

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Sprint Nextel Corporation and Clearwire	)	WT Docket No. 08-94
Corporation Seek FCC Consent to Transfer	)	
Control of Licenses and Authorizations	)	

**PETITION TO DENY OF AT&T INC.**

**AT&T INC.**

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## SUMMARY

AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (collectively, “AT&T”), hereby petitions to deny the applications of Sprint Nextel Corporation (“Sprint”), Clearwire Corporation (“Clearwire”), and New Clearwire Corporation (“New Clearwire”). The applicants have failed to address in any meaningful way the competitive showing traditionally required by the FCC when reviewing major transactions. Because the applications are therefore facially defective, they should be denied.

In other major transactions involving wireless carriers, the Commission has applied a spectrum screen to focus its competitive inquiry. Here, the applicants openly state that they intend to compete with other national wireless providers—including AT&T—yet they fail to make the required showings necessary for the Commission’s review. In such regards, AT&T believes that, at the present time, it would be irrational and contrary to prior analyses for the Commission to fail to include Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum in the input spectrum market. Among other factors, the applicants have touted this spectrum as being superior for the delivery of mobile broadband to the public. And, the major reason that the spectrum has not been previously included has evaporated—the applicants note that the BRS/EBS transition is “nearly complete.”

The Commission should also disregard the applicants’ attempts to discount their BRS/EBS holdings. Not only are these arguments flatly contradictory to public statements and Securities and Exchange Commission filings by the applicants, the stated bases for discounting the spectrum are unjustified as a technical and policy matter. Simply stated, the Commission must subject these applications to the same standard under which it reviews similarly situated carriers.

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**PETITION TO DENY OF AT&T INC.**

AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (collectively, “AT&T”), hereby petitions to deny the above-captioned applications. The applications were filed by Sprint Nextel Corporation (“Sprint”) and Clearwire Corporation (“Clearwire”) and seek Federal Communications Commission (“FCC” or “Commission”) consent to assign or transfer control of 2.5 GHz Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) licenses and lease arrangements to a newly restructured Clearwire Corporation (“New Clearwire”).<sup>1</sup> Under the terms of the proposed transaction, New Clearwire would combine the 2.5 GHz spectrum resources and assets of the applicants and receive a \$3.2 billion investment from Intel Corporation (“Intel”), Google Inc. (“Google”), Comcast Corporation, Time Warner Cable, and Bright House Networks.

As detailed below, the FCC must conduct a competitive review of the proposed transaction, starting with the application of a revised spectrum screen that includes BRS/EBS spectrum. The FCC has traditionally focused its competitive analysis by applying an initial

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<sup>1</sup> Applications of Sprint Nextel Corp., Transferor, Clearwire Corp., Transferor, and New Clearwire Corp., Transferee, for Consent to Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act, WT Docket No. 08-94, Lead File No. 0003368272, Description of the Transaction and Public Interest Statement (amended Jun. 24, 2008) (“Public Interest Statement”).

“spectrum screen” to all of the markets affected by the transaction. Because the spectrum screen previously applied by the FCC has not addressed BRS/EBS spectrum—but it is clear from the applications that New Clearwire intends to compete with traditional mobile services using such spectrum—AT&T files these comments to discuss appropriate revisions to the spectrum screen and the application of that screen to the New Clearwire deal. Specifically, both the applications and developments in the current wireless market dictate that the Commission must attribute BRS/EBS spectrum to New Clearwire when reviewing the applicants’ combined spectrum holdings. In this case, the applicants have sought to avoid the FCC’s review process by minimizing the extent of their combined spectrum holdings and have omitted any information relevant to the traditional public interest analysis applied by the FCC. The application is therefore fatally defective and must be dismissed.

**I. The Commission Should Apply a Revised Spectrum Screen to this Proposed Transaction that Includes BRS/EBS Spectrum.**

The Commission has applied a consistent analysis when reviewing transactions implicating competition in mobile services.<sup>2</sup> The Commission first applies an “initial screen”

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<sup>2</sup> See, e.g., *In the Matter of Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶ 39 (2007) (“AT&T-Dobson Order”); *In the Matter of Application of Aloha Spectrum Holdings Company LLC (Assignor) and AT&T Mobility II LLC (Assignee) Seeking FCC Consent For Assignment of Licenses and Authorizations*, Memorandum Opinion and Order, 23 FCC Rcd 2234, ¶ 11 (2008) (“AT&T-Aloha Order”); *In the Matter of Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 14863, ¶ 22 (2006) (“GCI-Alaska Digital Order”); *In the Matter of Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 13580, ¶ 18 (2006) (“DoCoMo-Guam Cellular Order”); *In the Matter of Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13967, ¶ 23 (2005) (“Sprint-Nextel Order”); *In the Matter of*

that is a processing tool “to eliminate from further review those markets in which there is clearly no competitive harm relative to today’s competitive marketplace.”<sup>3</sup> Specifically, the

Commission identifies markets where:

- the post-transaction Herfindahl-Herschman Index (“HHI”) would be greater than 2800 and the change in HHI would be 100 or greater;
- the change in HHI would be 250 or greater regardless of the level of the HHI; or
- post-transaction, the applicants would hold 95 megahertz or more of spectrum.<sup>4</sup>

In those markets where the screen is triggered, applicants have the burden of prevailing in a balancing test that “weigh[s] any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.”<sup>5</sup>

Most recently, this analysis was applied in the order granting consent to the acquisition of Dobson Communications Corporation by AT&T Inc. In that order, the Commission first noted

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*Applications of Western Wireless Corporation and ALLTEL Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 20 FCC Rcd 13053, ¶ 22 (2005) (“*ALLTEL-WWC Order*”); *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522, ¶¶ 43, 68 (2004) (“*Cingular-AT&T Wireless Order*”).

<sup>3</sup> See *AT&T—Dobson Order*, ¶ 39.

<sup>4</sup> See, e.g., *AT&T-Dobson Order*, ¶ 40; see also *In the Matter of Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc. For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 21 FCC Rcd 11526, ¶ 36 (2006) (“*ALLTEL-Midwest Order*”); *Sprint-Nextel Order*, ¶ 63; *ALLTEL-WWC Order*, ¶ 46; *Cingular-AT&T Wireless Order*, ¶ 106.

<sup>5</sup> See, e.g., *ALLTEL-Midwest Order*, ¶ 16; *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 16 (2005) (“*SBC-AT&T Order*”); *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, ¶ 16 (2005) (“*Verizon-MCI Order*”); *Sprint-Nextel Order*, ¶ 20; *ALLTEL-WWC Order*, ¶ 17; *Cingular-AT&T Wireless Order*, ¶ 40.

that the then pre-existing screen included “only cellular, broadband PCS, and . . . SMR . . . spectrum, which totals approximately 200 MHz,”<sup>6</sup> and then determined “the input market also includes . . . an additional 80 MHz of . . . 700 MHz spectrum . . . , bringing the total amount of spectrum suitable for mobile telephony nationwide to approximately 280 MHz.”<sup>7</sup> As a result, the FCC “revise[d] the spectrum aggregation screen to 95 MHz, approximately one-third of the 280 MHz of the spectrum suitable for mobile telephony today.”<sup>8</sup> The FCC’s actions in that order were consistent with its statement in the *ALLTEL-Midwest Order* that “the Commission may from time-to-time need to re-evaluate whether additional spectrum should be viewed as suitable for the provision of mobile telephony services.”<sup>9</sup> The FCC also determined—at the time—that “it is premature to include . . . [BRS] . . . spectrum in the initial screen.”<sup>10</sup> As discussed below, however, there have been substantial changes in the BRS/EBS service in the over eight months since the *AT&T-Dobson Order* was issued that warrant reversing this conclusion.<sup>11</sup>

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<sup>6</sup> *AT&T-Dobson Order*, ¶¶ 27, 30.

<sup>7</sup> *Id.*, ¶ 30.

<sup>8</sup> *Id.*

<sup>9</sup> *ALLTEL-Midwest Order*, ¶ 31, n.129. Notably, the Department of Justice relies on a two year window in conducting merger reviews: “In order to deter or counteract the competitive effects of concern, entrants quickly must achieve a significant impact on price in the relevant market,” thus “[DOJ] generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant market impact.” United States Department of Justice and the Federal Trade Commission, HORIZONTAL MERGER GUIDELINES at Section 3.2 (1992, rev’d 1997) (noting that “[f]irms which have committed to entering the market prior to the merger generally will be included in the measurement of the market”); *see also* *AT&T-Dobson Order*, n.117 (citing DOJ’s procedure).

<sup>10</sup> *AT&T-Dobson Order*, ¶ 17.

<sup>11</sup> Indeed, Chairman Martin, only three months ago, appropriately included BRS spectrum in his presentation on post-auction spectrum aggregation before the US House of Representatives Committee on Energy and Commerce, Subcommittee of Telecommunications and the Internet.

One of the major recent developments in the BRS/EBS band, of course, was the announcement of the New Clearwire transaction. The New Clearwire venture will hold a near monopoly in BRS/EBS spectrum and, in its own words, “will compete head-to-head against the soon-to-be-launched 4G offerings of Verizon Wireless and AT&T.”<sup>12</sup> Sprint’s Chief Executive Officer touted that “[t]he new Clearwire . . . will have an enviable 40 billion MHz position,’ ‘the largest spectrum position owned by one company.’”<sup>13</sup> And, according to Barry West, Chief Technology Officer of Sprint’s Xohm division, “WiMAX is here now, and it works.”<sup>14</sup> Xohm, in fact, has already deployed WiMAX in three major metropolitan areas— Baltimore, Washington D.C., and Chicago—with a “soft launch” of the services in January of 2008.<sup>15</sup> Full commercial service in those markets is slated for later this year, and even before the New Clearwire deal was announced, Sprint independently had stated that its Xohm service was

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*Written Statement Of The Honorable Kevin J. Martin, Chairman, Federal Communications Commission, 110th Cong. 12 (April 15, 2008).*

<sup>12</sup> Public Interest Statement at 17.

<sup>13</sup> Sprint CEO Dan Hesse, quoted in Tricia Duryee, “Sprint-Clearwire: Hesse: Spectrum Combo Puts New WiMax JV Two Years Ahead of Competition,” WASHINGTONPOST.COM (May 7, 2008), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050701164.html> (last visited July 24, 2008). *See also* Press Release, “Sprint and Clearwire to Combine WiMAX Businesses, Creating a New Mobile Broadband Company” (May 7, 2008), <http://www.clearwireconnections.com/pr/pressreleases/050708.pdf> (last visited July 24, 2008) (“[T]he new Clearwire will have a time-to-market advantage over competitors in fourth-generation services, supported by strong spectrum holdings and a national footprint.”).

<sup>14</sup> Brad Reed, “Sprint’s Xohm CTO Aggressively Defends WiMAX,” NETWORKWORLD (April 22, 2008), <http://www.networkworld.com/news/2008/042208-sprint-xohm-wimax.html?fsrc=netflash-rss> (last visited July 24, 2008).

<sup>15</sup> Brad Reed, “Sprint Gets WiMAX Soft Launch Underway,” NETWORKWORLD (Jan. 8, 2008), <http://www.networkworld.com/news/2008/010808-sprint-wimax.html> (last visited July 24, 2008).



slated to “reach[] 100 million people by year end.”<sup>16</sup> The New Clearwire applications also commit to a build-out that will “cover almost one half of the United States population in roughly thirty-six months,” “cover[ing] up to 140 million people in the United States by the end of 2010.”<sup>17</sup> Clearly, a company that has the largest spectrum position of any mobile carrier, deploying a service that is “here now,” with financial backing from Google, Intel, and three of the nation’s largest cable television companies is capable of substantially impacting competition in the mobile communications market. The spectrum assets of this company—a spectrum band that the applicants describe as being “best for mobile broadband services due to channel size and propagation characteristics”<sup>18</sup>—must be taken into consideration under any rational spectrum screen.

The sole reason that BRS/EBS spectrum was not previously included within the spectrum screen, as stated in the *AT&T/Dobson Order*, was that “the availability of BRS spectrum for new mobile uses depends on the ongoing transition process.”<sup>19</sup> At the time, however, the transition of BRS/EBS spectrum had only been in progress for slightly more than one year.<sup>20</sup> Now, however,

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<sup>16</sup> Press Release, “Sprint’s XOHM Will Expand Internet Access” (Sept. 26, 2007), <http://www.xohm.com/news-092607.html> (last visited July 24, 2008).

<sup>17</sup> Public Interest Statement at 20.

<sup>18</sup> “New Wireless Venture Seen Drawing Scant Regulatory Scrutiny,” *COMMUNICATIONS DAILY* at 4 (May 8, 2008).

<sup>19</sup> *AT&T-Dobson Order*, ¶ 34.

<sup>20</sup> The transition requirements adopted by the FCC became effective in July 2006. *See 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*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165 (2004) (“*BRS Report and Order*”); *see also Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order

the transition picture is substantially different. Indeed, the applicants themselves state that the “transition of the nation’s BRS and EBS licensees to the new 2.5 GHz band plan is *nearly complete*.”<sup>21</sup> This accords with AT&T’s own review of the BRS/EBS transition filings. As of July 19, 2008—the two year anniversary of the new transition rules—the transition has been initiated in 80% of the BTAs covering 90.6% of the U.S. population. The transition has been certified “complete” in 54% of the BTAs covering 73.6% of the U.S. population. Indeed, the deadline for filing transition initiation plans is only 6 months away, and by every rational measure the transition will be completed in a timely manner.

Given the current status of the transition, failure to include BRS/EBS spectrum in the screen would be flatly inconsistent with the Commission’s treatment of other spectrum bands. For example, in the *AT&T/Dobson Order*, the FCC included 700 MHz spectrum—despite that many of the 700 MHz spectrum blocks that had not been auctioned and that the analog-to-digital transition that would clear broadcasters from the band was not slated to occur before February 17, 2009. In such regards, the FCC stated “[w]e are . . . confident at this point in time that [the 700 MHz spectrum] will be licensed and available on a nationwide basis in the sufficiently near-term – less than a year and a half – that the prospect of its availability will discipline current market behavior.”<sup>22</sup> In this case, not only in eighteen months will the spectrum be available, the venture has targeted actual coverage to nearly half the U.S. population.

AT&T submits that it would defy logic and be entirely arbitrary to exclude BRS/EBS spectrum from the initial screen in light of the substantial progress in the BRS/EBS transition

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and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606 (2006).

<sup>21</sup> Public Interest Statement at 30 (emphasis added).

<sup>22</sup> *AT&T-Dobson Order*, ¶ 31 (citing DOJ/FTC merger guidelines).

and, even more importantly, the announced intention of a company holding a near monopoly in BRS/EBS spectrum to compete head-to-head with traditional providers of mobile services. As it has done in the past, the Commission must adjust the initial spectrum screen to include BRS/EBS holdings and to include the BRS/EBS spectrum in the overall pool of spectrum in the mobile product market. And, it must apply that revised screen to the spectrum consolidation proposed by the applicants.

## **II. The Amount of BRS/EBS Spectrum Attributed Should Not Be Decreased Based Upon New Clearwire’s Utility Arguments.**

In their applications, New Clearwire appears to argue that, if BRS/EBS spectrum is attributed, the maximum amount of the 195 MHz band that should be counted is 55.5 MHz. The applicants’ criticisms of the suitability of certain BRS/EBS spectrum, however, are unpersuasive. The Commission repeatedly has explained that the spectrum screen is “designed *to be conservative* and ensure that any market[] in which there is potential competitive harm based on spectrum aggregation is identified and subjected to more in-depth analysis.”<sup>23</sup> Despite that admonition, the applicants have raised no valid reasons for their purported exclusion of substantial portions of the BRS/EBS band.

As an initial matter, New Clearwire argues that the 112.5 MHz of EBS spectrum should not be included in the spectrum screen. EBS spectrum, while subject to eligibility restrictions for licensing purposes, is frequently leased to commercial service providers such as Sprint and Clearwire—the New Clearwire applications disclose, in fact, that New Clearwire will control all of the 112.5 MHz of EBS spectrum in no less than 314 counties. And, this spectrum is integral

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<sup>23</sup> *Id.*, ¶ 30 (emphasis added) (“setting this screen at approximately one third of the total suitable spectrum is designed to be conservative and ensure that any markets in which there is potential competitive harm based on spectrum aggregation [are] identified and subjected to more in-depth analysis”).

to the next-generation mobile telephony services these companies provide and will continue to provide. The applicants' primary basis for arguing that EBS spectrum should not be subject to the screen is that leases of EBS spectrum are subject to "thirty-year term maximum term limits [and] mandatory lessor 'rights of review' at 15 years into the term."<sup>24</sup> The Commission, however, currently attributes spectrum leases for cellular, SMR, PCS, and 700 MHz spectrum to both the lessor and the lessee, and the duration of these leases is limited by the underlying license term—generally ten to fifteen years.<sup>25</sup> The applicants' arguments notwithstanding, there appear to be no material distinctions between EBS leases and other commercial mobile leases that are attributed in other contexts. Accordingly, no basis exists to exclude the 112.5 MHz of EBS spectrum lease rights.

The applicants have also argued that the 42 MHz of Middle Band Segment ("MBS") spectrum should be excluded from attribution. The applicants argue that this spectrum—which is available for "high-site, high-power" operations—is "not compatible for use in the radio access network of cellularized mobile broadband operators in the presence of high-site facilities."<sup>26</sup> This argument also fails. Under the BRS rules, applicants are permitted—not required—to use this spectrum for high-power operations. Because Sprint and Clearwire admittedly control much of this spectrum across the country, the applicants will be fully empowered in many counties to coordinate their spectrum operations to ensure compatibility

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<sup>24</sup> Public Interest Statement at 40-41.

<sup>25</sup> The applicants also argue that EBS spectrum is subject to "a mandatory five percent capacity reservation." *See id.* at 41. At most, that argues for excluding 5 percent of the 112.5 MHz.

<sup>26</sup> *Id.*

between their MBS and adjacent spectrum.<sup>27</sup> In addition, the ability of mobile spectrum to be used for high-site, high-power operations has not previously been a ground for de-attribution—the Commission currently attributes the entire Lower 700 MHz commercial spectrum band for spectrum screen purposes, even though 700 MHz C and D Block license holders may use this spectrum for high-site, high-power operations. To ensure consistency in spectrum attribution procedures, the Commission should include MBS spectrum in the spectrum screen.

The applicants also suggest that the Commission should not include the 6 MHz BRS 1 channel for purposes of any spectrum screen.<sup>28</sup> As Commission statements in the *2.5 GHz Rebanding Order* make clear, the spectrum sharing concerns in the 2496-2502 MHz band raised by the applicants are vastly overstated. As a threshold matter, 2501-2502 MHz is licensed solely for BRS/EBS purposes, and is not encumbered by any additional users. Even in the 2496-2500 portion of the band, the three “co-primary use[rs]” of this spectrum cited by the applicants—Globalstar; 108 incumbent Broadcast Auxiliary Service (“BAS”) and private radio service licensees; and Industrial, Scientific and Medical (“ISM”) device users—will not noticeably

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<sup>27</sup> According to the charts filed with the applications, the New Clearwire would control all 186 MHz of non-guard band BRS/EBS spectrum in 235 counties in the U.S.; clearly, in those cases, New Clearwire can regulate high site, high power interference. Moreover, in an additional 49 counties, New Clearwire will control all 112.5 MHz of EBS spectrum and both BRS MBS channels—again, in those cases, it can plainly control high power interference. Similarly, the New Clearwire will control all 73.5 MHz of BRS spectrum in 1549 counties in the U.S. In those cases, because it is permitted to use the MBS guardband, it can simply shift the guardband into the MBS and make full use of all BRS spectrum. Although AT&T suspects that many other counties would be similarly situated, the data is insufficient to identify those cases. For example, in 1799 counties, New Clearwire would control all BRS MBS spectrum, but not all of the EBS spectrum. In those cases, it cannot be determined whether the EBS spectrum is even licensed or, if it is licensed, what percentage of the licensed spectrum in the MBS is under New Clearwire’s control. For example, if New Clearwire controls only 30 MHz of EBS spectrum in those 1799 counties, but that EBS spectrum is all MBS, New Clearwire can plainly control high site, high power interference.

<sup>28</sup> Public Interest Statement at 41.

interfere with New Clearwire’s operations. With respect to Globalstar’s use of this spectrum for Mobile Satellite Service (“MSS”) operations, the Commission explained that “the majority of the MSS channels will be unencumbered by new terrestrial use of the 2496-2500 MHz band” and also “dictated that MSS receive operations in the 2495-2500 MHz portion will not be able to claim interference protection from new fixed and mobile operations.”<sup>29</sup> Further, the Commission explained that BRS/EBS operators and the 108 grandfathered terrestrial licensees “could share the spectrum through coordination efforts, which should be successful given the limited number of licensees.”<sup>30</sup> Finally, the Commission stated that “BRS operations will be able to coexist with ISM operations because ISM operations use frequencies closer to the center of the [2400-2500 MHz] band and in a controlled environment.”<sup>31</sup> In sum, the Commission has addressed these spectrum sharing issues, and expressed confidence that all types of users will be able to successfully operate in this spectrum with minimal interference.

As a final matter, the applicants have sought to eliminate the guard band spectrum in the BRS/EBS band from attribution. While it is clear that spectrum not used or available to licensees should not be attributed for purposes of any spectrum screen, the two guard band segments between the lower power BRS/EBS bands and the MBS is, in fact, available to adjacent licensees. Indeed, where the New Clearwire holds exclusive rights for both the MBS and adjacent spectrum—which occurs in a number of markets—the MBS guard bands are fully available to the company for broadband deployment.

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<sup>29</sup> *BRS Report and Order*, ¶ 27, n. 67.

<sup>30</sup> *Id.*, ¶ 28.

<sup>31</sup> *Id.*

Thus, AT&T does not believe that the applicants' attempts to degrade the functionality of the BRS/EBS band for purposes of the spectrum screen should be validated. Indeed, when speaking to the investment community, applicants painted a dramatically different picture regarding the capacity of BRS/EBS band,<sup>32</sup> stating “[c]ombining Sprint and Clearwire’s 2.5 GHz spectrum holdings will give the new venture an average of 151 MHz of capacity in each of the top 100 U.S. markets,” and “[i]n markets 101 to 200 the company will have at least 100 MHz on average.”<sup>33</sup> In fact, the applicants directly compared their spectrum holdings to those of AT&T and Verizon in this chart, excerpted from a presentation<sup>34</sup> to potential investors on May 7, 2008:

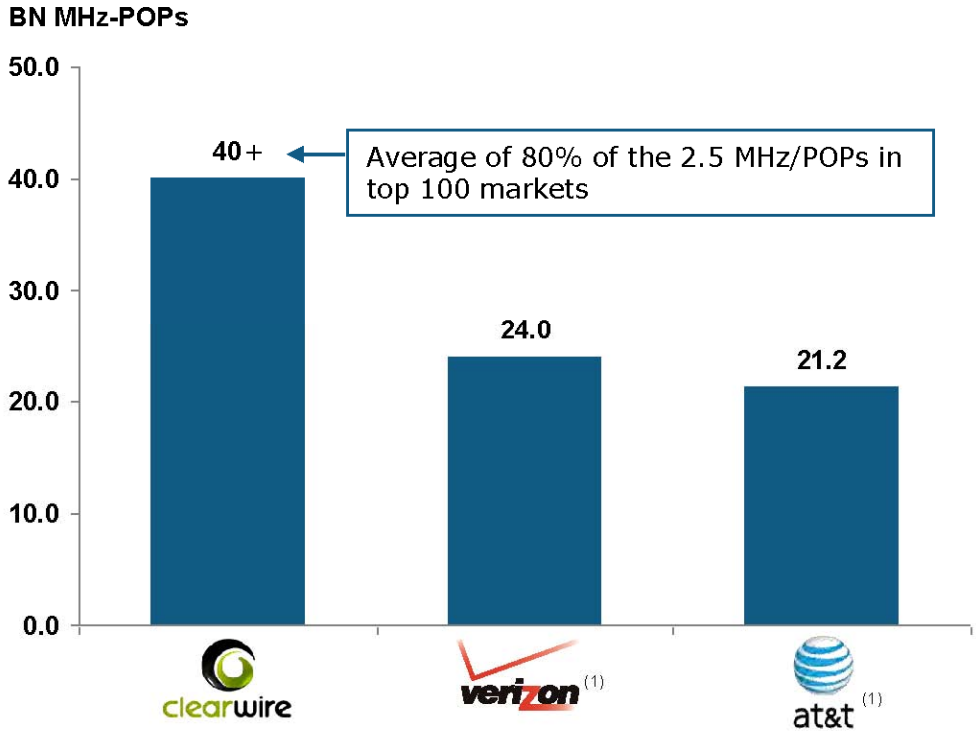
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<sup>32</sup> To the extent that Clearwire has been representing to the public—and the Securities and Exchange Commission—that its spectrum holdings are 150 MHz in the top 100 markets, and yet represented to the FCC that it has only 55.5 MHz of spectrum, questions are raised as to whether the company has engaged in a lack of candor before a federal government agency.

<sup>33</sup> “New Wireless Venture Seen Drawing Scant Regulatory Scrutiny,” *COMMUNICATIONS DAILY* at 4 (May 8, 2008).

<sup>34</sup> See Clearwire/Sprint Investor Presentation, May 7, 2008, p. 10, <http://www.clearwireconnections.com/pr/presentations/050708.pdf> (last visited July 24, 2008) (“Clearwire/Sprint Investor Presentation”).

## Spectrum Holdings (Key U.S. Carriers)



If the New Clearwire cannot and does not intend to use anything but 55.5 MHz of the 195 MHz BRS/EBS band, a substantial question is raised as to whether the company is warehousing nearly 140 MHz of spectrum and whether the transfer of control or assignment of that spectrum is in the public interest.

### **III. The New Clearwire Applications Fail to Address the Potential Competitive Effects Arising from the Consolidation of the BRS/EBS Band.**

If the spectrum screen is rationally adjusted to account for the entirety of the BRS/EBS band, the prior 95 MHz cap would increase by approximately 65 MHz to 160 MHz.<sup>35</sup> According to the aggregation data provided by New Clearwire, the restructured company would exceed the

<sup>35</sup> The Commission has traditionally adjusted the screen by 1/3<sup>rd</sup> of the total available pool of commercial mobile radio service spectrum. See *AT&T-Dobson Order*, ¶ 30.



screen in no less than 1,134 counties containing 70% of the U.S. population. Because the applicants' Public Interest Statement is predicated upon either non-attribution of BRS/EBS spectrum, or attribution of only a nominal amount of BRS/EBS spectrum, the application fails to address at all the competitive effects associated with the proposed consolidation of the BRS/EBS band, or to balance those effects against purported public interest benefits.<sup>36</sup> Simply stated, applicants have failed to set forth the appropriate *prima facie* evidence that the proposed transaction is in the public interest.<sup>37</sup> Accordingly the application cannot be granted under its terms.

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<sup>36</sup> In this regard, the applicants have cited—as a public interest benefit of the transaction—“non-exclusive wholesale access” to its network. AT&T would dispute these wholesale arrangements are a public benefit at all—the only entities to which the company is wholesaling are its own investors. There is no indication that those entities would compete against one another or against the venture itself.

<sup>37</sup> Applicants note that their proposed transaction would increase the special access alternatives available to them by providing each company more direct access to the other's backhaul networks and allowing them to combine their traffic, to eliminate duplicative facilities, and to increase efficiencies on those networks. *See* Public Interest Statement at 23-24 (transaction allows Applicants to “share network equipment, backhaul, gateways, site shelters, and related gear,” and allow collocation of facilities on transmitter sites so the new company could “take advantage of greater volume discounts for microwave backhaul”); *see also* Clearwire/Sprint Investor Presentation, p. 8 (identifying “Cost Efficiencies” for “Backhaul & Telecom” as (1) “Leverage low cost microwave backhaul,” (2) “Access Sprint and Strategic Investors' network infrastructure,” and (3) “Combine vendor agreements and purchasing volume”). Indeed, the Applicants crow that their new WiMax network will provide an entirely new alternative to incumbent LEC special access services – “a scalable tool to offer reliable, high-bandwidth backhaul” that the Applicants claim “may be more cost-effective” than existing offerings. Public Interest Statement at 51. While these representations should indisputably put to rest, once and for all, Applicants' baseless claims that they lack alternatives to ILEC special access offerings for wireless backhaul traffic, the fact of the matter is that, even apart from this transaction, Applicants have numerous options for their special access needs and Applicants are fully availing themselves of those options. Sprint, for example, recently announced that it will use 1.6 Gbps microwave backhaul for its 4G network, a solution that analysts note means that the only wires its towers will require are power lines. *See* Nate Anderson, “Sprint to use 1.6 Gbps Wireless Backhaul for Xohm WiMax,” ARS TECHNICA (July 10, 2008), <http://arstechnica.com/news.ars/post/20080710-sprint-to-use-1-6gbps-wireless-backhaul-for-xohm-wimax.html> (last visited July 24, 2008) (“Sprint has finally announced its [backhaul] solution: it's going wireless. Towers will only need power links; all other data passing from the

#### IV. Conclusion

AT&T submits that the Commission's prior treatment of mergers and competitive combinations in the mobile services market compels the application of the initial spectrum screen to the New Clearwire applications. And, in so doing, consistency and logic dictate that the BRS/EBS spectrum held and controlled by the applicants must be considered. Indeed, the applicants themselves have positioned their company as the single largest holder of broadband mobile spectrum in the country and stated their intent to apply those assets to competing with traditional mobile carriers such as AT&T. While AT&T does not fundamentally oppose the underlying transactions, the regulatory process must be consistent for all entrants, including the

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backbone (or a local aggregation facility) to the end user will travel over the air"). Indeed, in stark contrast to Sprint's baseless claims about special access pricing, Sprint's Chief Technology officer recently admitted that the only reason microwave backhaul is not already as prevalent here as it is in the rest of the world is that "relatively abundant and inexpensive T-1s have stifled the technology here." See Stephen Lawson, "Sprint Picks Wireless Backhaul for WiMAX," *INDUSTRY STANDARD* (THESTANDARD.COM) (July 9, 2008), <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax> (last visited July 24, 2008) (Sprint announces deal with DragonWave to build wireless backhaul networks and notes that "DragonWave is one of a number of vendors Sprint is working with in its WiMAX development," along with others, such as "FiberTower for wireless backhaul"). Hence, regardless of the outcome of this proceeding, Sprint and others will have plenty of affordable facilities-based alternatives to incumbent LEC special access services.

New Clearwire, and regulatory parity therefore requires an examination of the reformed company's spectrum aggregation.

Respectfully submitted,

**AT&T INC.**

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July 24, 2008

CERTIFICATE OF SERVICE

I, Kimberly Riddick, hereby certify that on this 24<sup>th</sup> day of July, 2008, I caused copies of the foregoing "Petition to Deny of AT&T Inc." to be served, First Class mail, postage pre-paid, on the following:

Robin J. Cohen  
Sprint Nextel Corporation  
2001 Edmund Halley Drive  
Reston, Virginia 20191

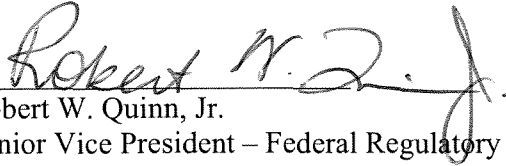
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Kimberly Riddick

**DECLARATION OF ROBERT W. QUINN, JR.**

I, Robert W. Quinn, Jr., declare under penalty of perjury that:

1. I am the Senior Vice President – Federal Regulatory of AT&T Inc. and have served in that capacity for 29 months.
2. I have reviewed the foregoing “Petition to Deny of AT&T Inc.” and, to the best of my knowledge and information, the facts stated therein are correct in all respects.



Robert W. Quinn, Jr.  
Senior Vice President – Federal Regulatory  
July 24, 2008