels included in each license, whether the mid-band and upper-band and lower-band segments will be segregated, etc.) and the nature and extent of permitted relationships between EBS license bidders and commercial operators during the bidding. Thus, given the time that process will take, the Commission’s decision to put EBS spectrum to good use now was reasonable.

Finally, CTN and NIA disagree with Sprint Nextel’s across-the-board assumption that the licensees affected by the Bureau’s action will not use their spectrum.\(^{27}\) The Commission has acknowledged that

> [EBS] entities could legitimately argue that they should have an opportunity to operate under the rules we have adopted today. For years, the band has been plagued by instability, uncertainty, filing freezes and burdensome rules, all of which have played substantial roles in fostering uncertainty and stagnation in the band. Ending the [EBS] service without having given licensees the benefit of a stable regulatory environment would neither be fair nor in the public interest…We are optimistic that the sweeping changes we make today will ultimately result in significant improvements in the utilization of [EBS] spectrum.\(^{28}\)

It is perfectly reasonable for the Commission to determine that denying the subject renewals would cause the spectrum to lie fallow for years, to the detriment of broadband deployment in the 2.5 GHz band.

\(^{27}\) Petition at 22 (“[T]he Division’s concern over the possibility that the EBS spectrum at issue might lay fallow for years falsely assumes that EBS licensees who have done absolutely nothing with their licenses…will commence service to the public upon renewal of their licenses.”). Sprint Nextel itself has not launched significant deployments using 2.5 GHz spectrum over the many years it and its predecessors have been licensed on the spectrum, presumably due in part to the same technical and regulatory hurdles facing EBS licensees.

\(^{28}\) 2004 Order at ¶ 156.
IV. CONCLUSION

For the reasons set forth above, CTN and NIA request that the Commission immediately dismiss or deny the Petition.

Respectfully submitted,

CATHOLIC TELEVISION NETWORK

By: /s/ Edwin N. Lavergne
    Edwin N. Lavergne
    Donna A. Balaguer
    Fish & Richardson P.C.
    1425 K Street, N.W.
    Suite 1100
    Washington, D.C. 20005
    (202) 626-6359

    Its Attorneys

NATIONAL ITFS ASSOCIATION

By: /s/ Todd D. Gray
    Todd D. Gray
    Dow Lohnes PLLC
    1200 New Hampshire Ave., N.W.
    Suite 800
    Washington, DC 20036-6802
    (202) 776-2571

    Its Attorneys

March 13, 2007
EXHIBIT A
CERTIFICATE OF SERVICE

I, Angelee Stamps, hereby certify that copies of the foregoing Joint Opposition to Petition for Reconsideration have been served, unless otherwise noted, by U.S. first class mail, postage prepaid, this 13th day of March, 2007, on the following:

Robert S. Foosaner
Senior Vice President and Chief Regulatory Officer
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191

Lawrence R. Krevor
Vice President, Government Affairs
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191

Trey Hanbury
Director, Government Affairs
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191

Nicole McGinnis
Director, Government Affairs
Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191

Daniel Gonzalez*
Federal Communications Commission
Office of Chairman Martin
445 12th Street, S.W., Room 8-B201
Washington, DC 20554

Barry Ohlson*
Federal Communications Commission
Office of Commissioner Adelstein
445 12th Street, S.W., Room 8-C302
Washington, DC 20554

John Branscome*
Federal Communications Commission
Office of Commissioner Copps
445 12th Street, S.W., Room 8-B115
Washington, DC 20554

Angela Giancarlo*
Federal Communications Commission
Office of Commissioner McDowell
445 12th Street, S.W., Room 8-C302
Washington, DC 20554

Aaron Goldberger*
Federal Communications Commission
Office of Commissioner Tate
445 12th Street, S.W., Room 8-A204
Washington, DC 20554

Cathleen Massey*
Federal Communications Commission
Wireless Telecommunications Bureau
445 12th Street, S.W., Room 3-C250
Washington, DC 20554

John Schauble*
Federal Communications Commission
Wireless Telecommunications Bureau
445 12th Street, S.W., Room 3-C130
Washington, DC 20554

Joel Taubenblatt*
Federal Communications Commission
Wireless Telecommunications Bureau
445 12th Street, S.W., Room 3-C124
Washington, DC 20554
Doug Reed
Danbury Independent School District
P.O. Box 378
Danbury, TX 77534

John Bentley
Freed-Hardeman University
158 East Main Street
Henderson, TN 38304

Franklin County Board of Education
902 Shepherd Street
Winchester, TN 37398

David L. Nace, Esq.
Lukas, Nace, Gutierrez & Sachs, Chtd.
1650 Tysons Boulevard, Suite 1500
McLean, VA 22102

Todd M. Lawyer
Unison Wireless, Inc.
3351 Wilbury Road
Oak Hill, VA 20171

Office of the President
Northwestern State University of Louisiana
Natchitoches, LA 71497

Office of the Superintendent
Marais Des Cygnes Valley US District 456
P.O. Box 158
Melvern, KS 66510

George Williams
Putnam County School District
200 S. 7th Street
Palatka, FL 32177

Suzanne S. Goodwyn, Esq.
Law Office of Suzanne S. Goodwyn
1234 Tottenham Court
Reston, VA 20194

Al Rooney
St. Vincent Healthcare
P.O. Box 35200
1233 N 30th Street
Billings, MT 59107

Ken Diebel
Nova Communications
414 Ineichen Street
Rayville, LA 71269

Joseph Belisle
Leibowitz & Associates PA
1 SE 3rd Avenue, Suite 1450
Miami, FL 33131

Barton Bond
Santa Fe Community College
6401 Richards Avenue
Santa Fe, NM 87508-4887

Rudolph J. Geist
RJGLaw, LLC
1010 Wayne Avenue, Suite 950
Silver Spring, MD 20910

Jerry Brisson
The College of Santa Fe
1600 St. Michaels Drive
Santa Fe, NM 87505

George W. Bott
Krisar, Inc.
P.O. Box 457
Hamlin, NY 14411

Peter D. Shields, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, DC 20006

Rev. Msgr. Michael J. Dempsey
Trans Video Communications
1712 10th Avenue
Brooklyn, NY 11215
James Woulfe  
Lambuth University  
705 Lambuth Boulevard  
Jackson, TN 38301

Tim Junek  
Bellville Independent School District  
404 E. Main Street  
Bellville, TX 77417-1599

*Via E-Mail

By:  /s/ Angelee Stamps  
     Angelee Stamps