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FOR PUBLIC INSPECTION**

October 24, 2006

**BY HAND**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
c/o Natek, Inc., Inc.  
236 Massachusetts Avenue, N.E., Suite 110  
Washington, DC 20002

**FILED/ACCEPTED**

**OCT 24 2006**

Federal Communications Commission  
Office of the Secretary

Re: WC Docket No. 06-74; DA 06-2035

Dear Ms. Dortch:

Clearwire Corporation ("Clearwire") encloses herewith for filing in this proceeding its Comments in response to the Commission October 13, 2006 Public Notice, DA 06-2035. Pursuant to the Second Protective Order in this docket, 21 FCC Rcd 7282 at ¶ 15 (2006), Clearwire is submitting (i) an original only of the Highly Confidential version of its Comments and this cover letter, both marked as "HIGHLY CONFIDENTIAL INFORMATION—SUBJECT TO SECOND PROTECTIVE ORDER IN WC DOCKET NO. 66-74 before the Federal Communications Commission" and to filed under seal; and (ii) an original and four copies of the Public version of its Comments and this cover letter, both marked as "REDACTED—FOR PUBLIC INSPECTION". Two copies of the Highly Confidential version are being delivered to Mr. Gary Remondino of the Wireline Competition Bureau. *Id.*; Public Notice at 2. The places where language has been redacted is indicated by double braces. Despite the redaction, the pagination between the two version is consistent.

Respectfully submitted,



Brett A. Snyder

Enclosure

042

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

FILED/ACCEPTED  
OCT 24 2006  
Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
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BellSouth Corporation, Transferor	)	
	)	
and	)	WC Docket No. 06-74
	)	DA 06-2035
AT&T Corp., Transferee	)	
	)	
Application for Consent to Transfer	)	
of Control of Licenses and	)	
Authorizations; Proposals	)	
Submitted by AT&T Inc. and	)	
BellSouth Corporation	)	

COMMENTS OF CLEARWIRE CORPORATION  
IN RESPONSE TO PUBLIC NOTICE

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October 24, 2006

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Note: Throughout the confidential version of this document, Clearwire Corporation will italicize Confidential Material and Highly Confidential Material and place such material within double braces. Such material will be redacted from the public version.

## SUMMARY

The conditions proposed by AT&T do absolutely nothing to alleviate the anticompetitive effects of its acquisition of BellSouth's 2.5 GHz spectrum. The conditions offer no protection against warehousing or underutilizing that spectrum to impede the emergence of an independent nationwide broadband mobile wireless WiMax-enabled platform that would bring badly needed competition to consumers.

The merged AT&T entity will have unrivaled control over, among other things, the largest wireline/DSL network in the country and the largest national PCS narrowband voice/data network. The merger will enhance AT&T's incentives and capability to use the 2.5 GHz spectrum holdings anticompetitively and to delay, disrupt, and impede the development of an emerging independent nationwide mobile wireless broadband platform using WiMax technology. AT&T will have a powerful ability and even stronger incentive to do so because no effort is required to underutilize or ignore the spectrum, and a new platform of this kind would compete in two product markets that account for most of AT&T's broadband service offerings and capabilities—fixed broadband services such as DSL and fixed wireless, and Cingular's mobile broadband and other wireless services.

In its very recent reconsideration filings in the BRS/EBS transition rulemaking, BellSouth made clear that it has no intention of accelerating its use of its 2.5 GHz spectrum until at least the year 2011. The notion that a merged AT&T/BellSouth should be able to control BellSouth's geographically concentrated 2.5 GHz spectrum through 2011 and beyond on the basis of a determination that the provision of legacy video services by BellSouth constitutes "substantial service" for 2.5 GHz license renewal

purposes is patently contrary to the public interest, which today demands use of that spectrum for competitive nationwide broadband services on a mobile WiMax platform.

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AT&T/BellSouth commits to offer by December 31, 2007, broadband Internet access service “to 100 percent of the residential living units in the AT&T/BellSouth in-region territory.” However, it is only to 15 percent or less of the residential living units in the AT&T/BellSouth in-region territory that AT&T/BellSouth will make available broadband Internet access service “using alternative technologies and operating arrangements” referencing as examples, “satellite and WiMax fixed wireless technologies.” Thus, AT&T/BellSouth makes no commitment whatsoever to provide *any* wireless broadband Internet access service anywhere in the AT&T/BellSouth in-region territory under this condition. Indeed, there is no mention at all of mobile WiMax or even of the 2.5 GHz spectrum.

The condition whereby AT&T/BellSouth commits to ten new trials of broadband Internet access service using “2.3 GHz or 2.5 GHz spectrum by the end of 2007,” including at least 5 of those trials within the BellSouth in-region territory, also is meaningless and perpetuates the AT&T/BellSouth mischaracterization of the issue. AT&T/BellSouth proposes only “trials” that have no stated purpose, no timeframe, no orientation towards the development of commercial services, and no benchmarks with which to judge the results. The condition permits AT&T/BellSouth to conduct these trials entirely at 2.3 GHz.

AT&T/BellSouth must be required to divest the BellSouth 2.5 GHz spectrum holdings and permit use as part of a geographically extensive, forward-looking (mobile WiMax capable) broadband wireless network. Divestiture is positive for competition and consumers, with very little effect, if any, on AT&T/BellSouth. BellSouth has little sunk investment and the merged entity will be able to collect a full market price.

Before the  
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Washington, D.C. 20554

In the Matter of	)	
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Application for Consent to Transfer	)	
of Control of Licenses and	)	
Authorizations; Proposals	)	
Submitted by AT&T Inc. and	)	
BellSouth Corporation	)	

COMMENTS OF CLEARWIRE CORPORATION  
IN RESPONSE TO PUBLIC NOTICE

Clearwire Corporation (“Clearwire”), by its attorneys and pursuant to the Commission’s Public Notice, DA 06-2035, dated October 13, 2006,<sup>1</sup> herein comments on the “certain merger conditions” contained in an *ex parte* letter submitted by AT&T Inc. (“AT&T”) on October 13, 2006 in the above-captioned proceeding.<sup>2</sup> In the October 13, 2006 Letter, AT&T states that it “would not object to the imposition of certain merger conditions previously proposed by certain parties in this proceeding and requested by the Democratic Commissioners in order to obtain expeditious unanimous approval of the merger.”<sup>3</sup>

<sup>1</sup> Public Notice, WC Docket No. 06-74 (Oct. 13, 2006).

<sup>2</sup> Letter from Robert W. Quinn, Jr., Sr. V.P. Federal Regulatory, AT&T Services, Inc. to Hon. Kevin Martin, Chairman, FCC, WC Docket No. 06-74 (Oct. 13, 2006), *as modified*, Erratum (Oct. 16, 2006) (“October 13, 2006 Letter”).

<sup>3</sup> October 13, 2006 Letter at 1. The October 13, 2006 Letter was filed as a notice of an *ex parte* communication identified as an October 12, 2006 meeting between identified

The conditions proposed by AT&T do absolutely nothing to alleviate the anticompetitive effects of its acquisition of BellSouth's 2.5 GHz spectrum. The conditions offer no protection against warehousing or underutilizing that spectrum to impede the emergence of an independent nationwide broadband mobile wireless WiMax-enabled platform that would bring badly needed competition to consumers. In fact, the proposed conditions pose no obligation for AT&T to do *anything* whatsoever with the 2.5 GHz spectrum—AT&T mentions the 2.5 GHz holdings *only* in a section of its proposal that allows it to fulfill all of its obligations by using spectrum in *other* bands if it so chooses.

Moreover, even were AT&T to agree to “trials” or to buildout BellSouth's 2.5 GHz spectrum holdings to some specified level in an attempt to address warehousing concerns, this would neither eliminate AT&T's anticompetitive incentives nor restrain its ability to act upon these incentives which commenters have demonstrated exist with respect to the 2.5 GHz spectrum. Any buildout obligation would fail to address the most significant merger-related fact—one that BellSouth well understands and that AT&T will have an even greater incentive to act upon—that the merged entity's retention of this spectrum impedes the development of an independent nationwide facilities-based wireless broadband platform that will compete in the home and across the country with the merged entity's multiple nationwide or nearly nationwide wireline and wireless platforms. The *only* condition that would avoid anticompetitive results and satisfy the

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representatives of AT&T and Michele Carey, Senior Legal Advisor to Chairman Martin and Tom Navin, Chief of the Wireline Competition Bureau “to respond to questions regarding objections raised and potential merger conditions that were proposed by parties in this proceeding.” *Id.*

public interest standard is divestiture of the 2.5 GHz spectrum, and divestiture should be required.

**I. The Merged Entity Will Have An Enhanced Incentive and Ability to Warehouse and Underutilize Its 2.5 GHz Spectrum.**

As has recently become clear, the 2.5 GHz band provides a unique, near-term opportunity to establish a competitive nationwide independent mobile wireless broadband platform using WiMax technology. While other bands such as 2.3 GHz can become mobile WiMax-capable, the standard for mobility has been written first for the 2.5 GHz band. That band has attracted the interest of, and substantial investment by, important manufacturers and independent carriers such as Clearwire and Sprint, among others. Deployment of a network that can be upgraded to provide mobility next year is well underway, and already serves more than 200,000 customers. It is clear that BellSouth understands that competitors are in a position to deploy mobile broadband wireless services shortly in the 2.5 GHz band, that its spectrum holdings is key to successful deployment, and that {{

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Against this background, Clearwire has focused its filings in this proceeding on the anticompetitive effect the merger will have on the development of an independent nationwide mobile WiMax broadband platform that would otherwise compete aggressively against AT&T's unprecedented post-merger array of national and nearly

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<sup>4</sup> See {{ }}.

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national fixed and mobile broadband-capable platforms.<sup>5</sup> A combined AT&T/BellSouth will have a lot to protect. Specifically, the merged AT&T entity will have unrivaled control over (a) the largest wireline/DSL network in the country; (b) the largest national PCS narrowband voice/data network; (c) the largest national UMTS/HSPDA-capable (EV-DO) network; (d) a large 2.3 GHz broadband spectrum footprint covering most of the nation; (e) a recently acquired spectrum footprint at 1.7 GHz (AWS) covering two-thirds of the U.S. population;<sup>6</sup> and (f) sufficient 2.5 GHz WiMax-optimal spectrum rights in roughly eleven BellSouth markets to pose a serious barrier to others developing or deploying a standalone mobile wireless broadband platform using WiMax technologies. The 2.5 GHz spectrum that BellSouth currently controls in the southeast creates critical coverage gaps for any nationwide mobile wireless broadband service in that band. The merged company has every incentive to exploit that control, simply by not building out 2.5 GHz in a way that is compatible with the open standard seamless coverage broadband platform that others who are building out the 2.5 GHz spectrum band for mobile wireless broadband are pursuing.

The merger will enhance AT&T's incentives and capability to use the 2.5 GHz spectrum holdings anticompetitively and to delay, disrupt, and impede the development of an emerging independent nationwide mobile wireless broadband platform using WiMax technology. AT&T will have a powerful ability and even stronger incentive to do so as a new broadband platform of this kind would compete in two product markets

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<sup>5</sup> See Clearwire Corp. Petition to Deny or, in the Alternative, to Condition Consent at 11-18 (June 5, 2006); Reply Comments of Clearwire Corp. at 3-10 (June 20, 2006); Reply of Clearwire Corp. to Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments at 4-19 (June 27, 2006).

<sup>6</sup> See Auction No. 66, Spreadsheets, All Markets, <http://wireless.fcc.gov/auctions/66/charts/66market.xls>.

that account for most of AT&T's broadband service offerings and capabilities—fixed broadband services such as DSL and fixed wireless, and Cingular's mobile broadband and other wireless services.<sup>7</sup> No effort is required for AT&T to underutilize or ignore the 2.5 GHz spectrum for broadband deployment, as has BellSouth to date, and AT&T has far more at stake and far more to lose than BellSouth.<sup>8</sup>

Indeed, BellSouth, prior to its merger plans with much less at stake and far less to protect, fully appreciated that its continued control over its 2.5 GHz spectrum band leases and licenses posed an effective barrier to competition as it considered its strategy for the 2.5 GHz spectrum, and it did virtually nothing with that spectrum for many years after the legacy wireless cable it explored failed to take hold.<sup>9</sup>

Consequently, BellSouth has virtually no relevant sunk investment in the 2.5 GHz spectrum, demonstrating how very easy it is for AT&T to do little as well. At the same time, this fact makes it easy to divest the 2.5 GHz spectrum without stranding investment.

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<sup>7</sup> See {{ }}.

<sup>8</sup> An independent, nationwide mobile wireless broadband platform can potentially affect the price and deployment plans of all of AT&T's broadband services. See Elizabeth White, *AT&T Earns \$2.17B in 3Q to Surpass Views: AT&T Third-Quarter Profit Soars to \$2.17 Billion, Beating Wall Street Expectations*, Oct. 23, 2006, [http://biz.yahoo.com/ap/061023/earns\\_at\\_t.html?v=15](http://biz.yahoo.com/ap/061023/earns_at_t.html?v=15). See also, e.g., Clearwire Corp. Petition to Deny or, in the Alternative, to Condition Consent at 14-17 (June 5, 2006). A “wireline carrier could have an incentive to protect its wireline customer base from intermodal competition while an independent wireless carrier would not.” *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21611 ¶¶237-42. Nextel/Sprint Order at P. 142; and a carrier with multiple wireless holdings will trade off among them to maximize its benefit. See *In re Applications of AT&T Wireless Servs. & Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, 199 FCC Rcd. 21522, at ¶ 243 (2004).

<sup>9</sup> See Petition for Partial Reconsideration of BellSouth Corp., BellSouth Wireless Cable, Inc. & South Florida Television, Inc. at 2, WT Docket No. 03-66 (July 19, 2006). See also {{

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To the extent that there may be any continuing service obligations, {{

}} those could be assumed by the purchaser of the divested 2.5 GHz spectrum.

**II. Notwithstanding the Proposed Conditions, There Is No Evidence That the Merged Entity Plans For 2.5 GHz Fixed or Mobile Broadband Service Roll-Out or Deployment At Least Through May 2011**

The merging parties have shown no inclination to develop the 2.5 GHz spectrum in any manner that would enable that spectrum to form part of a nationwide (or even regional) mobile wireless broadband platform. Despite having substantial swaths of this spectrum for many years, BellSouth has failed to use, or plan to use, the spectrum to provide such service to consumers. The conditions set forth in the October 13, 2006 Letter similarly reflect *no* commitment on the part of AT&T to use or develop the 2.5 GHz spectrum, let alone do so in a manner consistent with widespread industry expectations, consumer demand, and the development of new competitive broadband networks occurring at this time at 2.5 GHz.

In its very recent reconsideration filings in the BRS/EBS rulemaking, BellSouth makes clear its lack of intention to accelerate its use of its 2.5 GHz spectrum.<sup>10</sup> While it currently offers some limited and shrinking legacy wireless cable services, which even it describes as “unsuccessful,” those services are incompatible with the development of competitive wireless broadband Internet access networks, with or without WiMax

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<sup>10</sup> In that proceeding, BellSouth reiterates its long-standing request that the Commission enable it to rely on its legacy wireless cable video service at 2.5 GHz, *which it indicates it has curtailed*, as its substantial service demonstration required for its 2.5 GHz spectrum holdings renewal in *May 2011*. See Petition for Partial Reconsideration at 4.

technology. Nevertheless, BellSouth seeks to use these failed “legacy” wireless cable efforts as a basis to postpone satisfaction of the substantial service requirements of the 2.5 GHz band until at least the year 2011<sup>11</sup> when the public interest demands the use of that spectrum for competitive nationwide broadband service on a mobile WiMax platform.<sup>12</sup> {{

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BellSouth’s 2.5 GHz spectrum holdings essentially are defensive tools, maintained to keep that spectrum out of competitors’ hands regardless of underutilization at the cost of the central tenets of the public interest—promoting competition, and addressing consumer demand while making the best and most valued use of the spectrum. The merged entity’s incentive to perpetuate BellSouth’s current defensive strategy for the 2.5 GHz spectrum is even greater. Divestiture is the *only* answer to ensure that this key component of an otherwise independent third broadband platform for consumers

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<sup>11</sup> This belies BellSouth’s statement that it “recognized that its 2.5 GHz spectrum had significant value and application as a platform for broadband and advanced services.” Petition for Partial Reconsideration at 4.

<sup>12</sup> See Petition for Partial Reconsideration of BellSouth Corporation, BellSouth Wireless Cable, Inc. & South Florida Television, Inc. at 2, WT Docket No. 03-66 (July 19, 2006) (“Petition for Partial Reconsideration”); Consolidated Reply to Oppositions of BellSouth Corporation, BellSouth Wireless Cable, Inc. & South Florida Television, Inc., WT Docket No. 03-66 (Aug. 31, 2006) (“Consolidated Reply”).

<sup>13</sup> See {{

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nationwide, is not used by a post-merger AT&T as a tool to stifle and frustrate the emergence of an alternative platform that could effectively compete with its multiple national platforms.

III. {{

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**IV. AT&T/BellSouth's Conditions Confirm Its Lack of Commitment to Deploy on BellSouth 2.5 GHz Spectrum and Fail To Address the Anticompetitive Issues Surrounding This Spectrum.**

The conditions proposed by AT&T confirm a lack of commitment to develop the 2.5 GHz spectrum holdings consistent with industry needs and the demands of the

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<sup>23</sup> See {{

<sup>24</sup> See {{  
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<sup>25</sup> See {{

marketplace. More significantly, however, none of the conditions address the incentives and ability of AT&T/BellSouth to use their 2.5 GHz holdings in an anticompetitive manner.

1. Promoting Accessibility of Broadband Services—AT&T/BellSouth commits to offer by December 31, 2007, broadband Internet access service “to 100 percent of the residential living units in the AT&T/BellSouth in-region territory.” However, it says that it will accomplish this by offering **wireline** broadband service to “at least” 85 percent of those living units. It is only to the remaining 15 percent or less of the residential living units in the AT&T/BellSouth in-region territory that AT&T/BellSouth will make available broadband Internet access service “using alternative technologies and operating arrangements” referencing as examples, “satellite and WiMax fixed wireless technologies.” Thus, AT&T/BellSouth makes no commitment whatsoever to provide *any* wireless broadband Internet access service anywhere in the AT&T/BellSouth in-region territory under this condition. Indeed, there is no mention at all of mobile WiMax or even of the 2.5 GHz spectrum.

To the extent that satellite broadband offerings may already be available to consumers in these areas, AT&T’s commitment may not entail doing anything at all to expand broadband offerings to consumers. It may only provide simple resale, and a phone provider marketing a satellite service is nothing new.<sup>26</sup> There also is ample evidence that BellSouth prefers to use its much larger holdings of 2.3 GHz (WCS)

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<sup>26</sup> It is unclear whether this 15% commitment is anything more than what AT&T has already indicated it plans to do with respect to using alternative technologies and operating arrangements such as satellite and WiMax fixed wireless. *See* Edward Whitacre, Chairman & CEO, AT&T Inc., Keynote Address to the Detroit Economics Club, Detroit, Mich. (May 8, 2006).

spectrum, which also covers the area where it controls 2.5 GHz spectrum, to satisfy any broadband wireless needs that might arise, rather than the 2.5 GHz spectrum.<sup>27</sup> While the use of wireless broadband to provide rural or high cost area subscribers with a means of high speed Internet access would indeed be laudable, AT&T/BellSouth can do that with its large amounts of 2.3 GHz (WCS) spectrum *and unlicensed spectrum* as AT&T is currently doing, for example in Alaska,<sup>28</sup> and perhaps even with the 1.7 GHz (AWS) spectrum just acquired through Cingular.

Finally, the proposed condition suggests that the availability of AT&T/BellSouth wireline broadband Internet access service such as DSL within the AT&T/BellSouth in-region would make it unnecessary to offer fixed or mobile wireless broadband Internet access service using WiMax technology over that same area. This confirms an obvious intent to protect its wireline broadband offerings from cannibalization and to underutilize the coverage and capacities of the spectrum it will acquire from BellSouth. There is nothing in this commitment that would undermine the case for, or obviate the public interest basis for, divestiture of the 2.5 GHz spectrum.

2. Wireless—The condition whereby AT&T/BellSouth commits to ten new trials of broadband Internet access service using “2.3 GHz or 2.5 GHz spectrum by the end of 2007,” including at least 5 of those trials within the BellSouth in-region territory, also is meaningless and perpetuates the AT&T/BellSouth mischaracterization of the issue. First, it proposes only “trials,” yet the “trials” have no stated purpose, no

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<sup>27</sup> See {{ }}

<sup>28</sup> See Andrew Orłowski, *AT&T lifts kimono on WiMax trials*, The Register, Oct. 27, 2005, [http://www.theregister.co.uk/2005/10/27/wimax\\_world\\_all\\_trial/print.html](http://www.theregister.co.uk/2005/10/27/wimax_world_all_trial/print.html); *Media Advisory: AT&T Alascom Rural Broadband Initiative—Aniak Site Visit*, [http://www.attalacom.com/press/aniak\\_wimax.html](http://www.attalacom.com/press/aniak_wimax.html).

timeframe, no orientation towards the development of commercial services, and no benchmarks with which to judge the results. Second, the condition permits AT&T/BellSouth to conduct these trials entirely at 2.3 GHz, since the choice of spectrum is within the discretion of AT&T/BellSouth. Given that AT&T and BellSouth each have extensive holdings of 2.3 GHz spectrum, and that the merging parties have already conducted at least ten trials at 2.3 GHz during the period BellSouth also controlled the 2.5 GHz spectrum, there is no obvious reason to expect that any of these trials will be conducted at 2.5 GHz or that such trials would matter anyway. Nor is there any reason to expect that additional trials at 2.3 GHz will yield significant benefits not already available from the previous trials.<sup>29</sup> Committing only to more trials is nothing but smoke and mirrors, an embrace of further underutilization of the spectrum and use of the 2.5 GHz spectrum to choke competitive efforts to bring to the marketplace a new, independent nationwide wireless broadband network using mobile WiMax technology to provide 4G services.<sup>30</sup>

While AT&T will have many platforms that can deliver broadband Internet access services, the choice of which to offer is an AT&T/BellSouth business decision. It is naive and foolish to assume that such a decision is not driven by strategic and

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<sup>29</sup> While BellSouth has sought an extension until at least 2011 to provide “substantial service” using its 2.5 GHz spectrum, it has also requested that the Commission grant an extension of three years beyond the current 2007 dates, until 2010, to meet the construction deadlines for its 2.3 GHz (WCS) spectrum.

<sup>30</sup> A commitment to “trials” reflects no more build-out activity than would otherwise be required, at a minimum, to retain the spectrum licenses at both 2.3 and 2.5 GHz when renewal of such licenses becomes an issue. Similarly, were the Commission to extract as a condition of merger, a certain level of buildout at 2.5 GHz in an effort to mitigate claims of underutilization or warehousing, AT&T need only construct a minimal level of fixed point-to-point links to meet one of the safe-harbor thresholds at 2.5 GHz, a threshold, again, it would need to meet simply to have its 2.5 GHz holdings renewed in 2011.

competitive considerations. As indicated herein, AT&T has a strong incentive to delay any 2.5 GHz build-out or, if required to do so, to ensure that what it builds cannot and will not serve as a key component in the southeastern portion of the country of a ubiquitous open standard WiMax-enabled broadband platform available to customers of all competitors who need AT&T/BellSouth's cooperation in order to offer a nationwide service.<sup>31</sup>

**V. Divestiture of BellSouth's 2.5 GHz Spectrum Holdings is the Only Condition That Effectively Addresses the Post-Merger Independent Competitive Broadband Platform Issue.**

AT&T/BellSouth must be required to divest the BellSouth 2.5 GHz spectrum holdings and permit use as part of a geographically extensive, forward-looking (mobile WiMax capable) broadband wireless network. Divestiture is positive for competition and consumers, with very little effect, if any, on AT&T/BellSouth. As is demonstrated above, BellSouth has little sunk investment and the merged entity will be able to collect a full market price.

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<sup>31</sup> It is important to note that Clearwire is just representative of competition. Clearwire's efforts to date have been couched by AT&T as "a spectrum grab" at the AT&T/BellSouth 2.5 GHz spectrum. To the contrary, since AT&T/BellSouth should be afforded reasonable circumstances under which to sell their holdings to whoever they please with the understanding that the spectrum be used/transitioned to form part of a geographically extensive, forward-looking (mobile WiMax capable) broadband wireless network, Clearwire's efforts in this regard may end up inuring to the benefit of one of its other competitors. This notwithstanding, a 2.5 GHz broadband services network need not be licensed to the same entity nationwide for the benefits of such a platform to be available to consumers. It is perfectly adequate to have two or more regional-based providers deploying an open standard WiMax technology to provide nationwide compatibility. Clearwire's primary concern is, and always has been, that the AT&T/BellSouth 2.5 GHz spectrum end up in the hands of an entity that is committed to a rapid deployment consistent with nationwide broadband Internet access service on a WiMax platform, rather than an entity, as exists today, whose incentive is to frustrate rather than facilitate the emergence of such an independent broadband platform.

Divestiture most effectively furthers the development of competition in the delivery and type of advanced broadband services because 2.5 GHz spectrum is the focus of industry standards groups, providers and equipment manufacturers for the nationwide mobile WiMax (4G) networks. WiMax Standards for the 2.5 GHz band are at an advanced stage of readiness that no other band can equal and companies in that band are moving forward aggressively to establish an effective competitive open-standard broadband platform. Indeed, Clearwire and others are already committed to putting this spectrum to its highest and best use in a creating a nationwide footprint in accordance with consumer demand and industry expectations.

Divestiture serves the best interests of consumers. Allowing BellSouth's 2.5 GHz spectrum to become available for a third broadband pipe into the home and elsewhere on a new, independent nationwide broadband wireless network committed to the provision of mobile WiMax holds the greatest promise of delivery of 4G services in the very near term. AT&T and BellSouth have argued that many platforms and technologies might efficiently deliver broadband Internet access in the future, and that auctions lead quickly to the development of new broadband networks. This argument is mere speculation, however, intended only to undermine the importance of safeguarding actual competition that is emerging *now* from the anticompetitive effects of the merger.<sup>32</sup> This is amply illustrated by a recent statement by Cingular *after* AT&T offered the ineffective spectrum conditions that are the subject of this Comment. In the statement, Cingular CFO Pete

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<sup>32</sup> The fact is that construction, equipment, interference, geographic, standards, and capital issues, as well as other diversions, can make these assumptions about other spectrum band's availability for widespread broadband deployment in the near term unreasonable. See Reply Comments of Clearwire Corp. at 9-10 (June 20, 2006); Reply of Clearwire Corp. to Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments at 5-13 (June 27, 2006).

Ritcher noted that even though Cingular had just spent \$1.33 billion on spectrum in the recent AWS auction, Cingular didn't need it: "We obviously are not in a position where we have any real spectrum needs," he said. "We were there to be sort of opportunistic, and we're very happy with the markets we were able to get and the prices we were able to get them at." He talked about that spectrum providing flexibility for the "future."<sup>33</sup>

In an operational environment where a deregulatory approach toward broadband Internet access services may prevail and competitors need not share facilities, American consumers benefit from more independent choices among broadband platforms and providers. If there are enough independent platforms, then consumers will have a better opportunity to find a platform that is operated in a manner that meets their particular needs, as well as experience the other benefits of competition such as lower prices, better service and more innovation. Greater choice sustains deregulation, making nondiscrimination rules less necessary. Divestiture would be for competition and consumers, and it would not come at a significant cost or result in any negative impact to AT&T/BellSouth. {{

}} Furthermore, no harm would come to existing subscribers of BellSouth's legacy 2.5 GHz video services. {{

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<sup>33</sup> See *Cingular Ready to Complete AT&T Wireless Integration*, Communications Daily, Oct. 20, 2006.

}}, it would nonetheless be appropriate for the Commission to require that existing customers of BellSouth's legacy video services, including educational institutions, not be stranded by the acquirer of that spectrum.<sup>34</sup>

BellSouth's own chart of BRS/EBS competitors in BellSouth markets indicates only two ongoing efforts to obtain new spectrum leases, involving 48 MHz of additional spectrum in Atlanta where it already has extensive holdings of 2.5 GHz spectrum, among other bands.<sup>35</sup> {{

}}

## VI. Conclusion

AT&T/BellSouth must be required to divest the 2.5 GHz spectrum holdings either prior to the merger occurring or within a short timeframe thereafter. AT&T/BellSouth has limited holdings and insignificant sunk/stranded investment in this spectrum. On the other hand, the availability of these geographically concentrated spectrum holdings are

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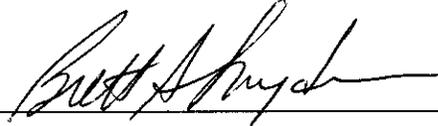
<sup>34</sup> Indeed, educational institutions (EBS licensees) that lease excess 2.5 GHz spectrum to commercial entities like BellSouth and Clearwire, and often rely on such entities to assist them in meeting their "educational use" needs, previously relied on video-broadcast type services to meet these educational use needs at 2.5 GHz but are increasingly and predominantly moving to broadband Internet services as the preferred, more technologically advanced way of serving their educational needs and requirements, but are only able to get such services from their 2.5 GHz spectrum if the 2.5 GHz spectrum lessee deploys a wireless broadband network. Consequently, Clearwire believes existing BellSouth 2.5 GHz customers, including educational institutions, would welcome the opportunity and ability to obtain 2.5 GHz services from an entity committed to bringing the full benefits of this spectrum to all consumers.

<sup>35</sup> See Competitors, Exh. 25.2.

*hugely important for the development of an independent third mobile broadband pipe* available to American consumers nationwide. To the extent this merger results in the creation of a single entity having unprecedented control over multiple nationwide service platforms, facilitating the existence of an alternative independent competitive platform while simultaneously removing the merged entity's ability to impede the development of this competitive platform, maximizes the public interest benefits that may otherwise result from this merger.

Respectfully submitted,

CLEARWIRE CORPORATION

A handwritten signature in black ink, appearing to read "Brett A. Snyder", is written over a horizontal line.

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October 24, 2006

## CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document by overnight courier, unless otherwise designated, upon the following persons.

Dated at Washington, D.C. this 24<sup>th</sup> day of October, 2006.

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