Before the
Federal Communications Commission
Washington, DC 20554

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

AT&T INC. REPLY TO SPRINT NEXTEL/CLEARWIRE JOINT OPPOSITION AND GOOGLE INC. OPPOSITION

AT&T INC.

Paul K. Mancini
Gary L. Phillips
Michael P. Goggin
1120 20th Street, NW
Washington, DC 20036
(202) 457-2054

Its Attorneys

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SUMMARY

The 2.5 GHz spectrum holdings of Sprint Nextel Corporation ("Sprint") and Clearwire Corporation ("Clearwire"), in conjunction with mobile spectrum assets of the investors in the New Clearwire, represent the largest consolidation of CMRS spectrum in the Commission's history. The proposed transaction directly involves a tremendous swath of spectrum – 194 MHz in the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") bands – and, when relationships among the Applicants and strategic investors are taken into account, involves over 300 MHz which is nearly half of spectrum available for CMRS today.[1]

Despite the tremendous amount of spectrum involved in the transaction, the Applicants assert that the transaction warrants no competitive review. The Applicants insist that their spectrum should not be considered available for commercial wireless use for purposes of the FCC's spectrum screen while they simultaneously claim that the resulting spectrum holdings will place them in a superior position in competing with even the largest commercial wireless carriers. The Applicants also claim before the Commission that they really have only 55.5 MHz of useable spectrum for competitive evaluation purposes while simultaneously claiming before the investment community and Securities and Exchange Commission that their spectrum holdings will be at least three times that size. The Applicants have made no effort to address these inconsistencies, even in the face of AT&T's observation that such inconsistencies before

[1] As discussed herein, the current input spectrum market includes 50 MHz of cellular, 30 MHz of ESMR/G Block, 120 MHz of PCS and 80 MHz of 700 MHz spectrum. AT&T argued in its petition to deny that the input market should be increased to include 194 MHz of BRS/EBS spectrum. AT&T also agrees with Sprint and Clearwire that the input market should include 90 MHz of AWS-1 spectrum and MSS/ATC spectrum. However, because rules for the mobile use of WCS, H Block and AWS-3 spectrum have not yet been adopted, those bands do not meet the FCC's criteria for inclusion in the input spectrum market.

government agencies bears heavily on an applicants' candor and qualifications to hold wireless licenses.

The Applicants have essentially requested that the Commission apply special treatment to the proposed transaction by foregoing its traditional competitive review, but have failed to justify this disparate treatment either in their Application or their Joint Opposition. For this reason, the Commission should analyze this transaction as it has every major wireless merger since the sunset of the spectrum cap, and dismiss the applications for failure to make the requisite showings.

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AT&T Inc., on behalf of AT&T Mobility LLC and its wholly-owned and controlled wireless affiliates (collectively, "AT&T"), hereby responds to the "Joint Opposition to Petitions to Deny and Reply Comments" ("Joint Opposition") filed by Sprint and Clearwire and the Opposition of Google Inc. ("Google") in the above-captioned proceeding. Far from responding to the concerns expressed by AT&T in its Petition to Deny, these filings merely strengthen AT&T's argument that the proposed transaction must be evaluated under the Commission's traditional competitive analysis. Because the Applicants have failed to make the requisite competitive showing in either their Application or Joint Opposition, their application is procedurally defective and must be dismissed.

I. CLEARWIRE PROPOSES TO UNDERTAKE THE LARGEST CONSOLIDATION OF CMRS SPECTRUM IN THE AGENCY'S HISTORY WITHOUT ANY EVALUATION OF ITS COMPETITIVE EFFECTS.

The transaction before the FCC involves an unprecedented amount of spectrum. The BRS and EBS bands total 194 MHz, and New Clearwire would control all of this spectrum in 235 counties in the U.S. In fact, the Applicants have boasted that they will control 40.1 billion

megahertz-POPs, which amounts to over 75% of all BRS/EBS spectrum nationwide.[2] But, the Applicant's BRS/EBS holdings are not the sole mobile spectrum implicated in the transaction:

- The controlling interestholder of the New Clearwire—Sprint—also has broadband PCS spectrum, with holdings ranging up to 45 MHz in certain markets, as well as nationwide rights to a 10 MHz "G Block" license at 1910-1915 MHz/1990-1995 MHz. Sprint also holds up to 14 MHz of 800 MHz ESMR spectrum, and 4.75 MHz of 900 MHz ESMR spectrum.

- Another investor in Clearwire—Comcast Corporation—holds a controlling interest in SpectrumCo, LLC ("SpectrumCo"), which has a near-nationwide footprint of 20 MHz of AWS spectrum. Notably, two other investors in Clearwire, Time-Warner and Brighthouse, also hold substantial stakes in SpectrumCo, and Sprint was also, at one time, an investor in that entity.

- In addition, Craig O. McCaw, the sole owner of Eagle River Holdings, LLC (Clearwire's largest shareholder prior to the proposed transaction), also has a 69% voting interest in, and control of, New ICO Satellite Services, L.P. ("ICO"), an MSS licensee with 30 MHz of MSS ATC spectrum.[3]

- Moreover, the Applicants have admitted that there are significant wholesale and other contractual relationships—beyond ownership in New Clearwire—that are implicated by the transaction.

Considering New Clearwire and its investors, and their attributable spectrum, the transaction could implicate over 300 MHz of spectrum in any given area—an amount that is nearly half of the spectrum allocated and available for mobile operations.

The Applicants, in fact, have touted the combined company's tremendous spectrum portfolio as giving them a significant advantage in the market for wireless broadband services, noting in various forums that New Clearwire would have a far larger spectrum portfolio than AT&T and Verizon Wireless. For example, Sprint CEO Dan Hesse has boasted that "[p]utting

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[2] Based on a U.S. Census 2000 population of 285.6 million, there are roughly 53 billion MHz-POPs of BRS/EBS spectrum available nationwide.

[3] Notably, Sprint and Clearwire argue that MSS ATC spectrum should be counted for purposes of the spectrum screen. Joint Opposition to Petitions to Deny and Reply to Comments of Sprint Nextel Corporation and Clearwire Corporation, WT Docket No. 08-99, at 40 (filed Aug. 4, 2008) ("Joint Opposition").

our spectrum together with Clearwire's . . . in megahertz/pops terms creates the largest wireless spectrum portfolio of any company in the country[,]"[4] while Clearwire CEO Ben Wolff has stated "we believe we will have among the deepest spectrum holdings of any wireless carrier across the top 100 markets and beyond. Following the close of the transaction, we expect to have more than 40 billion megahertz POPs of 2.5 gigahertz spectrum in the aggregate."[5] Similarly, in materials provided to investors in connection with the transaction announcement, the Applicants displayed a chart used to demonstrate how New Clearwire's spectrum portfolio would dwarf that of AT&T and Verizon Wireless.[6]

Notwithstanding the massive aggregation of spectrum implicated by this transaction, the Applicants blithely assert that "[t]he Commission should reject AT&T's demand to apply the CMRS spectrum screen to the proposed New Clearwire transaction." They base this argument on assertions that the combined company's spectrum holdings will be so encumbered and their market share so small that the Commission's typical competitive review would be inappropriate. Applicants' claims about the status of the encumbered nature of their spectrum holdings, however, are grossly exaggerated, and they are flatly inconsistent with their repeated boasting that the transaction will create the strongest wireless carrier in the country based on the combined company's spectrum holdings and its time-to-market advantage over other carriers. Thus, Applicants' claims that this transaction does not warrant further competitive review are simply unconvincing. The Applicants' statements regarding the competitive potential of the

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[4] Sprint CEO Dan Hesse, Sprint Nextel Q1 2008 Earnings Call (May 12, 2008), *available at* http://seekingalpha.com/article/76869-sprint-nextel-q1-2008-earnings-call-transcript?page=-1.

[5] Clearwire CEO Ben Wolff, Sprint Nextel/Clearwire Conference Call (May 7, 2008), *available at* http://www.sec.gov/Archives/edgar/data/101830/000119312508106229/d425.htm.

[6] *See* Sprint/Clearwire Announcement Presentation at 10, *available at* http://www.clearwireconnections.com/pr/presentations/050708.pdf.

combined company clearly warrant the application of the Commission's full competitive analysis.

II. SPRINT, CLEARWIRE, AND GOOGLE HAVE FAILED TO RECONCILE CONFLICTING REPRESENTATIONS TO THE SEC, INVESTMENT COMMUNITY, THE PUBLIC, AND THE COMMISSION

As AT&T previously noted, both the Applicants and their strategic investor, Google, have engaged in a pattern of double-speak with respect to this transaction—downplaying its significance in filings with this Commission, while touting its enormous import in statements to the investment community. This pattern of inconsistencies—on very material issues—raises a substantial and material question regarding the applicant's candor. Yet, in their opposition, the Applicants have done nothing to reconcile these contradictory statements.

For example, the Applicants have made vastly inconsistent statements made to various parties regarding the combined company's spectrum holdings and other elements of the proposed transaction:

"In the top 100 markets alone, we expect to have more than 32 billion megahertz POPs. We also estimate that we will have more than 120 megahertz of spectrum in most of the top 100 markets and more than 100 megahertz of spectrum in markets 101 through 200 on average."

- *Clearwire CEO Ben Wolff*[7]
May 7, 2008

"[T]he amount of contiguous 2.5 GHz spectrum available for licensing to commercial wireless providers is 55.5 megahertz."

- *Clearwire Pub. Int. Stmt*[8]
June 6, 2008

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[7] Clearwire CEO Ben Wolff, Sprint Nextel/Clearwire Conference Call (May 7, 2008), *available at* http://www.sec.gov/Archives/edgar/data/101830/000119312508106229/d425.htm.

[8] Applications of Sprint Nextel Corporation and Clearwire Corporation, Description of the Transaction and Public Interest Statement, ULS File No. 0003368272, at 41 (June 6, 2008) ("Clearwire Public Interest Statement").

"Combining Sprint and Clearwire's 2.5 GHz spectrum holdings will give the new venture an average of 151 MHz of capacity in each of the top 100 U.S. markets."

- Clearwire[9]
May 8, 2008

"With the closing of the combination with Sprint, our domestic spectrum holdings will substantially increase to more than 42 billion MHz/POPs of spectrum. . . . With the combination of our spectrum assets with Sprint's, we will be uniquely positioned to deliver next-generation wireless services with more than 100 megahertz of spectrum in most markets across the country."

- Clearwire CEO Ben Wolff
August 8, 2008[10]

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9 "New Venture Seen Drawing Scant Regulatory Scrutiny," Communications Daily (May 8, 2008).

10 Clearwire CEO Ben Wolff, Clearwire Corporation Second Quarter 2008 Earnings Conference Call (Aug. 8, 2008), *available at* http://www.sec.gov/Archives/edgar/data/1285551/000095013408014752/v42937e425.htm.

"[T]he minimum operating spectrum commitment in an N=3 architecture including internal guard band spectrum is 66 megahertz, or 10.5 megahertz more spectrum than the sum total of all commercially licensed spectrum in the 2.5 GHz band. Thus, spectrum demand for a robust wireless broadband network requires a potential 2.5 GHz operator to lease spectrum for some portion of the radio access network from the educational licensees that hold more than sixty percent of the 2.5 GHz band spectrum."

- *Clearwire Pub. Int. Stmt*[11]
June 6, 2008

The conclusion that there is "only" 55.5 MHz of usable BRS/EBS spectrum is inconsistent both with the company's description of its overall spectrum holdings, but also with its description of what it actually intends to use.

Applicants have also repeatedly reversed direction in their statements regarding the ability of the combined company's spectrum holdings to compete with other providers:

"The 2.5 GHz spectrum band has been commercially proven -- networks are being deployed, it has achieved consumer acceptance for wireless broadband services, and standards have been prepared to improve its capabilities. All of this heightens the competitive threat that a nationwide mobile wireless broadband service in this band poses…"

- *Clearwire*[12]
June 20, 2006

"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."

- *Clearwire Opposition*[13]
August 4, 2008

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11 Clearwire Public Interest Statement at 41.

12 Reply Comments of Clearwire Corporation, DA 06-904, WC Docket No. 06-74 (filed June 20, 2006).

13 Joint Opposition at 31.

This inconsistency also extends to the suitability of their spectrum for broadband operations, where their statements have varied wildly:

"The 2.5 GHz band is best for mobile broadband services due to channel size and propagation characteristics . . . . 'It's ideal for broadband because high bandwidth wireless networks have to deliver capacity, not just coverage.'"

- *Clearwire CEO Ben Wolff*[14]
August 4, 2008

"[T]here are numerous other spectrum bands well suited (and some argue, better suited) for the provision of broadband services."

- *Clearwire Pub. Int. Stmt*[15]
June 6, 2008

"The in-building and distance propagation characteristics in the 2.5 GHz band are materially less than those of the 700 MHz band recently auctioned to Verizon Wireless, AT&T, and other carriers."

- *Clearwire Pub. Int. Stmt*[16]
June 6, 2008

Similarly, the Applicants discussion of the network deployments costs of 2.5 GHz and other bands have been at variance:

"Our bountiful spectrum allows us to use advanced OFDM technology at a low cost because wide channels let us put more data through the same amount of physical equipment at a substantial cost savings over today's 3G networks.'"

- *Sprint CEO Dan Hesse*[17]
April 1, 2008

"[T[he 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.

- *Clearwire Opposition*[18]
August 4, 2008

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14 "New Wireless Venture Seen Drawing Scant Regulatory Scrutiny," Communications Daily (May 8, 2008).

15 Clearwire Public Interest Statement at 53.

16 *Id.* at 49.

17 Sprint CEO Dan Hesse, Keynote Address, CTIA Wireless 2008 Conference (April 1, 2008), *available at* http://www2.sprint.com/mr/sp_dtl.do?id=360&ex_id=560.

18 Clearwire Opposition at 30.

Moreover, the Applicants have vacillated regarding their ability to use the BRS/EBS bands, arguing their unique position to capitalize on the spectrum is a merger benefit, while arguing that the band is still largely unusable:

> Eliminating the need to follow height benchmarking limitations between the two companies immediately releases additional spectrum for consumer and business applications and unlocks the value of substantial spectrum resources that would otherwise have been relegated to exclusion zones between the two companies' operations…. As a result, New Clearwire will be able to deploy its network and provide broadband service more seamlessly and ubiquitously across larger regions, as if its authorized service areas were standard geographic area licenses.
>
> - *Clearwire Pub. Int. Stmt*[19]
> *August 4, 2008*

> Layered atop the various eligibility, technical, and use limitations, each of the thirty-three composite channels of the 2.5 GHz band can, and often do, have different, irregularly shaped geographic license areas that do not correspond to traditional patterns of commerce. The irregular license areas result in coverage "holes" that limit the ability of a licensee to make practical use of this band.
>
> - *Clearwire Pub. Int. Stmt*[20]
> *August 4, 2008*

The Applicants have similarly changed their position on the time-to-market advantage of the planned network to suit their audience:

> "And we're choosing WiMax as our fourth generation standard. By deploying WiMax, the most advanced 4G standard, we expect to have at least a two-year time-to-market advantage."
>
> - *Sprint CEO Dan Hesse*[21]
> *April 1, 2008*

> "Verizon, for example, plans to use its recently acquired nationwide 22 megahertz of 700 MHz spectrum as the core of a high-speed 4G LTE network, which it intends to have operational in late 2009 with a fuller rollout continuing through 2010."
>
> - *Clearwire Pub. Int. Stmt*[22]
> *June 6, 2008*

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19 Joint Opposition at 30.

20 *Id.*

21 Sprint CEO Dan Hesse, Keynote Address, CTIA Wireless 2008 Conference (April 1, 2008), *available at* http://www2.sprint.com/mr/sp_dtl.do?id=360&ex_id=560.

22 Clearwire Public Interest Statement at 54.

In addition to strategically tailoring statements regarding their time-to-market advantage to different audiences, the Applicants have vacillated as to New Clearwire's future market power, once again touting the transaction to investors while downplaying it to the Commission:

"Three years from now, we'll be the undisputed clear leader of wireless data in America. We'll be the only national mobile company out there offering that kind of broadband capability across the country."

- Sprint[23]
May 21, 2008

"New Clearwire will not exercise any sort of market power in providing its nascent broadband service in a spectrum band that has not even completed the complex transition to the reconfigured band established by the Commission decisions in 2004."

- Clearwire Pub. Int. Stmt[24]
June 6, 2008

These credibility issues are not limited to matters of spectrum and competition in mobile services. In other areas, as well, Applicants tell the Commission one thing while they tell the rest of the world something else. Their regulatory position on special access, for example, is flatly inconsistent with their recent public statements:

"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."

- Clearwire Opposition[25]
August 4, 2008

"[The only reason microwave backhaul is not already as prevalent here as it is in the rest of the world is that] relatively abundant and inexpensive T-1s have stifled the technology here."

- Sprint CTO Barry West[26]
July 9, 2008

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23 Cecilia Kang, "Bucking the Wind to Rebuild Sprint," The Washington Post at D01 (May 21, 2008).

24 Clearwire Public Interest Statement at 59.

25 Joint Opposition at 30.

26 *See* Stephen Lawson, "Sprint Picks Wireless Backhaul for WiMAX," INDUSTRY STANDARD (THESTANDARD.COM) (July 9, 2008), http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax (last visited July 24, 2008).

Unfortunately, it is not just the Applicants, but also their investors who are making contradictory statements about how FCC should review the joint venture. For example, Google, which in the past has vociferously supported encumbering the wireless licenses of Clearwire's competitors with so-called "open access" restrictions,[27] now apparently supports allowing market forces to determine the manner in which Clearwire should offer its services.[28] This makes apparent Google's strategy—to game the regulatory system to tie down other market participants with regulatory encumbrances while leaving its own networks and lines of business unregulated. While AT&T would not support encumbering Clearwire's spectrum with open access restrictions, Google's opportunistic "regulate everyone but us" approach should not go without notice.

In sum, the Applicants and their investors have displayed a clear pattern of making inconsistent representations before the Commission, the SEC, the investment community, and the general public. In each case, Applicants' statements are tailored to the respective audience, and the statements are so divergent as to be irreconcilable. Because these vastly inconsistent statements raise material questions of fact as to the most elemental aspects of the proposed transaction, the Commission should dismiss the applications.

[27] Google indicated that it would not invest in the C Block absent specific regulatory openness mandates. *See* Letter from Eric Schmidt, CEO, Google, Inc. to the Honorable Kevin J. Martin, Chairman, FCC, WC Docket Nos. 06-150; PS Docket No. 06-229; WT Docket No. 96-86 (filed July 20, 2007).

[28] Google Opposition at 2 (stating "[t]he open network not only will serve the consumers using it, the New Clearwire will also exert considerable marketplace pressure on other broadband providers to make openness a part of their standard business and engineering practices. This voluntary contractual agreement takes 'another important step to ensure that all consumers have unfettered access to the Internet'").

III. CLEARWIRE'S OPPOSITION FAILS TO JUSTIFY DISPARATE TREATMENT OF CLEARWIRE'S APPLICATION UNDER THE COMMISSION'S TRADITIONAL PUBLIC INTEREST ANALYSIS

AT&T's Petition to Deny was limited to a single point—Clearwire's application must be subjected to the same analysis applied to other transactions implicating competition in mobile services. Given the sheer scope of the BRS/EBS assets being conveyed to New Clearwire, there exists no justification for ignoring the potential competitive effects of this transaction merely because historically BRS/EBS spectrum has not been counted for purposes of the spectrum screen. Indeed, the Applicants have announced their intent to compete head-to-head with existing carriers and have used this intention as evidence that the proposed transaction is in the public interest. The Applicants cannot claim to compete with other wireless carriers while simultaneously seeking to avoid the competitive review applied to their stated peers.

As an initial matter, the Applicants have repeatedly stated their intention to compete with providers offering service in bands subject to the spectrum screen. Not only do the Applicants repeatedly state that they will compete with 700 MHz,[29] cellular,[30] and PCS[31] licensees, they explicitly announce that New Clearwire "will compete head-to-head against the soon-to-be-launched 4G offerings of Verizon Wireless and AT&T, which recently announced plans to

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29 Clearwire Public Interest Statement at 54-55 ("New Clearwire will face competition from 4G service providers using 700 MHz spectrum, which has propagation characteristics superior to the 2.5 GHz band. The 84 megahertz of 700 MHz spectrum licensed to commercial operators – long touted as the nation's 'beachfront spectrum' – has been hailed by the Commission, industry leaders and analysts as the most suitable frequency block for wireless broadband services, and the Commission has indicated that it expects many of the new technologies developed and deployed in this band to support advanced wireless services.").

30 *Id.* at 56.

31 *Id.*

deploy Long Term Evolution (LTE) – a competing technology to WiMAX."[32] Despite these repeated statements, Applicants attempt to cast their network as incapable of comparison to its competitors based on the "inherent differences" between their spectrum and their competitors.[33]

In their attempt to evade competitive review, the Applicants argue that "[t]he 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."[34] While the Commission did recently decline to include BRS spectrum in the screen, Applicants completely miscast the Commission's findings regarding the 2.5 GHz band. Indeed, the Commission determined in the *AT&T-Dobson Order* and reaffirmed in the *Verizon-RCC Order* that "BRS spectrum is capable of supporting mobile telephony services given its physical properties and the state of equipment technology, and the spectrum is licensed with allocation and service rules that allow mobile uses."[35]

In the *Verizon-RCC Order*, the Commission reiterated that BRS spectrum does "not yet meet *one* of the criteria for suitability on a nationwide basis" – that criteria being the fact that, in the Commission's view, the ongoing BRS transition precludes inclusion of BRS spectrum in the initial screen but that the spectrum is otherwise qualified.[36] The Applicants, however, have

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[32] *Id.* at 17. Further, in their presentation announcing the transaction, the Applicants, through a head-to-head comparison with Verizon Wireless and AT&T, touted their greater spectrum holdings in MHz-POP units. *See* Sprint/Clearwire Announcement Presentation at 10, *available at* http://www.clearwireconnections.com/pr/presentations/050708.pdf.

[33] Joint Opposition at 24.

[34] *Id.* at iii.

[35] *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases*, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-181, ¶ 44 (2008) ("*Verizon-RCC Order*").

[36] *Id.* at ¶ 44 (emphasis added).

attempted to portray this single reservation on the part of the Commission as a sweeping statement that BRS spectrum is inherently incapable of inclusion in the Commission's initial screen. This argument is patently false, and the Commission should reject it.

Further, Google has attempted to refute the argument that New Clearwire's proposed network proves the suitability of 2.5 GHz by attacking it as "circular[]" and "not germane" to the discussion of whether BRS/EBS spectrum belongs in the mobile telephony product market.[37] As an initial matter, AT&T reiterates that the issue of 2.5 GHz spectrum's suitability for inclusion in the mobile telephony product market is not open to debate – the Commission decided this issue in the *AT&T-Dobson Order* and has consistently found that their sole reservations regarding the spectrum's inclusion are reservations regarding the timing of the BRS transition. Further, the Commission itself in the *AT&T-Dobson Order* cited an earlier proposed Clearwire WiMAX venture as evidence of its finding that BRS spectrum is suitable for mobile use.[38] Both the *AT&T-Dobson Order* and the *Verizon Wireless/RCC Order* also expressly cite to BRS as a competitive factor when discussing local market conditions.[39]

As for the availability of BRS/EBS spectrum on a nationwide basis, AT&T reiterates that the BRS transition is sufficiently advanced—as documented by the Applicants themselves and transition plans on file—to be considered in near term reality. First, within the next two years—

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[37] Google Opposition at 4.

[38] *AT&T-Dobson Order* at n. 129 ("[W]e find that a considerable portion of [AWS-1 and BRS] capacity will be dedicated to mobile service. . . . [o]n May 21, 2007, Clearwire Corporation announced that it has successful completed [sic] the first phase of one of the country's first mobile WiMAX field trials . . . relying on Clearwire's spectrum in the 2.5 GHz frequency band.").

[39] *AT&T-Dobson Order* at ¶ 35; *Verizon-RCC Order* at ¶ 47.

the timetable under which the Department of Justice considers competitive entry feasible[40]—the transition must be completed for any market where a transition plan has been filed. That comprises over 85% of the U.S. population. Second, statements by the Applicants themselves support a finding that the BRS transition has advanced to the point that inclusion of the spectrum in the Commission's screen is merited. The Applicants described the transition as "nearly complete"[41] and have pledged an aggressive build-out that would result in New Clearwire's network covering nearly half of the U.S. population within thirty-six months.[42] Therefore, the Commission should treat BRS spectrum as available.

AT&T agrees with the Joint Commenters, however, in one limited respect. While AT&T addressed BRS/EBS spectrum because those bands were implicated by the proposed transaction, AT&T is not "cherry pick[ing]"[43] bands and its advocacy of recognizing BRS/EBS as mobile input spectrum should not be read as a rejection of including other bands as well. AT&T agrees, in fact, that AWS-1 spectrum should be included in the input market,[44] although the service rules for the H Block and AWS-3 bands are not yet adopted and inclusion of those bands is premature. Similarly, AT&T agrees that MSS/ATC spectrum should be considered in the screen. Because service rules for WCS spectrum do not yet permit mobile operation, that band does not meet the

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40 Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, at § 3.2 (Apr. 2, 1992, revised Apr. 8, 1997). *See also AT&T-Dobson Order* at ¶ 31.

41 Clearwire Public Interest Statement at 30.

42 *Id.* at 20.

43 Joint Opposition at 39.

44 *Id.* at 40. The Joint Commenters propose including 130 MHz of AWS spectrum. Based on the amount, this would include the 90 MHz of AWS-1 spectrum, as well as the 10 MHz H Block at 1915-1920 MHz and 1995-2000 MHz, as well as the AWS-3 bands at 2020-2025 MHz and 2155-2180 MHz.

FCC's criteria for suitability for mobile telephony, although AT&T recognizes that such rule changes are being considered and that the band should be included upon adoption of such rules.

IV. CLEARWIRE HAS PROVIDED NO REAL BASIS FOR DISCOUNTING BRS AND EBS SPECTRUM CONSISTENT WITH PRIOR COMMISSION POLICY.

In AT&T's Petition to Deny, it noted that despite the Applicants' claims to the contrary, BRS/EBS spectrum is clearly available to them to deploy their proposed network. Indeed, in hundreds of counties the combined country would control the entirety of the BRS/EBS band. In its Petition to Deny, AT&T addressed New Clearwire's *pro forma* arguments that its significant spectrum holdings be discounted to 55.5 MHz for purposes of competitive review.[45] The Applicants, in their opposition, largely rehash the same arguments that AT&T has already addressed, while adding several new, but still unavailing, rationales for discounting this spectrum.

The Applicants' response to AT&T's arguments completely ignores one basic reality of the BRS/EBS band—the simple fact that the Applicants control three quarters of it nationally. It is beyond dispute that in the considerable number of markets where the combined company would control all BRS/EBS spectrum, it obviously can use all of that spectrum for mobile telephony. The Joint Opposition completely ignores the Applicants ability to self-coordinate in those situations where it controls spectrum blocks whose occupants would otherwise need to coordinate operations with each other. In some markets, a legitimate question may exist as to how much of the BRS/EBS band New Clearwire can use, but it is utterly uncontroverted that there are numerous places in the United States where New Clearwire would have access to, and could use, 194 MHz of BRS/EBS spectrum for 4G services – including the four swaths of spectrum (EBS, BRS-1, MBS, and the 4 MHz Guard Bands) that the Applicants seek to have

[45] Petition to Deny of AT&T Inc., WT Docket No. 08-94 at 8-13 (filed July 24, 2008).

excluded from competitive review.

Here again the Applicants also make conflicting representations. As noted above, the Applicants have cited "unique aspects of the 2.5 GHz band that make this band very different from CMRS and other spectrum bands," including the band's geographic licensing scheme and other associated technical encumbrances, as well as the fact that the spectrum's financial value is less than that of other spectrum bands.[46] Yet, in their Public Interest Statement, they cite their unique ability to overcome these same issues as a key benefit. Specifically, the Applicants represent that "New Clearwire will have a much better opportunity than the separate companies to overcome the regulatory, operational, and technical obstacles that have stalled the deployment of commercially successful advanced wireless services at 2.5 GHz."[47] They conclude that "New Clearwire will be able to deploy its network and provide broadband service more seamlessly and ubiquitously across larger regions."[48]

The Applicants also assert that the financial value of BRS/EBS spectrum is grounds for the Commission classifying that spectrum differently than all other CMRS spectrum. In support of their argument, they note that "BRS spectrum generally trades at prices that are a fraction of CMRS and 700 MHz spectrum" and that this is evidence that "the marketplace recognizes the unique characteristics and challenges of the 2.5 GHz band and has adjusted 2.5 GHz valuations accordingly."[49] This attempt to redefine spectrum attribution ignores years of Commission policy and precedent. Considerations of financial value have never been relevant in the Commission's analysis of the input market. Recent spectrum auctions have demonstrated that

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46 Joint Opposition at 24, 29-30.

47 *Id.* at 32.

48 *Id.* at 33.

49 *Id.* at 24.

for various reasons, the marketplace values some spectrum bands higher than others. Yet, all bands are evaluated on a megahertz-to-megahertz basis for Commission review, and the Commission should continue to abide by this well-established precedent and evaluate BRS/EBS spectrum under the same criteria that it does competing spectrum bands.

V. CONCLUSION

The transaction before the FCC implicates the largest ever consolidation of mobile spectrum, and the Applicants have openly boasted about their unprecedented spectrum depth, the advantages of the spectrum relative to other mobile bands, their time to market advantage, the efficient economics of their network model, and their market dominance. Yet, their applications paint a far different picture, arguing that the no competitive is warranted, they lack market power, and that the spectrum is encumbered, worth only a fraction of other 4G bands, and should escape consideration under the Commission's traditional merger review. AT&T submits that this transaction must be reviewed under the case-by-case standards that have been employed in

every major transaction since the spectrum cap was eliminated. Because the Applicants have failed to reconcile their conflicting statements and continue to evade any substantive market review, their applications must be dismissed.

Respectfully submitted,

AT&T INC.

By: */s/* _____

Paul K. Mancini
Gary L. Phillips
Michael P. Goggin
1120 20th Street, NW
Washington, DC 20036
(202) 457-2054

Its Attorneys

August 11, 2008

CERTIFICATE OF SERVICE

I, Kimberly Riddick, hereby certify that on this 11th day of August, 2008, I caused copies of the foregoing "Petition to Deny of AT&T Inc." to be served, First Class mail, postage pre-paid, on the following:

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

Regina M. Keeney
Charles W. Logan
Stephen J. Berman
A. Renée Callahan
LAWLER, METZGER, MILKMAN & KEENEY, LLC
2001 K Street NW, Suite 802
Washington, DC 20006
202-777-7700
Counsel to Sprint Nextel Corporation

Nadja S. Sodos-Wallace
New Clearwire Corporation
815 Connecticut Avenue, NW, Suite 610
Washington, D.C. 20006

Howard J. Symons
Russell H. Fox
Stefanie A. Zalewski
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave. NW, Suite 900
Washington, DC 20004
202-434-7300
Counsel to Clearwire Corporation

Richard S. Whitt
Washington Telecom and Media Counsel
Google Inc.
1101 New York Avenue NW
Second Floor
Washington, DC 20005
(202) 346-1236

Donna N. Lampert
E. Ashton Johnston
Mark J. O'Connor
Lampert, O'Connor & Johnston, P.C.
1776 K Street NW, Suite 700
Washington, DC 20006
(202) 887-6230
Counsel to Google, Inc.

Best Copy and Printing, Inc.*
445 12th Street SW, Room CY-B402
Washington, DC 20554
fcc@bcpiweb.com

David L. Nace
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tysons Blvd., Suite 1500
McLean, VA 22102
Counsel for Rural Cellular Association

Holly Henderson
External Affairs Manager
SouthernLINC Wireless
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342

Christine M. Gill
David D. Rines
McDermott Will & Emery LLP
600 Thirteenth St. NW
Washington, DC 20005-3096
Counsel for SouthernLINC Wireless

Michael D. Rosenthal
Director of Legal and External Affairs
SouthernLINC Wireless
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342

Brendan Kasper
Senior Regulatory Counsel
Stephen Seitz
Vice President Regulatory Affairs
Vonage Holdings Corp.
23 Main Street
Holmdel, NJ 07733

Patricia Skinner, President
North Carolina Association of Community College Presidents
Michael Taylor, Chair
EBS Community College Consortium
200 West Jones Street
5006 Mail Service Center
Raleigh, NC 27699-5006

Patrick J. Burns
Vice President for IT and
Interim Dean of Libraries
Morgan Library – Dept. 1019
Colorado State University
Fort Collins, CO 80523-1018

University of Central Florida
4000 Central Florida Blvd.
MH 338K
Orlando, FL 32816

Larry Cochran
Oklahoma Distance Learning Association
P.O. Box 1125
Norman, OK 73069-1125

Anthony D. D'Amato
Ophir Trigalo, Chief Information Officer
Illinois Institute of Technology
10 West 33rd Street, Room 224
Chicago, IL 60616

William B. Wilhelm
Tamar E. Finn
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, DC 20006
Counsel for Vonage Holdings Corp.

Matthew A. Leibowitz
Joseph A. Belisle
Leibowitz & Associates
One SE Third Avenue, Suite 1450
Miami, FL 33131
Counsel for The School Board of Miami-Dade County, Florida

William K. Keane
Duane Morris LLP
505 9th Street NW, Suite 1000
Washington, DC 20004-2166
Counsel for The Northern Arizona University Foundation, Inc.

Mason Gerety, President
The Northern Arizona University Foundation, Inc.
P.O. Box 4094
Flagstaff, AZ 86011-4094

Willard D. Rowland, Jr., President & CEO
Colorado Public Television, KBDI/Ch. 12
2900 Welton Street
Denver, CO 80218

Richard P. West
Executive Vice Chancellor & Chief Financial Officer
The California State University
401 Golden Shore, 5th Floor
Long Beach, CA 90802-4210

James H. Johnson, Attorney
Atlanta Interfaith Broadcasters, Inc.
1155 Connecticut Ave. NW, Suite 1100
Washington, DC 20036

Henry S. Smith, Supervisor, St. Bernard Parish Public Schools
St. Bernard Parish School Board
200 East St. Bernard Highway
Chalmette, LA 70043

Kemp R. Harshman, President
Clarendon Foundation
5836 South Pecos Road
Las Vegas, NV 89120-3418

Mike Wooten, Director of Public Relations
& Communications
Clarke County School District
Clarke Central High School
240 Mitchell Bridge Road
Athens, GA 30606

Dr. Andy DiPaolo
Executive Director/Senior Associate Dean
Stanford Center for Professional
Development/Stanford School
of Engineering
Stanford University
496 Lomita Mall
Durand Bldg., Room 313
Stanford, CA 94305-4036

Wilfred C. Lemann
Director and Corporate Counsel
Caritas Telecommunications
Diocese of San Bernardino
1201 East Highland Avenue
San Bernardino, CA 92404

Gary B. Schuster, Interim President
Georgia Institute of Technology
Atlanta, GA 30332-0325

Frank T. Brogan, President
Florida Atlantic University
777 Glades Road, P.O. Box 3091
Boca Raton, FL 33431-0991

Russell W. Cook, Ed.D.
Executive Director
Northeast Georgia RESA
375 Winter Street
Winterville, GA 30683-1408

Monsignor John P. Caulfield, Pastor
St. Joseph's Church/Diocese of Orlando
P.O. Box 30
Lakeland, FL 33802-0030

His Eminence
Cardinal Roger Mahoney
Archbishop of Los Angeles
Archdiocese of Los Angeles
3424 Wilshire Boulevard
Los Angeles, CA 90010-2202

Edwin N. Lavergne
Fish & Richardson P.C.
1425 K St. NW, 11th Floor
Washington, DC 20005
Counsel for Archdiocese of Los Angeles, The Board of Trustees of the Leland Stanford Junior University (Stanford), Caritas Telecommunications, and Catholic Television Network

Monsignor Michael J. Dempsey
President
Catholic Television Network
Trans Video Communications, Inc.
1712 Tenth Avenue
Brooklyn, NY 11215-6215

Terry Holmes, President
Fortitude Ventures, LLC
720 Caribou Drive West
Monument, CO 80132

Todd D. Gray
Dow Lohnes pllc
1200 New Hampshhire Ave. NW, Ste. 800
Washington, DC 20036
Counsel for Georgia Institute of Technology and National Educational Broadband Services Association

Dr. Shannon Adams, Superintendent
Jackson County School System
Board of Education
1660 Winder Highway
Jefferson, GA 30549

Leigh Ann Spellman, CEO
Gryphon Wireless, LLC
P.O. Box 1782
Kearney, NE 68848

Susan Lundborg, President
Delta Band Services, Ltd.
8571 Egret Lakes Lane
West Palm Beach, FL 33412

Steven C. Schaffer
Schwartz, Woods & Miller
1233 20th Street NW, Suite 610
Washington, DC 20036-7322
Counsel for Mississippi Authority for Educational Television

P. Kelley Dunne, CEO
DigitalBridge Communications Corp.
44675 Cape Court, Suite 130
Ashburn, VA 20147

John B. Schwartz, President
Chicago Instructional Technology Foundation
P.O. Box 6060
Boulder, CO 80306

Lynn Rejniak, Chair
National Educational Broadband Services Association
P.O. Box 121475
Clermont, FL 34712-1475

Dr. Michael R. Kelley
MS 1D2
George Mason University Instructional Foundation, Inc.
Fairfax, VA 22030-4444

The Michael Kelley Revocable Trust d/b/a Shannondale Wireless
3623 Parklane Road
Fairfax, VA 22030-1851
Blake Twedt
800 Lowry Lane
Tampa, FL 33604

Paul J. Sinderbrand
Robert D. Primosch
Wilkinson Barker Knauer, LLP
2300 N Street NW, Suite 700
Washington, DC 20037-1128
Counsel for Wireless Communications Association International, Inc.

Jerrold F. Wareham, President & CEO
Ideastream
1375 Euclid Avenue
Cleveland, OH 44115-1835

John Primeau, President
North American Catholic Educational Programming Foundation Inc.
2419 Hartford Avenue
Johnston, RI 02919-1719

Charles McKee, President
Shekinah Network
6312 East 110th Street
Tulsa, OK 74137-7200

Robert J. Rini
Loretta K. Tobin
Rini Coran, PC
1615 L Street NW, Suite 1325
Washington, DC 20036
Counsel for Indiana Higher Education Telecommunications System and The Source for Learning, Inc.

Kenneth E. Hardman
2154 Wisconsin Avenue NW, Suite 250
Washington, DC 20007
Counsel for Private Networks, Inc.

Rudolph J. Geist
Eric E. Menge
RJGLaw LLC
7910 Woodmont Avenue, Suite 1400
Bethesda, MD 20814
Counsel for Hispanic Information and Telecommunications Networks, Inc.

Jeffrey H. Olson
Paul, Weiss, Rifkind, Wharton & Garrison, LLP
1615 L Street NW, Suite 1300
Washington, DC 20036-5694
Counsel for Community Telecommunications Network, Acadia Parish School Board, Calcasieu Parish School Board, Jefferson Davis Parish School Board, and New Trier Township High School District 203

Bert Schmidt
Hampton Roads Educational Telecommunication Association, Inc.
5200 Hampton Boulevard
Norfolk, VA 23508-1507

Michael Rapaport, President
IDT Spectrum, LLC
520 Broad Street
Newark, NJ 07102
Stephen E. Coran
Rini Coran, PC
1615 L Street NW, Suite 1325
Washington, DC 20036
Counsel for IDT Spectrum, LLC

Billy J. Parrot, President
Private Networks, Inc.
33 West Main Street, Suite 403
Elmsford, NY 10523

Michael W. Pagon, President & CEO
Cheryl K. Crate, V.P. Public Affairs
Xanadoo, LLC
225 City Line Avenue, Suite 100
Bala Cynwyd, PA 19004

George W. Bott
Rockne Educational Television
The Learning Paradigm, Inc.
Albion Community Development Corporation, Inc.
P.O. Box 457
Hamlin, NY 14464

Keith Ouweneel
Weld County School District RE-1
P.O. Box 157
Gilcrest, CO 80623

Father Edward Anthony
Franciscan Canticle, Inc.
611 S. Palm Canyon Drive, #7
Palm Springs, CA 92264

Randy Williams
Victoria Independent School District
P.O. Box 7159
Victoria, TX 77902-1759

Peter Mattaliano
Rutgers, The State University of NJ
96 Davidson Road, Room 170E
Busch Campus
Piscataway, NJ 08854

Brian Brooks
Anaheim City School District
1001 S. East Street
Anaheim, CA 92805

David Boyd
Lowndes County Public Schools
105 East Tuskeena Street
P.O. Box 755
Hayneville, AL 36040

Richard Rodriguez
Vista Unified School District
4680 North Avenue
Oceanside, CA 92056

Kent Keyser
San Diego Community College District
3375 Camino del Rio South, Suite 125
San Diego, CA 92108-3883

Steve Clemons
San Diego County Office of Education
6401 Linda Vista Road, Room 205
San Diego, CA 92111-7399

Lisa Dinga
Innovative Technology Education Fund
1001 Craig Road, Suite 260
St. Louis, MO 63146

Mark Rozewski
University of Southern Indiana
8600 University Boulevard
Evansville, IN 47712

Dr. James Richburg
Okaloosa Walton College
100 College Boulevard
Niceville, FL 32578

Ray Rushing
Texas State Technical College – Harlingen and Waco
3801 Campus Drive
Waco, TX 76705

Dr. Bill Arceneaux
The Foundation for Excellence in Louisiana Public Broadcasting
7733 Perkins Road
Baton Rouge, LA 70810

Kathryn Hott
Springfield Local Schools
6900 Hall Street
Holland, OH 43528

Scott Burns
San Diego State University
5500 Campanile Drive – Room 1620
San Diego, CA 92182

Matt Evans
Oceanside Unified School District
4680 North Avenue
Oceanside, CA 92056

Martin L. Wind
Diocesan Telecommunications Corp.
1200 Lantana
Corpus Christi, TX 78407

Joan Twidwell
Reorganized School District No. R-IV of Pettis County
301 S. Washington
LaMonte, Missouri 65337

Willard D. Rowland, Jr.
Colorado Public Television, Inc.
2900 Welton Street
Denver, CO 80205

Pat Burns
Board of Governors of the Colorado State University System
c/o Director of ACNS, Dept. 1018
Colorado State University
Fort Collins, CO 80523-1018

William Christopher Neale
Gasconade County R-1 Schools
164 Blue Pride Drive
Hermann, MO 65041

Jennifer Walters
Escondido Union School District
1330 East Grand Avenue
Escondido, CA 92027-3099

John D. Greydanus
Oregon Wireless Instruction Network
Oregon State University
109 Kidder Hall
Corvallis, Oregon 97331

Bob Baker
Region IV Education Service Center
7145 West Tidwell Road
Houston, TX 77092-2096

David A. Niccoli
Board of Governors of the Colorado State University System
2200 Bonforte Blvd.
Pueblo, CO 81001

Michael Bennet
School District No. 1 in the City & County of Denver & State of Colorado
900 Grant Street
Denver, CO 80203

Dr. John D. Long
Warren County R-3 School District
302 Kuhl Avenue
Warrenton, MO 63383

Dr. Michael Hilt
The Knowledge Network of Greater Omaha, c/o UNO-TV
University of Nebraska at Omaha
Engineering Room 200
6001 Dodge Street
Omaha, NE 68182

Steve Valdez
Weslaco Independent School District
P. O. Box 266
Weslaco, TX 78596

Mark Sena
Mars Communications, Inc.
157 Biscayne Avenue
Tampa, Florida 33606

Dewayne Geoghagan
Walton County School District
145 Park Street, Suite 5
DeFuniak Springs, FL 3 2435

James Chitwood
Okaloosa-Walton College Foundation, Inc.
100 College Boulevard
Niceville, FL 32578

Marty Ronning
University of Maryland
2104A Glenn L. Martin Hall
College Park, MD 20742

Mary Ann Coleman
Louisiana Independent Higher Education Research Foundation
320 3rd Street Suite 104
Baton Rouge, LA 70801-1307

Michael Pacella
Newburgh City School District
124 Grand Street
Newburgh, NY 12550

Christopher Paige
California Human Development Corporation
3315 Airway Drive
Santa Rosa, California 95403

Allan Tunis
Junior College District of Metropolitan Kansas City, Missouri
3200 Broadway
Kansas City, MO 64111

Thomas G. Smith
St. Norbert College
100 Grant Street
DePere, Wisconsin 54115

J. Craig Klimczak
St. Louis Community College
300 South Broadway
St. Louis, MO 63102

Joel A. Brick
Sioux Valley Rural Television, Inc. dba
Sioux Valley Wireless
P.O. Box 20
Colman, SD 57017

Dr. Brian F. Savage
Point Pleasant Beach Board of Education
299 Cooks Lane
Point Pleasant Beach, NJ 08742

Freddie P. Moon
Heritage Christian University
P.O. Box HCU
3625 Helton Drive
Florence, AL 35630

Meg Sakellarides
Connecticut Public Broadcasting, Inc.
1049 Asylum Avenue
Hartford, CT 06105

William W. Wood
Albright College
13th & Bern Streets
P.O. Box 15234
Reading, PA 19612-5234

Beth Courtney
The Louisiana Educational Television
Authority
7733 Perkins Road
Baton Rouge, LA 70810

Paul Edward Dix
School District of Oakfield
250 Church Street
Oakfield, WI 53065

Mary Beth Fetchko
La Roche College
9000 Babcock Boulevard
Pittsburgh, PA 15237

Cynthia McClain-Hill, President
National Association of Women Business
Owners
1760 Old Meadow Road, Suite 500
McLean, VA 22102

Randolph J. May, President
The Free State Foundation
10701 Stapleford Hall Drive
Potomac, MD 20854

Robert R. Davila, Ph.D.
President, Gallaudet University
800 Florida Ave. NE
Washington, DC 20002

W. Kenneth Ferree, President
Barbara S. Esbin, Senior Fellow
The Progress and Freedom Foundation
1444 Eye Street NW, Suite 500
Washington, DC 20005

_/s/_____
Kimberly Riddick