

WIRELESS PATHWAYS INC.

October 27, 2006

Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

**Re: AT&T Inc. and BellSouth Corporation
Application for Approval of Transfer of Control
WC Docket No. 06-74**

Dear Ms. Dortch:

It is clear from the record in this proceeding that the Commission must not move forward with approval of the AT&T/BellSouth merger absent serious consideration of a condition to divest spectrum in both 2.3 and 2.5 GHz bands.¹ This point was made to Chairman Martin by Senators Kohl and Dewine of the Senate Subcommittee on Antitrust Competition Policy and Consumer Rights (“Senate Subcommittee”).² It was also the focus of numerous commenters, including the American Antitrust Institute, CBeyond Communications, the Center for Digital Democracy, Clearwire Corp., the Computer & Communications Industry Association, the Consumer Federation of America, Consumer’s Union, Free Press, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications, Inc., and Xspedius Communications, and U.S. Public Interest Research Group.³ Providing the public just seven

¹ See, *Application For Consent to transfer of control filed by AT&T Inc. and BellSouth Corporation/ Commission seeks comment on Proposals Submitted by AT&T Inc. and BellSouth Corporation*, Public Notice DA 06-2035 (released October 13, 2006).

² On September 28, 2006, the Senate Subcommittee on Antitrust Competition Policy and Consumer Rights wrote to Chairman Martin and stated in no uncertain terms that “the issue most deserving of close scrutiny is the merger’s potential effect on the availability of wireless spectrum to be used for broadband service.” See Letter to Honorable Thomas Barnett, Assistant Attorney General and Honorable Kevin J. Martin, Chairman, FCC from Senator Mike DeWine (R-OH) and Senator Herb Kohl (D-WI), dated September 28, 2006. As the Senators made clear, wireless broadband is the most likely technology to create intermodal broadband competition with telephone and cable companies. However, that competition cannot be realized if the spectrum suitable for WiMax and other wireless broadband services is held by one company that has no incentive to deploy new services. The Senators urged the Commission to “take whatever steps are appropriate to assure that competitive WiMAX services have the opportunity to develop freely in the marketplace, including divestiture of spectrum . . .”

³ Various parties to this proceeding objected to the consolidation of spectrum holdings and requested divestiture. See, Center for Digital Democracy Petition to Deny (filed June 5, 2006) at 6 (“Thus, if it does not deny the applications for transfer entirely, the Commission should, at the least, impose requirements for divestiture of Cingular and all 2.3 GHz and 2.5 GHz spectrum licenses held by AT&T and BellSouth”); CBeyond Communications *et al.* Comment (filed June 5, 2006) (proposing divestiture of BellSouth’s wireless assets “within three (3) months after the Merger Closing Date...”); Computer & Communications Industry Association Comments (filed October 24, 2006) at 4 (“It is not pro-competitive for a company dominant in one ‘pipe into the home’ to also control the most promising local technology for a second

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business days from October 13th to comment on the merger conditions proposed by AT&T,⁴ and then closing off deliberations without serious evaluation of the critical divestiture requirement, will not serve the public interest. The Commission must take the time required to consider a divestiture requirement, and request and receive as much input as it needs to make a reasoned decision.

As the commenters made clear, unless the Commission conditions merger approval upon divestiture of 2.3 GHz and 2.5 GHz spectrum, new competitive entrants will be deprived of the tools necessary to deploy a third broadband pipe to the home, and the public will suffer.⁵ The merged AT&T/BellSouth entity already controls two or more nationwide pipes to the home, and it will have no incentive to build out a redundant, competitive service.⁶ This result will frustrate the President's goal of achieving affordable broadband connectivity for all Americans by 2007.⁷ As Clearwire aptly put it: "Insofar as Cingular already provides wireless broadband services on a significant and increasing basis, AT&T has every incentive to "bury" its 2.3 GHz and 2.5 GHz spectrum in non-core ancillary applications so as to avoid having it be used by a wireless broadband competitor"⁸

Where Clearwire is wrong however, is in its primary request for divestiture of 2.5 GHz spectrum only.⁹ Clearwire was the only commenter to suggest that divestiture should be limited to 2.5 GHz

conduit. The new entity, therefore, should divest itself of all so-called "WiMax" fixed wireless spectrum in the BellSouth region, except in markets where it is actually used by December 2007 by AT&T/BellSouth to offer wireless broadband ahead of or in place of fiber deployment."); Consumer Federation of America, *et al.* Reply Comments (filed June 20, 2006) at 22 (Recommending that the Commission "give serious consideration to requiring the pre-closing divestiture of both companies' holdings in the WCS band."); Consumer Federation of America, *et al.* Comments (filed October 24, 2006) at 6-7 ("To mitigate AT&T's market power with respect to in-region broadband and wireless markets, AT&T/Bell South should be required to divest sufficient spectrum to make it possible for one or more unaffiliated broadband competitors to offer wireless broadband service as a competitive alternative to AT&T's wireline DSL service."); Consumers Union Comments (filed October 19, 2006) at 2-3 ("AT&T and BellSouth should be required to divest sufficient spectrum in the merger territory to allow a third wireless broadband provider to compete in-region"); the American Antitrust Institute, Inc., Comments (filed October 24, 2006) at 5 ("[T]he Applicants have chosen to all but ignore the anti-competitive significance of the spectrum consolidation—and the exclusionary effect of such consolidation—occasioned by the merger"); Clearwire Corp. Comments (filed October 24, 2006) at 15 ("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.").

⁴ See, *supra* note 1.

⁵ See *supra* note 3; Clearwire Corp. Comments (filed October 24, 2006) at 7-8; Consumer Federation of America, *et al.* Petition to Deny (filed June 5, 2005) at 9 ("AT&T-BellSouth must be required to divest either Cingular, or all of its licenses and operations (including R&D) in 2.3 GHz and 2.5-2.7 GHz bands. This would enhance the prospects for entry of a wireless national third broadband platform, in competition with the ILEC cable duopoly.").

⁶ The merged entity will have the largest wireline/DSL network in the country, a nationwide PCS footprint, a nearly nationwide 2.3 GHz spectrum footprint; a large AWS (1.7 GHz) footprint, and a 2.5 GHz footprint. See Clearwire Corp. Comments (filed October 24, 2006) at 4.

⁷ *President Outlines Path for Lasting Prosperity in Wednesday Speech Remarks by the President at the Newspaper Association of America Annual Convention*, Omni Shoreham Hotel, Washington, D.C., Office of the Press Secretary (April 21, 2004) (available at <http://www.whitehouse.gov/news/releases/2004/04/20040421-5.html>).

⁸ Clearwire Corp. Petition To Deny, Or, In The Alternative, To Condition Consent (filed June 5, 2006) at 15.

⁹ *Id.*, at 4; Clearwire Corp. Comments (filed October 24, 2006) at 2-3.

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spectrum. Other commenters suggested strongly that both 2.3 and 2.5 GHz spectrum must be divested.¹⁰ Of the two spectrum holdings, the one that presents the greatest opportunity for a third competitive broadband pipe to the home is the combined 2.3 GHz spectrum held by BellSouth and AT&T, through AWACS, Inc., which has a nearly nationwide footprint.¹¹ In contrast, BellSouth's 2.5 GHz holdings cover only a small number of markets in the Southeast.¹² While divestiture of 2.5 GHz spectrum would be positive for Clearwire and Sprint/Nextel, who already have significant holdings in that band, it is not as critical to new competitive entrants as the substantial opportunity presented by the merged entity's 2.3 GHz spectrum, which offers nationwide coverage.

One important fact that the Commission must not lose sight of is that the combined 2.3 GHz holdings of AT&T/BellSouth will provide the merged entity with a substantial spectrum footprint that is sufficient as the basis for a **third** nationwide network. AT&T/BellSouth already have between them the largest wireline/DSL network in the country, and two nationwide networks including the Cingular voice/data network and a broadband HSDPA¹³ network.¹⁴ The merged company also would hold significant AWS spectrum from the recently concluded FCC auction covering a population of 200 million.¹⁵ Allowing one company to have three or more nationwide delivery vehicles cannot be justified as a competitive matter, does not serve the public interest, and requires, at a minimum, that 2.3 GHz spectrum with a national footprint is divested. As the record makes clear, "Divestiture is the *only* answer to ensure that this key component of an otherwise independent third broadband platform for consumers 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."¹⁶

Moreover, divestiture would not be detrimental to the viable businesses of AT&T and BellSouth. On the contrary, the Commission must take note that BellSouth and AT&T have not yet constructed or invested in significant or viable 2.3 or 2.5 GHz networks,¹⁷ and the companies will

¹⁰ See e.g., Center for Digital Democracy Petition to Deny (filed June 5, 2006) at 6; Center for Digital Democracy Comment (filed October 24, 2006) at 3-5; Consumer Federation of America, *et al.* Petition to Deny (filed June 5, 2006) at 9; Consumer Federation of America, *et al.* Comments (filed October 24, 2006) at 6-7.

¹¹ Clearwire Corp. Petition To Deny, Or, In The Alternative, To Condition Consent (filed June 5, 2006) at Exhibit 1.01 (showing AT&T and BellSouth WCS Spectrum Holdings).

¹² *Id.* (BellSouth 2.5 GHz GRS/EBS Spectrum Holdings and BellSouth BRS Footprint).

¹³ High Speed Downlink Packet Access ("HSDPA") is a packet-based, mobile telephony protocol that allows for higher data transfer speeds than the CDMA2000 1xEV-DO mobile telephony protocol.

¹⁴ Notice of Oral Ex Parte Communication, October 20, 2006 at 2.

¹⁵ Cingular won 48 licenses. See *Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66*, Public Notice DA 06-1882 (released September 20, 2006).

¹⁶ Clearwire Corp. Comments, October 24, 2006 at 7-8. Clearwire was referencing divestiture of 2.5 GHz spectrum when it made this statement, but the argument is equally true for 2.3 GHz spectrum.

¹⁷ See WCS Coalition Consolidated Request for Limited Extension of Deadline for Establishing WCS Compliance with Section 27.14 Substantial Service Requirement (filed March 22, 2006) at n.12 and 25 (indicating that BellSouth has performed some limited trials back in 2000 and 2005, and deployed broadband service in a few areas in Florida, Mississippi and Louisiana, and that AT&T launched a commercial service in a handful of markets in 2001-2002, but

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have little incentive to build out those networks after grant of the merger. Both spectrum bands are viewed as optimal for deployment of mobile wireless broadband networks using WiMAX technology. These networks will compete with data and voice services offered by AT&T and BellSouth over other platforms. As such, the likelihood of buildout in 2.3 GHz and 2.5 GHz bands by the merged company is low. As the Senate Subcommittee echoed to Chairman Martin, “the combined company will have little incentive to allocate that spectrum to WiMAX services because development of WiMAX will likely cannibalize their current customer base.”¹⁸

The substantial record in this docket supports wireless divestiture by the merged entity, and makes clear that the only way to encourage competition and mitigate the market power of the combined AT&T/BellSouth entity is to require the merged company to divest its 2.3 and 2.5 GHz spectrum, especially its nationwide 2.3 GHz spectrum. This spectrum should be divested to unaffiliated competitors who will actively use the spectrum to develop a third broadband platform, offer competitive services to the public, and satisfy the President’s goal of achieving affordable broadband connectivity for all Americans by 2007.

Sincerely,

/s/ Larry Day

Larry Day
Director
Wireless Pathways, Inc.
132 S. Central Avenue, Suite 238
Phoenix, AZ 85004

cc: Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Michelle Carey
Fred Campbell
Jessica Rosenworcel
Scott Deutchman
Bruce Gottlieb

discontinued that service due to costs). With respect to the 2.5 GHz band, as of September 2003, BellSouth apparently was still providing wireless cable service to subscribers in Alabama, Florida and Georgia. *See* Comments of BellSouth Corporation and BellSouth Wireless Cable, Inc., WT Docket No. 03-66 (Filed On September 8, 2003) at 3. Earlier this year, however, BellSouth indicated that it began curtailing the legacy wireless cable video services offered over its 2.5 GHz spectrum after the effective date of the new BRS rules. *See* Petition for Partial Reconsideration of BellSouth Corporation, WT Docket No. 03-66 (filed on July 19, 2006) at 4. To the extent BellSouth continues to serve customers with its legacy 2.5 GHz business, then it is even more clear that the Commission should require divestiture of the 2.3 GHz spectrum rather than the 2.5 GHz spectrum.

¹⁸ Letter to Honorable Thomas Barnett, Assistant Attorney General and Honorable Kevin J. Martin, Chairman, FCC from Senator Mike DeWine (R-OH) and Senator Herb Kohl (D-WI), dated September 28, 2006.

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Barry Ohlson
Scott Bergmann
Ian Dillner
Aaron Goldberger
Thomas Navin
Don Stockdale
Chris Reichman
Best Copy and Printing, Inc.
Gary Remondino
Nicholas Alexander
William Dever
John Branscome
David Krech
Robert W. Quinn, Jr., AT&T Services, Inc.
Bennett L. Ross, BellSouth Corporation
The Honorable Mike DeWine
The Honorable Herb Kohl
United States Senate Committee on the Judiciary, Subcommittee on Antitrust Competition
Policy & Consumer Rights
Brett A. Snyder, Esquire (counsel to Clearwire Corporation)
Karen Reidy, Comptel
Harold Feld (counsel to Center for Digital Democracy)
Andrew Jay Schwartzman (counsel to Center for Digital Democracy)
Edward J. Black, President and CEO, Computer and Communications Industry Association
Catherine R. Sloan, Vice President, Government Relations, Computer and Communications
Industry Association
Larry J. Blosser (counsel to Consumer Federation of America, Consumers Union, Free Press
and U.S. Public Interest Research Group)
Jonathan Rubin, American Antitrust Institute