

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

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

REPLY COMMENTS OF CLEARWIRE CORPORATION

CLEARWIRE CORPORATION

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June 20, 2006

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

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BellSouth Corporation, Transferor)	
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)	
Application for Consent to Transfer of Control of Licenses and Authorizations)	

REPLY COMMENTS OF CLEARWIRE CORPORATION

Clearwire Corporation ("Clearwire"), by its attorneys, herein replies to certain comments and other filings submitted on June 5, 2006 in the above-captioned matter. The application for Federal Communications Commission ("Commission") consent to the transfer of control of BellSouth Corporation ("BellSouth") to AT&T Inc. ("AT&T") (collectively "Applicants") (the "Merger Application")¹ was the subject of numerous petitions to deny and comments in opposition on a variety of grounds.

This Reply addresses two points raised in those filings. First, some petitions to deny and comments note that the Applicants failed to make available important and competitively significant information about the wireless licenses and leases in the 2.3 GHz and 2.5 GHz spectrum bands that are to be transferred. This Reply explains why that concern is accurate and important in the 2.5 GHz band, and identifies additional information that the Commission should require to be furnished.

¹ 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).

Second, Clearwire notes that several petitions to deny and comments explain that AT&T will have an increased incentive and ability to impede broadband wireless competition using the 2.5 GHz spectrum holdings it would acquire from BellSouth, and requests that the Commission condition any consent to the transfer on, among other things, divestiture of BellSouth's license and leasehold interests in the 2.5 GHz spectrum band. Clearwire also sought pre-consummation divestiture of those licenses and leases in its Petition,² and addresses this further in its Reply.

As Clearwire asserted in its Petition, and others noted as well, AT&T will gain complete control over multiple extensive and overlapping broadband wireline and wireless networks, licenses, and leases after the merger. Clearwire's interest in this proceeding and, more importantly, its opposition to the proposed transfer of control, focuses solely on the anticompetitive effect of the transaction on the development of competitive broadband Internet access and services marketplaces, and on nationwide mobile wireless broadband Internet access and services competition, including the increased incentive and ability of AT&T to impede competition against broadband platforms and services using the important but relatively limited number of 2.5 GHz spectrum licenses and leases that also will be transferred by BellSouth.³

Clearwire provides Worldwide Interoperability for Microwave Access (“WiMax”)-class wireless high-speed broadband Internet access and services to rural and urban residential and small business customers in the United States using the 2.5 GHz band, and has been deploying its network and adding customers rapidly. This service is portable and will increasingly be fully mobile -- and if built out nationally, can enable customers to access uninterrupted broadband wireless Internet access and services on Clearwire’s network and those of its roaming partners in a manner completely transparent to the customer. Clearwire has been seeking access to

² See Clearwire Petition to Deny Or, In The Alternative, Condition Consent, WC Docket No. 06-74 (June 5, 2006) (“Clearwire Petition” or “Petition”).

³ See Clearwire Petition at 11-13.

additional spectrum licenses and leases in this band to expand its service in competition with the Applicants and others.⁴ Clearwire has no competing interest in other overlapping broadband networks and services to protect when it considers deployment of this service -- as the Bell companies had, for example, when they delayed Digital Subscriber Line (“DSL”) deployment in part to avoid cannibalizing other more expensive offerings. Clearwire has every incentive to use this competitive and potentially disruptive 2.5 GHz band wireless broadband platform to the fullest extent possible, thus providing consumers with an important and robustly competitive independent facilities-based choice to vigorously compete with AT&T’s overlapping broadband platforms.

The Commission's Public Notice identifies File No. 0002545782 as containing the application seeking Commission consent to the transfer of control of the BellSouth 2.5 GHz Broadband Radio Service (“BRS”) licenses to AT&T. That file identifies thirty (30) BRS licenses, including six (6) Basic Trading Areas and thirty-three (33) Protected Service Areas. It also identifies two (2) Education Broadband Service (“EBS”) licenses with BellSouth as the licensee.⁵ Most notably, those licenses reflect a regional concentration in the southeast United States.

In addition, however, to the best of Clearwire's information and belief, BellSouth also controls considerable 2.5 GHz spectrum as a lessee of EBS channels. The Applicants do *not* disclose the spectrum controlled by BellSouth through these leases -- which may be subject to

⁴ See Clearwire Petition at 4-5; Declaration of Perry S. Satterlee, Ex. 1.00 to Clearwire Petition, ¶¶ 3-9, 7-11 (“Satterlee Decl.”).

⁵ A review of File No. 0002545782 is only the beginning of a serpentine journey to discover the contents of the associated Merger Application. That file, in turn, refers to File No. 0002545739, as the location of the exhibits. Once located, Exhibit 1 in File No. 0002545739 turns out to be an Executive Summary of the Public Interest Statement and it then refers the reader to WC Docket No. 06-74 in www.fcc.gov/cgb/ecfs for the complete Public Interest Statement.

the Commission's grandfather provisions of Section 27.1214 of its rules.⁶ The failure of the Applicants thus far to disclose the BellSouth 2.5 GHz spectrum leasehold interests with specificity, including by location, length of remaining term, and availability for two-way service, shields from clear view and analysis, and permits understatement of, AT&T's post-transfer ability to impede nationwide mobile wireless broadband competition in this WiMax-capable band. Further underscoring the significance of this missing information is that these types of leases typically are coupled with a right of first refusal to acquire the underlying EBS licenses should license eligibility rules be changed to permit the lessee to become the licensee. Given the anticompetitive effects of the proposed transfer of control as discussed by Clearwire and other petitioners and commenters, BellSouth's lease and license information relating in any way to the 2.5 GHz spectrum band, and even that of AT&T, is critically important. While Clearwire recognizes that the Commission's rules governing grandfathered leases may not have required filing and full disclosure of such leases in the ordinary course, the Commission's rules give it the authority to require such information.⁷ The Commission should use its authority promptly to obtain and make that information available for consideration of the proposed transfer of control.

While seeking licenses and leases and providing service in the 2.5 GHz spectrum band, Clearwire has obtained some information relating to BellSouth's leases in that band. While it cannot confirm the accuracy of all of that information associated with the Clearwire Petition or whether additional information is missing, the extent of Clearwire's information and belief

⁶ See 47 C.F.R. § 27.1214. Indeed, the discussion of wireless assets in the Applicants' Executive Summary of the Public Interest Statement referred to in File No. 0002545782 completely ignores the wireless holdings in the 2.3 GHz and 2.5 GHz bands, incorrectly stating "AT&T's and BellSouth's wireless operations already are jointly owned through Cingular" and fails to even mention the wireless broadband market. Merger Application, Ex. 1, Description of Transaction, Public Interest Showing and Related Demonstration, at 3 ("Public Interest Statement").

⁷ See, e.g., 47 C.F.R. § 1.9030 (b)(3) ("The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.").

regarding BellSouth's leases is reflected in the Exhibits attached to the Satterlee Declaration. It is very difficult for a number of reasons, however, to obtain complete and verified information as it is not readily available from the Commission's electronic licensing or other databases. The regulation of 2.5 GHz spectrum leased to commercial operators from EBS and BRS licensees has changed over the years.⁸ Leases entered into after January 10, 2005, the effective date of the new BRS/EBS rules, are subject to the Commission's *Secondary Markets* procedures requiring the filing of an FCC Form 603-T *De Facto* Spectrum Lease Transfer Application for each lease.⁹ These applications are processed and granted by the Wireless Telecommunications Bureau, and

⁸ The regulatory history of BRS/EBS 2.5 GHz spectrum is particularly tortured. At inception, in 1970, when the Commission established the Multipoint Distribution Service ("MDS"), it was first envisioned as a transmission medium for business data service. *See In re Part 21, Section 21.703(g) and (h) of the Commission's Rules*, 47 FCC 2d 957 (1970). When it was evident that such a service was not developing, the Commission encouraged the use of that spectrum for the distribution of television programming by establishing two 6 MHz channels in the 50 largest metropolitan areas and one 6 MHz and one 4 MHz channel in the rest of the country. *See In re Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules to Provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616 (1974), *reconsideration denied*, 57 FCC 2d 301 (1975). Because of its perceived potential as a source of competition for cable television, MDS was expanded with the reallocation of eight channels from the Instructional Television Fixed Service ("ITFS") to form the Multichannel Multipoint Distribution Service ("MMDS") and allowing ITFS licensees to lease excess capacity on their system to MDS operators. *See In re Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 94 FCC 2d 1203 (1983). In October 1991, the FCC classified certain private Operational Fixed Service spectrum as part of MDS. *See In re Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Microwave Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, Report and Order, 6 FCC Rcd. 6792, 6793-94, 6801-06 (1991), *reconsideration denied*, 7 FCC Rcd. 5648 (1992). This rule change allowed 2.5 GHz spectrum operators to increase their number of channels from 6 to 13 (3 OFS, 2 MDS, and 8 MMDS). This, coupled with the ability to lease ITFS channels, makes up today's 33-channel BRS/EBS spectrum available for wireless broadband services.

⁹ *See* 47 C.F.R. § 27.1214(d); *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*, 19 FCC Rcd. 14165 (2004) ("BRS/EBS Decision").

can thus be tracked through its Universal Licensing System database. Leases entered into prior to January 10, 2005, however, are grandfathered (notwithstanding any inconsistencies between such leases and the new rules concerning spectrum leasing arrangements).¹⁰ As such, while grandfathered leases may be available through the Commission's public reference room, there is no easy way to determine which spectrum licenses have associated grandfathered leases. In addition, those leases that are available are often redacted, and amendments and assignments may not be available.

As a result, it is difficult for the public or an entity with no historical knowledge of the BRS/EBS spectrum leasing regime to determine precisely BellSouth's leased BRS/EBS spectrum holdings.¹¹ Without such knowledge, it is impossible to assess fully the extent of the anticompetitive effects of putting BellSouth's licensed and leased BRS/EBS spectrum holdings under AT&T's control. Although BellSouth has opposed the **routine** filing of unredacted EBS excess capacity leases at the Commission based on concerns regarding disclosure of confidential financial terms¹² (as have Clearwire and other EBS lessees), Clearwire urges the Commission, in this particular case, to require, at **minimum**, that BellSouth identify the BRS and EBS leases it holds by location, length of lease term and whether they contain a right of first refusal ("ROFR"). Clearwire expects that these leases do in fact contain a ROFR provision should the Commission rules change to permit BellSouth to become the licensee. If the Commission finds it necessary to limit disclosure of lease information even as narrowly as suggested by Clearwire,

¹⁰ See 47 C.F.R. § 27.1215(a).

¹¹ As noted earlier, Clearwire's preparation of the BellSouth 2.5 GHz BRS/EBS Spectrum Holdings chart included with its Petition and the Satterlee Declaration (at Exhibit 1.02) was based on its familiarity with the BRS/EBS leasing environment and information it has come to understand through its own participation in the leasing process.

¹² See, e.g., Consolidated Opposition to Petitions for Reconsideration of BellSouth Corporation, BellSouth Wireless Cable, Inc. and South Florida Television, Inc., WT Docket No. 03-66 (Feb. 22, 2005), at 13.

this would not elicit financial information or any information that is not necessary for an appropriately complete competitive analysis.

Several commenting parties echo Clearwire's reasoning, its prayer for relief, and go even further with respect to divestiture conditions. For example, the Center for Digital Democracy states that "if it does not deny the applications for transfer entirely, the Commission should, at least, impose requirements for divestiture of Cingular and all 2.3 Ghz and 2.5 Ghz spectrum licenses held by AT&T and BellSouth."¹³ Similarly, the Consumers Groups state that "AT&T-BellSouth must be required to divest either Cingular, or all of its licenses and operations (including R&D) in the 2.3 GHz and 2.5-2.7 GHz bands."¹⁴ Other commenting parties also call

¹³ Petition to Deny filed by The Center for Digital Democracy (hereinafter "CDC"), WT Docket No. 03-66 (June 5, 2006), at 6. In its Petition (at 6), CDD states:

Both AT&T and BellSouth have held (or more accurately, warehoused) spectrum in the 2.3 Ghz band. Much more significantly, it is CDD's understanding that BellSouth is the second largest licensee in the 2.5 Ghz band, and that it holds 2.5 GHz authorizations in almost all of the top 50 markets. [citation to Del Bianco, *Bumps in the road for AT&T-BellSouth merger?*, http://news.com.com/Bumps+in+the+road+for=AT38T-BellSouth+merger/2010-1037_3-6057214.html]. These vast swaths of spectrum are especially well suited for broadband delivery *via* WiMax or other similar newly evolving technologies. [citation omitted]. Allowing the AT&T/BellSouth combination will withhold this potentially competitive wireless option from the market. Once they merge, a fiber-based AT&T would have no incentive to deploy, much less innovate in, wireless broadband services.

¹⁴ Petition To Deny filed By Consumer Federation Of America, Consumers Union, Free Press and U.S. Public Interest Research Group (hereinafter "Consumer Groups"), WT Docket No. 03-66 (June 5, 2006), at 9; *see also* Consumer Groups Petition, Joint Declaration of Mark N. Cooper and Trevor Roycroft at 24-25 ("BellSouth holds substantial, in region licenses and usage rights in the 2.3 to 2.69 GHz band [which] must be considered among the spectrum bands on which mobile broadband services can be offered . . . [C]hanges in technology and regulation mandate that these ranges of spectrum be considered along with cellular, personal communications service ("PCS"), specialized mobile radio ("SMR") as broadband wireless spectrum. . . . In all of these bands, the next generation of offerings will emphasize broadband anywhere, and mobility will be possible in the 2.5 GHz band within the foreseeable future. The control of this spectrum by a post-merger AT&T would diminish the possibility for competition both for competition in the wireless and broadband markets.") (citation omitted).

for divestiture.¹⁵ These petitions and comments, together with the Clearwire Petition, appropriately urge divestiture of the 2.5 GHz leases and licenses as a condition of any transfer.

With the acquisition of BellSouth, AT&T will gain unprecedented control over three (3) major overlapping wireline and wireless (Personal Communications Service (“PCS”) and Wireless Communications Service (“WCS”)) means of providing broadband connectivity and services to consumers and small businesses.¹⁶ Not only will AT&T have the incentive to manage its offerings and set prices to maximize the combined profits from these platforms, rather than necessarily deploy any to its fullest potential, it will also obtain a significant regional

¹⁵ See Comments Of CBeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications, Inc., and Xspedius Communications, WT Docket No. 03-66, (June 5, 2006), at 109 (urging as a divestiture condition that “[w]ithin three (3) months after the Merger Closing Date, the merged AT&T/BellSouth entity shall file with the Commission a plan for the auction of BellSouth's wireless assets, including licenses, in the 2.5Ghz band.”); see also Comments of Jonathan L. Rubin, J.D., Ph.D. In Opposition To The Application Of AT&T And BellSouth For Consent To Transfer Of Control (“J.L. Rubin Comments”), WT Docket No. 03-66 (June 5, 2006), at 18; *id.* at 12 (“In the U.S., spectrum in the Wireless Communications Service (WCS) 2.3-GHz band and the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) 2.5-GHz band are being actively considered for Wi-Max IP access. The Commission has recently concluded a lengthy proceeding amending its rules to make possible widespread deployment of wireless broadband services in the 2.5 Ghz spectrum band” (citing BRS/EBS Decision); *id.* at 16 (“AT&T acquisition of control of this spectrum will prevent any other operator from use of the 2.5-Ghz band for Wi-Max IP access distribution in the southeast US, and thus frustrate a national footprint.”); and *id.* at 17 (“The proposed merger will injure competition by blocking entry by alternative firms wishing to provide mass market IP connectivity using Wi-Max deployed on licensed, 2.5 Ghz band spectrum and requiring a national footprint to achieve minimal efficient scale for mobility or nomadicity.”).

¹⁶ See Clearwire Petition at ii (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, without sharing management and revenue with another giant. (The Applicants admit as much, stating that Cingular “is operated as a separate company with separate management.” Public Interest Statement at 3); (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.*).

concentration of WiMax-capable 2.5 GHz broadband spectrum to impede rapidly emerging independent wireless broadband networks from competing nationwide against it.

In the case of terrestrial wireless, the ability to provide broadband Internet access service is defined in large part by the characteristics of the spectrum used, the commitment of equipment manufacturers to produce the necessary equipment on a commercial scale, and the willingness of consumers to use the service. The 2.5 GHz spectrum band has been commercially proven -- networks are being deployed, it has achieved consumer acceptance for wireless broadband services, and standards have been prepared to improve its capabilities. All of this heightens the competitive threat that a nationwide mobile wireless broadband service in this band poses, and the value for AT&T of holding sufficient 2.5 GHz spectrum rights to impede that competition.

The transfer of BellSouth's 2.3 GHz licenses and leases would give AT&T a near nationwide footprint for yet another wireless broadband service. The 2.3 GHz spectrum accommodates similar equipment to that in the 2.5 GHz spectrum band according to BellSouth's vendor, and is being actively considered for very similar use.¹⁷

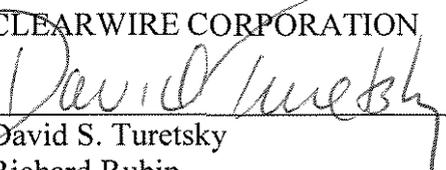
Considering the competitive landscape in light of other spectrum bands does not diminish the importance of competition from an independent company like Clearwire in the 2.5 GHz band. The 800 MHz cellular and 1.9 GHz PCS bands already are dominated by Incumbent Local Exchange Carriers ("ILECs") who are themselves balancing overlapping intermodal broadband platforms, and by Sprint Nextel which has multiple intramodal platforms. After considering (a) upper spectrum bands such as 38 GHz, 27 GHz or 24 GHz (which are not well suited to similar mobile wireless broadband services due to their line-of-sight requirement); (b) unlicensed spectrum (where wide scale commercial broadband services with acceptable quality of service ("QOS") standards have not been sustained and there is greater possibility for interference and

¹⁷ See Clearwire Petition at n.31.

other issues); and (c) 700 MHz, 1.7 GHz (AWS) or 3.5 GHz spectrum (which continue to be more remote possibilities and represent only future promise), the fact that the 2.5 GHz broadband platform is particularly important as a currently available and readily foreseeable competitive alternative is clear as is the value to AT&T of impeding nationwide mobile wireless broadband competition from independent competitors in this band. With unfettered control over large overlapping broadband wireline and wireless platforms, and a nearly nationwide footprint at 2.3 GHz, AT&T will have an enhanced incentive and ability to impede the development of independent facilities-based competition for the delivery of nationwide mobile wireless broadband access services in the 2.5 GHz band. With all of these broadband platforms and other wireless licenses, it certainly will not have a pressing need to deploy operations utilizing BellSouth's licenses and leases in that band to foster the emergence of such competition.

For the foregoing reasons, Clearwire urges the Commission to deny the Merger Application. In the alternative, the Commission should condition any grant of the Merger Application on the pre-consummation divestiture of the BellSouth licenses and leasehold interests in the 2.5 GHz band to a party with a demonstrated willingness and capability to provide competitive wireless broadband service in that vitally important band.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document by First Class mail, postage prepaid, upon on the following persons.

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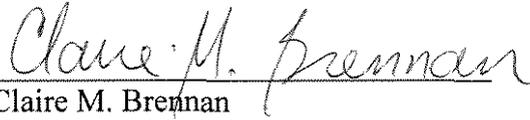
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