NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 15-3118 BLS 2

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC. et al.[1]
Plaintiffs

vs.

CLEARWIRE SPECTRUM HOLDINGS II LLC, CLEARWIRE LEGACY LLC and SPRINT SPECTRUM, L.P.,
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' EMERGENCY MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs are non-profit entities that hold licenses from the Federal Communications Commission (FCC) to operate Educational Broadband Services (EBS) channels in certain geographic markets. The FCC permits EBS license holders like plaintiffs to grant access to a portion of their wireless communications spectrum to commercial wireless broadband providers. In 2006, plaintiffs granted this access to the defendants Clearwire Spectrum Holdings II, LLC and Clearwire Legacy, LLC (Clearwire) pursuant to certain written agreements. In return for this access, Clearwire granted plaintiffs access to its wireless broadband network and facilities, which plaintiffs then used to serve their non-commercial customers. These customers include religious and educational institutions as well as smaller end-users who receive wireless broadband services at no cost or at very low rates.

[1] Chicago Instructional Technology Foundation, Inc., Denver Area Educational Telecommunications Consortium, Inc., Instructional Telecommunications Foundation, Inc., Portland Regional Educational Telecommunications Corporation, and Twin Cities Schools' Telecommunications Group, Inc.

In 2013, the defendant Sprint Spectrum L.P. (Sprint) acquired Clearwire and began to use those portions of the spectrum licensed to Clearwire for its own commercial use. As part of a plan to upgrade its own service, Sprint announced its intention to transition from a WiMAX network to a more advanced "Long-Term Evolution" (LTE) network. This transition required among other things the decommissioning of approximately 1,600 WiMAX-only sites. The closure of these sites would mean that the non-commercial customers of plaintiffs would no longer have the internet access they enjoyed through Clearwire. November 6, 2015 was set as the decommission date.

Although plaintiffs welcomed a transition to a more advanced network, they also insisted that, as part of the transition, Sprint had to offer the same services that Clearwire had provided pursuant to its agreements with plaintiffs. Sprint disagreed. Negotiations among the parties ensued. Although they did work out an interim agreement (the ISA) effective for three months between March and May 2015, Sprint ultimately would not go along with plaintiffs' demands as to the quality of service plans that plaintiffs' customers should receive. With the November 6 deadline looming, plaintiffs on August 14, 2015 sent the defendants a Notice of Default. Each side dug in its heels and on October 14, 2015, this lawsuit was filed seeking an injunction against the closure of the remaining WiMAX sites through which plaintiffs' customers obtain their internet access.

A hearing on plaintiffs' Motion for a Preliminary Injunction was held on November 3, 2015, just three days before the November 6 shutdown. Because of the need for a quick decision, this Court ruled on plaintiff's Motion the next day by way of a margin endorsement, concluding that that the plaintiffs were entitled to the relief they requested. This memorandum sets forth the reasons for that ruling.

The legal standard this Court applies is well established. Plaintiffs must demonstrated that there is a substantial likelihood that they will succeed on the merits of their claims, that there is a substantial risk they will suffer irreparable harm if the injunction is not granted, and that this threatened injury to plaintiffs outweighs any harm to defendants. Packaging Industries v. Cheney, 380 Mass. 609 (1980). This Court may also take into account the public interest. Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co., 399 Mass. 640, 647 (1987). In determining that plaintiffs have satisfied that standard, the Court has considered not only the arguments and memoranda of the parties but has carefully reviewed the affidavits they have submitted as well as certain written agreements attached thereto. Much of the relevant facts are undisputed.

As to the merits of the plaintiffs' claims, plaintiffs rely on the language of their contracts with Clearwire. Master Royalty and Use Agreements or "MRUAs" govern the overall relationship between Clearwire and the plaintiffs. See Exhibit A to Affidavit of Jonathan I. Handler. Individual Use Agreements or "IUAs" set forth the rights and obligations of each party with respect to use of the EBS spectrum. See Exhibit B to Affidavit of Jonathan I. Handler. Plaintiffs maintain that the defendants are in breach of these agreements in two important respects. First, Section 10(b) of the IUAs permits Clearwire to sublicense its use of the broadband spectrum to another commercial entity only if plaintiffs give their written consent, so long as that consent is not unreasonably withheld. It is undisputed that plaintiffs have not consented to Sprint's use of the spectrum. That same contractual provision states that plaintiffs may withhold their consent if Clearwire does not "covenant in writing" that the proposed sublicensee (here, Sprint) will provide broadband access equivalent to what Clearwire itself would have provided had there been no sublicense. This forms the second basis for plaintiffs' claim. The IUAs require that the

plans Clearwire provides to plaintiffs' customers must "have the same capacity and characteristics as the highest level of premium mass market retail services provided on Clearwire's network or its affiliate's network in the market where it is used." See §7(k)(4) of IUAs. Although Sprint maintains that it does not offer the same "unlimited" retail plan that Clearwire had provided to plaintiffs' customers, what it is offering to plaintiffs is plainly inferior to the "highest level of premium mass market retail services" that it offers its own commercial customers. See ¶45 of the Affidavit of Patricia Tikkala.[2]

Defendants argue that plaintiffs' contract claims are based on a "fundamental misreading" of the agreements. In particular, they rely on Section 10(c) of the IUAs to support their position that plaintiffs' consent to Sprint's use of the EBS spectrum is not required. That section states that Clearwire may, without the prior consent of plaintiffs, "sell, assign, sublease, delegate or transfer this Agreement or any of its rights and obligations hereunder to. ...any entity that acquires all or substantially all of the assets of the Clearwire subsidiaries that hold the U.S. assets and operating companies." Plaintiffs point out, however, that Sprint's acquisition of Clearwire (which required FCC approval) was consummated not by a transfer of assets but by Sprint's taking ownership of 100 percent of Clearwire's stock. Indeed, the FCC Order approving the trans-

[2] Tikkala, a Sprint executive, states that "Sprint concluded that it could only support a 6 GB plan, which we determined to be consistent with the average monthly usage on a wireless broadband data-only device." Although this Court has only a limited understanding as to what a 6 GB plan is, defense counsel at the hearing on the motion volunteered that Sprint was offering other license holders 15 GB plans, so Sprint is clearly capable of offering more to its retail customers. Based on the affidavits submitted by plaintiffs, it is also clear that 6 GB is not enough to meet the needs of institutions as opposed to individuals — among them the many educational entities for whom plaintiffs provide internet access on EBS channels.

action states that the application under review is to "Transfer Control of Licenses," not for consent to "Assign Licenses." As explained at pages 2-3 of plaintiffs' reply memorandum, the FCC itself regards a transfer of control as a transaction in which the licensee remains the same but control of the license is transferred to another entity. In other words, Clearwire is still the licensee, and if Sprint wants to exercise the rights that license confers, Clearwire must enter into a sublicense with it — and plaintiffs must give their written consent.

Turning then to the harm which could befall either party depending on whether the injunction issues, this Court concludes that the balance of those harms favors the plaintiffs and that the harm is irreparable. Those harms are summarized at pages 13-16 of plaintiffs' memorandum in support of their motion. If the WiMAX network were turned off as planned, plaintiffs estimate that some 300,000 people are at risk of being left without internet services since, without access to the EBS spectrum, they cannot afford the higher commercial rates. Because Sprint will agree to provide only 6 GB plans, permitting the transition on Sprint's terms threatens the existence of plaintiffs' nonprofit Mobil Beacon and Mobile Citizen Services that serve schools, since modems for these customers average 32 GB per month. Finally, the damage to plaintiffs' reputation, as its customers look elsewhere for their internet access, is difficult to monetize and ultimately may be beyond repair.

The harm to Sprint, on the other hand, is on balance far less significant. As Sprint describes it, issuance of the injunction would jeopardize its ability to meet a timeline for completing the transition work that has been established pursuant to separate agreements with the federal government. As proposed by plaintiffs, however, the injunction delays closure of the WiMAX sites only for 90 days, and the defendants have failed to present evidence to this Court that this three month delay means that they will be unable to meet the deadline. Sprint also argues that

an injunction will force it to divert resources and capital away from constructing an advanced LTE network in favor of what even plaintiffs concede is a diminished network close to being obsolete. At the same time, however, Sprint benefits tremendously from having the ability to use portions of plaintiffs' EBS licenses for its own commercial use. That use came with a price tag that plaintiffs are contractually entitled to insist that Sprint pays.

Accordingly for these reasons and for other reasons articulated in plaintiffs' memoranda, the Motion for a Preliminary Injunction is **ALLOWED**.

Janet L. Sanders
Justice of the Superior Court

Dated: November 9, 2015