

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

<b>In the Matter of</b>	)	
	)	
<b>BELLSOUTH CORPORATION</b>	)	
	)	<b>DA 06-904</b>
<b>and</b>	)	<b>WC Docket No. 06-74</b>
	)	
<b>AT&amp;T INC.</b>	)	
	)	
<b>Application for Consent to</b>	)	
<b>Transfer of Control</b>	)	

**PETITION TO DENY OR, IN THE  
ALTERNATIVE, TO CONDITION CONSENT**

**CLEARWIRE CORPORATION**

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## Summary

The Applicants have not established that the proposed transfer of control serves the public interest. The Merger Application should be denied. Should the Commission determine not to deny the Application, consent should be conditioned on the pre-consummation divestiture of all of BellSouth's 2.5 GHz BRS/EBS licenses and leases to a party with a demonstrated willingness and capability to provide competitive wireless broadband service in that vitally important band.

With the acquisition of BellSouth, AT&T will not only gain unprecedented control over several major overlapping wireline and wireless means of providing broadband connectivity and services to consumers and small businesses, but will also obtain enough spectrum to impede rapidly emerging wireless broadband networks from competing nationwide against AT&T in a key band. AT&T will control:

- (a) the largest wireline network with a much larger footprint with the addition of BellSouth's network;
- (b) a nationwide PCS network providing mobile wireless broadband;
- (c) an almost national footprint in the WCS (2.3 GHz) band which is suitable for WiMax-enabled wireless broadband service after consolidating BellSouth's licenses with AT&T's holdings; and
- (d) BellSouth's licenses and leases of 2.5 GHz BRS/EBS spectrum, in locations like Atlanta, New Orleans and other key southeast markets, *which are sufficient to impede the rapid development of nationwide WiMax-enabled wireless networks in competition with each of AT&T's broadband options.*

The Applicants fail to provide a thorough description of the wireless licenses and leases that they are transferring, particularly in the WiMax-capable bands at 2.3 GHz and 2.5 GHz, and offer no analysis of the competitive significance and possible anticompetitive effects of owning all of these overlapping capabilities.

The merger will allow AT&T to delay or obstruct vital nationwide competition from highly capable and rapidly emerging independent broadband wireless platforms that can compete against it intermodally and intramodally, by providing nomadic, eventually fully mobile, wireless broadband service. For example, the network that Clearwire has been deploying utilizes WiMax-capable 2.5 GHz BRS/EBS spectrum and already provides wireless broadband service to more than 88,000 urban and customers. Unlike AT&T, competitors like Clearwire have no conflicting interest in protecting other overlapping broadband networks and services, and have every incentive to use this competitive and potentially disruptive independent platform to the fullest extent possible to benefit consumers. However, AT&T will hold enough spectrum to impede promising platforms in that band from providing nationwide broadband service.

In a deregulatory environment, where broadband platforms may not be obliged to provide nondiscriminatory service, it is particularly important to have multiple independent competing broadband networks from which consumers can choose. Providers controlling several overlapping broadband distribution platforms may have incentives to take the same approach toward discrimination as each other, and apply it across each of their individual platforms. This makes it particularly important not to put AT&T in the position of being able to impede independent nationwide mobile wireless broadband platforms in the 2.5 GHz band.

AT&T also will have the incentive to warehouse or otherwise use spectrum at 2.5 GHz to avoid losing business in the services that would ride on competing independent broadband platforms. Clearwire, for example, offers its own VoIP service on its platform and plans to offer other broadband services as well.

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**PETITION TO DENY, OR, IN THE  
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Clearwire Corporation (“Clearwire”), by its attorneys herein, petitions the Federal Communications Commission (“Commission”) to deny (hereinafter “Petition”) the application of BellSouth Corporation (“BellSouth”) and AT&T Inc. (“AT&T”) (collectively, the “Applicants”) for consent to the transfer of control of BellSouth and its subsidiaries to AT&T (the “Merger Application”).<sup>1</sup> In the alternative, Clearwire requests that the Commission condition its grant of the Merger Application on the pre-consummation divestiture of certain spectrum and leaseholds more specifically discussed below.

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<sup>1</sup> See Application Pursuant to Section 214 of the Communications Act of 1934 and 63.04 of the Commission’s Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc., WC Docket No. 06-74 (Mar. 31, 2006), as amended April 14 and 19, 2006; *see also* Commission Seeks Comment on Application for Consent to Transfer of Control filed by AT&T Inc. and BellSouth Corporation, Public Notice, WT Docket No. 06-74 (Apr. 19, 2006); 47 C.F.R § 1.939 (2006).

## I. PRELIMINARY STATEMENT

Pursuant to section 310(d) of the Communications Act of 1934, as amended, the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of BellSouth to AT&T will serve the public interest, convenience and necessity.<sup>2</sup> As explained herein, Applicants have not satisfied this standard.

By granting unconditioned consent to this merger the Commission would sanction one company, AT&T, to have unrivaled control over several overlapping means to provide broadband connectivity and services, including: (a) a more extensive wireline broadband network after the merger, which it need not share with competitors and which has been deregulated; (b) a nationwide personal communications service (“PCS”) network that it is enhancing and aggressively marketing (*i.e.*, Media Net and BroadbandConnect); (c) an almost national footprint suitable for Worldwide Interoperability for Microwave Access (“WiMax”) enabled wireless broadband through joining BellSouth’s substantial Wireless Communications Service (“WCS”) spectrum (2.3 GHz) holdings with those of AT&T (“AWACS, Inc.”) covering much of the rest of the country;<sup>3</sup> and (d) license and leasehold holdings of 2.5 GHz Broadband Radio Service/Educational Broadband Radio Service (“2.5 GHz BRS/EBS”) spectrum in enough locations sufficient to create a formidable obstacle to the rapid development of competitive nationwide WiMax-enabled wireless broadband networks in that band.<sup>4</sup> The 2.3 GHz and 2.5 GHz spectrum is specifically designated for fixed and mobile broadband

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<sup>2</sup> 47 U.S.C. § 310(d).

<sup>3</sup> See Declaration of Perry S. Satterlee, attached hereto as Ex. 1.00 (“Satterlee Decl.”) and Ex. 1.01 attached thereto (“Postmerger AT&T/Bellsouth WCS Spectrum Holdings” map).

<sup>4</sup> Satterlee Decl.

service operations on a primary basis and the channelization and technical rules for this spectrum highlight the FCC's intent to promote broadband operations.<sup>5</sup>

Transferring control over BellSouth's spectrum licenses and leases to AT&T will permit--indeed enhance the incentive and ability of--AT&T to delay and stifle competition from the delivery of WiMax-enabled mobile wireless broadband access services that are being deployed aggressively by competing providers such as Clearwire using 2.5 GHz spectrum and could be deployed on a nationwide basis.

The public interest demands the availability of competitive broadband Internet access services to consumers across multiple different platforms.<sup>6</sup> The deployment of WiMax-class technology in the 2.5 GHz BRS/EBS spectrum band today, as the precursor to WiMax 802.16e standard, advances this public interest objective. Now is not the time to provide incentives to those with the self-interest and resources to forestall effective competitive choices from emerging in the 2.5 GHz band with the reach, scale and scope to further the marketplace for broadband services. The public interest cannot be satisfied in these circumstances by the hope or expectation that other competition may develop in the future, perhaps using spectrum not yet licensed, to which equipment manufacturers may not be fully committed, and without convincing evidence of marketplace acceptance. Public policy must ensure against anti-competitive behavior that aims to stifle competition by denying competitors access to critical scarce inputs such as spectrum

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<sup>5</sup> See *FCC Online Table of Frequency Allocations*, FCC Office of Engineering and Technology Policy and Rules Division, available at <http://www.fcc.gov/oet/spectrum/table/fcctable.pdf>; see also 47 C.F.R. § 2.106; 47 C.F.R. §§ 27.5(a) & (i). See also Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Order on Reconsideration and Fifth Memorandum Opinion and Order*, WT Docket No. 03-66, FCC 06-46 (Released Apr. 27, 2006) at ¶ 11 (explaining history of FCC rule changes to enable the 2.5 GHz spectrum to be capable of providing high-speed, mobile broadband services).

needed to provide broadband services that have the support of committed equipment manufacturers and funding sources.

Should the Commission determine that denial of its consent to the Merger Application is not warranted, the Commission should condition its consent on the pre-consummation divestiture of all BellSouth's 2.5 GHz BRS/EBS licenses and leases to a party with demonstrated willingness and capability to provide competitive service in that band, because transfer of these licenses and leases to AT&T provides the means for significant anticompetitive behavior.

## **II. CLEARWIRE'S INTEREST**

Clearwire was founded in October 2003 by telecommunications pioneer Craig O. McCaw to provide competitive and reliable wireless, portable, and eventually mobile high-speed broadband Internet service to residential and small business customers throughout the United States and around the world.<sup>7</sup> Clearwire operates on spectrum in the 2.5 GHz band in 27 markets in the United States covering more than 200 municipalities with an estimated 4.8 million people.<sup>8</sup> As of March 31, 2006, Clearwire provided portable wireless broadband connectivity to approximately 88,000 subscribers in the United States, in urban and rural areas.<sup>9</sup> In April 2006, Clearwire began offering Voice over Internet Protocol ("VoIP") telephony services, including service plans

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<sup>6</sup> See *In Re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 20 FCC Rcd. 14853, ¶ 3 (2005).

<sup>7</sup> Satterlee Decl., ¶ 3.

<sup>8</sup> *Id.*, ¶ 4. Clearwire also offers wireless broadband services in Brussels, Belgium and Dublin, Ireland, which together cover an estimated one million people. Clearwire's unconsolidated joint ventures offer wireless broadband services in seven regional markets in Denmark and Mexico, covering an estimated ten million people. As of March 31, 2006, Clearwire provided portable wireless broadband connectivity to approximately 11,500 subscribers in Belgium and Ireland in addition to its U.S. subscribers. In its international markets, Clearwire typically uses spectrum in the 3.5 GHz band. *Id.*, ¶ 6.

<sup>9</sup> *Id.*, ¶ 5.

providing subscribers with unlimited local and long distance calling for a fixed low monthly fee across its network in select markets.<sup>10</sup>

Clearwire is among the largest holders of spectrum in the 2.5 GHz BRS/EBS spectrum band through either license or lease and is seeking to acquire more spectrum in this band.<sup>11</sup> Clearwire has a demonstrated track record of using the 2.5 GHz spectrum it acquires to deploy wireless broadband services aggressively, as opposed to simply warehousing spectrum rights as has been common in the history of this band.<sup>12</sup> Clearwire offers no competing wireline or mobile wireless broadband service that deployment in this band would cannibalize, unlike other major competitors.

Clearwire's network was designed specifically to support portable wireless broadband services. With the use of WiMax technology, Clearwire delivers high speed broadband fixed and mobile services wirelessly to large areas with a fraction of the infrastructure, in competition with broadband wireless and wireline providers, including the Applicants.<sup>13</sup> Based on a subscriber survey in November 2005, approximately 44% of Clearwire's U.S. subscribers switched from a Digital Subscriber Line ("DSL") or cable modem service while 56% represented new broadband users.<sup>14</sup>

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<sup>10</sup> *Id.*, ¶ 7.

<sup>11</sup> *Id.*, ¶ 9. In the 2.5 GHz BRS/EBS spectrum, each territory or market in a geographically distinct location is generally divided into 33 channels for a total of 186 MHz of spectrum, with an additional three channels consisting of nine MHz of guard band spectrum. Clearwire generally needs access to a minimum of six channels of BRS/EBS spectrum in a given market, each containing at least 5.5 MHz, before it can deploy its services commercially. *Id.*, ¶ 11.

<sup>12</sup> *Id.* Technicians are not usually necessary at the user's house and building and, unlike most fixed broadband services, no antenna must be attached to the user's rooftop. "Plug-and-play" modem devices connected to personal or laptop computers can be transported to other locations where a network signal is present, and in some cases can be used while traveling at high speeds. *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services 10th Report*, 20 FCC Rcd. 15908, ¶¶ 120-22 (2005) ("Tenth CMRS Competition Report").

<sup>13</sup> Satterlee Decl., ¶ 8.

<sup>14</sup> *Id.*, ¶ 4.

### **III. THE EFFECT OF THE MERGER ON APPLICANTS' SPECTRUM HOLDINGS**

AT&T describes itself as a provider of domestic and international voice, data and Internet services for residential, business and government customers.<sup>15</sup> According to its website, "AT&T is the largest U.S. provider of broadband DSL and long distance and local voice services. The company serves millions of customers, with concentration in Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas and Wisconsin. These 13 states cover about one-third of the U.S. population."<sup>16</sup> AT&T currently offers broadband through residential and small business DSL service and dedicated Internet access services for businesses and Internet Service Providers.<sup>17</sup>

AT&T's wireless business includes large amounts of WCS spectrum (2.3 GHz) throughout the United States.<sup>18</sup>

BellSouth describes itself as the largest communications service provider in the southeastern United States, serving substantial portions of the population within Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.<sup>19</sup> According to the Merger Application, through its wholly owned subsidiary, BellSouth Telecommunications, Inc., BellSouth provides wireline local exchange, network access, intraLATA long distance and Internet services, almost exclusively within a nine-state region in the southeastern United States.<sup>20</sup>

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<sup>15</sup> Merger Application at 5.

<sup>16</sup> See <http://att.sbc.com/gen/investor-relations?pid=5177>.

<sup>17</sup> See Declaration of James S. Kahan, attached to Merger Application, ¶ 50 ("Kahan Decl.").

<sup>18</sup> See Satterlee Decl., Ex. 1.01 ("AT&T and Bell South WCS Spectrum Holdings" chart).

<sup>19</sup> Merger Application at 4; see also Merger Application, App. A, Description of Applicants, at A-2.

<sup>20</sup> Merger Application at 4-5.

BellSouth provides an array of broadband services to approximately 2.8 million business and residential customers. In addition, BellSouth provides Direct Internet Access to business customers via several underlying transport technologies, as well as wholesale DSL transport service.<sup>21</sup>

BellSouth's wireless business also includes large amounts of WCS spectrum (2.3 GHz) throughout the southeast United States.<sup>22</sup> That spectrum blankets BellSouth's service territory.

In addition, BellSouth has licenses, or has acquired leases, for 2.5 GHz BRS/EBS spectrum coverage in numerous markets. For example, BellSouth has control over 28 of 33 channels in the Atlanta, Georgia market, and 26 of 33 channels in the New Orleans, Louisiana market.<sup>23</sup>

BellSouth has a 40% ownership, and 50% management, interest in Cingular Wireless LLC ("Cingular").<sup>24</sup> AT&T holds the remaining 60% ownership interest. Cingular provides wireless service to 54.1 million customers nationwide<sup>25</sup> who use the nation's largest PCS voice and broadband data network.<sup>26</sup>

If approved, the proposed merger will not only result in making AT&T the nation's largest wireline service provider and the nation's largest PCS carrier, but will grant AT&T control over the consolidated BellSouth and AT&T separate WCS wireless broadband holdings into an almost national coverage area. AT&T also will take control of 2.5 GHz EBS/BRS spectrum in the southeast that it could use as a barrier to entry to

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<sup>21</sup> Declaration of William L. Smith, attached to Merger Application, ¶¶ 5-7 ("Smith Decl.").

<sup>22</sup> See Satterlee Decl., Ex. 1.01, ("AT&T and Bell South WCS Spectrum Holdings" chart); see also Smith Decl., ¶ 55.

<sup>23</sup> See Satterlee Decl., Ex. 1.02; see also Smith Decl., ¶ 55.

<sup>24</sup> Merger Application at A-3.

<sup>25</sup> *Id.* at A-4.

<sup>26</sup> See [http://cingular.mediaroom.com/index.php?s=company\\_overview](http://cingular.mediaroom.com/index.php?s=company_overview).

WiMax competitors. As a result, it will have the ability to impede competitors like Clearwire from becoming *national* providers in competition with the merged company's enhanced national broadband platforms. Competitors using 2.5 GHz BRS/EBS spectrum to provide WiMax-class service will face significant obstacles to give consumers ubiquitous coverage in competition with AT&T. Given AT&T's potential newly-acquired 2.5 GHz spectrum position after the merger, for example, AT&T's overwhelming majority of the channels in the Atlanta and other southeast markets, wireless broadband competitors may be hindered in obtaining important efficiencies of scale and scope that come from a more nationwide presence.

#### **IV. ARGUMENT**

##### **A. The Applicants' Do Not Show that the Merger is in the Public Interest.**

AT&T and BellSouth offer no comprehensive analysis, competitive or otherwise, of the possible anticompetitive effects of the contemplated wireless license and lease transfers. There is no listing of the spectrum holdings of AT&T, BellSouth or Cingular. The significant amounts of WCS 2.3 GHz spectrum held by AT&T or BellSouth independent of one another are not identified. Nor is there any listing of 2.5 GHz BRS/EBS spectrum held as a licensee or controlled as a lessee by either AT&T or BellSouth. Without this information, there cannot be, and the Merger Application wholly lacks, any detailed discussion, for example, of the significance of AT&T acquiring BellSouth's WCS 2.3 GHz spectrum interests which results in AT&T gaining a nearly national footprint<sup>27</sup> in a band that can provide mobile wireless broadband through WiMax. Nor is there discussion of the ability and incentive to slow or impede national

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<sup>27</sup> See Satterlee Decl., Ex. 1.01.

competition in a similar mobile wireless broadband WiMax-class service in the 2.5 GHz BRS/EBS band after consummation of the transfers. Nor is there discussion of whether allowing AT&T to have a national footprint for broadband wireless at a WiMax-capable WCS 2.3 GHz along with a regional concentration of 2.5 GHz BRS/EBS spectrum, *and* a national Commercial Mobile Radio Services (“CMRS”) network that is becoming broadband capable *and* a huge wireline broadband DSL footprint is in the public interest.

The Commission has specifically configured WCS 2.3 GHz and 2.5 GHz BRS/EBS channels for the provision of broadband connectivity and has identified mobile wireless as an important vehicle for such connectivity.<sup>28</sup> However, in their Public Interest Statement, the Applicants state “[a]lthough both AT&T and BellSouth have WCS or BRS spectrum, neither uses this spectrum for mobile services.”<sup>29</sup> This statement misses the point. The issue is not the use they are currently making of this spectrum but rather the fact that this spectrum can be and is used for mobile services that can and do provide competitive broadband access. Indeed, AT&T's own WCS 2.3 GHz trials “established the need for subscriber equipment . . . was sufficiently portable or mobile.”<sup>30</sup>

Further, there is no reference in the Merger Application to what press releases from BellSouth and its vendor Navini Networks (“Navini”),<sup>31</sup> along with other

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<sup>28</sup> See Tenth CMRS Competition Report, ¶ 87 (specifically citing “mobile broadband applications” and the creation of “incentives for development of low-power cellularized broadband operations.”).

<sup>29</sup> Merger Application, Ex. 1, Description of Transaction, Public Interest Showing and Related Demonstration (“Public Interest Statement”). The full Public Interest Statement may be found in the Commission’s Electronic Comment Filing System at <http://www.fcc.gov/cgb/ecfs> under WC Docket No. 06-74.

<sup>30</sup> Public Interest Statement, at 132.

<sup>31</sup> See, e.g., Press Release, BellSouth Introduces Wireless Broadband Product Enhancements (Mar. 21, 2006), *available at* [http://largebusiness.bellsouth.com/news\\_press\\_detail.aspx?npr\\_id=23666](http://largebusiness.bellsouth.com/news_press_detail.aspx?npr_id=23666); Press Release, BellSouth Launches Wireless Broadband Service in DeLand, Florida (Jan. 19, 2006), *available at* [http://www.wcai.com/pdf/2006/p\\_bellsouthJan19.pdf](http://www.wcai.com/pdf/2006/p_bellsouthJan19.pdf); Press Release, Navini Helps BellSouth Launch a Portable Broadband Wireless Service (Sept. 25, 2005), *available at* <http://www.navini.com/pages/press/2005/pr09.21.05.htm>; Press Release, BellSouth to Launch Wireless

information indicate: BellSouth has deployed a portable broadband wireless service in WCS 2.3 GHz spectrum. It uses non-line-of-sight Navini equipment that also can be used in the 2.5 GHz band (and possibly the 3.4/3.5 wireless local loop (“WLL”) Band). The Navini equipment supports pre-WiMax and WiMax "mobile" networks in either band, with a software upgrade for 802.16e mobile WiMax.<sup>32</sup> Nonetheless, faced with impending construction deadlines for their respective WCS 2.3 GHz licenses, BellSouth and AT&T are currently seeking a three-year extension of time,<sup>33</sup> leaving it unclear to what use they are currently putting these large amounts of spectrum and how much of it they are actually using, now nine years after licensing.

Somewhat paradoxically, while making nothing of the transfer of any wireless license, the Merger Application is replete with references to how Cingular had a narrow mission, stood at a crossroads, and how the different priorities and interests of its owners rendered cumbersome and limited Cingular’s ability to decide and act quickly and efficiently in many areas.<sup>34</sup> Given that the purpose of the merger is partly to allow AT&T to integrate wireless and wireline decisionmaking and prioritization in ways not possible previously, and given that it did not previously have any ownership interest in BellSouth’s WCS and BRS/EBS spectrum, it would be wrong for the Commission to forego a competitive analysis on the basis of the Applicants’ formalistic and obviously evasive efforts to characterize the merger in a competitively neutral manner. It seems evident that the fact that BellSouth may have controlled WCS and BRS/EBS licenses in

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Broadband in August (June 7, 2005), *available at* <http://www.navini.com/pages/press/2005/pr06.07.05.htm>; *see also* The Navini Solution, <http://www.navini.com/pages/products/solution.htm>.

<sup>32</sup> In this regard, the Applicants' assertion that "neither uses this spectrum for mobile services" is evasive.

<sup>33</sup> In Re AT&T Inc., BellSouth Corporation, Comcast Corporation, NextWave Broadband Inc., NTELOS, Inc., Sprint Nextel Corporation, Verizon Laboratories Inc., and WaveTel NC License Corporation, Consolidated Request for Limited Extension of Deadline for Establishing WCS Compliance with Section 27.14 Substantial Service Requirement (Mar. 22, 2006).

which AT&T had no control or interest, and also had negative control of Cingular, and that AT&T had negative control of Cingular, should not stifle the analysis. Indeed, as BellSouth's Chief Technology Officer, William L. Smith, stated: "the combined company would be able to more rapidly deploy wireless broadband, across a broader swath of customers, than BellSouth could by itself."<sup>35</sup>

**B. The Merger Poses Barriers to the Emergence of Independently-Owned Broadband Platforms and is not in the Public Interest.**

Consumers and businesses are demanding fast broadband connectivity, increasingly on a mobile basis. Much of what the Internet now has to offer cannot be enjoyed without broadband connections. Fostering the rapid deployment of broadband on a competitive basis is a priority of the Commission and is a national goal.<sup>36</sup>

The Commission has taken a deregulatory posture toward broadband Internet access services. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Commission's approach was upheld as to cable modem operators.<sup>37</sup> Soon after, the Commission took a similar approach to wireline broadband Internet access services, including DSL.<sup>38</sup>

The Commission also has adopted a deregulatory approach to wireless broadband Internet access services, whether offered on a fixed or mobile basis. One result is that

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<sup>34</sup> See, e.g., Kahan Decl.

<sup>35</sup> Smith Decl., ¶ 57.

<sup>36</sup> President George W. Bush, Remarks at the Department of Commerce on Innovation (June 24, 2004), available at <http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html>; see also Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (Section 706 is reproduced in the notes to section 157 of the Act, 47 U.S.C. § 157 nt.); *High-Speed Services for Internet Access: Status as of December 31, 2004*, FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, at 1 (July 2005), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/hspd0705.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0705.pdf).

<sup>37</sup> 125 S. Ct. 2688 (2005) (hereinafter "*Brand X*").

<sup>38</sup> See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 20 FCC Rcd. 14853 (2005).

none of these platforms are required to share their broadband Internet access facilities with competing Internet providers. A critical element for the success of this policy is to assure that there are enough independent, competitive platforms to obtain broadband access so that if one platform is operated in a discriminatory manner, consumers have access to one of several independent, alternative broadband platforms. Thus, the offering of broadband Internet access through many independent platforms not only brings powerful competitive benefits such as lower prices, better service and more innovation, but also facilitates a continued deregulatory policy to broadband access and the Internet.

This merger, however, will allow AT&T not only to expand its wireline broadband reach and to consolidate its nationwide broadband PCS network, but to acquire from BellSouth a large amount of WCS 2.3 MHz spectrum that will give AT&T a nearly nationwide footprint in that band as well. This will enable AT&T to either offer another means of mobile broadband Internet access on a national basis or effectively warehouse a scarce resource from competitors. In the face of these merger effects, BellSouth should not be permitted to transfer control over any BRS/EBS 2.5 GHz spectrum to AT&T--certainly not where all of that 2.5 GHz spectrum is in a few key southeastern markets and overlaps what will be AT&T's broadband PCS service, its WCS 2.3 MHz footprint that permits WiMax-class service, and its broadband wireline facilities. If approved by the Commission, this will allow and further incent AT&T to warehouse or otherwise use that 2.5 GHz spectrum in a defensive manner to prevent or delay an independent competitor like Clearwire from offering in the 2.5 GHz band a *national* broadband service in competition with AT&T's post-merger wireline and multiple (PCS and WCS) wireless broadband services.

The 2.5 GHz band has been designated by the Commission for the provision of broadband wireless services on a primary basis<sup>39</sup> and the WiMax standard has been prepared for use in that band. Broadband radio service is intended to compete specifically with existing broadband access services.<sup>40</sup> As has been recognized by the Commission, deployments have been made in that band by Clearwire and others, making that band a particularly likely source of effective broadband wireless competition of significant scale and scope.<sup>41</sup> Clearwire in particular offers no other competing intermodal or intramodal products or services that would distract or dilute its efforts to serve customers using the 2.5 GHz band.

The Commission has determined that the public interest is best served by a competitive broadband regulatory regime that encourages deployment and innovation of broadband platforms through deregulation . Permitting the transfer of control of BellSouth's 2.5 GHz spectrum to AT&T would be inconsistent with this public interest objective. A pre-consummation divestiture of that spectrum and related leasehold interests to a party that has demonstrated a willingness and capability to provide competitive broadband service in the 2.5 GHz band is necessary.<sup>42</sup>

**C. The Merger will Delay or Obstruct Vital Competition from a Rapidly Emerging Independent Broadband Wireless Platform.**

Consumers primarily obtain broadband Internet access through either DSL service over the incumbent telephone company's wires, usually from the incumbent, or via cable

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<sup>39</sup> See note 5, *supra*.

<sup>40</sup> Tenth CMRS Competition Report, ¶ 90.

<sup>41</sup> *Id.*, ¶¶ 121-22.

<sup>42</sup> Unlike the situation in the Nextel/Sprint merger where the Commission allowed the combined entity to retain the 2.5 GHz spectrum but included construction deadlines, here, the concentration of broadband access in the hands of the combined AT&T/BellSouth entity is much more significant as a result of the wireline broadband and WCS components. Nextel/Sprint Merger Order at P 188.

modems, through their local cable company.<sup>43</sup> Few use other means and some do not have access to any broadband platform.<sup>44</sup> Only about 61% of broadband users reported in December 2005 that they have more than one broadband service provider where they live.<sup>45</sup> Moreover, many will not purchase broadband unless prices come down<sup>46</sup> and others likely will want specific service attributes, such as mobility, in light of rapidly growing demand for laptops and other Internet connected handheld devices.<sup>47</sup>

While intermodal competition between wireless and wireline platforms will increase in some respects, there will increasingly be wireless broadband access demands that only a mobile wireless platform will be able to satisfy. That makes the ability to roam and have a national platform even more vital. AT&T and BellSouth have recognized as much. Indeed, Cingular aggressively markets its wireless broadband services, which it provides using its comprehensive broadband PCS infrastructure.<sup>48</sup>

To the extent that WiMax deployments in 2.3 GHz or 2.5 GHz or even other bands have significant advantages, it is particularly important that AT&T not be afforded additional opportunities to delay or impede wireless broadband competitors. Moreover, because Clearwire has every incentive to rapidly and broadly deploy WiMax, and has no alternative broadband offerings to protect unlike other major spectrum holders in that

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<sup>43</sup> See *High-Speed Services for Internet Access: Status as of June 30, 2005*, FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, at 2-3 (Apr. 2006), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264744A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264744A1.pdf).

<sup>44</sup> *Id.* at 3; see also a very recent report, Pew Internet and American Life Project, *Home Broadband Adoption 2006* (May 28, 2006) (“Pew Broadband Report”), available at [http://www.pewinternet.org/pdfs/PIP\\_Broadband\\_trends2006.pdf](http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf). The Pew Broadband Report also indicated that DSL offered over telephone wires had substantially increased its market share as compared to cable modem, in part because prices had been lowered. As of March 2006, DSL connections were reported to constitute half of all home broadband connections and cable modems had a 41% share. *Id.* at 5.

<sup>45</sup> See *id.* at iv, 7-8.

<sup>46</sup> See *id.* at 9.

<sup>47</sup> IDC Forecast Update, *Worldwide Smart Handheld Device 2005-2009*, IDC #34359 (Nov. 2005), at 1-2.

<sup>48</sup> See Cingular MEdia at [https://www.cingular.com/media/media\\_net](https://www.cingular.com/media/media_net); BroadbandConnect at [http://www.cingular.com/broadbandconnect\\_consumer](http://www.cingular.com/broadbandconnect_consumer).

band, AT&T has a heightened interest in slowing Clearwire by using BellSouth's 2.5 GHz spectrum to restrict access to key markets necessary for Clearwire to fully achieve a national footprint. Such impediments might relieve any pressure on AT&T to deploy WiMax at 2.3 GHz, which it might welcome so it could delay cannibalizing its other, perhaps more lucrative, broadband offerings. AT&T states as much in the Merger Application when it says that "[t]his transaction will not create any geographic overlaps of spectrum used to provide mobile wireless voice or data services."<sup>49</sup> Whether currently true or not, what AT&T is saying is that it does not intend to compete with its own services provided through Cingular. This is precisely the problem. Insofar as Cingular already provides wireless broadband services on a significant and increasing basis, AT&T has every incentive to "bury" its 2.3 GHz and 2.5 GHz spectrum in non-core ancillary applications so as to avoid having it be used by a wireless broadband competitor such as Clearwire. AT&T would like the Commission to focus exclusively on CMRS and ignore the competitive impact of the merger on other critical wireless broadband access services. This is a myopic view of the marketplace.

Many observers have argued that this is precisely what the Bell Companies did with DSL—they could have deployed considerably ahead of the cable industry, but kept DSL on the shelf so as not to cannibalize certain other, more profitable, services it offered.<sup>50</sup> BellSouth's simultaneous statements that it owns "large amounts" of WCS and BRS/EBS spectrum<sup>51</sup> and that wireless broadband is "particularly attractive" for rural

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<sup>49</sup> Public Interest Statement at 132.

<sup>50</sup> Deborah A. Lathen, Cable Services Bureau, *Broadband Today, A Staff Report To William E. Kennard, Chairman, Federal Communications Commission On Monitoring Sessions Convened By Cable Services Bureau*, at 27 & n.73 (Oct. 1999), available at <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf>.

<sup>51</sup> Smith Decl., ¶ 55.

areas “*that would otherwise not have access to DSL*”<sup>52</sup> suggests this concern is very well based—BellSouth’s collection of licenses and leases that supposedly is well suited to certain rural areas actually includes, for example, 28 of the 33 BRS/EBS channels in the Atlanta market where DSL has wide availability.<sup>53</sup> The Commission has noted on several occasions that a “wireline carrier would have an incentive to protect its wireline customer base from intermodal competition while an independent wireless carrier would not”<sup>54</sup> and specifically that Cingular’s strategies are influenced by BellSouth and AT&T’s concerns about their individual wireline revenues and access lines.<sup>55</sup> Similarly, this merger will also provide AT&T with the incentive and tools to impede intramodal broadband wireless competition from WiMax-enabled competitors using BRS/EBS spectrum, a service many customers will require or desire, even as AT&T would gain a second national mobile wireless broadband platform through WCS.

There is no question that competition by independent companies on their own platforms is vital—the Commission need look no further than the explosion of price competition, innovation and choice to the benefit of consumers after the Commission went beyond licensing just two cellular competitors in each market and introduced PCS to the marketplace. The Commission, and every Commissioner individually, has emphasized the importance of broadband competition among multiple platform providers. While even a duopoly sometimes provides downward price pressure, much more competition is necessary to provide a vigorous competitive environment and the

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<sup>52</sup> *Id.*, ¶ 57 (emphasis added).

<sup>53</sup> Ex. 1.02, Satterlee Decl.

<sup>54</sup> Nextel/Sprint Order at P 142; *In re Applications of AT&T Wireless Servs., Inc. & Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, 199 FCC Rcd. 21522, ¶ 243 (2004) (“Cingular/AT&T Wireless Merger Order”).

<sup>55</sup> *Id.*

Commission should disapprove as contrary to the public interest those license transfers that undermine the creation of independent facilities-based competitors.

**D. AT&T Will Have an Incentive to Warehouse or Otherwise Use Spectrum at 2.5 GHz to Avoid Losing Business in the Services that Would Ride on Broadband Platforms.**

AT&T's incentive to impede a competitor from establishing a national WiMax broadband platform, particularly in the 2.5 GHz band, is not just the possible loss of revenue from supplying broadband access. It is also that they may also lose the revenue for other services that they provide now or may hope to provide in the future that also might ride on that platform. For instance, Clearwire began providing VoIP service to customers in April 2006. Clearwire's network will support a broad range of premium services. Moreover, as wireless broadband becomes widely available, demand for a broad range of mobile applications is fully expected to increase dramatically, escalating the competitive importance to consumers, and threat to AT&T, of a vital independent competitor on a wireless WiMax-enabled platform at 2.5 GHz.

**V. CONCLUSION**

Wherefore, for the foregoing reasons, the proposed Merger Application of BellSouth Corporation and AT&T, Inc. should be denied. However, if the Commission concludes that the Applicants have satisfied their burden to show that the merger will serve the public interest, convenience and necessity, as a general matter the Commission should condition its grant of the Merger Application to order the pre-consummation

divestiture of the 2.5 GHz BRS/EBS spectrum and related leasehold interests to a party that has demonstrated a willingness and capability to provide service in that band.

Respectfully submitted,

**CLEARWIRE CORPORATION**

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Its Attorneys

June 5, 2006

# **Exhibit 1.00**

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

<b>In the Matter of</b>	)	
	)	
<b>BELLSOUTH CORPORATION</b>	)	
	)	<b>DA 06-904</b>
<b>and</b>	)	<b>WC Docket No. 06-74</b>
	)	
<b>AT&amp;T INC.</b>	)	
	)	
<b>Application for Consent to</b>	)	
<b>Transfer of Control</b>	)	

**DECLARATION OF PERRY S. SATTERLEE IN SUPPORT OF PETITION TO DENY, OR IN THE ALTERNATIVE, TO CONDITION CONSENT**

I, Perry S. Satterlee, hereby declare the following:

**Position:**

1. My name is Perry S. Satterlee. I am the Co-President of Clearwire Corporation and the President and CEO of Clearwire LLC.

**Purpose:**

2. The purpose of my declaration is to support Clearwire Corporation's ("Clearwire") Petition to Deny, or in the Alternative, to Condition Consent ("Clearwire Petition") of the Application for Consent to Transfer of Control submitted by BellSouth Corporation ("BellSouth") and AT&T, Inc. ("AT&T"). In addition, my declaration will explain Clearwire's business and the impact the proposed merger of BellSouth and AT&T could have on Clearwire's, and other providers' of wireless broadband

services, use of certain spectrum to provide next generation wireless broadband services.

3. Clearwire was founded in October 2003 by telecommunications pioneer Craig O. McCaw and launched its first market in August 2004. Clearwire's business is to provide competitive and reliable portable wireless, and increasingly mobile, high-speed broadband Internet service to residential and small business customers throughout the United States and around the world.
4. Clearwire deploys its network using licensed radio frequencies, or spectrum. Using licensed spectrum avoids radio frequency interference that hinders competitors using non-licensed spectrum, and enables Clearwire to provide a consistently higher quality of service. Clearwire operates on spectrum in the 2.5 GHz band (2.495-2.690 GHz) in 27 markets in the United States covering more than 200 municipalities with an estimated 4.8 million people. Based on a subscriber survey in November 2005, approximately 44% of Clearwire's United States subscribers switched from a Digital Subscriber Line ("DSL") or cable modem service while 56% represented new broadband users.
5. As of March 31, 2006, Clearwire provided portable wireless broadband connectivity to approximately 88,000 subscribers in the United States, including urban and rural areas.
6. Clearwire also offers wireless broadband service outside the United States in Brussels, Belgium and Dublin, Ireland, which together cover an estimated one million people. As of March 31, 2006, Clearwire provided portable wireless broadband connectivity to approximately 11,500 subscribers in Belgium and Ireland in addition

to its U.S. subscribers. Clearwire joint ventures offer wireless broadband services in seven regional markets in Denmark and Mexico, covering an estimated ten million people. In its international markets, Clearwire typically uses spectrum in the 3.5 GHz band.

7. In April 2006, Clearwire began offering facilities-based Voice Over Internet Protocol ("VoIP") telephony services over its wireless broadband network. Clearwire's VoIP telephony service includes service plans providing subscribers with unlimited local and long distance calling for a fixed low monthly fee across its network in select markets. Clearwire's VoIP telephony service is currently available in portions of California, Washington State and Nevada.
8. Clearwire's wireless broadband network was designed specifically to support portable, and eventually mobile, wireless broadband services. With the use of WiMax-class technology, Clearwire delivers high speed wireless broadband services to large areas with a fraction of the infrastructure, in competition with other broadband wireless and wireline providers.
9. Clearwire is among the largest holders of spectrum in the 2.5 GHz BRS/EBS spectrum band through either licenses or leases and is seeking to acquire more spectrum in this band. Clearwire has demonstrated its commitment to using the 2.5 GHz spectrum it acquires to rapidly deploy wireless broadband services, as evidenced by its aggressive market rollout to date. Clearwire's wireless network is the first widely deployed network that was specifically designed and built from inception to deliver a full range of two-way wireless broadband content and applications over 2.5 GHz .

10. The 2.5 GHz BRS/EBS spectrum is allocated for mobile broadband wireless services.

If built out nationally, it can enable customers to access uninterrupted broadband services on Clearwire's network, and those of its roaming partners, in a manner completely transparent to the consumer.

11. In the 2.5 GHz BRS/EBS spectrum, each territory or market in a geographically distinct location is generally divided into 33 channels for a total of 186 MHz of spectrum, with an additional three channels consisting of nine MHz of guard band spectrum. In order to deploy our services commercially, Clearwire generally needs access to a minimum of six channels of 2.5 GHz BRS/EBS spectrum in a given market, each containing at least 5.5 MHz.

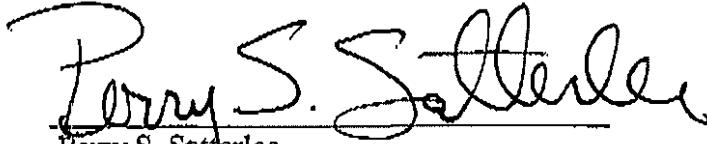
12. BellSouth currently holds rights to large amounts of WCS spectrum (2.3 GHz), blanketing BellSouth's local service territory throughout the southeast as well as other portions of the United States. AT&T holds 2.3 GHz spectrum rights in markets throughout much of the rest of the nation. The spreadsheet of AT&T and BellSouth WCS spectrum (2.3 GHz) prepared by Clearwire, attached hereto as Exhibit 1.01, shows the markets in which BellSouth and AT&T hold 2.3 GHz spectrum rights.

13. In addition, BellSouth has licenses or has acquired leases for the 2.5 GHz BRS/EBS spectrum coverage in numerous markets. The BellSouth 2.5 GHz BRS/EBS Spectrum Holdings chart attached hereto as Exhibit 1.02

demonstrates the control BellSouth has over key markets at 2.5 GHz including Atlanta, Georgia, and New Orleans, Louisiana market, among others.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2006.

  
Perry S. Satterlee

# **Exhibit 1.01**

**AT&T and Bell South  
WCS Spectrum Holdings Chart**

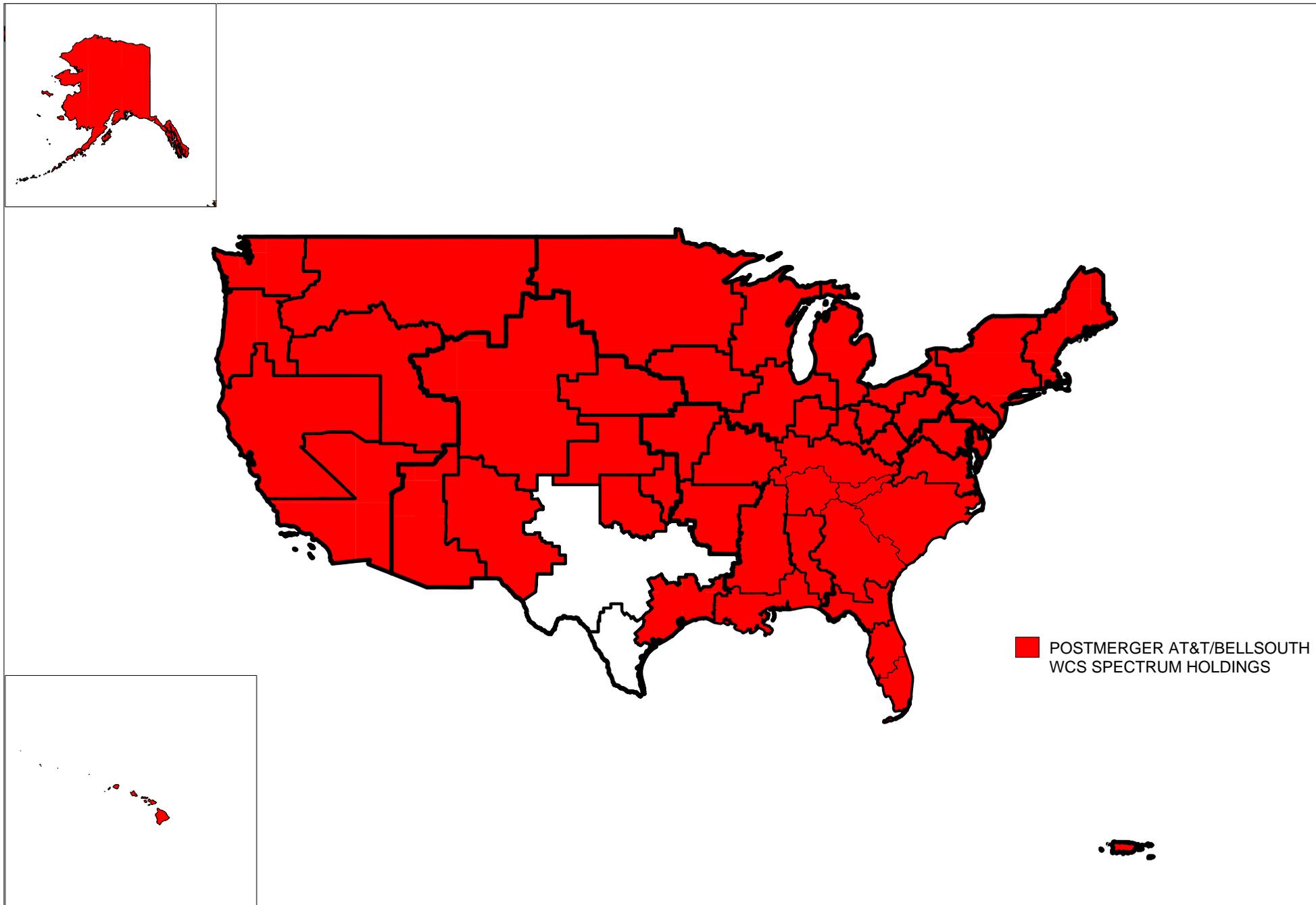
### AT&T and Bell South WCS Spectrum Holdings

Market	POPs - 2002	A 10 MHz (MEAs)	B 10 MHz (MEAs)	C 5 MHz (REAs)	D 5 MHz (REAs)
Boston	9,348,899	other	other	BellSouth	other
New York City	31,084,550	other	other	other	other
Buffalo	1,490,958	other	other	BellSouth	other
Philadelphia	8,483,837	other	other	other	other
Washington	8,990,729	other	other	BellSouth	BellSouth
Richmond	4,408,577	other	BellSouth	BellSouth	BellSouth
Charlotte	11,961,295	BellSouth / Nextel / WaveTel*	BellSouth / Nextel / WaveTel*	BellSouth	BellSouth
Atlanta	9,526,436	BellSouth / Nextel / WaveTel*	BellSouth / Nextel / WaveTel*	BellSouth	BellSouth
Jacksonville	2,717,971	other	BellSouth / Nextel*	BellSouth	BellSouth
Orlando	7,105,360	BellSouth / Nextel*	BellSouth / Nextel*	BellSouth	BellSouth
Miami	6,526,595	BellSouth	BellSouth	BellSouth	BellSouth
Pittsburgh	4,080,137	other	BellSouth	BellSouth	BellSouth
Cincinnati-Dayton	4,521,301	other	AT&T	AT&T	AT&T
Columbus	2,382,390	other	AT&T	AT&T	AT&T
Cleveland	5,203,519	other	other	BellSouth	BellSouth
Detroit	10,771,964	other	other	other	AT&T
Milwaukee	5,066,471	other	other	BellSouth	BellSouth
Chicago	13,783,275	other	AT&T	AT&T	AT&T
Indianapolis	3,102,814	other	other	other	AT&T
Minneapolis-St. Paul	6,743,091	other	other	BellSouth	BellSouth
Des Moines-Quad Cities	2,881,477	AT&T	other	AT&T	AT&T
Knoxville	1,579,423	Bell South	other	BellSouth	BellSouth
Louisville	4,374,268	BellSouth / Nextel*	BellSouth / Nextel*	BellSouth	BellSouth
Birmingham	3,409,546	BellSouth	other	BellSouth	BellSouth
Nashville	2,498,541	BellSouth / Nextel*	BellSouth / Nextel*	BellSouth	BellSouth
Memphis-Jackson	4,220,509	other	other	BellSouth	BellSouth
New Orleans-Baton Rouge	4,813,865	BellSouth / Nextel*	BellSouth / Nextel*	BellSouth	BellSouth
Little Rock	2,692,762	BellSouth	other	BellSouth	BellSouth
Kansas City	3,216,000	other	BellSouth	BellSouth	BellSouth
St. Louis	4,820,820	other	other	BellSouth	BellSouth
Houston	6,843,138	other	BellSouth	other	other
Dallas-Fort Worth	11,958,883	other	other	other	other
Denver	5,159,128	other	AT&T	other	other
Omaha	1,783,610	AT&T	other	other	other
Wichita	1,178,150	AT&T	AT&T	other	other
Tulsa	1,395,506	AT&T	AT&T	other	other
Oklahoma City	1,846,304	AT&T	AT&T	other	other
San Antonio	3,799,713	other	other	other	other
El Paso-Albuquerque	2,563,326	AT&T	AT&T	other	other
Phoenix	5,069,228	BellSouth	other	other	other
Spokane-Billings	2,030,670	BellSouth	BellSouth	other	other
Salt Lake City	3,225,925	AT&T	AT&T	other	other
San Francisco	14,295,402	AT&T	AT&T	other	other
Los Angeles-San Diego	23,287,317	other	BellSouth	other	other
Portland	3,772,185	other	BellSouth	other	other
Seattle	4,927,618	other	BellSouth	other	other
Alaska	639,400	AT&T	AT&T	AT&T	AT&T
Hawaii	1,232,217	BellSouth	other	BellSouth	other
Guam	154,000	other	other	other	other
Puerto Rico and Virgin Isl.	3,917,228	AT&T	AT&T	AT&T	AT&T
American Samoa	57,000	other	AT&T	other	other

\* Represents partitioned/disaggregated license holdings among named entities.

**Post Merger AT&T / BellSouth  
WCS Spectrum Holdings**

# POSTMERGER AT&T/BELLSOUTH WCS SPECTRUM HOLDINGS



## **Exhibit 1.02**

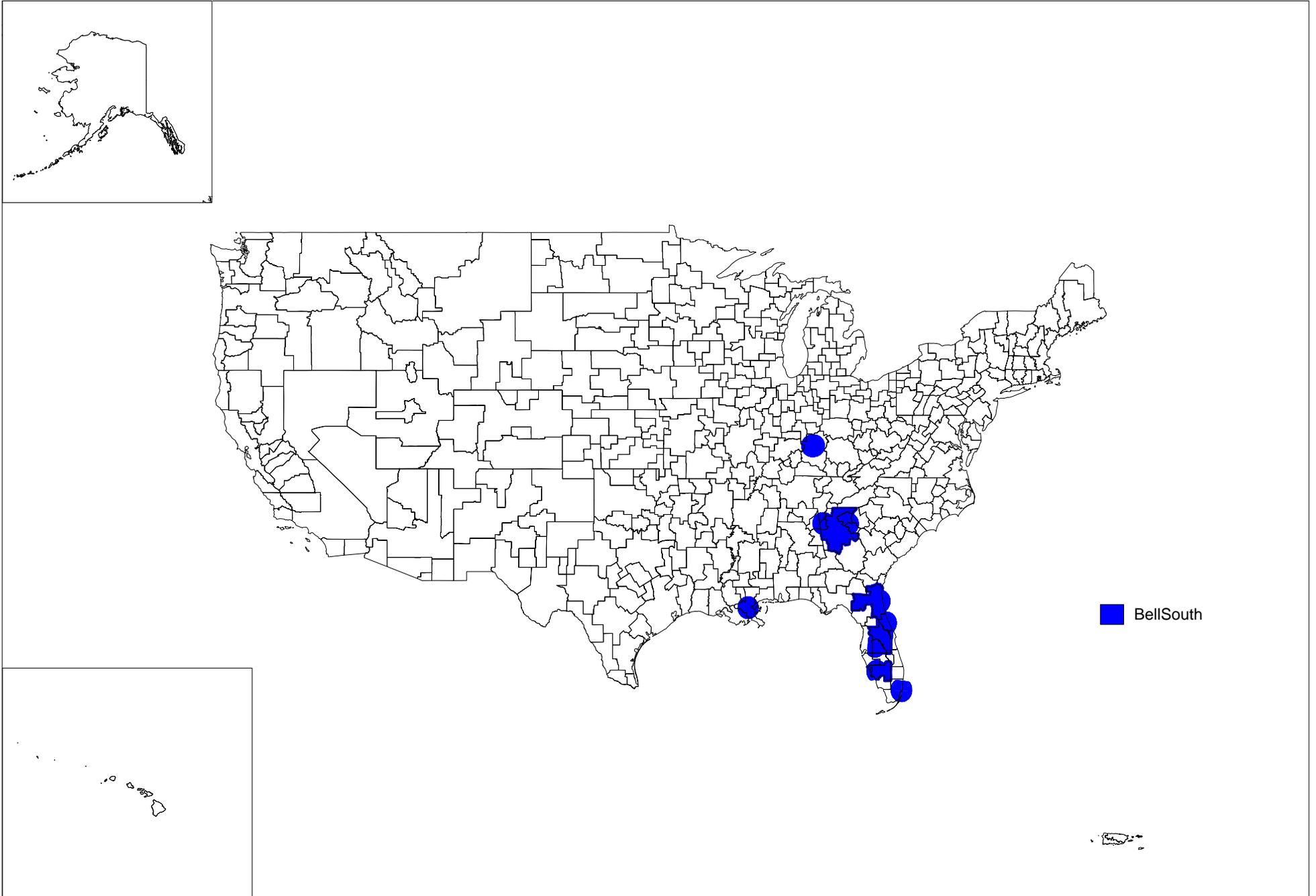
**BellSouth 2.5 GHz BRS/EBS  
Spectrum Holdings**

## BellSouth 2.5 GHz BRS/EBS Spectrum Holdings

Market	Total Channels per Market	Estimated Population Coverage per Market
Athens, GA	10	875,000
Atlanta, GA	28	4,400,000
Daytona Beach, FL	12	590,000
Ft Myers, FL	11	750,000
Jacksonville, FL	24	1,210,000
Lakeland, FL	31	830,000
Louisville, KY	20	1,230,000
Miami, FL	11	4,000,000
New Orleans, LA	26	1,250,000
Orlando, FL	19	1,860,000
Rome, GA	4	411,067
<b>TOTAL</b>	<b>196 (Represents both licensed and leased interests)</b>	<b>17,406,067</b>

## **BellSouth BRS Footprint**

# BellSouth BRS Footprint



## CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served the foregoing document on the following persons, with paper copies served by first-class mail on June 6, 2006.

Dated at Washington, D.C. this 5th day of June, 2006.

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