

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

In the Matter of)	
)	
)	WT Docket No. 11-186
The State of Mobile Wireless Competition)	
)	

REPLY COMMENTS OF CLEARWIRE CORPORATION

Clearwire Corporation ("Clearwire"), pursuant to the Commission's *Public Notice* (DA 11-1856, rel. November 3, 2011), hereby submits its Reply to the comments in the above-captioned matter.

I. THE COMMISSION SHOULD REJECT THE CALLS TO MODIFY ITS SPECTRUM SCREEN IN THIS PROCEEDING

This proceeding is not the appropriate forum for consideration of changes to the Commission's spectrum screen. The FCC Staff uses the screen as a tool for analyzing proposed transactions and adjusts the screen to take into account the facts and circumstances surrounding spectrum available for commercial mobile providers at the time applications for approval of a transaction are under consideration.¹ It would therefore be inappropriate to use this proceeding to make a fundamental change to the FCC's future merger analysis when it is impossible to predict the next transaction that will come before it and the state of spectrum availability at that time. Nonetheless, AT&T, Inc. ("AT&T") renews here the request that it made in the context of

¹ See *Sprint Nextel Corp. and Clearwire Corp. Application for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, WB Docket No. 08-94, (rel. Nov. 7, 2008) ¶¶ 71-74 ("Sprint-Clearwire Order"); See also *Application of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses Authorizations, and Spectrum Manager and De Facto Transfer Lease Arrangements*, Memorandum Opinion and Order and Declaratory Ruling, WB Docket No. 08-95, (rel. Nov. 10, 2008) ¶¶ 62-65("Verizon-ALLTEL Order").

its applications for approval of a merger with T-Mobile that the Commission include all Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum in the screen.² AT&T itself has acknowledged that the spectrum screen is a tool used by the Commission to conduct a case-by-case analysis of a proposed transaction. It has stated:

[T]he Commission’s definition of the spectrum input market for purposes of the initial spectrum screen is not a ‘rule’ subject to the APA ‘notice and comment’ procedures. Rather, the Commission’s screen is simply one analytical tool used by the Commission to evaluate the competitive effects of an application proposing a merger of regulated carriers. . . . It is well established that administrative agencies have the right to develop decisional standards in adjudicatory proceedings on a case-by-case basis, and a case-by-case approach is particularly appropriate in merger proceedings given the fact-intensive nature of the competitive analysis required.³

AT&T has not provided any rationale for why the Commission should depart from its past practice of reviewing and updating the screen as it is analyzing a proposed transaction.

Accordingly, the Commission should reject AT&T’s request that the Commission significantly modify its spectrum screen in this proceeding.

If the Commission nonetheless decides to consider adjustments to the spectrum screen in this proceeding, it should reject AT&T’s request to include all 194 MHz of BRS/EBS spectrum in the screen. In the Sprint-Clearwire transaction, the Commission decided that portions of the 2.5 GHz band would not be included in the spectrum screen as part of the analysis of the proposed deal after taking into account regulatory and leasing issues associated with the band.⁴

As Clearwire discussed in its reply comments in the AT&T and T-Mobile merger proceeding, the Commission’s rationale remains unchanged for excluding portions of the 2.5 GHz band,

² At the request of AT&T and T-Mobile, the Commission has dismissed AT&T’s and T-Mobile’s merger applications. *See Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, DA 11-1955 (released November 29, 2011) (AT&T and T-Mobile Merger Proceeding). The Commission has also released the Commission staff’s report determining that the merger is not in the public interest. *See Staff Analysis and Findings*, AT&T and T-Mobile Merger Proceeding (filed Nov. 30, 2011) (“Staff Report”).

³ *Opposition of AT&T Inc. to Petition for Limited Clarification of Frontline Wireless, LLC*, WT Docket No. 07-153, P. 4, (filed Dec. 31, 2007) (footnotes omitted).

⁴ Sprint-Clearwire Order at 71-74.

including Middle Band Spectrum ("MBS"), BRS Channel 1, the J and K guard bands, and EBS spectrum from the screen.⁵ In particular, EBS educational use requirements and other leasing rules that initially compelled the Commission to exclude EBS spectrum from the screen remain unchanged. In the recently released Staff Report regarding the proposed merger of AT&T and T-Mobile, staff again chose to include 55.5 MHz of BRS/EBS spectrum despite AT&T's request that all of BRS/EBS spectrum be included in the screen, therefore reaffirming its prior decisions to exclude portions of the 2.5 GHz band from the screen.⁶

In light of the foregoing, Clearwire urges the Commission to reject AT&T's request to modify the spectrum screen in this proceeding by including all 194 MHz of BRS/EBS spectrum in the spectrum screen.

Respectfully submitted,
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⁵ Clearwire Corporation Reply Comments, *Deny Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (filed June 20, 2011) Pg. 12; *See also*, Sprint-Nextel Petition to Deny, *Applications of AT&T Inc. and Deutsche Telekom AG For Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65 (filed May 31, 2011) Pg. 73 (citing Sprint-Clearwire Order at ¶¶ 67-71).

⁶ In fact, FCC staff actually reduced the trigger for the screen by subtracting 12.5 MHz of SMR spectrum from the denominator. Staff Report at ¶ 23 n.137 (citing not-yet-released draft order in *Applications of AT&T Inc., and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations*, WT Docket No. 11-18). *See also*, Staff Report at ¶ 35 n.110 (citing to spectrum screen used in the AT&T-Centennial merger).