COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 1584CV03118-BLS2

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC., et al.,

Plaintiffs,

v.

CLEARWIRE SPECTRUM HOLDINGS II LLC, et al.,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO IMPOSE PRELIMINARY INJUNCTION BOND

Leaving aside that Defendants' motion does not constitute an emergency and should be denied on that basis alone, Defendants have not remotely demonstrated that their requested **$65 million** bond has any legal or factual basis. Instead, it is apparent that Defendants' "emergency" request for a $65 million bond is not intended to protect its reasonable financial interests; rather, it is a tactic designed to undermine the injunction entered by the Court and thereby make it impossible for the Plaintiffs to migrate their user base to LTE without a service interruption, which was precisely what the Court's Order was designed to foster. Perhaps the best evidence of this underlying motivation is the massive incongruity between the relief Plaintiffs seek and the superficial effort they have made to actually document their purported prospective damages. Rule 65(c), which permits – but does not obligate – the Court to require a bond is not intended to be a device by which an unhappy party can defeat an injunction entered against it merely by

conjuring up the greatest amount of purported monetary harm it can possibly imagine. Accordingly, the Court should deny this motion.

ARGUMENT

A. A Bond Is Not Required Here.

While Defendants suggest that a bond is mandatory,"[R]ule 65(c) explicitly allows the court discretion as to security." Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392, 400-401 (1994) (quoting James W. Smith & Hiller B. Zobel, Rules Practice § 65.9 (1981).) Some federal courts have suggested that a likelihood of success on the merits on the part of the party in whose favor an injunction has been issued militates toward not requiring that party to post a bond.[1] Crowley v. Local No. 82, Furniture & Piano Moving, 679 F.2d 978, 1000 n. 25 (1st Cir. 1982), rev'd on other grounds, 467 U.S. 526 (1984).[2] Here, the Court has already indicated that the Plaintiffs have a "strong likelihood of success on the merits."[3] (November 4, 2015 Order; November 9, 2015 Memorandum of Decision and Order at 4-5.)

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[1] As the SJC has repeatedly noted, "[W]e interpret our rule[] consistently with the construction given [its] Federal counterpart[], . . . absent compelling reasons to the contrary or significant differences in content." Am. Int'l Ins. Co. v. Robert Seuffer GMBH & Co. KG, 468 Mass. 109, 116 (alternations in original) (quoting Strom v. Am. Honda Motor Co., 423 Mass. 330, 335 (1996)), cert. denied, 135 S. Ct. 871 (2014).

[2] See generally McCormack v. Twp. of Clinton, 872 F. Supp. 1320, 1328 (D. N.J. 1994) (citing Crowley for the proposition that a court should (1) weigh the potential loss to the enjoined party against the hardship that a bond requirement would impose on the movant, and (2) consider whether the application seeks to enforce a significant federal right or matter of public interest).

[3] In weighing its decision, the Court should also consider the relative economic positions of the two sides. Sprint had net operating revenues of $34.5 billion in its most recent fiscal year. During their most recently-reported fiscal years, Plaintiffs had combined gross revenues of about $15 million, excluding the effect of one-time investment losses. Sprint is thus asking the Court to require a bond that is more than four times Plaintiffs' annual revenues. In comparison, the amount Sprint purports to be at risk is financially immaterial; even if one accepts the $65 million figure as properly calculated -- which it is surely not -- Sprint has at risk an amount that is less than 0.2% of its annual net operating revenue.

Moreover, "the burden is on the party seeking security to establish a rational basis for the amount of the proposed bond." Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd., 441 F. Supp. 2d 552, 566 (S.D.N.Y. 2006); see also Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882 (9th Cir. 2003) ("the bond amount may be zero if there is no evidence the party will suffer damages from the injunction"); Doctor's Assocs. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996) ("it has been held proper for the court to require no bond where there has been no proof of likelihood of harm") (quoting Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir. 1961)).[4] Here, Defendants have not met their burden of providing any rational basis for the amount of the bond they seek.

As a preliminary matter, there is no basis for Defendants' attempt to file this motion and have it heard on an emergency basis. Defendants had a full opportunity to present support for the issuance and amount of a bond in their opposition to Plaintiffs' Motion for Preliminary Injunction. Indeed, Defendants presented a substantive argument in favor of the issuance of a bond but made the strategic choice not to introduce any documentary or other specific, substantive basis for that position. Having made that choice, Defendants should not now be heard to claim that the Court's allowance of Plaintiffs' Motion for Preliminary Injunction turns Defendants' purported need for a bond into an emergency.

B. Defendants' Claims Of Future Harms Are Poorly Documented and Entirely Speculative.

Defendants' claims of financial harm relating to the injunction, which rely entirely on a new affidavit from Patricia Tikkala of Sprint ("2nd Tikkala Aff."), can be broken down into four

[4] See generally Westernbank P.R. v. Kachkar, No. 07-1606, 2008 WL 8089778, at *12 (D.P.R. July 23, 2008) (noting that defendants had not set forth evidence on "the nature or quantum of hardship they would suffer . . . even though they have had the opportunity to do so both in the context of their bond argument as well as the preliminary injunction analysis itself.")

categories, each of which will be addressed in turn. While Defendants' claims for each of these is deficient for one or more reasons, they are uniformly objectionable because, once again, Defendants have chosen not to provide the underlying documentation to support their allegations or that would allow Plaintiffs or the Court to determine their accuracy. A careful reading shows that on most of the key allegations, Ms. Tikkala has no personal knowledge but rather has relied on consultations with unidentified individuals or vaguely described, undisclosed documents. As to the individual points in Ms. Tikkala's affidavit, Plaintiffs note the following:

13, 693 sites (2nd Tikkala Aff. ¶¶ 9-12). Defendants provide no basis to assess the accuracy of this number of sites that must be decommissioned, which is obviously the most significant driver of the enormous size of the bond they seek. Ms. Tikkala indicates that the Network CFO "confirmed which cost items would be incrementally incurred in the network 90-day WiMAX extension." Given that the size of these "incremental costs" are essential to Defendants' analysis, it was incumbent upon them to tender an affidavit from either this unnamed Network CFO or someone else with first-hand knowledge. At the very least, Defendants should have produced the "financial statements and underlying information" regarding network costs that Ms. Tikkala claims to have relied upon as well as the Excel file used to analyze that data. (2nd Tikkala Aff. ¶ 9.) To take one example of an essential question that remains unanswered, Defendants have not distinguished between those sites that provide WiMAX service only versus those that provide WiMAX and LTE service. In the event a site serves both networks -- and Defendants have disclosed in SEC filings that over 10,000 of them do[5] -- then the incremental cost of maintaining the site for WiMAX purposes may be

[5] "As of the date of the Clearwire Acquisition, Clearwire had deployed WiMAX technology on approximately 17,000 cell towers and was in the process of deploying 4G LTE technology using the 2.5 GHz spectrum on certain sites. We have evaluated our consolidated

significantly less than Defendants have suggested here. But again, they have provided no documentation by which Plaintiffs could confirm the facts. Indeed, Defendants have not even provided a coherent description of what steps are actually required to decommission one of these sites.

Utility, hardware, and software costs, service fees, and backhaul costs (2nd Tikkala Aff. ¶ 12). Ms. Tikkala claims to have determined these "average costs" based on a "review of Clearwire network costs for the second quarter of fiscal year 2015." Although it would presumably be well within their ability to do so, Defendants have not documented any of these costs, leaving Plaintiffs with no meaningful way to assess their accuracy or applicability. For example, Ms. Tikkala attributes a significant portion of the per site costs to management services provided by Ericsson but, as noted above, because there is no breakdown between WiMAX only and LTE plus WiMAX sites, there is no way to know how much of these costs would be incurred even if WiMAX had been decommissioned as planned. More broadly, Ms. Tikkala provides no explanation for what these costs are actually for beyond the general categories into which they fall. What is the nature of the utility expenses? What services does Ericsson provide? None of these questions is answered in the affidavit. As a further example of the unreliability of these categories of purported damages, Ms. Tikkala states that some of the expected costs involve "backhaul costs for connection of the site to the public switched telephone network or central data hub...." (Id. ¶ 12.) The reason for connection to the public switched telephone network is to allow users to make telephone calls. Plaintiffs, however, offer Internet service to their

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cell tower portfolio, including the 17,000 cell towers obtained in the Clearwire Acquisition, and identified approximately 6,500 redundant sites that we expect to no longer utilize...." Sprint Corp. Quarterly Report (Form 10-Q) (Feb. 2, 2015), p. 44, available at http://www.sec.gov/Archives/edgar/data/101830/000101830150000005/sprintcorp12-31x1410q.htm.

customers not telephone service, meaning that it is not necessary for Sprint to pay for backhaul to the telephone network.

Expiring leases/tower costs (2nd Tikkala Aff. ¶ 13). Once again, Defendants have chosen not to provide any of the underlying documentation upon which Ms. Tikkala bases her conclusions. Indeed, what is clear from Ms. Tikkala's affidavit is that the roughly $7.5 million she claims in incremental site rental costs is not based upon actual cost information. Again based upon a hearsay-type conversation -- this time with an unnamed "member of the Real Estate Network Team" -- Ms. Tikkala states that "I understand that a reasonable estimate of the leases with professional tower companies likely will require a full-term extension, which range from 3 to 10 years, depending on the lease." But Defendants do not submit documentation of actual extension requirements they have obtained from tower owners or even an affidavit from the real estate team member.[6]

Further, Ms. Tikkala states that incremental costs will be incurred with respect to 183 of 13,693 towers involved in the 90-day extension, meaning that the vast bulk of the underlying leases extend beyond that period. However, her affidavit omits to mention whether ongoing contracts will require the payment of costs in such categories as hardware and software maintenance, service fees to Ericsson Management Services, and backhaul -- all of which she attributes entirely to the Court-ordered injunction at a claimed combined expense of about $49 million. Significantly, Defendants offer no underlying contracts or other information which would allow these figures to be independently evaluated by the Court or the Plaintiffs.

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[6] Ms. Tikkala goes on to state that "I also understand that a reasonable estimate of the leases with other private, non-tower companies is that approximately 80% may likely be renewed on a month-to-month basis and approximately 20% may require a full-term extension." (Id. ¶ 13.) With respect to this latter category of tower owner, Defendants' proof becomes even more unreliable, as Ms. Tikkala does not specify the source of her claimed "understanding."

Alleged Disruption to Sprint's Spectrum Use (2nd Tikkala Aff. ¶¶ 14-18). Ms. Tikkala references the putative importance of transitioning WiMAX spectrum to Sprint's LTE network, but fails to identify a single instance where WiMAX spectrum needed to meet its obligations to Plaintiffs is also required over the next 90 days for Sprint's LTE network. Moreover, Defendants' public filings appear to belie her assertions. Clearwire has stated that it holds "approximately 140 MHz of spectrum on average across our national spectrum footprint and approximately 160 MHz of spectrum on average in the 100 largest markets in the United States."[7] This past August, Sprint CEO Marcelo Claure indicated that Sprint's LTE initiative would utilize 40 MHz (two 20 MHz channels) in each of its LTE markets.[8] The typical Clearwire network design uses 30 MHz-40 MHz to serve most metropolitan areas. Thus, if Sprint generally needs 40 MHz per market for LTE and is required to simultaneously maintain WiMAX for 90 days, using up to an additional 40 MHz, for a total of 80 MHz, that would still leave at least an additional 60 MHz (i.e., 140 MHz minus 80 MHz) available for LTE in Sprint's largest markets. It is incumbent on Defendants to substantiate what, therefore, appears to be at best an exaggerated claim even if there were an unusual circumstance in a particular market where Sprint would not have access to its other local frequencies for LTE without reclaiming WiMAX spectrum.

Other purported harm (2nd Tikkala Aff. ¶¶ 19-21). Based on Ms. Tikkala's affidavit, Defendants appear to have largely abandoned their previous arguments that entry of the injunction would (1) do serious harm to their "competitive position," and (2) pose significant

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[7] Clearwire Corp., 2012 Annual Report (Form 10-K) (Feb. 16, 2012), p. 17, available at http://www.sec.gov/Archives/edgar/data/1442505/000144250513000015/clwr1231201210-k.htm

[8] R. Marcelo Claure, CEO, Sprint Corp. 1Q Earnings Call (Aug. 4, 2015) (comments on Sprint's spectrum deployment plans, available at http://seekingalpha.com/article/3397085-sprint-s-r-marcelo-claure-on-q1-2015-results-earnings-call-transcript?part=single

risk to their ability to comply with their National Security Agreement requiring removal of certain equipment by the end of 2016. In particular, Ms. Tikkala's affidavit makes no serious effort to quantify or explain the specific nature of the competitive harm, nor does she establish any causal link between the 90 day injunction and the purported harm. (Id. ¶ 19.) Likewise, the two meager paragraphs she devotes to the National Security Agreements make no effort to respond to the argument raised in Plaintiffs' Reply in support of their motion for preliminary injunction, i.e., that Defendants have failed to document how many of these sites are even in Plaintiffs' markets. Indeed, it remains true (and unrebutted) that (1) not all WiMAX sites contain a transceiver subject to the NSA, and (2) the injunction entered by the Court does not cover all Clearwire WiMAX metro areas. Thus, Defendants should be able to mitigate any purported burden of decommissioning by prioritizing WiMAX sites not subject to the injunction.

Finally, the legitimacy of Defendants' claimed prospective financial losses arising from the injunction is cast into further doubt by Defendants' failure to discuss with Plaintiffs various means by which such costs could be minimized while still continuing service to Plaintiffs' end users. Had Defendants inquired, they would have discovered that Plaintiffs were prepared to make every reasonable effort to be accommodating where possible. For example, a significant portion of Defendants' claimed justification for the gargantuan size of the bond relates to the need to sign new leases with tower companies, some of which may be done on a month-to-month basis and others of which may require a full-term renewal/extension. (Id. ¶ 13.) Plaintiffs remain prepared to negotiate a compromise on these points, e.g., to the extent any cell site has not been used by one of Plaintiffs' customers recently, Plaintiffs are likely to agree to have those sites decommissioned. Likewise, to assuage Defendants' (undocumented) claim that delayed de-commissioning could interfere with its LTE network roll-out, Plaintiffs would be willing to work

with Defendants to identify the affected markets to see if any have limited numbers of educational end users who might be transitioned in less than 90 days. Lastly, if Defendants were able to document instances where the 90 day stay would force them to enter into full site lease extensions, Plaintiffs would be willing to discuss intermediate, compromise steps. But again, Defendants' rush to the courthouse did not permit these conversations to take place.

CONCLUSION

Defendants' motion is an example of overreach and of seeking to use a mind-bogglingly large bond request to render meaningless the injunction issued by the Court. For that reason, and those cited above, the Court should deny Defendants' Emergency Motion for Preliminary Injunction Bond.

Respectfully submitted,

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC., 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.,

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Dated: November 9, 2015

CERTIFICATE OF SERVICE

I, Jonathan I. Handler, hereby certify that on this 9th day of November, 2015, I caused a copy of the foregoing to be served by email and first-class mail upon:

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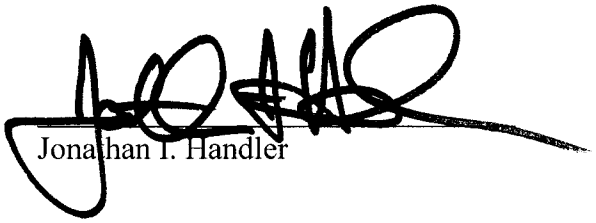

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