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

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

REPLY OF CLEARWIRE CORPORATION TO JOINT OPPOSITION OF AT&T INC. AND BELLSOUTH CORPORATION TO PETITIONS TO DENY AND REPLY TO COMMENTS

CLEARWIRE CORPORATION

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SUMMARY

In their Joint Opposition, the Applicants do not effectively refute the arguments made in Clearwire's Petition to Deny or, In the Alternative, to Condition Consent.

They respond that after the merger there will be plenty of spectrum available that can be used to provide broadband wireless service in competition with its expanded wireline and wireless broadband platforms, and that AT&T will own only a small portion of it. But that argument totally misses the point. Finding sufficient, high quality spectrum, among this scarce and finite resource, to develop nationwide mobile wireless broadband platforms is challenging. After the merger, AT&T will have a nearly nationwide footprint in the WiMax-capable 2.3 GHz band and will also acquire in the southeast, sufficient concentrations of spectrum in the WiMax-capable 2.5 GHz band to anti-competitively impede the development of a nationwide mobile broadband platform in that band that could provide disruptive competition to AT&T's wireline and wireless broadband offerings. AT&T will be able to create coverage gaps and/or coordination difficulties for any 2.5 GHz platform—and prevent service from being offered at all in major markets very important to customers.

The rag-tag collection of licensed, unlicensed, yet to be auctioned, and other spectrum cited as suitable by Applicants to provide mobile or fixed wireless broadband service, to the extent relevant at all, grossly overstates the limited universe of spectrum options currently available to create nationwide mobile wireless platforms. Nor does it make any sense at all to discount the increased concentration of national mobile wireless platforms which will result after the merger both from the national footprints AT&T will have, and the potential one that it will gain the means to impede in the 2.5 GHz band.

AT&T distorts the landscape of spectrum available to enable nationwide mobile wireless broadband service by aggregating the spectrum on that motley list and comparing AT&T's average percentage ownership where it owns spectrum. Such analysis says nothing about nationwide mobile broadband competitive opportunities. Moreover, this analysis masks by design the anticompetitive effects of AT&T ownership of concentrations of the 2.5 GHz spectrum, for example, listed spectrum available in Kentucky or Florida, whatever the spectrum band, is simply not useful to address the 2.5 GHz impediment that AT&T poses to competitors in other geographic areas such as Atlanta.

The Applicants' suggestions that Clearwire or any 2.5 GHz mobile wireless broadband platform can be national-enough even if AT&T acquires ownership of the 2.5 GHz spectrum is unreasonable. AT&T should not be positioned to impose impediments of this kind, and this argument is hypocritical given the efficiencies of scale and scope and other benefits that AT&T predicts from the expansion of its broadband and other capabilities through this merger. Moreover, AT&T's increased abilities to offer service on nationwide mobile broadband platforms through this merger, makes it even more necessary than before for broadband competitors to be able to do so. Any suggestion of consumer's ability to access mobile wireless broadband service on other bands to avoid AT&T's barrier is impractical given AT&T's ownership of the 2.3 GHz band which is the most similar spectrum and, at best, would allow AT&T to anticompetitively raise rivals costs substantially and create technical and customer difficulties.

In sum, AT&T will have powerful incentives to use the 2.5 GHz band spectrum so that it will not be available to be part of a nationwide mobile broadband network.

Every indication it offers is that to the extent it uses these concentrations of spectrum, it will do so inefficiently to avoid cannibalizing the offerings from the multiple overlapping broadband networks it will control, and serve only some outlying customers (which it apparently uses other bands to do elsewhere).

The WiMax-capable 2.5 GHz band is well-positioned to provide mobile broadband service quickly. This represents an important opportunity for consumers and competitors, not just for Clearwire.

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REPLY OF CLEARWIRE CORPORATION TO JOINT OPPOSITION OF AT&T INC. AND BELLSOUTH CORPORATION TO PETITIONS TO DENY AND REPLY TO COMMENTS

Clearwire Corporation ("Clearwire"), by its attorneys and pursuant to Sections 1.939(f), 1.45(c) and 1.4(h) of the Federal Communication Commission's ("Commission") rules, herein replies to those portions of the Joint Opposition of AT&T Inc. and BellSouth Corporation to Petitions to Deny and Reply to Comments, filed by AT&T, Inc. ("AT&T") and BellSouth Corporation ("BellSouth") (together AT&T and BellSouth are referred to herein as the "Applicants") on June 20, 2006 ("Joint Opposition"), that oppose the Petition to Deny or, in the Alternative, Condition Consent of Clearwire Corporation filed by Clearwire on June 5, 2006 ("Clearwire Petition") in the above-captioned matter.[1]

[1] *See* 47 C.F.R. §§ 1.939(f), 1.45(c) and 1.4(h) (2006). The proceeding concerns the application for Commission consent to the transfer of control of BellSouth to AT&T (the "Merger Application"); *see also* 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

Applicants' opposition to the Clearwire Petition essentially boils down to this: (a) there is enough broadband competition already, and the future may bring more, so whatever AT&T or Clearwire may or may not do with 2.5 GHz band spectrum does not matter very much; and (b) any harm their plans may cause is about Clearwire's *private* interest—not the public interest.

As Clearwire discusses below, the Applicants' opposition is based on false assumptions and a cramped concept of the public interest. The public interest cannot be served by allowing AT&T to acquire non-core 2.5 GHz spectrum that it will use to impede establishment of a nationwide mobile broadband platform that would compete against its multiple overlapping broadband platforms in the hope that more spectrum will be available later to create an opportunity for a national mobile platform like the one that will be lost.

I. While Broadband Availability and Subscribership has Increased in the United States, Far More Competition -- Particularly Wimax-Capable Mobile Wireless Broadband Competition -- is Necessary.

More consumers have some access to broadband and to some choice of providers than ever before, most of it via cable modem or Digital Subscriber Line ("DSL").

Far more competition and innovation is needed, however, to meet the United States' vital national broadband goal.[2]

(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).

[2] *See, e.g.*, Wireline Broadband Order, CC Docket No. 02-33, (FCC 05-150) (released Sept. 23, 2005), ¶ 3, n.8 (Commission indicates that the broadband market is characterized by emerging platforms. The regulatory regime it adopts seeks to promote the availability of competitive broadband service via multiple platforms.). The Applicants strongly support as a policy what they believe to foster achievement of that goal. To this end, the Applicants strongly urge the Commission in this proceeding to

Both Clearwire and Applicants' expert witness Marius Schwartz cite and rely on the recent Pew Broadband Report[3] regarding broadband deployment to consumers.[4] As Clearwire previously noted, that study reports that only 61% of consumers say that they have *any* choice of broadband providers, let alone more than two options.[5] The Pew Broadband Report also reflects that more consumers will choose to purchase broadband or switch among providers as prices drop.[6]

Increasingly, consumers will want high-quality two-way broadband connectivity not just in their homes, but wherever they are and whenever they want it. As Professor Schwartz correctly indicates, "the FCC and others believe that wireless technologies have

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adhere to a deregulatory regime that imposes no nondiscrimination or net neutrality constraints. *See In the Matters of Appropriate Framework for Broadband Access to the Internet over WirelineFacilities*, 20 FCC Rcd. 14853 (2005). Such a regulatory regime, however, depends on vigorous competition among many independent broadband on and off ramps so that consumers are able to choose a discriminatory or nondiscriminatory platform that meets their individual preferences and needs. Yet, AT&T's Merger Application seeks control over 2.5 GHz spectrum that would enable it to impede the emergence of just such a new independent broadband platform.

[3] John B. Horrigan, Pew Internet & American Life Project, "Home Broadband Adoption 2006" (May 28, 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf ("Pew Broadband Report").

[4] *See* Declaration of Marius Schwartz, ¶¶ 55-57 ("Schwartz Decl."). Professor Schwartz cites the Pew Broadband Report repeatedly for its analysis of residential broadband. He also rests his conclusion that broadband access for consumers is not a "blockaded duopoly," for consumers in part on the "potential" emergence of competition from wireless technologies." *Id.*, ¶ 57 & n.51; *see also* Clearwire Petition at 16-17.

[5] Clearwire Petition at 14; Pew Broadband Report at iv, 7-8. The Applicants also recognize and urge the Commission to accept that customer perspectives on competition are important to this proceeding -- they submit for the Commission's consideration a large number of statements that they extracted from business customers. *See* Joint Opposition, App. B.

[6] Pew Broadband Report at 9.

wider potential for broadband provision."[7] The spectrum available to provide reliable high-quality nationwide mobile wireless broadband Internet access, however, is very limited. Indeed, the U.S. Department of Justice ("DOJ") has recognized that "[m]obile wireless broadband services is a relevant product market under Section 7 of the Clayton Act, 15 U.S.C. § 18."[8]

Mobile broadband connectivity, provided via Worldwide Interoperability for Microwave Access ("WiMax") technology or personal communication service ("PCS"), will increasingly become the avenue to address these present and future needs, and will also compete against the wireline broadband connections in use today. As discussed *infra*, industry consultants and industry groups identify the 2.3 GHz Wireless Communications Service ("WCS") and 2.5 GHz Broadband Radio Service/Educational Broadband Radio Service ("BRS/EBS") bands as the only two currently licensed bands suitable for WiMax-capable mobile broadband access service on a nationwide basis.[9] Of the two, the 2.5 GHz band has specific advantages, even according to Applicants.[10]

After the merger, AT&T will have sole control over a nationwide PCS platform to provide mobile broadband connectivity, a nearly nationwide footprint in the WiMax-capable 2.3 GHz band to provide mobile broadband connectivity, the largest wireline

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[7] Schwartz Decl., ¶ 57.

[8] *Department of Justice v. Cingular Wireless Corp.*, Complaint, Civ. No. 1:04CV01850 (RBW) (D.D.C. Oct. 25, 2004), ¶¶ 17, 19 ("DOJ Complaint").

[9] *See, e.g.*, Doug Docherty, Maravedis, "BRS, EBS and WCS Regulatory and Licensing Analysis" at 6-8 (Dec. 2005), *available at* http://www.wcai.com/pdf.2005/p_maravedisDec1brochure.pdf. ("Maravedis Report"); *see also* Doug Gray, WiMax Forum, "Mobile WiMax: A Performance and Comparative Summary" (June 2006), *available at* http://www.wimaxforum.org/news/downloads/Mobile_WiMAX_Performance_and_Comparative_Summary.pdf ("WiMax Forum White Paper").

[10] Joint Opposition at 71.

broadband network in the country, and a significant collection of licenses and leaseholds concentrated in portions of the southeastern United States in the 2.5 GHz band.

Through its 2.5 GHz holdings, AT&T will also have the ability, and powerful incentives, to impede the emergence of an independent nationwide mobile wireless broadband platform in the 2.5 GHz band -- a band otherwise particularly well-suited to provide WiMax mobile broadband services on a nationwide basis. If AT&T built mobile capacity to accommodate access by other 2.5 GHz licensees, a nationwide mobile broadband platform that it didn't control would emerge, and it would compete with all of the other extensive and overlapping broadband platforms that AT&T will control. AT&T will not do that. It will have enough 2.5 GHz spectrum in key locations, such as Atlanta, however, to keep such a platform from reaching key markets required to be a national platform.

Consequently, a competitive analysis of the proposed merger must find that it contravenes the public interest for the Commission to approve transfer of the 2.5 GHz band licenses to AT&T.

II. The Universe of Suitable Spectrum Available For Nationwide Mobile Wireless Broadband Access Platforms is Very Limited and Applicants Efforts to Show Otherwise are not Convincing.

The Applicants go to great lengths to cobble together an argument that the universe of spectrum available to establish competitive nationwide wireless mobile broadband networks is plentiful and accessible. Indeed, this is the central tenet of their opposition to the Clearwire Petition, supported by the Reply Declaration of Dennis W. Carlton and Hal S. Sider ("Carlton/Sider Reply Decl." or "Carlton/Sider"), a declaration which labors mightily to minimize the amount of spectrum suitable for wireless

broadband that AT&T will control on a post-merger basis.[11] AT&T's position is demonstrably inaccurate as a factual matter and misguided as a matter of telecommunications regulatory policy. The Carlton/Sider Reply Declaration fails to measure anything of relevance, and grossly exaggerates the universe of spectrum, characterized as useable for "mobile or fixed services."[12] However, mobile wireless broadband is a separate relevant market,[13] and the DOJ has stated that: "[t]here are no cost-effective alternatives to mobile wireless broadband services" and "fixed wireless services and other wireless services that have a limited range (e.g., Wi-Fi) do not offer a viable alternative to mobile wireless broadband services."[14] Thus, the universe of spectrum chosen by Carlton/Sider is overly expansive and not reflective of the spectrum suitable for mobile wireless broadband services.

Most particularly, in an effort to dilute the competitive impact of the proposed merger, Applicants improperly include unlicensed spectrum and other spectrum not realistically suited for the provision of nationwide mobile broadband access in their universe of competitive broadband alternatives.[15]

A. Applicants incorrectly consider unlicensed and yet to be licensed spectrum as suitable for nationwide mobile broadband services.

Table 3.1 of the Carlton/Sider Reply Declaration, which is a list of spectrum bands that supposedly are relevant to this matter because they purportedly can provide fixed or mobile broadband service, includes two (2) bands of spectrum that are not

[11] *See* Carlton/Sider Reply Decl., App. 2.

[12] *See, e.g.*, Carlton/Sider Reply Decl., ¶¶ 76, 78.

[13] DOJ Complaint, ¶¶ 17, 19.

[14] *Id.*, ¶ 19.

[15] *See* Joint Opposition at 67-68; Carlton/Sider Reply Decl., ¶¶ 64-72.

intended to be licensed[16] and five (5) bands of spectrum that have yet to be licensed.[17] Each group is nonetheless included in the Carlton/Sider analysis.[18]

Inclusion of spectrum that is not yet licensed in a competitive analysis of the proposed merger is an exercise in speculation. Even if licensing were imminent, there is simply no reliable way to know that equipment manufacturers will support as of yet unidentified business plans; equipment will be readily available; licensees will construct facilities in a timely manner; licensees will use such spectrum to provide mobile broadband access in a manner that enables nationwide coverage; AT&T will not purchase some of this spectrum also; or, consumer acceptance will allow a commercially viable broadband service to develop.

B. Applicants erroneously consider certain currently licensed spectrum as suitable for nationwide mobile broadband services.

Applicants also include certain currently licensed spectrum in the 700 MHz band, which is not presently suitable for a WiMax-capable nationwide mobile broadband access service. Use of the 700 MHz band on a wide scale, particularly in urban areas, must await clearance of analog Ultrahigh Frequency ("UHF") television broadcast operations

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[16] The two (2) bands that are not intended to be licensed, the 2.4 GHz and 5 GHz spectrum, are subject to sharing by numerous potentially interfering uses and simply are not reliable as a place for a commercially viable nationwide WiMax-capable mobile broadband access network.

[17] These five (5) bands not yet licensed include the Upper and Lower 700 MHz, the 1.4 GHz (WCS), and the 1.915/2.180 GHz Advanced Wireless Service ("AWS") bands, none of which are yet scheduled for auction, as well as the 1.7-2.1 GHz (AWS) band whose auction schedule has been subject to considerable challenge. The 1.4 GHz WCS spectrum referenced consists of only 8 MHz. Considering the need for six 6 MHz channels in order to achieve commercial viability of a WiMax-capable mobile wireless broadband access service, this spectrum is insufficient. *See* Clearwire Petition at 5, n.11; *see also* Declaration of Perry S. Satterlee, Ex. 1.00 to Clearwire Petition, ¶ 11 ("Satterlee Decl.").

[18] *See* Carlton/Sider Decl., ¶ 64.

from that band which will not be completed for several years. Indeed, the Commission has stated, "the degree of incumbency in the Lower 700 MHz Band -- consisting of both digital and analog broadcasters -- is likely to make it far more difficult for new services to operate in this band, particularly in major metropolitan markets, prior to the end of the transition to digital television."[19] Timing considerations alone dictate that this spectrum not be considered suitable for a WiMax-capable nationwide mobile broadband access service in the context of an analysis of the competitive impact of the proposed merger.[20]

The Upper 700 MHz band consists of a total of six MHz of paired spectrum (only one 4 MHz license and one 2 MHz license in each of 52 Major Economic Areas). These so-called "guard bands" are licensed to a Guard Band Manager and are subject to specific technical and operational measures designed to minimize interference to public safety licensees, and must comply with defined frequency coordination procedures. Moreover, cellular system architecture is prohibited from operating in these bands. Thus, operations in this band would not be easily made suitable for wireless mobile broadband.

The Applicants cite very different niche services, as proffered evidence of wireless broadband competition, including "mediacasting" or "mobile tv," and even most of those only mention "plans to provide" or "test marketing" -- none of which are evidence of a competitive nationwide wireless broadband network.[21]

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[19] Federal Communications Commission, "About Lower 700 MHz," *available at* http://wireless.fcc.gov/services/index.htm?job=about&id=lower700.

[20] Indeed, there is no construction requirement for the 700 MHz licenses until license renewal – which is not until 2015 in the case of most of the earlier Lower 700 MHz band licenses.

[21] *See* Joint Opposition at 67-68. The Applicants also note instances of wireless broadband operations using the Lower 700 MHz band in North Dakota and rural Michigan, ignoring the fact that those operations are based on individual transmitter sites that these examples are not reflective of the absence of any wireless broadband

C. The 2.3 GHz and 2.5 GHz bands are currently suitable for nationwide mobile broadband services.

Of the spectrum listed by the Applicants (at 67) in their Joint Opposition and on Table 3.1 of the Carlton/Sider Reply Declaration, the 2.3 GHz WCS and 2.5 GHz BRS/EBS bands are those bands currently recognized by industry consultants and the WiMax Forum as suitable for WiMax-capable mobile broadband access service on a nationwide basis.[22]

Although the spectrum most similar to the 2.5 GHz band is the 2.3 GHz band -- a band in which AT&T will gain a nationwide footprint through the merger -- the Applicants criticize even that band for, among other faults, interference and too little bandwidth, and then tout the virtues of the 2.5 GHz band for wireless broadband. They do so even though other bands on their list of supposedly relevant spectrum have far worse interference and other problems.

At the end of the day, regardless of the status of the 2.3 GHz spectrum, it is the 2.5 GHz spectrum band in which Clearwire operates which provides AT&T with the ability to obstruct a nationwide WiMax-capable mobile broadband platform.[23]

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operations in the 700 MHz band in metropolitan areas. Applicants also mention the 1.6 GHz WCS band without any evidence of suitability for mobile broadband. *Id.* at 68. Applicants' reference to a single mobile television (effectively a wireless cable) service using 5 MHz in the 1.6 GHz Mobile Satellite Service band is hardly evidence of any capability of that spectrum to be used for a WiMax-capable mobile broadband access service.

[22] *See, e.g.*, Maravedis Report at 8; WiMax Forum White Paper, at 5, Table 1. In addition, Carlton/Sider treats the 2.3 GHz and 2.5 GHz bands as the same in their analysis. Moreover, Table 3.1 also reflects Carlton/Sider's belief that the 2.3 GHz spectrum and the cellular and PCS spectrum to be acquired by AT&T in this transaction will provide AT&T with two wireless broadband networks. *See* Carlton/Sider Reply Decl., ¶ 64, Table 3.1.

[23] Joint Opposition at 71.

D. A rapidly changing technology has superseded the Commission's conclusions in the Sprint/Nextel Merger Order.

Having failed in their attempt to demonstrate that there is considerable spectrum available for mobile broadband services, Applicants further note that the Commission stated in the Sprint/Nextel Merger Order last year that the 2.5 GHz band may not be "intrinsically superior" for wireless broadband and that "it will be one of many existing and potential inputs into the mobile data services market."[24] That statement is not dispositive here. Technology is changing rapidly, far faster than the ability to make suitable spectrum available, and behavior by AT&T **now** cannot be deemed acceptable because future spectrum allocation or licensing offer the possibility of offsetting the anticompetitive nature of that behavior at some later time. The Commission should simply deny the transfer because it is anticompetitive, regardless of the superiority of the 2.5 GHz band.

Since the Sprint/Nextel Merger Order, there have been several changes affecting the 2.5 GHz band or competition which may allow the Commission to conclude that this band is particularly promising for mobile WiMax service. Clearwire has now established both that there is proven equipment and very substantial commercial acceptance of broadband service in this band. The WiMax Forum reports that full mobility is coming soon, citing approval of the Mobile WiMax systems profiles in February 2006, based on the 802.16e-2005 standard.[25] Stating that standardization results in low consumer equipment prices, even Applicants state that "the head start held by 2.5 GHz WiMax

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[24] *In re Applications of Nextel Commc'ns, Inc. & Sprint Corp. For Consent To Transfer Control Of Licenses And Authorizations*, 20 FCC Rcd. 13967, ¶ 157 (2005) ("Sprint/Nextel Merger Order").

[25] WiMax Forum White Paper at 3.

operators in the standards and equipment development process is a substantial competitive benefit."[26] In addition, the Commission's deregulatory approach to broadband access services makes it particularly important to foster independent broadband Internet access platforms.[27] This transaction puts extra weight on achieving nationwide wireless mobile broadband capabilities, as noted above. Finally, there have been some delays in spectrum auction schedules since last year, including for AWS, and other schedules remain to be set.

III. The Carlton/Sider Analysis of Wireless Broadband Presented By Applicants Is Not Useful.

In the prior section, Clearwire demonstrated that, contrary to the Applicants' implausible contentions and the Carlton/Sider Reply Declaration, the universe of spectrum suitable for nationwide mobile broadband Internet access services is extremely limited, requiring the Commission's focus on the 2.3 GHz and 2.5 GHz bands today.[28]

In addition to analyzing the wrong spectrum, the Carlton/Sider analysis analyzes the wrong places, further developing a theory that is demonstrably lacking in relevance to Clearwire's claims. The anticompetitive impact of the transaction in the 2.5 GHz band does not rest on the brute aggregation of spectrum by AT&T across a national landscape. It rests, as Clearwire has explained, on AT&T using the 2.5 GHz spectrum it will have in the southeast in a way that impedes the emergence of a WiMax-capable nationwide

[26] Joint Opposition at 71.

[27] *See* note 2, *supra.*

[28] Apparently the Carlton/Sider table lists spectrum "identified by various parties" that is "suitable for the provision of mobile or fixed broadband services." Carlton/Sider Reply Decl., ¶ 78. It does not appear that they made any independent effort to assess whether that spectrum is suitable for even those purposes or could provide a platform for nationwide mobile wireless service.

mobile wireless broadband platform in that band. As an example of that problem, Clearwire cited the extensive holdings of 2.5 GHz spectrum in certain markets in which customers are very interested, such as Atlanta and New Orleans, that will allow AT&T to punch a significant hole in any effort to create a nationwide wireless broadband access platform in that band.

Carlton/Sider completely ignores Clearwire's concerns about the barriers to entry that can be posed through these holdings in Atlanta, New Orleans and elsewhere that will impede a nationwide platform from emerging in the 2.5 GHz band. In fact, their analysis conceals that problem. They add the holdings in Atlanta together with markets where AT&T will have far less spectrum holdings, perhaps none in the 2.5 GHz band, and produce for the Commission an overall average ownership of broadband spectrum by AT&T that says absolutely nothing about their ability to use Atlanta and other southeastern markets in exactly the way Clearwire discusses.[29]

If Carlton/Sider considered only the appropriate spectrum for their analysis, conducting a geographic market by market analysis, that analysis would illustrate the extensive barriers in markets like Atlanta, a result that would be very disturbing for the Applicants' position and for the Commission. In short, AT&T will have 28 of 33 BRS/EBS channels of 2.5 GHz spectrum in the Atlanta market, or approximately 85%.[30]

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[29] Obviously, spectrum in Florida or Kentucky in whatever band chosen for inclusion by the Applicants, is in no way substitutable for the 2.5 GHz spectrum needed to provide coverage for customers located in or visiting Atlanta!

[30] The Applicants state that Clearwire has 24 MHz in Atlanta by virtue of being the licensee of one BRS/EBS channel group as if that is supposed to give the impression that Clearwire holds significant or adequate spectrum in Atlanta. The truth is quite different. That 24 MHz translates into four channels, only three of which (pre-transition) would be useable even with clearance and coordination with BellSouth given that the Clearwire channels are interleaved with some of the BellSouth channels. Moreover, on a post-

It will also have substantial 2.3 GHz spectrum in that market.[31] The Applicants' efforts notwithstanding, there is no disguising that this is a very serious barrier.

The key consideration is that, as a result of the transaction, AT&T will have strategically located EBS/BRS 2.5 GHz spectrum to impede the establishment of a competitive nationwide broadband network in that band, helping to protect its two national wireless broadband platforms and extensive wireline broadband platform from disruptive competition. It is the EBS/BRS 2.5 GHz spectrum -- concentrated in locations within the BellSouth region -- that is the subject of Clearwire's divestiture request if the transaction is allowed to proceed, not what AT&T may or may not have at 700 MHz, 1.6 GHz or what use it makes of unlicensed spectrum.

IV. Applicants' Suggestion That the 2.5 GHz Band may be Available to Provide Nationwide Mobile Broadband Wireless Competition No Matter What AT&T Does With the Licenses and Leaseholds After the Merger is False.

Applicants offer some suggestions in their Joint Opposition that competitors still will be able to use the 2.5 GHz band to provide a nationwide mobile wireless broadband

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transition basis, Clearwire's four channels will become three channels. As Clearwire has stated, six 6 MHz channels are the minimum necessary to initiate commercial broadband wireless access service in a given market. *See* Clearwire Petition at 5, n.11; *see also* Satterlee Decl., ¶ 11.

[31] Beyond these considerations, it is important to remember that licensees of this spectrum -- like AT&T and BellSouth with respect to 2.3 GHz WCS -- will not need to meet construction benchmarks and so long as they satisfy the "substantial service" test at the 10-year license renewal date, they need not do anything with the spectrum until that time or even later if their request for a three-year extension of time is granted. *See 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).

service in competition with AT&T.[32] The facts show otherwise. Consumers will not enjoy the benefits of a nationwide mobile wireless broadband platform in that band if AT&T acquires BellSouth's 2.5 GHz license and leasehold interests.

Noting that Clearwire has identified Atlanta to illustrate its point that AT&T could impede development of a nationwide mobile wireless broadband platform at 2.5 GHz after the transaction, the Applicants correctly point out that Clearwire actually controls some 2.5 GHz spectrum there.[33]

However, AT&T will control enough channels in Atlanta to impede Clearwire's ability to launch commercial service there. There are no other identified sources of spectrum in that band that could enable Clearwire to meet or exceed the minimum threshold needed to launch commercial service.[34] Nor is this just a problem for Clearwire and its customers. As the Applicants understand, companies frequently partner with others who build mobile platforms in the same band where each has coverage and arrange to hand off with one another to create a nationwide service. Atlanta will be one of the major areas where AT&T will be able to do more than make this difficult -- it will create a coverage gap so that this cannot be done at all. It is this ability to punch holes in or otherwise impede an effort to create a WiMax-capable mobile broadband nationwide network, coupled with AT&T's incentive to protect the multiple, overlapping broadband

[32] Joint Oppositon at 67-68.

[33] *Id.* at 69 & n.282.

[34] *See* note 30, *supra* (explaining that Clearwire needs a minimum of six (6) channels at 2.5 GHz to launch commercial service in a market).

networks it achieves through the merger, that require a finding that AT&T's acquisition of the BellSouth 2.5 GHz spectrum holdings is contrary to the public interest.[35]

AT&T also suggests that Clearwire (or presumably others who might try to work with it to create a nationwide mobile wireless network in the 2.5 GHz band) might instead use "other" spectrum.[36] Applicants seem to be suggesting that it is somehow acceptable to allow them to impede mobile broadband coverage at 2.5 GHz in key geographic areas because providers who are putting together a 2.5 GHz band broadband network should arrange to have their customers access service in other bands in those areas.

The notion that blatant anticompetitive activity is mitigated by the possible existence of a "work-around" regardless of cost, equipment availability, consumer acceptance or even whether suitable spectrum is available, is plain nonsense. The 2.5 GHz spectrum acquired from BellSouth would allow AT&T to raise its rivals' costs dramatically, and make such rivals' service offerings less attractive nationwide.

[35] The Applicants note that BellSouth has "commitments" to use its EBS licenses "to transmit educational content" for certain educational institutions in the Atlanta area, and that divestiture might cause disruption. Joint Opposition at 74, n.300. While the Applicants are not clear about the nature and extent of BellSouth's obligations, BellSouth certainly can arrange for assumption of these commitments by a pre-consummation buyer or otherwise.

[36] *Id.* at 69.

V. Applicants' Suggestion That Clearwire Does Not Need to Provide Service Where AT&T Will Have BellSouth's 2.5 GHz Licenses and Leaseholds is Hypocritical and Self-Serving, Especially Given AT&T's Expanded Broadband Holdings and the Increased Concentration of National Network Ownership After This Transaction.

Applicants suggest in their Joint Opposition that Clearwire can be a national-**enough** competitor, because "limited" coverage gaps are not a problem and "[t]here are many successful regional carriers that do not even seek nationwide coverage."[37]

That Applicants make this argument is particularly ironic given the behemoth this merger creates coupled with the fact that the Application itself lauds the extensive efficiencies that they claim will be realized with a larger scale and scope.[38] AT&T's post-merger wireless broadband PCS and 2.3 GHz platforms will be used to serve Atlanta, New Orleans, important areas of Florida and elsewhere, where it also hopes to have BellSouth's 2.5 GHz licenses and leasehold interests, with which it can impede independent mobile broadband competition in that band in those same locations.

Applicants tell the Commission that competitors in the 2.5 GHz band do not need to compete on a **nationwide** mobile wireless broadband platform. The Applicants act like a camp counselor suggesting that because the big kids are on the playing field, the smaller children should find another game to play. As described above, they spotlight irrelevant examples of what usually are very small companies who have the ambition to use wireless spectrum at one band or another (only a couple of which even provide a

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[37] *Id.*

[38] The merger would bring about a much larger wireline broadband footprint -- adding such key metropolitan areas as Miami, Atlanta and New Orleans, a *nationwide* mobile PCS broadband platform in Cingular Wireless, LLC ("Cingular") that AT&T will control in its entirety, and an almost **nationwide** footprint in 2.3 GHz spectrum, which is designated for mobile and fixed wireless services and identified by industry consultants and industry groups as suitable for mobile WiMax broadband services.

commercial service of any kind) to serve niche markets, usually with a service such as video programming rather than broadband access. There is no apparent evidence, however, that any of these companies are trying to create a national broadband mobile wireless network.[39] No doubt AT&T would welcome more such remote, niche efforts that pose no national -- if any -- competitive threat. It knows well that most of the companies of the 1990s, whose presence and technologies AT&T once cited as competition to justify any number of objectives, are long gone.

A. The Merger Increases the Importance of Competitors Having a National Broadband Wireless Footprint.

Moreover, the proposed acquisition actually increases the importance that a competitive broadband platform, and in particular one that is mobile, have as nearly national a footprint and realize as many efficiencies of scale and scope as possible. Certainly under any circumstances, the value of a mobile network is higher when it allows service anywhere, particularly in heavily visited or trafficked locations.[40] But this transaction changes the math for several reasons.

First, taking the Applicants' assertions at face value, Cingular will be a more nimble and effective competitor nationally, with a substantially improved ability to compete and respond to challenges after AT&T assumes unilateral control. Moreover, AT&T will be able to integrate Cingular's nationwide mobile wireless broadband capabilities with those of AT&T across the nation and with BellSouth in the southeast. To the extent that Cingular becomes a more efficient and effective nationwide mobile

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[39] *Id.* at 67-68.

[40] National coverage need not be on a single national network -- if network quality is maintained, and networks based on open industry standards are deployed, consumers can gain nationwide access from providers who have built-out that band in different geographic locations.

broadband operator, that certainly will pressure competitors to be the same, and presents a challenge for less than nationwide mobile wireless operators.

Second, the merger brings together the AT&T and BellSouth spectrum holdings at 2.3 GHz to form a nearly national footprint. This WiMax-capable band is designated for mobile, among other primary uses. AT&T's ownership of another wireless broadband national footprint that can be used to provide mobile service underscores the importance of other independent competitors who may also use WiMax operating with a national footprint.

Third, AT&T will add the broadband capabilities of the large BellSouth landline network, including such metropolitan areas as Miami, Atlanta and New Orleans to the already expansive landline broadband network put together through its prior consolidation of numerous companies, such as Pacific Telesis, Ameritech, SNET, and SBC, over the last decade.

The above-described growth in AT&T's multiple broadband networks makes it more important but harder to compete as a mobile nationwide broadband service provider with holes in significant markets and without the efficiencies of scale and scope that would be achievable without those holes.

B. Contrary to Applicants' Assertions, the Merger Increases Concentration in National Broadband Networks, Including Mobile Networks.

The Applicants and their declarants fail to recognize that the transaction increases concentration in the ownership of national broadband platforms overall, giving AT&T unprecedented control over two that are wireless, and the largest that is wireline. AT&T's nationwide Cingular and 2.3 GHz holdings will increase overall concentration in the ownership of nationwide wireless broadband platforms that can provide mobile

service.[41] At the same time, the merger will decrease the possibility that another nationwide mobile wireless broadband network can be secured by competitors at 2.5 GHz, if AT&T is permitted to take control of the licenses and leaseholds in the 2.5 GHz spectrum band.

Whatever challenges broadband competitors may face, one such challenge should not be that the Commission found it in the public interest to enable AT&T to acquire spectrum licenses and leaseholds to expand its national broadband coverage and impede other competitors from providing an efficient and effective nationwide mobile broadband wireless service that offers consumers competitive choices.

VI. Applicants' Argument That AT&T Will Not Have Incentives to Use or Warehouse the 2.5 GHz Spectrum in Order to Impede Nationwide Mobile Broadband Competition From Emerging in That Band is Incorrect.[42]

A. AT&T will have powerful incentives to impede competition.

The merger would put into the hands of AT&T assets which are vital to everyone who wants to provide a competitive nationwide mobile broadband service to consumers in the 2.5 GHz band -- 2.5 GHz licenses and leaseholds, including extensive channel holdings in some important areas. To impede a nationwide mobile wireless broadband platform from being developed in the 2.5 GHz band that would compete with AT&T's national and nearly national networks, AT&T need not do much of anything with this spectrum. All it need do is abstain from building mobile wireless broadband capabilities that permit customers to have access to the 2.5 GHz band spectrum in AT&T markets.

[41] Nor will there be another national platform available at 2.3 GHz for ownership by someone else.

[42] Joint Opposition at 64.

This would allow AT&T to ensure that there would be gaps in coverage in some geographics areas where it controls the vast majority of channels in that band.

Not only will AT&T have the ability to impede the development of a nationwide 2.5 GHz platform and an incentive to do so, it will have a greater incentive than BellSouth.

B. The Applicants' claims about the Sprint/Nextel Merger Order do not justify approval of the licenses and leaseholds.

Contrary to the Applicants' suggestion, the concentration of ownership of 2.5 GHz spectrum permitted by the Commission in the Sprint/Nextel merger did not raise or dispose of the same issue as here.[43]

As the Commission noted in the Sprint/Nextel Merger Order, its regulatory policies encourage "consolidation of spectrum in this band, due to its historical underutilization."[44] Here, Applicants intent to acquire BellSouth's pockets of spectrum in this band are likely to result in the very type of underutilization the Commission's policies seek to avoid.

In the Sprint/Nextel merger, there also was less clear reason to believe as here, that the company would seek to impede development of a nationwide mobile wireless broadband platform. Sprint was divesting its wireline holdings and did not have a multitude of overlapping landline and mobile wireless broadband platforms to protect on the order of those that AT&T seeks to control. Its significantly greater holdings at 2.5 GHz also gave it a more substantial interest in the success of that band after its merger than AT&T will have. Recognizing the different balance of incentives and circumstances

[43] *Id.* at 65.

[44] Sprint/Nextel Merger Order, ¶ 160.

involved in the Sprint/Nextel transaction, indeed, Clearwire supported, rather than opposed, Commission consent to that transaction.

Nor does the fact that the Commission did not impose a spectrum cap in general rulemakings regarding the 2.5 GHz band services (or rulemakings involving the 2.3 GHz band) dispose of this issue in these particular circumstances.[45] Those rules do not foreclose the Commission from considering whether there is a significant likelihood of substantial competitive harm in specific markets as suggested by Clearwire in its Petition, which can and should be avoided by denial of the Application or, alternatively, divestiture of the 2.5 GHz licenses and leasehold interests.[46] Those rulemakings certainly were not meant to predetermine that every request to transfer control over 2.5 GHz licenses or leasehold interests to an Incumbent Local Exchange Carriers ("ILEC"), regardless of the circumstances, including how these licenses might be used, require approval under the "public interest" standard.

C. The Applicants say enough about what they will do with the spectrum to confirm that they will underutilize it.

As demonstrated below, AT&T would use the 2.5 GHz spectrum in a grossly inefficient and non-intensive manner that would defeat the regulatory purpose of achieving the "highest and best" use of the spectrum.[47] This is at odds with the policies and goals of Congress, which expected that competitive bidding licensing procedures

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[45] Joint Opposition at 72 & n.293.

[46] *See In re Matter of 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*, WT Docket No. 03-66, 2006 FCC LEXIS 2082, ¶¶ 29-31 (Apr. 27, 2006).

[47] The Omnibus Budget Act of 1993 gave the Commission the authority to use competitive bidding procedures to issue commercial spectrum licenses. *See* Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. § 309.

would, among other things lead to "efficient and intensive use of the electromagnetic spectrum."[48] It is contrary to the goals of the Commission as well, e.g., in 2003, the Commission's Strategic Plan FY2003-FY2008 identified as one of only six goals for the next five (5) years -- to "encourage the highest and best use of spectrum."[49] Permitting AT&T to acquire BellSouth's 2.5 GHz spectrum actually undermines the policies underlying the "highest and best" uses of spectrum, where the licensee is motivated to **underutilize** the 2.5 GHz spectrum, which it considers to be a non-core asset, and to withhold access to that spectrum by competitors in order to protect the nationwide broadband networks which result from the proposed merger.

The Applicants' discussion of what they might do with the spectrum should substantially narrow the issue for the Commission. AT&T claims no intention to build out the 2.5 GHz band spectrum in a timely fashion for mobile use. To the contrary, the Applicants speak only about possibly using the spectrum to provide a limited fixed

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[48] 47 U.S.C. § 309(j)(3)(D); *see also* H.R. Rep. No. 103-111, at 248 (1993) (the "Committee Report"), *reprinted in* 1993 U.S.C.C.A.N. 378, 575 (competitive bidding was intended to direct licenses toward those entities and technologies that would put them to the best use); *Id.* at 253, *reprinted in* 1993 U.S.C.C.A.N. at 580 (promote efficient and intensive use of the electromagnetic spectrum); *Id.* at 249, *reprinted in* 1993 U.S.C.C.A.N. at 576 ("[b]ecause new licenses would be paid for, a competitive bidding system [would] ensure that spectrum is used more productively and efficiently than if handed out for free.").

[49] In a September, 2002 Government Accounting Office ("GAO") Report entitled "Better Coordination and Enhanced Accountability Needed to Improve Spectrum Management," the GAO noted that "in early 2002, [the] FCC announced the creation of a Spectrum Policy Task Force to explore how spectrum could be put to the highest and best use in a timely manner." *Id.* at 18, *available at* http://www.gao.gov/new.items/d02906.pdf. The regulatory purpose of affording licensees flexible use of the spectrum and dispensing with construction benchmark rules assumes that by requiring the licensee to pay market value for the licenses (initially by auction and then in the secondary market), they are sufficiently incented to put the licensed spectrum to its "highest and best" use in the public interest.

wireless service that would be ancillary to, and not competitive with, the overlapping wireline and wireless broadband network platforms they will acquire, serving only a few outlying customers that they may not care, or be able, to serve with DSL.[50] This reflects AT&T's incentive not to cannibalize its more profitable broadband offerings.

This sparse use by AT&T of so many channels of valuable spectrum by AT&T in areas including cities such as Atlanta and New Orleans certainly would not appear to be anything like the efficient and intensive use of this spectrum that Congress sought. But it would be the perfectly rational choice for AT&T; enabling it to impede a new competitive threat from emerging that could take away customers and apply pricing and other competitive pressure against each of the broadband platforms that it is expanding through this merger.

The Applicants deny vigorously that they will "warehouse" spectrum. But this is just squabbling about language. Of course Clearwire was not suggesting that AT&T would fail to meet the minimal build-out requirements of the band and lose the 2.5 GHz licenses. If they did that, they would lose their ability to continue to impede nationwide mobile wireless competition in that band. They have conceded much of the "warehousing" point, properly understood.

Clearwire submits that the Commission's public interest mandate requires it to determine, as part of its competitive analysis under the public interest test, whether a

[50] Joint Opposition at 73-74. "AT&T has been using wireless spectrum to bring broadband services to remote rural and other areas to complete the DSL footprint." *Id.* at 73. Since AT&T has no 2.5 GHz band spectrum, it has not needed spectrum in that band to do this. Perhaps several of the options cited by Carlton/Sider are appropriate for AT&T to provide limited fixed-wireless service. The Applicants' description of what BellSouth has done emphasizes outlying rural areas, failing to note whether what it has done involves 2.5 GHz versus 2.3 GHz spectrum and how many channels or customers.

post-merger AT&T will make the highest and best use of the 2.5 GHz BRS/EBS spectrum. The anticompetitive potential of allowing AT&T to effectively warehouse this spectrum so as to impede unaffiliated entities from developing a WiMax-capable nationwide mobile broadband service that could challenge its multiple nationwide broadband access services dictates a divestiture of the 2.5 GHz BRS/EBS spectrum.

While effectively warehousing this spectrum may be the "highest and best" use for the merged entities, it is not the "highest and best" use for the public interest. The Commission is required to prevent this from happening.[51]

VII. The Applicants' Accusation About Clearwire's Motives and Interests is Misguided and Irrelevant.

The Applicants' effort to cast the arguments in the Clearwire Petition as being all about Clearwire's individual interest ignores the substance of the arguments themselves. This point is simply a distraction. The facts are what they are. The proposed merger will result in AT&T having three nationwide broadband networks and a geographical concentration of 2.5 GHz spectrum that will impede the development of a competitive nationwide wireless broadband network.

Clearwire is not alone in asking the Commission to condition any consent to the merger on the divestiture of BellSouth's EBS/BRS 2.5 GHz spectrum holdings. Indeed, requests for divestiture of BellSouth's spectrum holdings have been made by a grouping of four consumer organizations, public policy groups, two groups consisting of a total of 18 competitive carriers, a telecommunications investment group, and a respected telecommunications consultant. Each such request for divestiture reflecting the loss of

[51] *See* 47 U.S.C. § 309(j)(4)(B) (requiring the Commission to "prevent stockpiling or warehousing of spectrum by licensees or permittees").

competition that this transfer would accomplish and how that loss would hurt consumers and broadband competition. It is not just a matter of Clearwire's interests.

Clearwire states in its Petition and again in its Reply Comments, that it has significant spectrum holdings in the 2.5 GHz band, and is seeking to acquire and deploy more spectrum. As the Applicants know, a competitive nationwide broadband network need not be owned and operated entirely by one entity. Indeed, Cellular and Personal Communications Services have clearly demonstrated that to be the case.

Clearwire's central issue of concern with this merger is that AT&T will be positioned and incented -- and indeed has already demonstrated its predisposition -- to use the 2.5 GHz spectrum it obtains from BellSouth to impede that spectrum from becoming part of a nationwide mobile broadband network. That AT&T can impede competition to the detriment of consumers and other broadband competitors, is neither a private matter nor one that the law and public interest standard countenances. The condition requested, if the transaction is permitted, is that the 2.5 GHz licenses and leases be divested to an entity or entities that are committed and have the resources to construct and operate facilities that can form part of a competitive wireless nationwide mobile broadband network in the 2.5 GHz band.

VIII. Conclusion

For the reasons stated in the Clearwire Petition, in Clearwire's Reply Comments and in this Reply, 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.

Respectfully submitted,

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