COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

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.,	)
Plaintiffs,	)
v.	)
CLEARWIRE SPECTRUM HOLDINGS II LLC, CLEARWIRE LEGACY LLC, f/k/a CLEARWIRE CORPORATION and SPRINT SPECTRUM L.P.,	)
Defendants.	)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs seek emergency injunctive relief to halt Defendants' attempt to shut down the Clearwire broadband Internet service, which will render Plaintiffs' constituents, along with an estimated 300,000 end users, at risk of being will be left without Internet service. Plaintiffs are nonprofit entities that hold licenses from the Federal Communications Commission to operate broadband services for educational and charitable purposes. In 2006, Plaintiffs licensed their respective portions of the spectrum to Defendants Clearwire, which in turn provided Plaintiffs with cost-free broadband accounts on its commercial service that Plaintiffs utilized to provide

Internet access to their end-users. In 2013, however, Defendant Sprint purchased Clearwire, appropriated these portions of the spectrum for its own commercial use, and refused to provide equivalent in-kind services to Plaintiffs as required under the license agreements. Now, Sprint threatens to permanently discontinue the Clearwire service, terminating Internet service to Plaintiffs and their constituents. These constituents include educational institutions and other nonprofit organizations that rely on Plaintiffs to serve students, elderly, and disabled persons, and other people who are often not able to afford Internet services at the usual and customary fee levels offered by "for profit" providers. As a result, Plaintiffs ask the Court for injunctive relief as described in the attached Motion and proposed order.

FACTUAL BACKGROUND

The following facts are taken from the Verified Complaint (attached as Exhibit D to the Affidavit of Jonathan I. Handler ("Handler Aff.")), and the Affidavits of John Primeau, President and Chief Executive Officer of Plaintiff North American Catholic Educational Programming Foundation, Inc. ("NACEPF"), and John Schwartz, President and Chief Executive Officer of the Voqal Plaintiffs, in support of this motion.

A. Background to Education Broadband Service Licenses

The Federal Communications Commission ("FCC") is charged with the management of the United States' electromagnetic spectrum in part to "to make available, so far as possible, to all the people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 USC § 151 et seq. In its discharge of this duty, the FCC established the Educational Broadband Service ("EBS"). See 47 CFR 27.1201 et seq. EBS and its predecessor, the Instructional Television Fixed Service, are an over 50-year-old program under which the FCC allocates wireless licenses

to nonprofit entities to serve the public interest in providing educational-based broadband services. (Affidavit of John Primeau ("Primeau Aff.") at ¶ 2.) Specifically, EBS licenses are granted to accredited institutions and governmental organizations to further the licensee's educational mission to enrolled students, faculty and staff in a manner and setting conducive to educational usage; licenses are also granted to nonprofit organizations, such as Plaintiffs, that serve accredited educational institutions or governmental organizations. (Id.)

Plaintiffs are EBS licensees who provide wireless broadband services to educational institutions, nonprofit entities seeking to reduce the "digital divide"[1] between affluent and low-income people, public libraries, religious institutions, and other nonprofit, social welfare and governmental entities (defined contractually as "Educational End Users"). (Ver. Compl. ¶ 23.) These entities, in turn, typically make the services available to their constituents, including students, faculty, and low-income families. (Id. ¶ 24.) Some end-users receive wireless broadband service at no cost and the remainder pay very low rates. (Id. ¶ 2) In many cases, these end-users have no other way of connecting to the Internet that is financially feasible for them. (Id. ¶ 24.) NACEPF provides such service through a project known as Mobile Beacon. The remaining Plaintiffs provide service chiefly through a joint project called Mobile Citizen. (Id.) Collectively, Mobile Beacon's and Mobile Citizen's services benefit over 300,000 people, many of whom would not otherwise have affordable Internet access. (Id.)

The FCC allows EBS licensees, like Plaintiffs, to lease no more than 95% of the capacity of their EBS channels, requiring that at least 5% of the capacity to be reserved by the licensee for its educational use. See FCC Rule 27.1214(b)(1). This reservation is a fundamental requirement

[1] The digital divide is an economic and social gap between those who do not have access, or have restricted access, to information and communications technology, in particular the Internet, and those who do.

for leasing excess capacity of EBS channels. (Ver. Compl. ¶ 33.) In exchange for the lease of portions of their EBS spectrum capacity, Plaintiffs receive (among other things) cost-free accounts on Clearwire's network to achieve their educational missions and other charitable objectives as described above. (Id. ¶ 31.)

B. Plaintiffs' Contractual Relationship with Defendants

Plaintiffs have provided access to the commercial spectrum capacity of their EBS channels to Clearwire through two Master Royalty and Use Agreements ("MRUAs") both dated July 31, 2006 (Handler Aff., Exhibit A)[2] and certain Individual Use Agreements ("IUAs") executed in accordance therewith (Handler Aff., Exhibit B), collectively referred to as "Existing Agreements".) (Ver. Compl. ¶ 25.) The MRUAs govern the overall relationship among the parties. (Id.) The IUAs are the agreements actually granting access to the commercial spectrum capacity under specific spectrum licenses and have greater specificity with regard to the relationship and the consideration. (Id.) Together, the Existing Agreements provide a unified framework pursuant to which Plaintiffs permit Clearwire to utilize the commercial spectrum capacity of the Plaintiffs' EBS channels. (Id. at ¶ 26.)

In exchange for the use of the EBS channels, Plaintiffs receive economic royalties (including monthly fees) and what the Existing Agreements refer to as Access Right Royalties (collectively referred to as the "Total Consideration"). (Handler Aff., Ex. A, Recitals.) The Total Consideration is essential to the Plaintiffs' ability to advance the objectives and goals of their individual nonprofit missions. (Ver. Compl. ¶ 28.) Its paramount public-interest importance is evidenced in each of the MRUAs which states, "...the IUAs and this Agreement would not have

[2] The two MRUAs cover different groups of Plaintiffs, but are otherwise, substantially identical.

been executed but for all of the elements of the Total Consideration." (Handler Aff., Ex. A, Recitals.)

Access Right Royalties are described in Section 7 of each IUA and include, amongst other things, access to Cost Free Educational Accounts, along with technology, equipment purchase rights, facilities and other functionality and support needed to provide service to Educational End Users. (See Handler Aff., Ex. B, § 7.) Cost Free Educational Accounts ("CFEAs") are broadband Internet access accounts entitling the user to access the Internet through the Clearwire wireless broadband network. (Ver. Compl. ¶ 30.) They are, as the name implies, cost-free accounts, meaning that Licensees do not pay any service or other charges for these accounts, regardless of what Clearwire charges retail subscribers for such accounts. (*Id.*) Cost Free Educational Accounts, pursuant to Section 7(k)(iv) of the IUAs, are required to "have the same capacity and characteristics as the highest level of premium mass market retail service provided on Clearwire's network in a Market Area." (See Handler Aff., Ex. B § 7(k)(iv).)

The CFEAs that Clearwire provides on its wireless network afford users access to unlimited Internet capacity. (Ver. Compl. ¶ 32.) This means their "throughput" is not shut off after reaching a certain data capacity allotment and their throughput speeds are not "throttled" after a particular amount of data capacity is used in a billing period.[3] (Id.) These CFEAs are critical in that they enable Plaintiffs to use their required 5% of the capacity of the licensed channels mandated by FCC rules. (Id. at ¶ 33.) If Clearwire continues to access Plaintiffs'

[3] "Throttling," in this context, is broadband service industry vernacular for slowing down the speeds of broadband connections after a certain level of data usage has been reached in a billing cycle. (Ver. Compl. ¶ 32.) Wireless carriers also throttle wireless service at times when the cell site serving the account at any particular time is loaded to capacity by simultaneous users. (Id.) Plaintiffs do not object to throttling that is applied equally to all users for the purpose of reasonable network management consistent with the FCC's Open Internet Order adopted on February 26, 2015 and Clearwire's generally applicable customer policies. (Id.)

spectrum (or provides other Sprint parties with access to Plaintiffs' spectrum) without meeting the reservation, Clearwire de facto forces Plaintiffs to be out of compliance with FCC rules. (Id.) To this end, the Section 6(e) of each IUA provides, in part, that if (after notice to Clearwire) the Plaintiffs become aware that Clearwire's actions might cause the FCC to adversely impact the ESB licenses or might cause Plaintiffs to be in violation of FCC regulations, Plaintiffs are entitled to immediately seek injunctive relief to force Clearwire into compliance. (See Handler Aff., Ex. B § 6(e).)

The Existing Agreements protect Plaintiffs' CFEAs in the event that the Clearwire spectrum is sublicensed by requiring Plaintiffs' consent to such sublicense and specifically anticipating that Plaintiffs will withhold such consent if the sublicensee does not provide equivalent broadband access as does Clearwire. (See Handler Aff., Ex. B §10(b) (Plaintiffs' consent to sublicense "may be withheld if, among other things, Clearwire does not covenant in writing in form and substance reasonably acceptable to [Plaintiffs] . . . to provide the same level of service, features and access to [Plaintiffs] that it would have provided or been obligated to provide had such Clearwire Capacity not been sublicensed").)

C. Sprint's Acquisition of Clearwire

In July 2013, affiliates of Sprint acquired control of Clearwire by stock purchase. (Ver Compl. ¶ 35.) All of Plaintiffs' Educational End Users and CFEAs were, at that time, on Clearwire's wireless network. (Id.) Over a year later and only after inquiries of Sprint by third parties, Sprint announced its intention, as the new parent of Clearwire, to shut down service on the Clearwire network on or about November 6, 2015, at which time Clearwire will no longer make broadband access services available to the public and Plaintiffs will no longer be able to obtain CFEAs on a Clearwire network. (Id. at ¶ 36.) Sprint's plan for Clearwire's spectrum is to

sublicense it to Sprint, so that Sprint and its affiliates can use that spectrum in Sprint's broadband wireless network. (Id. at ¶ 51.)

Plaintiffs have met and communicated with Sprint continuously since January 2014 seeking a reasonable path to facilitate the transition from WiMAX to the LTE network. (Primeau Aff. ¶ 7.) Despite Plaintiffs' earnest attempts at reaching a good-faith resolution, Sprint has appeared more interested in giving the appearance of negotiating while dragging out the process until after it has shut down the Clearwire network, leaving Plaintiffs without viable service.[4] From January through April 2014, the parties met several times to build their relationships and develop a plan to transition Plaintiffs' users from WiMAX to LTE. (Id. ¶ 8.) Initially refusing to undertake the obligations under the MRUAs and IUAs, Sprint provided a highly unfavorable draft amendment on May 28, 2014. (Id. ¶ 9.) In November 2014, Plaintiffs, seeing no positive movement from Sprint and worried that time was not on their side, asked Sprint to agree to a bridge agreement to migrate the Plaintiffs' existing accounts to the Sprint LTE network. (Id. ¶ 11.) After requesting this bridge agreement in November of 2014, the parties eventually signed the agreement, called the Interim Service Agreement (ISA), on March 6, 2015. (Id.; see Handler Aff., Ex. C.) While the Plaintiffs wanted more of their CFEAs to be transitioned, Sprint was only willing to agree in the ISA to transition approximately one-third of their quota of CFEAs to ease the burden of the ultimate transition in the ISA. (Primeau Aff. ¶ 11.) The ISA required the transitioned CFEAs to be "unlimited" and to have the throughput and characteristics of Sprint's best level of retail Internet access service, thus substantially mirroring

[4] The following is a brief recitation of the interaction between Sprint and Plaintiffs. For a more detailed explanation, please see the Affidavit of John Primeau ¶¶ 7-20.

the requirements applicable to the CFEAs provided by Clearwire under the IUAs. (Id.; see Handler Aff., Ex. C at Exhibit A, "Services"; id. at Ex. B, § 7(k)(iv).)

Sprint has breached the Existing Agreements and the ISA in a number of material ways. First, the Sprint broadband service plan that Defendants are imposing on Plaintiffs deliberately slows speeds down drastically from an average download speed of 6-8 Mbps to 256 Kbps after just 6 GB of capacity is used in a month. (Ver. Compl. ¶ 40.) This plan is not mentioned in the ISA and it is both far from "the best unlimited plan" and one that is not "available to retail customers."[5] (Id.) Sprint's self-imposed 6 GB limit renders a near lethal blow to Licensees' public service to nonprofit organizations, as well as the scores of schools that depend on, among other things, surveillance systems for student and staff protection, and other vital public interest educational imperatives such as addressing the "homework gap." (Id. at ¶ 45.)

Second, under the Existing Agreements, Clearwire is required to provide Plaintiffs with the same supporting system capabilities and service that Clearwire provides to its retail customers. (Id. at ¶ 46.) These services provide functionality for ordering devices for Plaintiffs' customers, establishing their accounts, and tracking and recording the status of their accounts. (Id. at ¶ 47.) Defendants have failed to provide the required services for Sprint's wireless network. (Id. at ¶ 48.)

Third, Section III (A) of the ISA requires that Sprint provide specific wireless data "Devices" (*i.e.*, user modems) described therein. (Id. at ¶ 58.) These Devices are various models of Sprint's "data-only" devices, most of which connect to the Internet via Sprint's wireless

[5] Sprint offers a retail service plan that serves hotspots with 30 GB of data per month, coupled with overage charges above 30 GB (but no throttling upon reaching a certain data allotment). This plan appears to be "the best unlimited plan available to retail customers generally." (Ver. Compl. ¶ 41.)

network and simultaneously connect to users' nearby computers or other data devices usually by Wi-Fi. Sprint has refused to sell Plaintiffs many of the specified Devices, claiming they are discontinued or out of stock. (Id.) There is no contractually sanctioned process for discontinuing the sale of the specified Devices. (Id.) Sprint thus is in default for failing to sell those Devices as required. (Id.)

Thus, as Sprint continues to shut down the Clearwire network, it leaves most of Plaintiffs' customers with old devices on a network that is impaired and being phased out and no path to timely substitute service. (Id. at ¶ 5.) When the Clearwire network is completely shut down, the vast majority of Plaintiffs' customers will have no Internet service at all. (Id.) So abandoned, Plaintiffs' customers will have no alternative but to pay Sprint or another provider the standard customary rates for devices and service, which many of them cannot afford to do. (Id.) Effectively, they are rendered without any access to the Internet. (Id.) This is far short of the requirement under the license agreements that Clearwire and Sprint provide Plaintiffs' customers and other end-users with the best level of devices and services provided to regular retail customers.

ARGUMENT

Under Mass. R. Civ. P. 65(b), the Court should grant Plaintiffs' motion for a preliminary injunction because (1) there is a substantial likelihood that they will succeed on the merits of their claims, (2) there is a substantial threat that Plaintiffs will suffer irreparable injury if the injunction is not granted, (3) the threatened injury to Plaintiffs outweighs the threatened harm the injunction may cause to Defendants, and (4) the public interest will be served by the injunction. See, e.g., Loyal Order of Moose, Inc., Yarmouth Lodge #2270 v. Bd. of Health of Yarmouth, 439 Mass. 597, 601 (2003); Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.,

399 Mass. 640, 648 (1987) (noting that judge may consider risk of harm to the public in appropriate cases).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

Plaintiffs are likely to prevail on their breach of contract claim because (1) they entered into enforceable, binding agreements with Defendants, (2) Defendants have breached the terms of these agreements, and (3) Plaintiffs will suffer damages as a result of the breaches. See Singarella v. Boston, 342 Mass. 385, 387 (1961).

A. Defendants' Failure to Obtain Plaintiffs' Consent to Sublicense the Spectrum.

Section 10(b) of the IUAs places strict and important limitations on Clearwire's ability to divert Plaintiffs' spectrum to a third party by sublicense. (See Handler Aff., Ex. B § 10(b).) Section 10(b) of the IUAs specifically provides

> ... that with advance written consent of Licensee and any required FCC consent or authorization, which consent of Licensee shall not be unreasonably withheld, conditioned or delayed, Clearwire may sublicense the use of Clearwire Capacity .... Licensee's consent may be withheld if, among other things, Clearwire does not covenant in writing in form and substance reasonably acceptable to Licensee to provide the same level of service, features and access to Licensee that it would have provided or been obligated to provide had such Clearwire Capacity not been sublicensed.

(Id. (Emphasis added).) It is undisputed that Clearwire did not seek, and did not obtain, Plaintiffs' consent to sublicense the spectrum subject to the IUAs to Sprint or any other entity. (Ver. Compl. ¶ 65.) This is plain breach of the parties' contracts.

Only "Affiliates" of Clearwire may use the spectrum without this consent and Sprint and its affiliated entities (other than Clearwire Legacy and Clearwire Legacy's direct and indirect

subsidiaries) are specifically excluded from the definition of "Affiliate" for purposes of sublicensing by Section 6(c)(i) of the IUAs.[6] (Ver. Compl. ¶ 65.)[7]

B. Defendants' Failure to Provide Access Rights Royalties.

Clearwire is obligated, among other things, to provide Plaintiffs with Access Right Royalties. (Ver. Compl. ¶ 68.) The MRUA defines any entity that provides Access Right Royalties as a "Service Affiliate" and covenants that all Service Affiliates will assume all of the Obligations of Clearwire under the Existing Agreements. (See Handler Aff., Ex. A § 1.03(a).) Clearwire and Sprint, as Service Affiliate, have breached their obligations to provide Access Right Royalties of the kind, quality and quantity mandated by the Existing Agreements. (Ver. Compl. ¶ 71.) Sprint has also breached its obligation under the ISA to provide an "unlimited data usage plan on the Sprint network" that "shall not be inferior in any material respect to the best unlimited plan available to retail customers generally." (Handler Aff., Ex. C at 10.)

In particular, the Sprint broadband service plan that Defendants are imposing on Plaintiffs is materially inferior to that mandated by the Existing Agreements and the ISA in three respects:

1. It deliberately slows speeds down drastically from an average download speed of 6-8 Mbps to 256 Kbps after just 6 GB of capacity is used in a month. (Ver. Compl. ¶ 40.) This plan is far from the "highest level of premium mass market retail service provided" to Sprints customers, (See Handler Aff., Ex. B § 7(k)(iv)) and clearly is "inferior in [] material respect[s] to the best unlimited plan available

[6] This language is redacted from the publicly filed form IUA attached as Exhibit B to the Handler Aff.

[7] Nor does the asset purchase exception to the consent requirement apply because Sprint did not acquire the assets of Clearwire, but purchased the stock of its ultimate parent company; the spectrum lease rights are still owned by Clearwire entities, even though Sprint now indirectly controls those entities. (Ver. Compl. ¶ 55.)

to retail customers generally" (Handler Aff., Ex. C at 10.) Rather, the "best unlimited plan" appears to be a retail service plan that serves hotspots with 30 GB of data per month, coupled with overage charges above 30 GB (but no throttling upon reaching a certain data allotment). (Ver. Compl. ¶ 41.)

2. It deprives Plaintiffs of the same supporting system capabilities and management service that Clearwire provides to its retail customers. (See Handler Aff., Ex. B § 7(E).)

3. Sprint is unwilling or unable to provide the devices it has promised to Plaintiffs. (See Handler Aff., Ex. C at 10.)

C. Defendants' Failure to Reserve Plaintiffs' 5% Spectrum Capacity.

Clearwire is required by Sections 7(a) and (b) of the IUAs to provide Plaintiffs with significant numbers of CFEAs. (Ver. Compl. ¶ 82.) These accounts are the sole means by which Plaintiffs may satisfy the FCC's requirement that Plaintiffs reserve at least 5% of the capacity of their EBS channels so that they are available for educational uses as a mandatory regulatory condition to providing the commercial spectrum capacity of the EBS channels to a commercial wireless provider like Clearwire or Sprint. (Id. at ¶ 83.)

Sprint is in the process of shutting down the Clearwire network, while diverting the commercial spectrum capacity Plaintiffs have provided to Clearwire to use in Sprint's wireless network. (Id. at ¶ 85.) Sprint has replaced a small fraction of those accounts with CFEAs that use the Sprint network. (Id.) Because of the combined effect of severe reductions in both the number of CFEAs and the capacity allotted to those accounts, once the Clearwire wireless network is terminated, Clearwire and Sprint will, by their breaches, de facto force Licensees to be out of compliance with the FCC's minimum 5% set-aside regulation. (Id.)

The FCC is empowered to impose severe sanctions for violations of its regulations, including the most extreme sanction of license forfeiture. Because of the importance of FCC regulation compliance, Section 6(e) of each IUA provides, in part, that if (after notice to Clearwire):

> Licensee becomes aware of an on-going violation or repeated violations by Clearwire of the Communications Act or the FCC Rules governing its use or Licensee's use of the Channels (collectively, the "Governing Rules"), or any other violation of the Governing Rules that might adversely affect Licensee's rights in the License, might impose unreimbursed liability on Licensee as licensee of the Channels or might cause the FCC to revoke, cancel, rescind or materially adversely modify the De facto Transfer Authorization ...Licensee shall be entitled to take action to force Clearwire to immediately cease such violation(s), immediately comply with the Governing Rules and take such preventative steps, all at Clearwire's expense, and including the right to immediately seek injunctive relief, and in each case without first giving Clearwire any further notice or awaiting any further cure period.

(Handler Aff., Ex. B § 6(e) (emphasis added).) Clearwire is required to provide the CFEAs, which are knowingly used (in part) to meet the FCC 5% requirement. This breach will cause Plaintiffs not to be in compliance with FCC regulations, which, under IUA Section 6(e), is to be cured by injunctive relief. The only practical relief is to maintain the Clearwire WiMAX network in operation until Plaintiffs have sufficient Sprint LTE devices, with sufficient utilized throughput, to meet this 5% requirement.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT ENTER A PRELIMINARY INJUNCTION.

When Defendants turn off the WiMAX network on or about November 6, 2015, an estimated 300,000 people are at risk of being left without Internet service. Plaintiffs' customers are not financially endowed companies who can afford to pay commercial market rates for Internet services. (Ver. Compl. ¶ 23.) They are most often nonprofit institutions who serve people that can often not even afford a computer or mobile device, never mind the usage fees. (Id. at ¶¶ 23-24.) Moreover, Sprint's throttled data plans are inadequate to the needs of Plaintiffs

and their users.[8] Curtailing usage to a mere 6 GB monthly is a near lethal blow to Plaintiffs' nonprofit users. (Id. ¶ 4) This threat to Plaintiffs' nonprofit organizations and users' Internet access gives rise to four distinct forms of harm, each of which qualifies on its own as irreparable harm justifying the imposition of a preliminary injunction.

First, this action threatens the existence of Plaintiffs' nonprofit Mobile Citizen and Mobile Beacon services. See Hull Mun. Lighting Plant, 399 Mass. at 643 (noting that threat to business constitutes irreparable harm). Here, Defendants threaten to cut off the supply of data, the very product that it is Plaintiffs' mission to supply. These actions have a strong likelihood of forcing Plaintiffs out of the business conducted by Mobile Citizen and Mobile Beacon prior to their ability to obtain final relief in this court. See, e.g., iQuartic, Inc. v. Simms, No. 15-13015-NMG, 2015 WL 5156558, at *14 (D. Mass. Sept. 2, 2015) (jeopardizing plaintiff's ability to deliver product to client that threatens existence of business can constitute irreparable harm). As the Affidavit of John Primeau explains:

> We hope to remain active as suppliers of Internet service to educational institutions and non-profit organizations for decades to come. But a debacle such as the widespread cut-off of service to our user base and the provision of inferior throttled services will so significantly damage our reputation and relationships as to call into question the viability of our efforts to bridge our corner of the digital divide.

[8] Mobile Beacon school modems use an average of 32 gigabytes (GBs) per month, with the top 25% using capacity between 50 and 300+ GBs per month. (Ver. Compl. ¶ 4.) For example, some schools, particularly in rural or underserved areas of the United States, rely on Mobile Beacon as their primary Internet service for all of their access needs, others use Mobile Beacon's service for surveillance systems for students' and staffs' protection, which requires higher capacity to remain functional. (Id.) Mobile Citizen average broadband capacity consumption of 40 GB per month.

(Primeau Aff. ¶¶ 27.) Under these facts, the threat to Plaintiffs' business clearly constitutes a "a loss of rights that cannot be vindicated should [Plaintiffs] prevail after a full hearing on the merits." Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 616 (1980).

Second, the shutdown of the Clearwire network along with the throttling of the Sprint accounts will damage client relationships and wreak substantial damage to Plaintiffs' goodwill in the eyes of its customers, resellers, and partners. "[D]amage to client relationships and customer goodwill has been held to be 'irreparable harm' under Massachusetts law," Bear, Stearns & Co., Inc. v. Sharon, 550 F. Supp. 2d 174, 178 (D. Mass. 2008), citing All Stainless, Inc. v. Colby, 364 Mass. 773 (1974); see also BNY Mellon, N.A. v. Schauer, No. 201001344BLS1, 2010 WL 3326965, at *34 (Mass. Super. May 14, 2010). As explained in the Affidavit of John Primeau:

> The delay and uncertainty occasioned by Sprint's failure to transition our customers to LTE network services, with unthrottled devices that replicate what they were receiving from Clearwire have so severely damaged the reputation of Mobile Citizen and Mobile Beacon that we have been told that we are no longer a reliable source of Internet connectivity or reliable collaborators in general. A reputation critical to our business and built over many years has been severely damaged and will be destroyed if WiMAX is shuttered and service lost.

(Primeau Aff. ¶ 25.) As in Concourse Ticket Agency v. Kraft, No. CA9500666, 1995 WL 809935, at *10 (Mass. Super. Apr. 3, 1995), Plaintiffs "have suffered, and will continue to suffer, a severe loss of reputation and goodwill in their industry" as they receive the blame for their inability to provide the expected level of service to their customers. This loss of goodwill plainly constitutes irreparable harm justifying an injunction.

Third, Defendants' actions threaten non-economic harms to the charitable purpose of Plaintiffs' nonprofits. In Loyal Order of Moose, Inc., the SJC found that a threatened smoking ban ordinance that discouraged use of the defendant's social club compromised "the altruistic purposes of the lodge" because "members who would normally engage in activities in the social

quarters are not using their memberships to do so." 439 Mass. at 603. Again, as John Primeau notes, Sprint's actions are "a direct assault on our purposes and responsibilities as nonprofit organizations devoted to service." (Primeau Aff. ¶ 28.) This non-economic harm is clearly sufficient to justify a preliminary injunction. 439 Mass. at 603.

Lastly, in evaluating harm, Massachusetts courts also look to the potential harm a failure to grant an injunction will wreck on a litigant's customers. See Hull Mun. Lighting Plant, 399 Mass. at 643 (noting that lower "judge found that HMLP's failure to make its payments would interfere with MMWEC's ability to provide low cost, efficient service to its customers.") Here, Sprint's actions will interfere with the low cost services provided to Plaintiffs' customers, as John Primeau notes:

> Our inability to guarantee adequate future service has led end users with a choice of Internet providers to leave our service. This uncertainty and diminished customer base has deteriorated the economic viability of our non-profit digital divide customers, as they are deprived of their portion of even the small amounts paid by end-users for the service.

(Primeau Aff. ¶ 27.) Moreover, Sprint's actions are a threat as well to Plaintiffs' Educational End-Users' customers, many of whom will have no other means of obtaining Internet service were an injunction to fail to issue. These deep harms to Plaintiffs' constituents are well described in the Affidavit of John Primeau, ¶¶ 32-47 and John Schwartz ¶¶ 4-27.

III. A BALANCING OF HARDSHIPS FAVORS INJUNCTIVE RELIEF.

Sprint is a major player in the marketplace providing wireless broadband and voice services to more than 56 million customers. (Primeau Aff. ¶ 49.) It has benefited tremendously from having the ability to use portions of Plaintiffs' EBS licenses to its commercial benefit. (Id.) Not only is Sprint contracted to provide service to Plaintiffs, it has the wherewithal, economic and otherwise, to maintain the WiMAX service until such time as it can transition all of Plaintiffs' customers to its LTE network. (Id.)

Sprint professes to want to participate in helping to breach the digital divide. According to Jim Spillane, Director of Project ConnectEd at Sprint, "[a]t Sprint, we believe Internet access is a basic human right. It's critical to a student's success beyond just education; it's critical to their success in life." (Id. at ¶ 50.)

While Defendants may have to maintain some towers that they were going to decommission, expedite delivery of Devices to Plaintiffs' customers, and expedite the provision of some services that they were otherwise going to delay, none of that rises to the level of harm that will result to educators, students, the elderly and infirm, and other nonprofit entities who will be without Internet services if the relief requested is not granted. (See Primeau Aff., ¶¶ 32-47; Schwartz Aff. ¶¶ 4-27.)

Moreover, because Plaintiffs are likely to succeed on the merits of their claims, the importance of any hardship to Defendants is diminished. See FDIC v. Elio, 39 F.3d 1239, 1247-48 (1st Cir. 1994) (recognizing that less weight afforded to defendant's prospective loss where the likelihood of plaintiff's success on the merits is high). Defendants should not be permitted to complain of any hardship that results from their own breach of contract. See Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 197 (3d Cir. 1990) (noting that defendant can hardly claim to be harmed by an injunction that defendant brought upon itself). Finally, if Defendants ultimately prevail on the merits, they can be compensated for the costs of the injunction; in contrast, no such compensation will remedy the damage caused by a shutdown of the Clearwire network. Cf. Boston Athletic Ass'n v. Int'l Marathons, Inc., 392 Mass. 356, 362, (1984) (noting that injunction was justified in part because damage caused by injunction would be more easily remedied with award of money damages than damage caused by failure to issue injunction).

IV. THE PUBLIC INTEREST WILL BE SERVED BY THE INJUNCTION.

Finally, public interest weighs heavily in favor of granting this injunction. Hull Mun. Lighting Plant, 399 Mass. at 648 (noting that judge may consider risk of harm to the public in appropriate cases). Plaintiffs are nonprofit entities whose constituents include educational institutions and other nonprofit organizations that rely upon the Plaintiffs for low or no cost Internet service to service students, the elderly, the disabled, and people often not able to afford Internet service at the usual and customary fee levels offered by "for profit" providers. (Primeau Aff. ¶ 56.) As Sprint continues to shut down the Clearwire network, it leaves most of Plaintiffs' customers with old devices on a network that is impaired and being phased out without any path to timely substitute service. (Id.) As a result, an under-served and under-represented part of the public will be severely impacted. (Id.)

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court grant a Preliminary Injunction in the form attached hereto.

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: October 23, 2015

CERTIFICATE OF SERVICE

I, David W.S. Lieberman, hereby certify that on this 23rd day of October 2015, I caused a copy of the foregoing to be served by e-mail and overnight delivery upon the following attorney of record:

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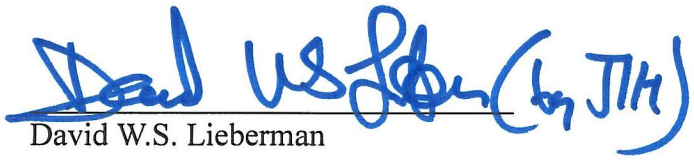

David W.S. Lieberman