BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Applications of Sprint Nextel Corporation	)	
and Clearwire Corporation for Consent to	)	WT Docket No. 08-94
Transfer Control of Licenses and	)	
Authorizations	)	
	)	
File Nos. 0003462540, *et al.*	)	

JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY TO COMMENTS

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Summary

The New Clearwire transaction presents an unparalleled opportunity to accelerate broadband deployment in the United States. Nearly 100 parties, including numerous educational and religious institutions and commercial operators, recognize the significance of this opportunity and have filed comments urging the Commission to approve the transaction expeditiously. These supporting comments confirm the important public interest benefits of the transaction. By combining the 2.5 GHz assets of Sprint Nextel Corporation ("Sprint") and Clearwire Corporation ("Clearwire") (collectively, the "Applicants") New Clearwire will be able to deploy a nationwide mobile WiMAX broadband network in a spectrum band that has long been underutilized. New Clearwire's advanced 4G mobile broadband network, based on open standards and providing wholesale access, will create new broadband competition, stimulate greater choice and innovation, and benefit millions of consumers as well as schools, universities, religious institutions, and businesses throughout the country.

Only three parties opposed the transaction or proposed conditions. Their claims lack merit and provide no basis for denying, delaying, or imposing conditions on the approval of the New Clearwire license transfers. Vonage Holdings Corporation ("Vonage") supports the Applicants' open network proposal and agrees that this approach will spur innovation in applications and devices and greater broadband competition. Nevertheless, Vonage asks the Commission to require New Clearwire to comply with the Commission's *Internet Policy Statement* and to offer its new WiMAX service unbundled from its VoIP service. These conditions are unwarranted and unnecessary. As a new company in a highly competitive environment, New Clearwire has every incentive to act

in full compliance with the principles in the *Internet Policy Statement*. Moreover, by choosing to deploy WiMAX technology in its nationwide mobile broadband network, New Clearwire has already ensured that consumers using its network can and will enjoy the rights set forth in that *Statement*. Nor is there any basis for an unbundling condition. The Applicants have consistently stated that customers will have unimpeded access over New Clearwire's network to any service provider, application, or WiMAX–compatible device they desire.

New Clearwire's business depends on expanding the "ecosystem" of WiMAX users and operators. Therefore, New Clearwire has a strong commercial incentive to negotiate reasonable roaming and wholesale arrangements with as many WiMAX operators as possible. Unaffiliated entities that negotiate roaming or wholesale arrangements with New Clearwire will have a unique opportunity to pursue their own innovative marketing of WiMAX devices and services in the 2.5 GHz band. Accordingly, there is no public interest basis for imposing the conditions sought by the Rural Cellular Association.

Finally, AT&T Inc. ("AT&T") filed a "Petition to Deny" but concedes that it "does not fundamentally oppose the underlying transactions." AT&T, the world's largest telecommunications operator, fails to identify a single competitive harm that would result from the proposed New Clearwire transaction. Nonetheless, AT&T argues that the Commission should apply its Commercial Mobile Radio Service ("CMRS") spectrum screen to the proposed transaction. The Commission should reject AT&T's transparent attempt to distort the Commission's public interest analysis to benefit its own competitive self-interest. AT&T proposes an entirely new "spectrum screen" that would include the

2.5 GHz Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") spectrum, in which AT&T has no holdings, while excluding other bands (such as the Advanced Wireless Service-1 band) where AT&T holds sizeable spectrum rights. AT&T's cherry-picked spectrum screen ignores Commission precedent and important distinctions between 2.5 GHz spectrum and the spectrum bands the Commission has previously included in its initial CMRS spectrum screen.

In several prior orders, including an order released just three days ago, the Commission determined that its CMRS spectrum screen does not apply to the 2.5 GHz BRS spectrum, let alone the 2.5 GHz EBS spectrum. The Commission has just affirmed that the 2.5 GHz band is very different from the CMRS and 700 MHz bands that have been included in the spectrum screen analysis in prior CMRS mergers. The 2.5 GHz band has different propagation characteristics, unusual licensing and leasing restrictions, and a range of technical and licensing challenges that 2.5 GHz operators must overcome to deploy broadband service. As a result, operators require more spectrum at 2.5 GHz to deploy a mobile broadband network than in the CMRS or 700 MHz bands. The Commission has recognized these challenges when it emphasized the "nascent" nature of 2.5 GHz services and the Commission's "longstanding regulatory policies regarding the 2.5 GHz band, including the encouragement of consolidation of spectrum in this band, due to its historical underutilization." The Commission should reject AT&T's transparent attempt to use the Commission's spectrum screen to hamstring prospective competition to AT&T.

Approving the New Clearwire transaction will stimulate broadband deployment in a historically underused portion of the radio spectrum and encourage competition against

much larger, vertically integrated Bell Operating incumbents, such as AT&T. New Clearwire will invest billions of dollars in facilities-based wireless broadband infrastructure, services, and applications designed to serve American consumers, businesses, and educational and religious institutions. The Commission should expeditiously approve the Applicants' proposed license transfers.

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JOINT OPPOSITION TO PETITIONS TO DENY AND REPLY TO COMMENTS

Sprint Nextel Corporation ("Sprint") and Clearwire Corporation ("Clearwire") (collectively the "Applicants") hereby submit their Joint Opposition to Petitions to Deny and Reply to Comments in the above-captioned proceeding. The vast majority of commenters strongly support expeditious and unconditional approval of the proposed New Clearwire transaction. As the record demonstrates, the proposed transaction will create a new, vibrant broadband competitor and promote innovation in the U.S. The New Clearwire transaction poses no competitive concerns, and the public interest strongly weighs in favor of quick and unqualified Commission approval.

INTRODUCTION

On June 24, 2008 the Applicants submitted amended applications seeking FCC approval for a new venture that would combine the resources of their 2.5 GHz assets and businesses to create a nationwide advanced wireless broadband network and, upon approval of the transaction, enable New Clearwire to receive a vital $3.2 billion investment from five of the nation's technology, content and communications leaders:

Intel Corporation ("Intel"), Google, Inc. ("Google"), Comcast Corporation ("Comcast"), Time Warner Cable ("Time Warner") and Bright House Networks ("Bright House") (collectively the "Transaction"). As the Applicants explained, New Clearwire seeks to deploy an advanced mobile WiMAX broadband network that will cover up to 140 million people in the U.S. in thirty months and cover additional population shortly thereafter.[1/]

Only two parties filed Petitions to Deny the applications, and only one other party sought to condition the Transaction. In an ironic maneuver, AT&T, the largest telecommunications company in the world with annualized projected revenues this year of $123 billion and almost $43 billion in wireless revenue, seeks to invoke inapplicable regulatory restraints that would stifle and delay the emergence of New Clearwire.[2/] AT&T states that it "does not fundamentally oppose the underlying transactions,"[3/] but nonetheless attempts to stifle the emergence of a viable wireless broadband competitor by improperly seeking to apply the Commission's Commercial Mobile Radio Service ("CMRS") spectrum screen to Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") spectrum. Vonage Holdings Corporation ("Vonage") – although it also does not oppose the Transaction – rehashes old and unfounded

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[1/] As the Applicants also explained, consumers using the New Clearwire network will be able to use any lawful, WiMAX-compatible device, and download and use any software applications, content or services they desire, subject only to reasonable network management practices and law enforcement and public safety considerations. New Clearwire will also permit non-exclusive wholesale access to its network on commercially reasonable terms.

[2/] AT&T Inc., Current Report (Form 8-K) at Exhibit 99.2, "Selected Financial Statements and Operating Data" (July 23, 2008), *available at*: <http://www.sec.gov/Archives/edgar/data/732717/000073271708000056/0000732717-08-000056-index.htm>. AT&T does not hesitate to boast that it is the "largest communications holding company in the world by revenue." AT&T Corporate Profile, *available at:* <http://www.att.com/gen/investor-relations?pid=5711> (viewed Aug. 3, 2008).

[3/] Petition to Deny of AT&T Inc. at 15 ("AT&T Petition"). (Unless otherwise indicated, all comments and petitions to deny cited herein were filed in WT Docket No. 08-94 on or about July 24, 2008.)

complaints against Clearwire in an effort to justify imposing unnecessary regulatory conditions on the Transaction, despite Vonage's acknowledgement that the New Clearwire broadband network will be built on the inherently open standards of the WiMAX technology itself. The Rural Cellular Association ("RCA") asks the Commission to impose an ill-defined, unsupported, and unprecedented roaming condition on New Clearwire.[4/] Apart from these three parties, nearly 100 other parties, including scores of educational and religious institutions that collectively serve millions of American students, unconditionally support the applications and urge their expeditious approval.

The Commission should reject these requests to hamstring New Clearwire with unnecessary conditions. New Clearwire lacks market power in the provision of any service, and no petitioner or commenter has alleged any merger-specific harm from the Transaction. As the Commission has consistently held, regulation imposes costs on the regulated entities as well as the regulators and is appropriate only in the instance of market failure.[5/] There is no evidence here of market failure warranting government intervention. To the contrary, the Transaction will strengthen the marketplace by introducing an exciting new competitor that will deploy a network utilizing the inherently

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[4/] SouthernLINC Wireless ("SouthernLINC") submitted comments welcoming the Applicants' pledge to provide wholesale access to New Clearwire's open, mobile WiMAX network, but at the same time expressed a need for greater clarity and certainty regarding this commitment. The Applicants address these comments *infra* at section III.A.

[5/] *1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, Notice of Proposed Rulemaking, 13 FCC Rcd 25132, ¶ 5 (1998) (stating that the "Commission should consider imposition of regulation when there is an identifiable market failure and imposition of the regulation would serve the public interest because it is targeted to correct that failure."); *see also Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 173 (1994) (affirming that "in a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power.").

open WiMAX standard and will make capacity on that network available to third parties. The prospect of such a new competitor with an open business model renders government involvement in this instance wholly unnecessary.

I. THE OVERWHELMING MAJORITY OF COMMENTERS UNCONDITIONALLY SUPPORT THE PROPOSED TRANSACTION

A. The Proposed Transaction Presents an Unparalleled Opportunity to Accelerate Broadband Deployment

Commenters' overwhelming support for the Transaction shows that "combining the assets of the two companies will ignite faster introduction of 2.5 GHz mobile WiMAX service and thus introduce new broadband competition across the country . . . [representing] precisely the sort of accelerated broadband deployment that the Commission hoped to encourage by overhauling the 2.5 GHz bandplan."[6/] Commenters note that the New Clearwire will be able to compete with large incumbent local exchange telephone companies and cable operators.[7/] As a substantial holder of EBS licenses notes, "New Clearwire will also permit a number of unaffiliated firms to purchase access to its wireless broadband service on a non-exclusive wholesale basis and resell that service directly to consumers in competition with New Clearwire and other wireline and wireless providers."[8/]

6/ Comments of Wireless Communications Association International, Inc. ("WCA") at 5.

7/ *See, e.g.*, Comments of Vonage at 3-4 ("New Clearwire's nationwide WiMax network should spur competition in the provision of broadband service to the home. . ."); Comments of Fortitude Ventures, LLC ("Fortitude") at 1 (the Transaction will "benefit all Americans by bringing them another competitive broadband alternative choice to the current incumbent providers").

8/ Comments of Hispanic Information and Telecommunications Network, Inc. ("HITN") at 5.

The majority of commenters also note that the proposed Transaction makes the Commission's vision for the 2.5 GHz band a reality.[9/] For instance, the George Mason University Instructional Foundation notes that "[i]f the FCC were to reject the request of these two companies to combine their efforts and their 2.5 GHz assets, the Commission would kill any hope for nationwide fixed and mobile broadband services on the 2.5 GHz spectrum."[10/] Given the historic underutilization of the 2.5 GHz band, many commenters celebrate the prospect of finally having this spectrum put to efficient use for not only the educational community but the American public at large.[11/]

Commenters cite the benefits that New Clearwire's proposed WiMAX network will bring in spurring innovation in broadband applications and devices.[12/] They note that the Transaction will lower costs for consumers by promoting increased development of new products and services based on WiMAX technology.[13/] Others note that authorizing the New Clearwire transaction can help drive the expansion of advanced wireless broadband services to small rural communities.[14/] As Digital Bridge states, "New Clearwire's proposal . . . will dramatically increase [Digital Bridge's] ability to achieve

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9/ *See, e.g.*, Comments of Broadband Spectrum Development III, LLC, Broadband Mobile Data IV, LLC and Blake Twedt (collectively, "Broadband Spectrum") at 1 ("The transaction will enable New Clearwire to utilize the 2.5 GHz spectrum to create a long-awaited nationwide broadband network").

10/ Comments of The George Mason University Instructional Foundation, Inc., *et al*. at 3.

11/ *See, e.g.*, Comments of Fortitude at 1 ("It is no secret that the 2.5 GHz spectrum band has been historically underutilized despite efforts in the past to promote its use for various different types of uses"); Comments of School Board of Miami-Dade County at 4.

12/ *See, e.g.*, Comments of Vonage at 3; Comments of St. Bernard Parish School Board at 1 ("New Clearwire's deployment . . . will create a unique opportunity to deliver new broadband products and services in the 2.5 GHz band"); Comments of Clarendon Foundation at 1.

13/ *See, e.g.*, Comments of WCA at 6.

14/ *See* Comments of DigitalBridge Communications ("Digital Bridge") at 1; *see also* comments of Xandoo, LLC ("Xanadoo") at 1 (noting its use of 2.5 GHz spectrum in Texas and Oklahoma).

its own goal of providing wireless broadband services to small, rural communities using WiMAX technology throughout the United States."[15/]

Commenters also note that New Clearwire is uniquely positioned to bring these new broadband services and products to the public and that the Transaction "is the only feasible means of achieving the synergies, economies of scale and industry-wide benefits inherent in a coast-to-coast mobile WiMAX network."[16/] As the commenters recognize, multiple synergies inherent in the proposed Transaction will lead to more efficient and effective spectrum use and reduced operational costs.[17/] BRS operators and other wireless service providers confirm that the Transaction is essential for obtaining the capital funding necessary for the deployment of a nationwide advanced wireless broadband network. For instance, Xanadoo states that it is "painfully aware of the capital constraints currently facing entrepreneurial wireless broadband network operators seeking to introduce competitive broadband wireless services to American consumers and businesses."[18/] Likewise, IDT Spectrum notes that "as separate companies without access

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15/ Comments of Digital Bridge at 2. *See also* Comments of Gryphon Wireless at 1 ("This commercial ability [of WiMAX technology] will provide new opportunities for other Commission licensees and wireless network operators at 2.5 GHz, especially those in rural areas, such as Gryphon").

16/ Comments of WCA at 4, *see also, e.g.*, Comments of IDT Spectrum, LLC ("As a well funded nationwide WiMAX provider, however, New Clearwire undoubtedly would have the ability to ramp up its capital expenditures and roll out WiMAX services on a more aggressive timetable."); Comments of Source for Learning at 4 (New Clearwire will have the "capacity, scale and funding necessary to deploy a nationwide mobile wireless broadband network"); Comments of Shekinah Network at 2 ("New Clearwire will have the capacity, scale and money necessary to unleash the promise of the historically underutilized 2.5 GHz spectrum"); Comments of North Carolina Association of Community College Presidents at 2; Comments of Northeast Georgia RESA at 2; Comments of Clarke County School District at 1; Comments of Jackson County School System at 1.

17/ For example, the Indiana Higher Education Telecommunications System notes that "[T]he New Clearwire proposal would minimize the number of adjacent service area boundaries that otherwise require resource-intensive coordination and accommodation." Comments at 5.

18/ Comments of Xanadoo at 2.

to substantial capital, Clearwire and Sprint would face high hurdles to construct their individual systems in an expeditious manner."[19/] As the commenters further observe, by pooling spectrum resources, New Clearwire can secure the capital needed to build a nationwide wireless broadband network that otherwise will not be possible.[20/]

B. The Transaction Will Provide Significant Benefits to Existing EBS Licensees

The EBS community, represented by its major trade associations as well as individual EBS licensees, strongly supports the Transaction. EBS licensees state that the Transaction will "enable EBS licensees and other educational institutions, as well as their students, faculty and staff, to finally obtain the educational benefits made possible by 2.5 GHz-based advanced wireless broadband services"[21/] and "stimulate the deployment of 2.5 GHz wireless broadband services on those licenses, furthering EBS licensees' educational missions as well as economic benefits from their spectrum leases."[22/] EBS licensees agree that the Transaction is necessary because combining the Sprint and

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19/ Comments of IDT Spectrum, LLC at 4. *See also* Comments of Private Networks, Inc. at 2 ("In our opinion, it doesn't make sense to build two totally new Wimax networks. It would be too costly to build and, too costly to operate").

20/ *See, e.g.*, Comments of The Source for Learning at 3 ("[U]nless they combine their spectrum assets, infrastructure and expertise, neither Sprint nor Clearwire alone would be able to provide EBS licensees with high-speed broadband access, advanced broadband services or a nationwide mobile broadband network any time in the near future."); *see also* Comments of IDT Spectrum, LLC at 4; Comments of St. Joseph's Church/Diocese of Orlando at 1; Comments of Atlanta Interfaith Broadcasters, Inc. at 2.

21/ Comments of National Educational Broadband Services Association ("NEBSA") at 1; *see also,* Comments of the Archdiocese of Los Angeles at 1; Comments of University of Central Florida at 1.

22/ Comments of HITN at 2; *see also, e.g.*, joint comments of fifty six EBS licensees ("Joint EBS") at 2 ("The combination of these assets and this significant investment will promote the deployment of an advanced, nationwide wireless network in the 2.5 GHz band that will benefit consumers and the EBS community alike."); Colorado Public Television ("The EBS license that Colorado Public Television leased to Sprint enables CPT the financial freedom to offer more quality programming to our community.")

Clearwire assets and the infusion of the proposed capital is essential to the deployment of this nationwide, advanced wireless network.[23/] In all, more than 75 educational and religious institutions with a collective student population of millions stand behind the Transaction as the best way of fulfilling their educational mission to their students, parishioners, and other constituents.[24/]

Many educational institutions believe that granting the applications will further their educational missions as well provide economic benefits.[25/] The Indiana Higher Education Telecommunications System cites a recent report by the State Education Technology Directors Association ("SETDA"), stating that access to high-speed broadband in the schools would:

> (i) allow teachers and students to take advantage of a wide range of new educational tools and resources available for learning anytime and anywhere; (ii) advance teachers' professional development by allowing them to engage in professional learning communities and to access new educational resources, such as curriculum cadres and education portals; (iii) allow school administrators to conduct online assessments and access data for effective decision making; and (iv) help students to overcome the digital divide in rural and low socio-economic areas.[26/]

[23/] *See, e.g.*, Comments of Joint EBS at 3; Mississippi Authority for Educational Television at 1-3; Comments of Oklahoma Distance Learning Association at 1; Comments of Colorado State University at 1.

[24/] *See, e.g.*, Comments of Illinois Institute of Technology ("EBS licensees need a viable commercial partner capable of deploying new technologies and being a strong partner with the EBS community").

[25/] *See, e.g.*, Comments of HITN at 2-3; New Trier Township High School District 203 at 1-2; Acadia Parish School Board, Calcasieu Parish School Board, Jefferson Davis Parish School Board at 1-2; Community Telecommunications Network at 2-4; The Source for Learning at 2-5; Indiana Higher Education Telecommunication System at 3-5; California State University at 1-2; North American Catholic Educational Programming Foundation at 1-2; Chicago Instructional Technology Foundation, Inc. at 2-3; Mississippi Authority for Educational Television Comments at 1-3; Catholic Television Network Comments at 1; Caritas Telecommunications at 1; Stanford Center for Professional Development at 1-2.

[26/] Comments of Indiana Higher Education Telecommunication System at 3.

The Source for Learning likewise states that "[a]pproval of the Sprint-Clearwire [transaction] would promote the deployment of a new integrated nationwide broadband network within the very near future, thus expediting the availability of high-speed advanced broadband services to the educational community."[27/] Joint EBS, a group of 56 like-minded EBS licensees from around the country, agrees: "[T]he greater speed, mobility, and reach of the network may allow us to expand the educational resources we can deliver to our communities."[28/]

In addition to benefiting schools and other educational institutions, commenters recognize that the proposed Transaction will increase availability of broadband to minorities and underserved areas of the country. HITN's long-term lease agreements with Clearwire create a capacity reservation that provides for mandatory access to New Clearwire's services that will reach underserved educational, minority, and non-profit communities. HITN intends to create a nationwide WiMAX service through this reservation to promote educational opportunities for minorities.[29/]

Given the historic underuse of the 2.5 GHz band and repeated attempts to change the Commission's rules to facilitate the mission of the educational community and others through this spectrum, EBS licensees convey excitement at the prospect of their spectrum

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27/ Comments of The Source for Learning, Inc. at 3.

28/ Comments of Joint EBS at 3; *see also* Comments of Northern Arizona University of Foundation at 1 ("These capabilities will dramatically enhance the ways that students, faculty, and surrounding communities access the Internet – combining mobility and speed with access anytime and anywhere, whether at home, at school, or on the road."); Comments of Stanford Center for Professional Development at 1 ([the Transaction] "will extend the reach, accessibility and functionality of Stanford's professional course offering, and enhance Stanford's distant education programs."); Comments of Florida Atlantic University at 1 ("FAU looks forward to the untethering of educational broadband services and applications through mobile WiMAX); Comments of Ideastream at 1.

29/ Comments of HITN at 3.

resources becoming "part of a state-of-the-art wireless broadband network that has nationwide reach."[30/] Many EBS licensees have mentioned that they "have looked forward to the day when their EBS facilities could be employed to support the provision of . . . 21st century services for the use of their students, faculty and administration," and note that the Transaction will enable them to incorporate these technologies in the "day-to-day education of their students."[31/]

II. VONAGE'S PROPOSED NETWORK ACCESS CONDITION IS UNWARRANTED AND UNNECECESSARY

Vonage, a provider of voice over Internet protocol ("VoIP") services, does not oppose FCC consent to the applications, but nevertheless asks the FCC to require New Clearwire to comply with the Commission's *Internet Policy Statement*[32/] and to offer its new WiMAX service unbundled from its VoIP service. The predicate for Vonage's request appears to be unsubstantiated three-year-old claims previously reported by Vonage customers *to Vonage* about being unable to use its VoIP service over the "old" Clearwire network.[33/] Imposing such conditions is unnecessary, contrary to the public interest, and inconsistent with the Commission's long-held reliance on market forces rather than regulation to advance its policy objectives.

In evaluating applications for transfer or assignment, the FCC considers whether grant of the proposed transaction will promote the public interest, convenience and

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30/ Joint EBS Comments at 3; *see also* Comments of Delta Band Services at 1; Comments of Georgia Institute of Technology at 1.

31/ Comments of the Community Telecommunications Network at 2, 4; *see also* Comments of Acadia Parish School Board, *et al.* at 1-2; Comments of New Trier Township High School District 203 at 2.

32/ *Policy Statement*, 20 FCC Rcd 14986 (2005) (*"Internet Policy Statement"*).

33/ Comments of Vonage at 1.

necessity,[34/] and "[t]he Commission has held that it will impose conditions *only to remedy harms that arise from the transaction* (*i.e.*, transaction-specific harms)."[35/] In this instance, Vonage has failed to demonstrate any harms that would arise as a result of the proposed transaction.[36/] To the contrary, Vonage acknowledges and supports the Applicants' open network proposal and "agrees with Sprint and Clearwire that an open network will spur innovation in applications and devices" and that "WiMax network should spur competition in the provision of broadband services to the home."[37/]

In the face of Vonage's recognition of the openness and consumer benefits of New Clearwire's proposed nationwide WiMAX network, Vonage's request for merger conditions is puzzling. As Vonage itself apparently recognizes, the WiMAX network New Clearwire will deploy is inherently open in nature, obviating the need for mandated conditions that require what WiMAX technology already embraces. By choosing to adopt and deploy WiMAX technology in its nationwide broadband network, New

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34/ 47 U.S.C. § 310.

35/ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶ 22 (2007) ("*AT&T-BellSouth Merger Order*") (emphasis added).

36/ Vintage non-recurring allegations of the sort advanced by Vonage cannot remotely be considered "merger specific" and do not provide any justification for imposing conditions on the instant Transaction. *See, e.g., Transfer of Certain Spectrum Licenses and Section 214 Authorizations from Verizon Communications Inc., et al. to Fairpoint Communications, Inc.,* Memorandum Opinion and Order, 23 FCC Rcd 514, ¶ 24 (2008) (declining to impose a service quality merger condition because the petitioners had already resolved such service quality problems and because it is "inappropriate to accord too much significance to prior performance issues . . . that have been corrected"); *Teleport Communications Group Inc. and AT&T Corp., Applications for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd 15236, ¶ 54 (1998) (approval of the transfer applications should not be subject to a proposed condition because the "concerns over the discriminatory aspects of AT&T's SCPA policy have been resolved by subsequent actions taken by the parties").

37/ Comments of Vonage at 3-4.

Clearwire has already ensured that consumers using its network can and will enjoy the rights set forth in the Commission's *Internet Policy Statement*.

In support of its proposed conditions, Vonage cites several merger orders involving Bell companies.[38/] But in each of those instances, the Bell entities *voluntarily* agreed to treat the *Internet Policy Statement* as an enforceable requirement.[39/] The Commission itself concluded that codification of the *Internet Policy Statement* was unnecessary because there was no evidence that the principles were then being violated by the parties and because, as the Commission explained in the *AT&T-BellSouth Merger Order*, "the vigorous growth of competition in the high-speed Internet access market further reduces the chances that the transactions are likely to lead to violations of the principles."[40/] In the one merger where the Commission was specifically asked to impose the *Internet Policy Statement* as a merger condition without the consent of the merger parties, as Vonage has done here, the agency declined to do so on similar grounds,[41/] noting that if instances of a company willfully blocking or degrading Internet content in the future occurred, the affected parties could file a complaint with the Commission.[42/]

38/ *Id.* at 7.

39/ *See AT&T-BellSouth Merger Order*, Appendix F; *see also Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶¶ 3, 143 (2005) ("*Verizon-MCI Order*"); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶¶ 3, 144 (2005) ("*SBC-AT&T Order*").

40/ *AT&T-BellSouth Merger Order* ¶ 119, *see generally id.* ¶¶ 117-120; *see also Verizon-MCI Order* ¶ 141 (market incentives "make it unlikely that the merged company would choose to engage in packet discrimination or degradation of IP traffic"); *SBC-AT&T Order* ¶ 142 (same).

41/ *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶¶ 217-223 (2006) ("*Adelphia Order*").

42/ *Adelphia Order* ¶ 220; *see also* FCC News Release, "Commission Orders Comcast to End Discriminatory Network Management Practices" (rel. Aug. 1, 2008).

The same remedy exists here and the Commission should similarly decline to impose a condition on New Clearwire.[43/] As a new company in a highly competitive environment, New Clearwire has every incentive to act in full compliance with the principles in the *Internet Policy Statement*.[44/]

There is also no basis or need to require as a condition of approval of the Transaction that New Clearwire offer its broadband WiMAX service unbundled from its VoIP service. There is no history of Clearwire or Sprint refusing to provide stand-alone broadband services, in stark contrast to the instances cited by Vonage.[45/] Clearwire currently provides its wireless broadband Internet access service on a stand-alone basis, and the Applicants have consistently stated that customers will have unimpaired access over New Clearwire's network to any service provider, application or WiMAX–compatible device they desire. Moreover, New Clearwire lacks market power in any service. Accordingly, imposing an unbundling condition is wholly unnecessary and inappropriate.[46/]

43/ Indeed, in response to the only two informal complaints alleging problems with accessing third-party VoIP providers in the four years Clearwire has offered commercial wireless broadband service, Clearwire took immediate and aggressive measures designed to ensure that its customers could access the VoIP providers of their choice.

44/ *Cf. Adelphia Order* ¶ 223; *AT&T-BellSouth Merger Order* ¶ 119.

45/ Comments of Vonage at 7. In those cases, moreover, the unbundling requirement prevented the Bell companies from using their market power over basic voice telephone service to force subscribers to purchase voice as a condition of being able to buy digital subscriber line ("DSL") service.

46/ Vonage's concern about the availability of application programming interfaces ("APIs") is also misplaced. *See* Comments of Vonage at 4. New Clearwire will make service level APIs available to any third party on a non-discriminatory basis. Moreover, New Clearwire has committed in the first instance to design its network such that not only will its offerings be open, but it will provide robust consumer access to the public mobile Internet at capacities sufficient to enable commercially viable application as a basic service.

Finally, the fact that New Clearwire intends to provide service on an open, unbundled basis is not a justification for codifying this intent as a regulatory obligation. As noted above, the Commission has consistently held that regulation imposes costs on the regulated entities as well as the regulators and is appropriate only in the instance of market failure. As demonstrated above and in the Application, there is no evidence of market failure warranting government intervention.

III. NEW CLEARWIRE'S PROVISION OF WHOLESALE ACCESS TO ITS NETWORK WILL PROMOTE COMPETITION AND OBVIATES ANY CONCERNS ABOUT ROAMING

A. New Clearwire's Commitment to Wholesale Access Encompasses SouthernLINC and Other Potential Competitors

In the Application, Sprint and Clearwire indicated that "New Clearwire will permit a number of unaffiliated firms to purchase access to its advanced wireless broadband service on a non-exclusive wholesale basis and resell that service directly to consumers in competition with New Clearwire and other wireline and wireless providers."[47/] By providing wholesale access to its nationwide WiMAX network, New Clearwire will be able to generate new forms of competition and further enhance consumer choice in the broadband marketplace.[48/] In its comments, SouthernLINC states that it "welcomes the[se] public statements," and observes that these commitments could mean that "the proposed transaction . . . provide[s] significant public benefits, such as greater access to a broader variety of services, service providers, and service options for a

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47/ Application of Sprint and Clearwire, Description of Transaction and Public Interest Statement (attached as Exhibit 1 to ULS File No. 0003368272), at 21 (June 24, 2008) ("Application").

48/ *Id*. at 21-22.

greater number of US consumers, including those in rural and underserved areas."[49/] At the same time, however, SouthernLINC asks that the Applicants "provide greater clarity and certainty regarding their intentions with respect to wholesale broadband access to the proposed New Clearwire network."[50/]

In response to SouthernLINC's concerns, the Applicants hereby reiterate their commitment to give unaffiliated entities wholesale access to New Clearwire's nationwide WiMAX network. Specifically, New Clearwire will provide this wholesale access not only to its strategic investors that have already committed to enter into non-exclusive wholesale agreements with New Clearwire,[51/] but also to other entities that are willing to negotiate commercially reasonable terms and conditions for this access. This commitment encompasses any provider, including SouthernLINC, that may in the future desire to resell New Clearwire's service in a particular market. Given the unparalleled openness of New Clearwire's network, SouthernLINC and other mobile virtual network operators ("MVNOs") and resellers will have a unique opportunity to pursue their own innovative marketing of WiMAX devices and services in the 2.5 GHz band, resulting in greater competition and wireless broadband options for consumers. This opportunity will only exist, however, if the Transaction is approved and the network can be deployed.

B. The Commission Should Reject the Rural Cellular Association's Ill-defined, Unnecessary, and Unprecedented Conditions

New Clearwire has a strong commercial incentive to extend roaming rights to any interested party as the best – and perhaps only – means of encouraging the proliferation

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49/ Comments of SouthernLINC Wireless at 4.

50/ *Id*. at 5.

51/ As indicated in the Application, Sprint, Comcast, Time Warner Cable, and Bright House Networks have already committed to enter into non-exclusive wholesale agreements with New Clearwire, and Intel and Google have options for similar agreements. Application at 21.

of WiMAX devices. In its Petition, however, the RCA ignores New Clearwire's commercial incentive to encourage roaming and proposes a number of ill-defined, unprecedented government-mandated merger conditions on New Clearwire.[52/] As a threshold matter, New Clearwire does not yet exist, its broadband network is unbuilt, and its mobile broadband services are unavailable. Imposing vague, open-ended government mandates would prove particularly harmful in this case because the restrictions RCA seeks would fall on a nascent business developing vital new broadband competition in the troubled and long-dormant 2.5 GHz band.

In any event, RCA does not appear to appreciate the degree to which the unprecedented openness of the New Clearwire network resolves RCA's professed concerns about "interoperability."[53/] Openness here means that any WiMAX-compliant device that does not harm the network will be able to operate on New Clearwire's network. As the Applicants have explained (and other commenters have recognized), New Clearwire's business model depends upon *encouraging* the proliferation of WiMAX devices and operations as a means of achieving the economies of scale necessary to

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52/ RCA asks that the Commission condition any grant of the Application on a requirement that New Clearwire enter into "interoperability" agreements with other wireless carriers when a reasonable request is made and networks are technologically compatible. RCA provides no meaningful definition of "interoperability" other than ensuring a robust, seamless roaming capability. RCA does not describe what this "interoperability" entails or what steps New Clearwire would have to take to comply with this requirement. *See* Petition to Deny, Rural Cellular Association, at 9 ("RCA Petition").

53/ Indeed, while RCA mentions the problems of dropped voice calls and lost data resulting from service interruptions in rural areas, it offers no connection between these events and the Applicants' proposed transaction. RCA Petition at 7. RCA attempts to connect the instant transaction to the pending merger application of Verizon Wireless and Alltel Wireless. RCA Petition at i, 6, 11. However, that transaction principally involves CMRS operations. In contrast, the instant Transaction relates solely to broadband wireless spectrum and service, which have never been subject to the same regulatory requirements. Accordingly, there is no basis for such linkage. The Commission must consider the proposed transfer of licenses to New Clearwire on its own merits.

produce highly affordable WiMAX chipsets. Sprint has already demonstrated its ability to work with ecosystem partners to incorporate WiMAX technology in a range of computing, portable multimedia, interactive and other consumer electronic devices, and New Clearwire intends to extend the same level of aggressive outreach to other prospective WiMAX operators. In the United States and around the globe, New Clearwire fully anticipates that other wireless operators will want to take advantage of the growing ecosystem of WiMAX devices and applications.

RCA, however, brushes aside New Clearwire's commercial incentives to cooperate with other WiMAX operators and demands a loosely defined "interoperability" merger condition that appears unprecedented in the wireless industry for even the largest, most entrenched wireless operators. The Commission is already examining the issue of wireless broadband roaming in an ongoing rulemaking proceeding.[54/] Therefore, given the lack of any transaction-specific harm, any consideration of roaming obligations for mobile WiMAX services in the 2.5 GHz band belongs in that proceeding.[55/] The petitioners provide no defensible reason for the Commission to depart from its past practice and consider an automatic roaming condition in this merger proceeding, where New Clearwire, a new wireless broadband competitor with no market power and that does not yet exist, would alone be subject to a regulatory obligation that would not be

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54/ *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, ¶ 79 (2007).

55/ *See Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 30 (2002) ("*AT&T-Comcast Order*") (to the "extent commenters raise concerns regarding an industry-wide trend . . ., we conclude that the appropriate forum to consider such issues is a rulemaking of general applicability"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from S. New England Telecomm. Corp. to SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21292, ¶ 29 (1998).

imposed on any of the incumbent wireless broadband service providers with which it would compete. By interceding only where there is evidence of marketplace failure, the Commission will foster the innovative and efficient development of mobile broadband services at 2.5 GHz.

RCA's requested prohibition on exclusive handset agreements between wireless operators and equipment manufacturers would be better addressed in a rulemaking proceeding that studied the entire marketplace for wireless broadband services. The petition for rulemaking that RCA filed with the Commission on exclusive handset agreements in May 2008 is the appropriate vehicle for the requested relief.[56/] There is no basis for adopting any condition related to this issue in conjunction with the instant Transaction; RCA provides no evidence regarding the Applicants' equipment procurement plans or potential harms in the 2.5 GHz band. Notably, RCA's petition itself asks that as a first step the Commission *investigate* the use and effects of any exclusivity arrangements, and any factual findings by the Commission on this issue are a long way off.[57/] In any case, as described in the Application, the formation of New Clearwire will promote more rapid development of the worldwide ecosystem of equipment and chipset manufacturers already supporting the open, non-proprietary WiMAX standard.[58/] These manufacturers will deliver an ever-increasing volume of standard WiMAX-enabled equipment and interoperable network and consumer devices

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56/ Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, Rural Cellular Association (May 20, 2008) ("RCA Petition for Rulemaking").

57/ RCA Petition for Rulemaking at 1.

58/ Application at 25-27.

and chipsets. This highly competitive landscape of WiMAX vendors should eliminate any concerns regarding exclusive equipment arrangements.

The Commission should reject RCA's call for singling out New Clearwire for government regulation and allow wireless broadband to evolve freely within a competitive market. With its open network, New Clearwire has every commercial incentive to expand roaming to the greatest degree possible. Imposition of unnecessary conditions on New Clearwire would upend commercial incentives to expand open network architectures and frustrate the chance of achieving new broadband competition in the United States.

IV. CONTRARY TO AT&T's CLAIMS, APPLICANTS HAVE DEMONSTRATED THAT COMBINING THEIR 2.5 GHz HOLDINGS WILL PROMOTE COMPETITION

Authorizing the Applicants to create New Clearwire will further invigorate broadband competition in the United States. AT&T – the largest telecommunications operator in the world with a market capitalization of $179 billion and an asset value of $278 billion – demands that the Commission deny this Transaction to create a new wireless broadband competitor.[59/] The Commission should dismiss AT&T's anti-competitive petition.

A. AT&T Fails to Rebut Applicants' Showing and Points to No Competitive Harm that Would Arise from the New Clearwire Transaction

In their detailed, 312-page public interest statement, Sprint and Clearwire fully documented all of their spectrum holdings in commercially useful bands below 2700

[59/] *See* "AT&T . . . At A Glance," FORBES.COM, *available at*: <http://finapps.forbes.com/finapps/jsp/finance/compinfo/CIAtAGlance.jsp?tkr=t> (viewed Aug. 3, 2008). The New Clearwire transaction represents less than five percent of AT&T's total asset value.

MHz on a county-by-county basis and demonstrated that the proposed Transaction will significantly enhance competition in the provision of fixed and mobile broadband services.[60/] The combination of Applicants' 2.5 GHz assets and the infusion of capital provided by the Transaction will enable New Clearwire to become a new, viable broadband competitor, offering consumers greater choice in service providers, broadband technology, and innovative services and applications. Applicants further showed that without the efficiencies and capital created by the proposed Transaction, the 2.5 GHz band is unlikely to develop as a viable broadband platform capable of competing against established broadband competitors, at least for the foreseeable future.

In its petition to deny, AT&T ignores the Applicants' comprehensive public interest analysis and claims that the Applicants did not address the competitive effects associated with combining their 2.5 GHz assets.[61/] Yet AT&T fails to point to a single competitive harm that would arise from the New Clearwire transaction. To the contrary, AT&T states that it "does not fundamentally oppose the underlying transactions."[62/] In any event, New Clearwire's 2.5 GHz spectrum holdings do not raise *any* competitive concerns and, as set forth in its Public Interest Statement, the Transaction provides numerous and substantial public interest benefits.

Spectrum in the 2.5 GHz band is only an input, not a service or a product itself, and the New Clearwire transaction will in no way undermine competition in the broadband marketplace; on the contrary, it will stimulate competition. Today, Sprint and

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60/ Applicants set forth each of their spectrum holdings in detailed spreadsheets spanning 239 pages.

61/ AT&T Petition at 14.

62/ *Id*. at 15.

Clearwire together have approximately 450,000 2.5 GHz broadband subscribers, with most of these subscribers served by fixed, pre-WiMAX networks. If this small base of largely fixed and portable subscribers were classified as mobile, it would be a mere *1.3 percent* of the total number of mobile wireless high-speed connections (35,305,253) in the nation and an even smaller share (0.4 percent) of the total number of wireline and wireless broadband lines nationally (100,921,647).[63/] Even with the combination of the Sprint and Clearwire 2.5 GHz assets, New Clearwire will be a new entrant to the mobile 4G broadband marketplace and a comparatively small one at that.

B. The Commission Should Not Apply Its CMRS Spectrum Screen to the Proposed Transaction

AT&T also argues that the "spectrum screen" the Commission has previously applied in assessing the competitive effects of major CMRS mergers should be applied to the proposed New Clearwire transaction. In these major CMRS mergers, the Commission applied an initial spectrum screen to determine which geographic markets warranted closer scrutiny to determine the impact of the merger on the provision of mobile telephony services in that area. In markets where the applicants' spectrum holdings fell below the screen, the Commission deemed that the merger would have no adverse competitive effect on the mobile telephony spectrum input market and eliminated those markets from further review. In markets that exceeded the screen, the Commission conducted a further, case-by-case analysis of the prospective major merger's potential

63/ *High-Speed Services for Internet Access: Status as of June 30, 2007*, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, Table 1 (March 2008), *available at*: <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-280906A1.pdf> ("*March 2008 Broadband Report*")

effect on competition in each such market.[64/] The Commission consequently used the screen as a sorting mechanism to help guide and channel its review of major CMRS mergers. The screen is not a spectrum cap, has only been applied in CMRS mergers, and does not determine the Commission's ultimate conclusion about whether to approve a proposed merger, particularly one involving a new independent company deploying a new broadband technology.

The Commission should reject AT&T's demand to apply the CMRS spectrum screen to the proposed New Clearwire transaction. AT&T's argument ignores Commission precedent, the important distinctions between CMRS spectrum and the 2.5 GHz band, and the 2.5 GHz band's long history of challenges and underutilization. It is also totally circular for AT&T to argue that this Transaction renders the BRS and EBS spectrum usable on a nationwide basis,[65/] and from that to argue that the spectrum should be counted toward the screen in such a way as to defeat the Transaction.

1. The 2.5 GHz Band Is Far Different From CMRS and 700 MHz Spectrum and Should Not Be Subject to the Commission's CMRS Spectrum Screen

The 2.5 GHz band is not in the same category of spectrum as the PCS, cellular, SMR and 700 MHz bands that have been subject to the Commission's CMRS spectrum screen in prior CMRS mergers. As an initial matter, the transition to the reconfigured 2.5

64/ For example, in the AT&T-Dobson merger proceeding, the Commission applied a "spectrum aggregation screen of 95 MHz, approximately one-third of the 280 MHz of the spectrum suitable for mobile telephony today." *Applications of AT&T Inc. and Dobson Communications Corporation for Consent to Transfer Control*, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶¶ 29-30 (2007) ("*AT&T-Dobson Merger Order*") (including PCS, cellular, SMR, and 700 MHz spectrum in the mobile telephony spectrum screen). The Commission applied this same screen more recently in the AT&T-Aloha merger. *Application of Aloha Spectrum Holdings Company LLC and AT&T Mobility II LLC*, Memorandum Opinion and Order, 23 FCC Rcd 2234, ¶ 10 (2008).

65/ AT&T Petition at 7-8.

GHz band is not yet complete,[66/] and the Commission determined less than nine months ago that this fact precluded application of the screen to BRS spectrum.[67/] The Commission reaffirmed this determination only three days ago, reiterating its prior conclusion that it is not appropriate to include BRS spectrum (let alone EBS spectrum) in the initial spectrum screen analysis it has applied in reviewing CMRS mergers.[68/] While the Commission may consider including BRS spectrum in some future CMRS screen applicable to evaluating CMRS transactions, applying the CMRS spectrum screen to the instant Transaction would send the Commission on an inappropriate, unnecessary and burdensome detour and delay the competitive entry of a new wireless broadband competitor to the market.

Moreover, neither the 2.5 GHz transition nor the New Clearwire transaction alter the basic physical characteristics of the band: the 2.5 GHz band has much less favorable propagation characteristics for wireless broadband coverage than the 700 MHz broadband spectrum that AT&T eventually intends to use to offer services that will compete with New Clearwire. Achieving the same geographic coverage as AT&T's lower-frequency bands will require New Clearwire to deploy significantly more transmitters than AT&T and other, lower-frequency competitors. In addition, the 2.5 GHz band remains subject to a number of licensing and regulatory challenges that make spectrum in this band significantly different than CMRS spectrum. These restrictions make it impossible to

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66/ Although progress has been made, only 58% of all BTAs (288 of 493) have completed the transition so far.

67/ *AT&T-Dobson Merger Order* ¶ 32.

68/ *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp.*, WT Docket No. 07-208, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-181, ¶¶ 44-47 (rel. Aug. 1, 2008) ("*Verizon Wireless-RCC Order*"). EBS spectrum has never been considered for inclusion in any CMRS spectrum screen even on a case-by-case basis and no basis exists for departing from that policy now or in the future.

compare Applicants' 2.5 GHz holdings on a megahertz-to-megahertz basis with spectrum in other bands, including the CMRS bands, thereby making it impractical and contrary to the public interest to apply the CMRS screen to the proposed Transaction.[69/]

In addition, BRS spectrum generally trades at prices that are a fraction of CMRS and 700 MHz spectrum.[70] The disparity provides evidence that the marketplace recognizes the unique characteristics and challenges of the 2.5 GHz band and has adjusted 2.5 GHz valuations accordingly. This marketplace data is far more telling, and far less biased, than the self-serving statements in AT&T's petition to deny.

AT&T's attempts to minimize the inherent differences of the 2.5 GHz band *vis-à-vis* CMRS and 700 MHz spectrum are contradicted not only by marketplace spectrum valuations, but also by the record in this proceeding and the prior statements of BellSouth, one of AT&T's subsumed companies.

BRS-1 Channel. In its petition to deny, AT&T tries to downplay the encumbrances created by the requirement that BRS-1 channel licensees share spectrum on a co-primary basis with MSS, BAS and ISM licensees. Yet, in 2006, AT&T's predecessor company expressed alarm about this sharing and stated its belief that "BRS-1 should not be relegated to co-primary status and that the threat of harmful interference

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69/ Application at 40-53.

70 In 2007, AT&T sold its 2.5 GHz assets to Clearwire for $300 million, or $0.17 per MHz-pop, while AT&T has acquired 700 MHz licenses through the Commission's 700 MHz auction and private market transactions at a weighted average of $2.04 per MHz-pop, or *twelve times the value AT&T placed on its 2.5 GHz spectrum. See* AT&T Inc., Quarterly Report (Form 10-Q), at 34 (Aug. 3, 2007); Stifel Nicolaus, "Some Further Thoughts on 700 MHz Auction Results," at 1 (Mar. 24, 2008); Stifel Nicolaus, "What the AT&T Purchase of Aloha Spectrum Suggests," at 1 (Oct. 9, 2007).

persists."[71/] The 2006 statements of AT&T's predecessor are correct and support Applicants' view that it is inappropriate to include this encumbered channel under the Commission's CMRS spectrum screen.

EBS Spectrum. AT&T asserts that there are "no material distinctions between EBS leases and other commercial mobile leases."[72/] Not only is AT&T wrong, but BellSouth's prior statements prove just the opposite. AT&T's predecessor urged the Commission to abolish the Commission's "artificial" EBS lease term limits because they are "inconsistent with the secondary market rules, which impose no limitation and encourage flexibility and spectrum use."[73/] The Commission rejected this request and now limits EBS leases entered into after July 2006 to thirty-year terms with a mandatory lessor "right of review" at 15 years into the term and every five years thereafter.[74/] These term limits and rights of review create significant business uncertainty for EBS lessees that lessees of commercial spectrum do not face. Indeed, New Clearwire is not even eligible under the Commission's rules to be an EBS licensee;[75/] AT&T can become the licensee of commercial spectrum it leases – whether it does so or not is a matter of business choice. New Clearwire will not be able to hold EBS licenses, but must instead enter into EBS lease agreements that are subject to a wide range of restrictions that do not apply to CMRS spectrum leases. No doubt because of these many restrictions and the

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71/ Petition for Partial Reconsideration of BellSouth Corporation, *et al.*, WT Docket No. 03-66, at 7 (July 19, 2006); *see also id.* at 6 (stating that "ample record evidence" contradicts the Commission's conclusion that it is feasible for MSS and BRS to share spectrum).

72/ AT&T Petition at 9.

73/ Consolidated Opposition to Petitions for Reconsideration of BellSouth Corp., *et al.*, WT Docket No. 03-66, at ii (Feb. 22, 2005).

74/ 47 C.F.R. § 27.1214(e).

75/ *See* 47 C.F.R. § 27.1201.

unique interests of the EBS licensees whose interests would be adversely affected, although the Commission has considered but declined to apply its spectrum screen to BRS spectrum, it has never raised even the possibility of applying the screen to EBS lease rights.

In its prior incarnation as BellSouth, AT&T proposed elimination of the prohibition against a commercial operator acquiring EBS spectrum, warning that "[c]hanging the technical rules [of the 2.5 GHz band] alone may not be enough to stimulate the capital investment necessary" to "develop a viable product attractive to customers."[76/] This prohibition and other lease restrictions remain, however, undermining AT&T's assertion that "no basis exists to exclude the 112.5 MHz of EBS spectrum lease rights" from the spectrum screen.[77/]

In addition, EBS lease obligations and restrictions affect the operational usability of this spectrum in ways simply not required or existent with other secondary market leases. As AT&T's predecessor BellSouth itself noted when considering proposals to give EBS licensees a regulatory right to recapture additional capacity for educational use during the lifetime of an EBS lease, this right would result in making excess capacity EBS leases "'inherently less valuable to the [commercial] operator than unencumbered capacity, whether or not the [EBS] licensee ever exercises its recapture rights.'"[78/]

[76/] Reply Comments of BellSouth Corp., *et al.*, WT Docket No. 03-66, at 28 (Oct. 23, 2003) (quoting with approval Comments and Reply Comments of Network for Instructional TV ("NITV"), WT Docket No. 03-66, at 3-4).

[77/] AT&T Petition at 9.

[78/] Reply Comments of BellSouth Corp., et al., WT Docket No. 03-66, at 26 (Oct. 23, 2003) (quoting *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, Report and Order, 13 FCC Rcd 19112, ¶ 88 (1998), which quoted BellSouth's 1997 Reply Comments in MM Docket No. 99-217).

The value of EBS channels is also reduced by the Commission's requirement of a mandatory minimum five percent capacity reservation for educational use. A significant number of EBS licensees negotiate lease agreements that reserve an even greater percentage of their spectrum capacity to educational use or allow them to recapture their EBS spectrum at any time during the lease term to meet their educational needs. These arrangements may devote one-fourth or more of an EBS licensee's available spectrum to high-site, high-power educational video programming or may require the commercial operator to construct and operate educational facilities on the licensee's behalf. Moreover, EBS leases often contain carefully negotiated provisions and means of consideration designed to meet an EBS licensee's educational needs. The consideration is often not just monetary, but may include equipment, facilities or special services tailored specifically to that EBS lessor's educational objectives. EBS licensees carefully choose their lessee to ensure that their particular requirements are satisfied. In some cases, lessees provide programming or have a position on the EBS licensee's board of directors, making the EBS lease relationship significantly different than those in other secondary market transactions. Including EBS spectrum in any spectrum screen for any purpose would disrupt these carefully tailored relationships, to the detriment of the EBS community, by forcing the divestiture of EBS spectrum or by limiting the pool of potential EBS lessees due to spectrum aggregation considerations.

In short, EBS spectrum and leased commercial spectrum are not fungible as parts of a commercial network. AT&T's arguments for equating EBS channels and leased commercial channels for spectrum screen purposes fail on the facts.[79/] EBS licensees

[79/] AT&T appears to have conveniently changed its position with respect to including leased spectrum in a spectrum screen; it previously argued to the Commission that such spectrum

serve non-profit educational objectives that create far different incentives than the profit motive that typically drives lessors of commercial licenses and are mandated under FCC rules to use their licenses to "further their educational mission."[80/]

MBS Spectrum. AT&T argues that the 42 MHz of the Middle Band Segment (MBS) of the 2.5 GHz band should be subject to the spectrum screen, suggesting that Applicants can "coordinate their spectrum operations" so that they can somehow render this spectrum, which is reserved for high-site, high-powered operations, usable in a low-site, low-powered cellular network. Aside from making little sense, AT&T's argument ignores the fact that a majority of the MBS will be used by EBS licensees to transmit their educational programming via high-site, high-powered systems. AT&T understood this restriction previously, stating that the Commission established the MBS to "preserve existing high-power operations, including distance-learning and other educational video programming."[81/] The MBS will not support mobile telephony and should not be subject to the CMRS spectrum screen.

Guard Bands. AT&T concedes that "it is clear that spectrum not used or available to licensees should not be attributed for purposes of any spectrum screen."[82/] Guard bands, by definition, fit this description and should be excluded from the screen, since their purpose is to create a buffer zone of spectrum that provides limited or no

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should not be attributed to a lessee in any circumstance. *See* Comments of AT&T Wireless Services, Inc., WT Docket No. 00-230, at 5 (Feb. 9, 2001) ("To the extent the Commission continues to believe a spectrum aggregation limit is wise, then it is appropriate to attribute that spectrum to the licensee, not the lessee."); Reply Comments of AT&T Wireless Services, Inc., WT Docket No. 00-230, at 2 (Mar. 12, 2001) ("If the Commission retains . . . spectrum limits, however, leased spectrum should not be attributable to the lessee.").

80/ 47 C.F.R. § 27.1203(b).

81/ Comments of BellSouth Corp., *et al.*, WT Docket No. 03-66, at 8 (Sept. 8, 2003).

82/ AT&T Petition at 11.

service in order to protect adjacent operations from interference. Although AT&T suggests that the guard bands should be included in the spectrum screen because they are "available to adjacent licensees," the fact that spectrum may be "available" does not mean it can be used to provide broadband services to customers, let alone mobile telephony.[83/] AT&T further suggests that New Clearwire could deploy broadband service in the guard bands if the proposed Transaction results in New Clearwire holding rights to both the MBS and adjacent spectrum; however, the guard bands are assigned in small, interleaved increments, and operations in the guard band are explicitly made secondary to adjacent operations.[84/] AT&T ignores these facts and ignores the high-power operations by BRS and EBS licensees in the MBS. The Commission should reject AT&T's assertions and exclude the guard bands from the CMRS spectrum screen.

Other Significant Distinctions Between 2.5 GHz and CMRS/700 MHz Bands. AT&T completely ignores other unique aspects of the 2.5 GHz band that make this band very different from CMRS and other spectrum bands the Commission has previously included in its spectrum screen. Much of the 2.5 GHz band has also been licensed using irregular geographic areas that can result in different geographic license areas on each six-megahertz channel in the band and do not correspond to customary commercial and population patterns.[85/] This "crazy quilt" licensing scheme is the result of the Commission's decision to overlay Basic Trading Area licenses awarded by auction over hundreds of incumbent site-specific licenses awarded many years ago, with many of

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83/ *Id*.

84/ *See* 47 C.F.R. § 27.5(i)((2) (establishing guard band channels with 0.33333 MHz in bandwidth); 47 C.F.R. § 27.1222 (guard band operations are secondary).

85/ *See* Application at 42-47.

these site-specific license areas overlapping each other. The Commission, in contrast, established the PCS and cellular bands without these site-based licensee encumbrances, giving these CMRS licensees far greater flexibility in deploying their services.

In addition, CMRS licensees generally deploy the same type of services in providing mobile telephony to customers, with these services deployed nationwide in CMRS bands. On the other hand, deployment in the 2.5 GHz band has been sporadic, with an incompatible mixture of high-power educational programming, commercial "wireless cable" video services, low power wireless services, and other services. The licensing and technical rules governing the CMRS bands have tended to be clear and consistently enforced. Because of the many different types of services and licensees in the 2.5 GHz band, however, 2.5 GHz licensees face more uncertainty, from complex "split the football" rules used to define the geographic services areas of licensees with overlapping service areas, to "height-benchmarking" that create vaguely defined interference protection obligations, to uncertain standards for accepting late-filed license renewal applications. On top of these differences, the in-building and distance propagation characteristics of the 2.5 GHz band require 2.5 GHz broadband operators to deploy significantly more cell sites than licensees in the CMRS and 700 MHz bands, and lowers the value of 2.5 GHz band relative to lower frequency bands.[86/]

[86/] The lower value of higher spectrum frequencies is reflected in the Commission's decision relocating the Digital Electronic Message Service ("DEMS") from the 18 GHz band to the 24 GHz band. The Commission recognized that this higher frequency band would have inferior propagation characteristics that would impose greater operational burdens on DEMS licensees. The Commission consequently granted relocating DEMS licensees a *fourfold increase* in their spectrum assignments "to maintain DEMS system performance in the 24 GHz band at a level equivalent to that at which it had operated in the 18 GHz band." *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, Memorandum Opinion and Order, 13 FCC Rcd 15147, ¶¶ 13, 45-54 (1998).

As described above, the 2.5 GHz spectrum band is very different from the spectrum bands previously included in the FCC's spectrum screen for identifying spectrum concentrations that could inhibit wireless competition. Height benchmarking limitations, protecting the irregular service areas of unaffiliated incumbents, the unsuitability of the mid-band segment, and the limitations of the EBS channels for commercial use can all be overcome so long as New Clearwire has sufficient alternative channels from which to select in deploying its 4G high-bandwidth WiMax network. Simply put, it takes more spectrum at 2.5 GHz to deploy a broadband network than is required in the lower commercial bands. AT&T's attempts to equate 2.5 GHz and other commercial channels under the spectrum screen is a blatant attempt to deny New Clearwire the spectrum access necessary to introduce new 4G wireless broadband competition. The combination of Sprint and Clearwire's 2.5 GHz assets make this new mobile broadband network possible despite the inherent complications of the 2.5 GHz band; AT&T's attempt to frustrate competition by urging the Commission to misapply the CMRS merger spectrum screen can and should be disregarded.

2. AT&T's Proposed Spectrum Screen Ignores the Commission's Prior Findings Regarding the Aggregation of 2.5 GHz Spectrum

AT&T's argument that the screen should apply in the instant proceeding also ignores the Commission's findings in the *Sprint Nextel Merger Order*. In that order, the Commission reviewed the Sprint Nextel 2.5 GHz holdings, including in markets where the merger resulted in Sprint Nextel holding nearly all 2.5 GHz spectrum, and found that these holdings "will not cause any competitive harm in the BRS band in any specific

local market."[87/] The Commission further stated that "by the time [Sprint's 2.5 GHz] spectrum capacity is put to use, sufficient other spectrum should be available so that no undue market power will be conferred on" Sprint.[88/] The Commission's conclusion there applies with equal strength to New Clearwire – perhaps even more given that New Clearwire is a new entrant in the mobile 4G broadband marketplace whereas Sprint and Nextel were both established wireless providers at the time of their merger.

AT&T also ignores the 2.5 GHz spectrum holdings of its predecessor-in-interest, BellSouth. Prior to AT&T's purchase of one of the last remaining Bell Operating Companies, BellSouth held nearly all of the BRS spectrum and EBS lease rights in several counties in the Southeast. The Commission never found that the spectrum holdings of AT&T's predecessor-in-interest raised a competitive concern, notwithstanding the very large CMRS holdings of BellSouth's affiliated company, Cingular. In approving the AT&T-BellSouth merger, the Commission stated that "significant blocks of spectrum are available, or soon will be available, to competitors wishing to provide competing wireless mobile broadband services."[89/] The Commission further found that the merged company's combined BRS and WCS assets "will be just one of several broadband services" and that "no competitive harm is likely" in the provision of fixed broadband services.[90/] The Commission also raised no concern when

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87/ *Sprint Nextel Merger Order* ¶ 158.

88/ *Id.* ¶ 4.

89/ *AT&T-BellSouth Merger Order* ¶ 178.

90/ *Id.* ¶ 181.

AT&T transferred these spectrum rights to Clearwire in 2007, which the Commission approved by public notice.[91/]

The Commission has consequently already determined that holding a high concentration of BRS and EBS spectrum in a market does not raise competitive concerns. The Commission based this conclusion on findings that the broadband marketplace is competitive and growing, and its intent to make a large amount of spectrum in other bands available to broadband competitors. In addition, the Commission emphasized in these prior orders the "nascent" nature of 2.5 GHz services and "the Commission's long-standing regulatory policies regarding the 2.5 GHz band, including the encouragement of consolidation of spectrum in this band, due to its historical underutilization."[92/]

These findings and longstanding regulatory policies continue to apply today, obviating any need to apply a spectrum screen to the proposed Transaction. The New Clearwire transaction will serve the Commission's policies by overcoming the many challenges described in the preceding section that have led to the underutilization of the 2.5 GHz band, and finally unlocking the value of this band for the benefit of consumers. Moreover, as the Commission recognized in these prior orders, the consolidation of 2.5 GHz spectrum does not present a competitive risk because broadband competition remains robust and there continues to be significant broadband spectrum available in alternative bands.

91/ Public Notice, "Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications . . . Action," Report No. 3166, at 11 (rel. May 16, 2007). Interestingly, in many of the counties where New Clearwire would allegedly exceed AT&T's proposed spectrum screen for this transaction, AT&T previously held all of that 2.5 GHz spectrum through BellSouth and sold it to Clearwire pursuant to a voluntary commitment it made in the course of the AT&T-BellSouth merger proceeding.

92/ *Sprint-Nextel Merger Order* ¶¶ 156, 160.

In addition, as the Commission found in its *Sprint Nextel Merger Order* and BellSouth orders, the 2.5 GHz band continues to represent only a portion of the spectrum that can be used to provide fixed and mobile broadband services. As described in the Application, competitors will have access to more than 500 MHz of spectrum in other licensed bands that could be used to provide wireless broadband services, including:

- *84 MHz of commercial 700 MHz spectrum* – The Commission completed its 700 MHz auction earlier this year. This band has superb propagation characteristics and is very well suited for wireless broadband. Verizon Wireless and AT&T were the two biggest winners, with Verizon Wireless acquiring the 22 MHz C-Block covering 8.5 billion MHz-pops and AT&T acquiring 12 MHz B-Block licenses covering 2.1 billion MHz-pops.[93/]

- *130 MHz of AWS Spectrum* – In 2006, the Commission auctioned off 90 MHz of Advanced Wireless Service ("AWS") spectrum. Once again, Verizon Wireless and AT&T were among the big auction winners. The Commission has allocated an additional 40 MHz of spectrum to AWS in bands below 2.2 GHz.[94/]

- *170 MHz of Cellular and Broadband PCS Spectrum* – Verizon and AT&T are largest holders of CMRS spectrum. These and other CMRS licensees provide mobile data services on this spectrum, with many carriers deploying 3G and eventually 4G services.

- *30 MHz of WCS Spectrum* – AT&T holds almost half of the total number of active Wireless Communications Service licenses, and has committed to offer significant mobile or fixed wireless broadband services on this spectrum within two years.

- *Approximately130 MHz of MSS ATC Spectrum* – The Commission has authorized Mobile Satellite Service ("MSS") licensees to provide Ancillary Terrestrial Component ("ATC") services on their spectrum. Several MSS operators are licensed to deploy services and have ambitious broadband and wireless communications deployment plans in the L-Band, Big LEO and 2 GHz MSS bands.

In addition to these licensed bands, more than 150 MHz of unlicensed spectrum is available at 900 MHz, 2400 MHz, and 3650 MHz. A number of these bands are used to

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93/ Stifel Nicolaus, "Some Further Thoughts on 700 MHz Auction Results," at 1 (Mar. 24, 2008).

94/ Application at 55-56.

provide wireless Internet access. The Commission also is examining permitting low power wireless devices to use up to 300 megahertz of TV broadcast spectrum in the spectrum bands below 700 MHz.[95/]

In a 2007 order declining to impose eligibility restrictions in the 700 MHz commercial spectrum auction, the Commission stated that "[g]iven the number and diversity of available licenses, it is unlikely" that any broadband provider "would be able to acquire enough spectrum to foreclose the broadband market to potential competitors, even if it should attempt to do so."[96/] This recent Commission finding remains true today and will remain true after approval of the New Clearwire transaction.[97/] New Clearwire will deploy a new 4G broadband service in a spectrum band with a number of unique operational and technical challenges and will be competing against both large incumbents and new entrants using a variety of technologies, wireline services, and spectrum bands to provide broadband service to American consumers. AT&T has offered no facts that support any competitive concerns stemming from the proposed Transaction or to justify applying the CMRS spectrum screen to the Transaction.

95/ *Unlicensed Operation in the TV Broadcast Bands*, First Report and Order and Further Notice of Proposed Rulemaking, 21 FCC Rcd 12266 (2006). Both the Commission and AT&T have cited unlicensed spectrum bands in describing broadband competition. *See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289, ¶ 256 (2007) ("*700 MHz Second Report and Order*"); Comments of AT&T, WT Docket No. 06-150, at 32 (May 23, 2007); Reply Comments of AT&T, WT Docket No. 06-150, at 4-5 (June 4, 2007).

96/ *700 MHz Second Report and Order* ¶ 257 (declining to impose eligibility restrictions on acquiring 700 MHz commercial bands).

97/ *See, e.g.*, Reply Comments of AT&T Inc., WT Docket No. 06-150, at 11 (July 7, 2008) ("There has been no change in circumstances since the *Second Report and Order* that would warrant altering these conclusions.").

3. New Clearwire's Open Network and Wholesale Access Will Promote New Entry by Multiple Competitors

In trying to shoehorn the New Clearwire transaction into a CMRS spectrum screen analysis, AT&T ignores another fundamental difference between New Clearwire's business model and traditional CMRS services. Unlike these services, New Clearwire is committed to a business plan based on an open platform and providing wholesale access to its network to unaffiliated parties. Far from foreclosing new entry into spectrum-based broadband services, New Clearwire will create a dynamic, nationwide platform from which new competitors aside from New Clearwire can launch retail service.[98/] Sprint, Comcast, Time Warner, and Bright Newhouse Networks have already committed to enter into non-exclusive wholesale agreements with New Clearwire, and Intel and Google have the option of entering into similar agreements. New Clearwire expects to enter into wholesale arrangements with other unaffiliated entrepreneurs on a commercially reasonable basis, allowing them to pursue their own innovative retail marketing of WiMAX devices and services. In addition, as described in section II, New Clearwire will permit consumers to use any lawful device so long as it is compatible with and not harmful to the network, and to download any applications or content subject only to reasonable network management practices and law enforcement and public safety considerations.

New Clearwire's wholesale access and open network offerings are unique. Certainly no parties to a CMRS merger subject to a spectrum screen have made similar offerings. In these mergers the Commission reviewed the impact of the applicants'

98/ *See Sprint Nextel Merger Order* ¶ 58 ("non-facilities based service options such as MVNOs and resellers have an impact in the marketplace and in some instances may provide additional constraints against anti-competitive behavior.").

spectrum holdings on the spectrum input "market" to ensure that the merged company did not aggregate so much spectrum as to foreclose entry by other competitors. New Clearwire presents no such risk in any relevant market not only because competitors will have access to a large amount of spectrum in alternative bands, but also because unaffiliated parties will have wholesale access to New Clearwire's spectrum and customers will have flexibility to use devices and applications provided by other parties. New Clearwire will thus promote new competition in broadband retail services, devices, and applications.

4. The Proposed Transaction Is Essential to Deploying Nationwide Broadband Service in a Band that Has Long Been Underutilized

In its petition to deny, AT&T strains to treat the 2.5 GHz band like any other CMRS band even though there are substantial differences and challenges that set the 2.5 GHz band apart. AT&T pretends that the 2.5 GHz band has already settled into well-defined "mobile telephony" product and geographic markets, yet the Commission has expressly declined to precisely define 2.5 GHz markets because the band is still developing.[99/] AT&T is engaging in the same sort of self-serving attempt to "artificially manipulate a nascent product market and geographic markets that have not yet emerged" for which it has faulted others.[100/]

The transition to the new 2.5 GHz band is still underway, and proposed services that ultimately will be deployed are still in development. New Clearwire cannot exercise

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99/ In the Sprint Nextel merger proceeding, the Commission stated that it was "neither prudent nor possible to define precise relevant product or geographic markets" for services in the 2.5 GHz band "[g]iven the history of underutilization of this spectrum and the uncertainty concerning when and what types of new services will be provided." *Sprint Nextel Merger Order* ¶ 150.

100/ Comments of BellSouth, *et al.*, WT Docket No. 03-66, at 15 (Sept. 8, 2003).

any sort of "market power" where its proposed WiMAX service has yet to be commercially launched in a band not yet completely reconfigured. Indeed, without the proposed Transaction, neither Sprint nor Clearwire individually will be able to deploy a nationwide wireless broadband network in the 2.5 GHz band, which is the best explanation for why AT&T has filed its petition. As explained in the Application, the capital funding and aggregation of assets created by the proposed Transaction are essential to deploying a nationwide broadband network in the 2.5 GHz band.[101/]

The proposed New Clearwire transaction represents an important crossroad in the development of the 2.5 GHz band. With Commission approval, New Clearwire will have the spectrum assets and financing essential to deploying a new advanced broadband network that will promote broadband competition. Without unconditional approval, the Applicants will lack the financing and spectrum assets they need to be a viable nationwide competitor, and the 2.5 GHz band will continue its long history of underutilization.

C. AT&T's Proposal to Count BRS and EBS in the Spectrum Screen Would Distort the Commission's Public Interest Analysis Serving Only AT&T's Anti-Competitive Interests

As explained in the preceding sections, AT&T provides no public interest basis for applying the CMRS spectrum screen to the New Clearwire transaction. AT&T's argument, of course, serves its own interests in stifling emerging competition. Given that AT&T currently holds no 2.5 GHz spectrum rights itself, increasing the total pool of spectrum subject to the screen by including all 186 MHz of non-guardband 2.5 GHz spectrum would facilitate future attempts by AT&T to add to its already very large

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[101/] Application at 22-25, 59-62.

spectrum holdings. Under AT&T's proposal, the total pool of spectrum subject to the screen would increase to 475 MHz (including cellular, PCS, SMR, 700 MHz, and 2.5 GHz spectrum), with the new screen becoming 158 MHz (one-third of the new pool total).[102/]

AT&T's new "screen" would lead to absurd results and a spectrum screen that is both underinclusive and overinclusive. For example, AT&T could enhance its already large CMRS spectrum position to the point of acquiring 92 percent of all PCS and cellular spectrum in a market, yet still fall below its proposed screen and avoid any scrutiny of the competitive effects of such a dominant share of CMRS spectrum. At the same time, transactions such as New Clearwire, which pose no competitive risk whatsoever, would be subject to a laborious spectrum screen analysis that only serves to slow Commission review and delay the introduction of new, more advanced, broadband services that may compete with AT&T and other incumbents.[103/]

In the spectrum screen proposed in its petition to deny, AT&T cherry-picks a set of bands for the screen that inflates the post-merger share of New Clearwire and downplays AT&T's large spectrum holdings, which are excluded from the count. Specifically, AT&T proposes that the Commission exclude those broadband-capable

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[102/] AT&T Petition at 13.

[103/] Delaying New Clearwire's plan to provide WiMAX broadband to 140 million customers by the end of 2010 would serve the competitive interests of AT&T, which has announced plans to roll out a 4G LTE wireless broadband service on its 700 MHz spectrum by 2012. Om Malik, *AT&T's 700 MHz Strategy: LTE*, GIGAOM (Apr. 3, 2008), *available at*: <http://gigaom.com/2008/04/03/open-access-restrictions-may-have-undervalued-spectrum/>; *see also* Marguerite Reardon, "AT&T Threatens WiMax Joint Venture," CNET NEWS.COM, July 25, 2008, *available at*: <http://news.cnet.com/8301-1035_3-10000105-94.html?hhTest=1&tag=bl> ("It's funny that AT&T is putting up any kind of stink to the merger, considering that the company exists in its current state only because of several massive mergers in the past few years . . . But it's clear that AT&T is nervous about the new Clearwire's plans. AT&T is . . . years away from . . . LTE. By contrast, WiMax technology is available and working today.").

bands where AT&T has significant spectrum – namely, the AWS and WCS bands – but include the BRS-EBS band where AT&T no longer holds any spectrum rights. If the rationale of supply-side substitution has any appeal, of course, then an intellectually honest approach would need to include *all* bands capable of supporting broadband services in its analytical screen, including AWS-1, AWS-2, AWS-3, MSS ATC, and WCS. By finding competition wanting in situations where it is abundant and competition present in situations where it may be lacking, AT&T's proposal to cherry-pick bands to include within the screen on an *ad hoc* basis has no analytical merit. Indeed, the selective inclusion of BRS-EBS spectrum within the screen serves no rational purpose other than AT&T's parochial interest in overstating other operators' spectrum holdings for the purpose of delaying or denying new wireless broadband competition.

The Commission should reject AT&T's efforts to game the license transfer review process to serve its own competitive interests.[104/] AT&T's fear of new broadband competition provides no basis for applying the CMRS spectrum screen to the New Clearwire transaction. As established in its prior orders and in the Application, the

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[104/] *See, e.g.*, Caroline Gabriel, "AT&T Tries to Block Clearwire, Betraying Nerves About Mobile Broadband," WIMAX TRENDS , July 29, 2008, *available at*: <http://www.wimaxtrends.com/2008/07/att-tries-to-block-clearwire-b.html> ("AT&T will be well aware that the new Clearwire represents a greater competitive threat than the wounded Sprint on its own," but this "will only be true if the merger can be achieved quickly and without significant watering down of the agreed terms"); Ainsley Jones, "AT&T Opposes Sprint-Clearwire Merger," IT BUSINESS EDGE, July 25, 2008, *available at*: <http://www.itbusinessedge.com/blogs/hdw/?p=2692> ("Analysts suspect AT&T's action signals that it is concerned that the merger could threaten its wireless business"); Matt Hamblen, "AT&T Files Objection to Sprint-Clearwire Deal," COMPUTERWORLD, July 25, 2008, *available at*: <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId= 9110762> (AT&T's petition "demonstrates how intensely AT&T, and possibly other carriers, intend to fight WiMax technology"); James Quintana Pierce, "AT&T Opposes Sprint/Clearwire Merger – Or At Least Wants It To Be More Difficult," MOCONEWS.NET, July 25, 2008, *available at*: <http://www.moconews.net/entry/419-att-opposes-sprint-clearwire-merger-or-at-least-wants-it-to-be-more-dif/>.

proposed Transaction will not create any competitive harm but will instead stimulate competition and innovation.

VI. INCUMBENT LECS ARE AND WILL REMAIN DOMINANT IN THE PROVISION OF SPECIAL ACCESS

AT&T's unfounded assertions regarding the availability of alternatives to its special access service warrant brief mention. AT&T alleges in a footnote that "even apart from this transaction, Applicants have numerous options for their special access needs."[105/] In fact, the record in the Commission's special access rulemaking proceeding fully documents the stranglehold that the incumbents wield over the dedicated transmission links that wireless companies require to interconnect tens of thousands of cell sites with their networks.[106/] In addition, the Commission's own data exposes as fiction AT&T's contention that there are "plenty" of alternatives to the incumbents' special access services. Incumbent LECs' share of the special access marketplace was 94.1 percent in 2005, and was trending in the direction of *increasing*, not decreasing, market share.[107/] The incumbents are able to entrench their dominant position through the enforcement of restrictive service provisions that effectively prevent operators from

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105/ AT&T Petition to Deny at 14 n.37.

106/ *See, e.g.*, Comments of Sprint Nextel Corporation, WC Docket No. 05-25, at 31-32 (Aug. 8, 2007) (Responses to Sprint Nextel's questioning of 77 potential alternative vendors of special access services last year showed that only 16 such vendors had fiber facilities located at one or more of the cell sites in the questionnaire, reaching approximately one percent of Sprint Nextel cell sites nationwide covered by the questionnaire.).

107/ *See ex parte* presentation attached to letter from Anna M. Gomez, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, at 3 (Aug. 22, 2007), *citing* FCC Universal Service Monitoring Report, Table 1.5 and Telecommunications Industry Revenue Report, Table 5 (2005 percentage adjusted to include pre-merger AT&T and pre-merger MCI in-territory revenue in the ILEC percentage).

using alternative providers along the few routes where such alternatives are available.[108] Although this Transaction may permit New Clearwire to reduce reliance on incumbent LEC special access services, it would represent merely a small step in a long march towards the goal of having "plenty of affordable facilities-based alternatives."

CONCLUSION

Sprint and Clearwire demonstrated in their Application and in this Joint Opposition that the proposed Transaction will result in significant public interest benefits and raises no anticompetitive concerns. As numerous EBS and other parties pointed out in their comments, New Clearwire will stimulate broadband competition and innovation for American consumers, businesses, and educational and religious institutions. The

[108] Sprint's recent announcement of its backhaul agreement with Dragon Wave does not signify the end of the incumbents' dominance. For example, that agreement will have no effect on Sprint's continued dependence on incumbent LEC special access service to connect 60,000 existing cell sites.

Commission should expeditiously and unconditionally approve the Applicants' proposed license transfers.

Respectfully submitted,

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Certificate of Service

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