

would perpetuate the inefficient use of spectrum to support the legacy networks, providing no change in dropped call rates for subscribers of either party. Nor would divestiture free up additional spectrum at 850 MHz needed by Cingular and AWS to begin the evolution towards UMTS. Use of the PCS bands that the merged entity may also acquire may be encumbered by TDMA subscribers depending upon the RSA, making PCS bands alone only a partial solution to clearing adequate spectrum needed for UMTS.

Combining the two companies' overlapping 850 MHz service areas also provides unique benefits to the legacy subscribers of both carriers that would not be the case if one of the spectrum blocks (and accompanying network assets) were divested. While the two carriers have roughly overlapping service areas, the locations of each carrier's facilities varies in a given area. As a result, where one carrier has a weak signal, the other's signal may be strong. Likewise, where one system has facilities and the other does not, it may be possible to dedicate additional spectrum from the other frequency block to improve service and increase capacity. The complementary nature of the overlapping service areas will thus bring more consistently reliable service to the legacy 850 MHz customers of both networks. This is a particular benefit in rural areas where coverage tends to be more differentiated than in urban areas.²⁹⁰ By contrast, requiring divestiture means that legacy customers of both companies would be denied this benefit. Moreover, Cingular customers would be identified as roamers on the divested system to the extent it covers certain areas that the retained system does not, and vice versa.

These benefits – better service quality and coverage and better spectrum utilization to support UMTS – are uniquely available by merging the two 850 MHz systems and would not be achievable if one of the 850 MHz blocks were divested. As the Hogg/Austin Declaration notes, “the merger will make it possible for rural areas — including those where the two companies are both present at 850 MHz — to receive UMTS more quickly and in a broader geographic area than would have occurred without the merger.”²⁹¹ Moreover, they are achievable without a significant likelihood of substantial competitive harm, as discussed above, making waiver manifestly in the public interest.

For all the foregoing reasons, Cingular respectfully requests that, as part of its approval of the instant transaction, the Commission waive Section 22.942 of its rules to permit the holding of the cellular RSA cross-interests described herein by the merged company post consummation.

V. OTHER ISSUES

A. International

The instant transaction also involves the transfer of control of Section 214 authorized international carrier AWS, which holds a single authorization to provide global facilities-based and resold international services.²⁹² Approving this transfer will promote and preserve

²⁹⁰ *Id.* at 22.

²⁹¹ *Id.* at 23.

²⁹² The parties are filing concurrently a separate transfer of control application with respect to the international Section 214 authorization held by AWS in accordance with the Commission's Part 63 rules. There also will be a *pro forma* transfer of control of GSM Corridor, LLC, an international Section 214 authorization holder in which AWS and Cingular each have

(continued)

competition in the international telecommunications marketplace. Consummation of the proposed transaction will enable Cingular to offer more innovative and competitive domestic and international service offerings, thereby enabling Cingular to become a more effective competitor in the U.S. international telecommunications marketplace. In addition, grant of the instant application will ensure that Cingular has the necessary authority to continue to offer seamless international services to existing AWS customers.

The proposed transaction poses no risk of anticompetitive impact on the U.S. international telecommunications marketplace. Applicants together hold only a miniscule share of the international telecommunications market. For this reason alone, Cingular would have little ability to adversely affect competition, even if it so desired. In addition, the Commission's principal concern for "the exercise of foreign market power in the U.S. market" is that such market power "could harm U.S. consumers through increases in prices, decreases in quality, or reductions in alternatives in end user markets."²⁹³ As the Commission explained further, "generally, this risk occurs when a U.S. carrier is affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market."²⁹⁴ As discussed in more detail in the related application to transfer control of authorized international carrier AWS, Cingular will acquire no affiliations with foreign carriers presumed to have market power. Moreover, on all but a few select non-dominant routes Cingular will remain authorized only to resell the services of unaffiliated facilities-based carriers, thus further mitigating the risk of anticompetitive conduct.²⁹⁵ Finally, for all international routes on which Cingular is regulated as dominant, Cingular has *already* agreed to abide by any applicable dominant carrier regulation, and Cingular does not seek any change to such dominant status in the instant application. Therefore, the transaction will have no adverse impact on competition in the international telecommunications marketplace.

B. Related Governmental Filings

The DOJ will conduct its own review of the competitive aspects of this transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18(a), and the rules promulgated under that Act. Cingular and AWS have submitted a pre-merger notification form and an associated documentary appendix to the DOJ and the FTC. Filings also may be required with telecommunications and competition regulators in certain foreign countries.

(footnote continued)

negative control. Cingular will file a post-consummation notification of this transfer pursuant to 47 C.F.R. § 63.24(f).

²⁹³ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23891, 23951-54 (1997).

²⁹⁴ *See id.*

²⁹⁵ *See* 47 C.F.R. § 63.10(a).

C. Additional Authorizations

In addition to seeking the Commission's approval of the transfers of control of the FCC authorizations covered in these applications, the parties also request the additional authorizations described below.

1. After-Acquired Authorizations

While the list of call signs referenced in each application is intended to be complete and to include all of the licenses and authorizations held by the respective licensees that are subject to the transaction, AWS licensees may now have on file, and may hereafter file, additional requests for authorizations for new or modified facilities which may be granted before the Commission takes action on the instant applications. Accordingly, the parties request that any Commission approval of the applications filed for this transaction include authority for Cingular to acquire control of: (1) any authorization issued to the respective licensees/transferees during the pendency of the transaction and the period required for consummation of the transaction; (2) any construction permits held by the respective licensees/transferees that mature into licenses after closing; and (3) any applications that are pending at the time of consummation. Such action would be consistent with prior decisions of the Commission.²⁹⁶ Moreover, because Cingular is acquiring AWS and all of its FCC authorizations, Cingular requests that Commission approval include any facilities that may have been inadvertently omitted.

In addition, the parties hereby request a blanket exemption from Sections 1.927(h) and 1.933(b) of the FCC's rules, 47 C.F.R. §§ 1.927(h), 1.933(b), in cases where the licensee files amendments to pending applications to reflect consummation of this application. The exemption is requested so that such amendments reporting the change in ownership will not be treated as major amendments requiring a second public notice for the still-pending applications. Since any ownership changes that result with respect to any particular pending application are part of a larger transaction undertaken for a legitimate business purpose, grant of such an exemption would be consistent with previous Commission decisions.²⁹⁷

²⁹⁶ *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, Memorandum Opinion and Order*, 12 F.C.C.R. 19985, 20097 (1997); *Applications of Craig O. McCaw, Transferor, and AT&T, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, Memorandum Opinion and Order*, 9 F.C.C.R. 5836, 5909 n.300 (1994) ("McCaw").

²⁹⁷ *See, e.g., Applications of PacifiCorp Holdings, Inc. Transferor, and Century Telephone Enterprises, Inc. Transferee, For Consent to Transfer Control of Pacific Telecom, Inc. a Subsidiary of PacifiCorp Holdings, Inc., Memorandum Opinion and Order*, 13 F.C.C.R. 8891, 8915; *McCaw*, 9 F.C.C.R. at 5909 n.300 (1994); *Applications of Centel Corporation, Transferor, and Sprint Corporation, and F W Sub Inc., Transferees, For Consent to the Transfer of Control of Authorizations in the Domestic Public Cellular Radio Telecommunications Service and Other Common Carrier Services, Memorandum Opinion and Order*, 8 F.C.C.R. 1829, 1833 (1993).

2. Trafficking

To the extent any authorizations for unconstructed systems are covered by this transaction, these authorizations are merely incidental, with no separate payment being made for any individual authorization or facility. Accordingly, there is no reason to review the transaction from a trafficking perspective.²⁹⁸

3. Miscellaneous *Pro Forma* Issues

AWS and Cingular currently each have negative control over the licensees that are part of their "Roadrunner" joint venture. Roadrunner Cingular License Sub, LLC; Cingular New England License Sub LLC; and AT&T Wireless Roadrunner License Sub, LLC all hold CMRS licenses while GSM Corridor, LLC holds an international Section 214 authorization. With respect to these licensees, Cingular will be moving from negative to positive control, which is a *pro forma* transfer of control.²⁹⁹ The PCS and international Section 214 authorizations held by these licensees are all subject to forbearance from advance consent.³⁰⁰ Therefore, Cingular will file post-consummation notifications of these *pro forma* transfers of control.

In addition to the applications being filed by the Applicants, Cordova Wireless, Muskegon Cellular Partnership, Pittsfield Cellular Telephone Company, and St. Joseph CellTelCo will be filing *pro forma* transfers of control of AWS' minority interests in those general partnerships. Under the relevant partnership agreements, AWS is precluded from exercising control over these partnerships, and the relevant state partnership laws permit parties to contract around the default presumption that each general partner has a right to participate in *management and governance*. In a similar instance, the staff approved post-consummation notifications.³⁰¹ Therefore, Applicants believe that the transfer of these interests is a *pro forma*

²⁹⁸ 47 C.F.R. § 1.948(i) (noting that the Commission *may* request additional information regarding trafficking if it appears that a transaction involves unconstructed authorizations that were obtained for the principal purpose of speculation); *id.* § 101.55(c)-(d) (permitting transfers of unconstructed microwave facilities that are "incidental to the sale [of] other facilities or merger of interests").

²⁹⁹ *Applications of Vodafone AirTouch, Plc, and Bell Atlantic Corporation; For Consent to Transfer of Control or Assignment of Licenses and Authorizations, Memorandum Opinion and Order*, 15 F.C.C.R. 16507, 1608 n.4 (2000); Stephen F. Sewell, *Assignments & Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 321 & n.169 (1991).

³⁰⁰ See 47 C.F.R. §§ 1.948(c)(1), 63.24(f).

³⁰¹ See *Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications & Spectrum Manager Lease Notifications Action, Public Notice*, Rep. No. 1756, at 14 (WTB rel. Feb. 25, 2004) (approving ULS File No. 0001529630); *Assignment of Authorization & Transfer of Control Applications Action, Public Notice*, Rep. No. 1695, at 25 (WTB rel. Dec. 17, 2003) (approving ULS File No. 0001534079); see also *Review of Proposed Investment by Teléfonos de México, S.A. de C.V. in Parent of Cellular Communications of Puerto Rico, Public Notice*, 15 F.C.C.R. 1227, 1227-28 (WTB/IB 1999) (concluding that a transfer of an interest that is defined under the Commission's rules as a

(continued)

transfer of control subject to forbearance under Section 1.948(c)(1) of the Commission's rules.³⁰² Nevertheless, applicants have requested the four partnerships to waive forbearance and file transfer applications in advance out of an abundance of caution.

AWS also holds interests of 50 percent or more in the following designated entities: ABC Wireless, L.L.C.; Arnage Wireless, L.L.C.; Cascade Wireless, LLC; Indiana Acquisition, L.L.C.; Lone Star Wireless, L.L.C.; Panther Wireless, L.L.C.; Royal Wireless, L.L.C.; Sabre Wireless, L.L.C.; Southwest Wireless, L.L.C.; THC of Houston, Inc.; THC of Melbourne, Inc.; THC of Orlando, Inc.; THC of San Diego, Inc.; THC of Tampa, Inc.; Wireless Acquisition LLC; Zuma/Lubbock, Inc.; and Zuma/Odessa, Inc. By definition, those interests are non-controlling; otherwise, the companies in question would not qualify as designated entities.³⁰³ Consequently, a transfer of such an interest – even though of 50 percent or more – is a *pro forma* transaction.³⁰⁴ Because the interests are being transferred from one non-designated entity to another, unjust enrichment concerns are not implicated by this transaction. Therefore, the Applicants believe that advance consent is not required.³⁰⁵ Nevertheless, the staff has requested that the designated entities file applications for advance consent for the transfer of these interests, and the Applicants understand that the designated entities are doing so.

CONCLUSION

For the foregoing reasons, Cingular and AWS respectfully request that the Commission find that the subject transaction serves the public interest, convenience, and necessity, and thus expeditiously grant the instant transfer of control applications, as well as the accompanying waiver request.

(footnote continued)

controlling interest only requires a *pro forma* notification if the interest holder, by contract, cannot exercise control) (“*Cellular Communications of Puerto Rico*”).

³⁰² 47 C.F.R. § 1.948(c)(1).

³⁰³ See 47 C.F.R. § 1.2110; *In re Amendment of Part 1 of the Comm'n's Rules – Competitive Bidding Procedures, Fifth Report and Order*, 15 F.C.C.R. 15293, 15323-28 (2000) (“We will adopt as our general attribution rule a ‘controlling interest’ standard for determining which applicants qualify as small businesses.”) (subsequent history omitted).

³⁰⁴ *Cellular Communications of Puerto Rico*, 15 F.C.C.R. at 1227-28 (generally concluding that a transfer of an interest that is defined under the Commission's rules to be a controlling interest in licensees but that, by contract, cannot exercise control of the licensees is a *pro forma* transfer of control of the licensees).

³⁰⁵ See 47 C.F.R. § 1.948(c)(1).

1

Declaration of Richard J. Gilbert

I, Richard J. Gilbert, hereby declare the following:

I. Qualifications

1. My name is Richard J. Gilbert. I am Professor of Economics and Chair of the Department of Economics at the University of California at Berkeley. I am also a Director of LECG, LLC, a firm providing expert analysis and management consulting in economics, accounting, and finance.
2. I received Bachelor and Master of Science degrees in Electrical Engineering from Cornell University in 1966 and 1967, respectively. I received a Master of Arts Degree in Economics from Stanford University in 1975, and a Doctor of Philosophy in Engineering-Economic Systems from Stanford University in 1976.
3. I teach and pursue research in industrial organization and regulation. Industrial organization is the academic field that deals with policy issues related to the structure and performance of firms in an industry, with particular attention to competition and antitrust policy. I have been an associate editor of *The Journal of Economic Theory*, *The Journal of Industrial Economics*, and *The Review of Industrial Organization*. From 1994 to 1995, I was President of the Industrial Organization Society. From 1994 to 1996, I was vice-chair of the American Bar Association Section of Antitrust Law's Economics Committee. I have lectured widely on industrial organization theory and policy, and I have testified before U.S. courts of law, regulatory commissions, and Congress on economic policy issues. My curriculum vitae is attached to this declaration.
4. From 1993 until 1995, I was the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice ("Antitrust Division"), the highest-ranking economics position in the Antitrust Division. While at the Antitrust Division, I oversaw the drafting of the Antitrust Guidelines for the Licensing of

Intellectual Property (the "Intellectual Property Guidelines").¹ The Intellectual Property Guidelines were adopted by both the U.S. Department of Justice and the U.S. Federal Trade Commission ("FTC") and describe the antitrust enforcement policy of these Agencies with respect to the licensing of intellectual property protected by patent, copyright, and trade secret law, and of know-how. That document addresses the analysis of competitive effects associated with intellectual property licensing in product and geographic markets.

5. I have been invited to testify before the U.S. Federal Trade Commission and the U.S. Department of Justice on matters relating to intellectual property and competition. On October 25, 1995, I presented testimony on the analysis of innovation effects on merger policy at the FTC Hearings on Global and Innovation-Based Competition. On February 6, 2002, I presented a keynote address on the first day of the DOJ and FTC Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy. On February 25, 2002, I presented testimony on antitrust and intellectual property issues in these hearings.
6. I have consulted for the Antitrust Division of the U.S. Department of Justice on several matters dealing with issues of market definition, including the proposed merger of EchoStar and Hughes-DirectTV satellite services and *U.S. v. Microsoft*. I have also consulted for a number of private parties regarding the possible competitive effects of several transactions in the telecommunications industry. These include applications to provide in-region interLATA service by Ameritech, SBC Communications, and BellSouth, and the mergers of SBC and Pacific Telesis, SBC and Ameritech, Bell Atlantic and NYNEX, and MCI Worldcom and Sprint.
7. As I explain below, it is my conclusion that the proposed merger of Cingular and AT&T Wireless ("AWS") will not harm competition in the markets for mobile wireless voice and data services and is in the public interest. Indeed, the merger will promote

¹ Antitrust Guidelines for the Licensing of Intellectual Property, jointly issued by the U.S. Department of Justice and the Federal Trade Commission, 1995, available at www.usdoj.gov/atr/public/guidelines/ipguide.htm.

competition in mobile wireless services by creating a more efficient and innovative competitor.

II. Competition in mobile wireless services is robust

8. The Federal Communications Commission, in its Eighth “Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services” concluded that “...while there are several large, established carriers in the CMRS industry, they have no guarantee of maintaining their market share, and they are faced with consumers that would readily leave carriers that attempted to raise prices or diminish service quality.”²
9. Consumers have benefited directly from competition-driven innovation in mobile wireless services. According to the FCC, “Competitive forces combined with increased capacity have induced companies to offer calling plans with large buckets of relatively inexpensive minutes, free enhanced services such as voicemail and caller ID, and wireless data and mobile Internet offerings.”³ “Continued downward price trends, the continued expansion of mobile networks into new and existing markets, high rates of investment, and churn rates of about 30 percent, when considered together with the other metrics, demonstrate a high level of competition for mobile telephone consumers.”⁴
10. Trends in prices, service quality and innovation in the mobile wireless industry provide evidence of robust competition. Between 1996, when the first PCS networks were deployed, and 2002, the prices of mobile wireless packages have declined while the minutes included in the packages have increased. During this time, average revenue per minute declined approximately 70 percent, from \$0.38 to \$0.11.⁵ Service quality has improved as mobile wireless carriers have built out their networks throughout the

² FCC, “Eighth Report,” *In the Matter of Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, July 14, 2003, ¶ 4. (Hereinafter “Eighth CMRS Report.”)

³ *Id.*, ¶ 34.

⁴ *Id.*, ¶ 57.

⁵ *Id.*, Table 9, p. D-11.

country. Between 1996 and 2002, mobile wireless carriers have invested more than \$100 billion, increasing cell sites by five-fold from approximately 23,000 to 139,000.⁶ Carriers have also added new features and services that have increased the appeal of wireless services to consumers. Wireless Internet was introduced in 1999.⁷ Since then, data transmission speeds have increased more than ten-fold,⁸ and many new applications, including text messaging and color pictures, have been introduced. Today, millions of customers are using these data services.⁹ Other advanced services include Cingular's "FastForward," which automatically forwards a user's calls from his wireless to home wireline phone.¹⁰

11. Even though carriers are using different segments of spectrum and different technologies for providing service, their service offerings are similar, and consumers view the offerings as close substitutes. Wireless customers have shown that they are willing to switch their allegiance in response to attractive service offerings from other providers.¹¹ The FCC reported that in 2002, nearly one-third of mobile wireless customers leave their carriers each year.¹² Competition in the mobile wireless industry has become even more intense with the implementation of wireless local number portability beginning in November 2003, which allows consumers to retain their mobile phone numbers when they switch carriers.¹³

⁶ *Id.*, Table 1, p. D-2.

⁷ Dube, Jonathan, "Cutting the Cord: New Wireless Internet Services Set to Deliver," *ABCNews.com*, September 27, 1999.

⁸ Maier, Matthew, "The Real 3G," *Business 2.0*, October 28, 2003.

⁹ For example, Cingular reports 6.6 million active data services users as of year-end 2003 and Sprint PCS reports 5.5 million data subscribers as of 4Q03 (up 400,000 from the previous year). See "Item 1. Business: Overview," *Cingular Wireless Annual Report on Form 10-K*, December 31, 2003, p. 2 and "Wireless Data Leadership," *PCS Group: Fourth Quarter and Full Year 2003 Investor Update*, February 3, 2004, slide 11.

¹⁰ Rosenbluth, Todd, "Will Phone Users Cut Their Cords?" *BusinessWeek Online*, November 24, 2003. See also "Cingular Wireless - FastForward," *Cingular Wireless website*, available at http://www.cingular.com/beyond_voice/fastforward.

¹¹ Backover, Andrew, "Keep-your-cell-number rules to begin Monday," *USA Today*, November 20, 2003. Available at http://www.usatoday.com/money/industries/telecom/2003-11-20-wireless_x.htm.

¹² Eighth CMRS Report, ¶ 217.

¹³ "FCC Provides Information for Consumers on Wireless Local Number Portability," *FCC News Release*, November 4, 2003. On November 24, 2003, wireless local number portability (WLNP) was implemented in the 100 largest metropolitan areas; by May 24, 2004, WLNP will be available to all customers.

12. Trends in aggregate subscriptions to mobile wireless services illustrate the power of consumer choice in this industry.¹⁴ Table 1 provides percentage shares based on year-end subscribers for the six national carriers and all other regional carriers. It shows that recent entrants into the mobile wireless industry have achieved significant shares of total subscribers at the expense of the established cellular providers. Between 1999 and 2003, the major national carriers with cellular licenses (Verizon Wireless, Cingular and AWS) have lost a combined eight percentage points of aggregate subscriber share, and the newer national PCS and SMR carriers (Sprint PCS, T-Mobile, and Nextel) have gained 11 percent. These share trends clearly demonstrate that there are no strong incumbency effects in the provision of mobile wireless services.

Table 1: Subscriber Shares of Mobile Wireless Providers¹⁵

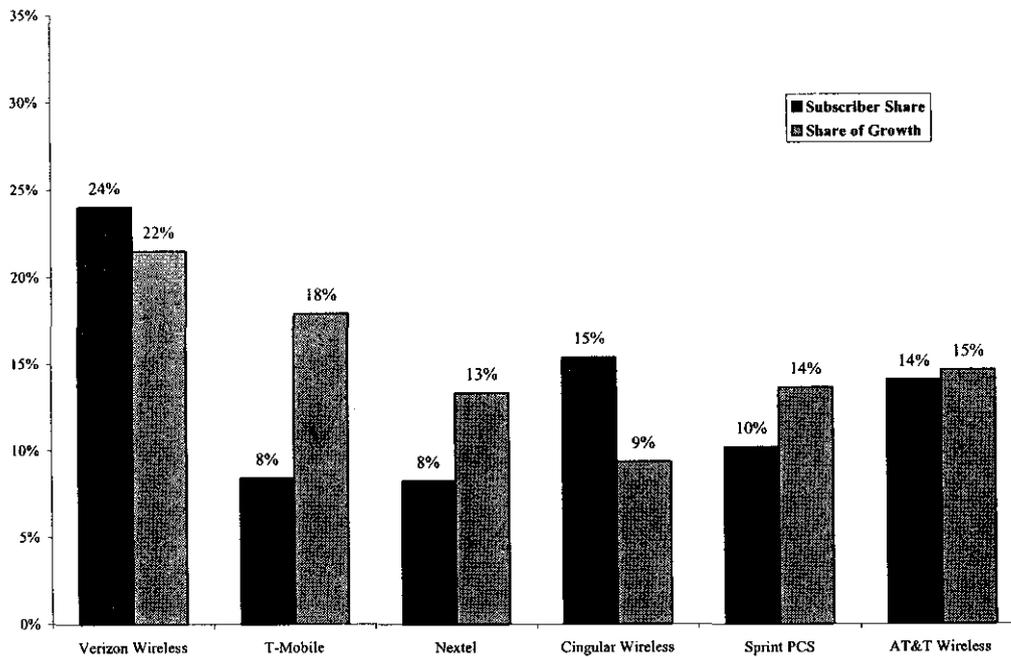
Carrier	1999	2000	2001	2002	2003
Verizon Wireless	30%	25%	23%	23%	24%
Cingular Wireless	19%	18%	17%	16%	15%
AT&T Wireless	12%	14%	14%	15%	14%
Sprint PCS	7%	9%	11%	10%	10%
Nextel	5%	6%	7%	8%	8%
T-Mobile	3%	4%	5%	7%	8%
Regional Carriers	24%	24%	23%	21%	20%
Total	100%	100%	100%	100%	100%

13. Net subscriber additions show the net new customers that choose a carrier and provide a better measure of the success of each carrier in the current market. Net adds are the difference between the number of new subscribers for a company's service and the number of existing subscribers that terminate their service ("churn"). A provider's subscriber share is growing if its share of net new subscribers is larger than its current share of total subscribers, and its subscriber share is falling if its share of net new subscribers is lower than its current share of total subscribers. Thus, a comparison of a carrier's share of net new subscribers with its share of total subscribers is an indicator of whether the carrier is becoming a more or less important force in the supply of mobile wireless services.

¹⁴ As I discuss later, revenue provides a more accurate portrayal of competition. I provide historical data based on subscribers here because subscriber information is more readily available and is useful in assessing industry trends.

14. Figure 1 shows both the subscriber share and the share of net new subscribers for each of the national carriers over the three-year period 2000-2003. The figure shows that the aggregate shares of T-Mobile, Nextel and, to a lesser extent, Sprint PCS, were growing over this time period while Cingular and Verizon Wireless were losing share.

Figure 1: Share of Total Subscribers and Share of Net New Subscribers, 2000-2003



Sources: FCC CMRS Competition Reports; company 10-K reports; company Q4 2003 financial results; CTIA website.

15. Figure 2 repeats this exercise for the most recent year, 2003. This figure shows that AWS and Sprint PCS joined Cingular in the category of declining firms over this more recent time period, while T-Mobile, Verizon Wireless and Nextel gained share.

¹⁵ Sources: FCC CMRS Competition Reports; company 10-K reports; company Q4 2003 financial results; CTIA website. Regional Carriers = Total – National Carriers.

16. The disparity between the fastest growing providers and the merging companies is even more pronounced when viewed from the perspective of subscriber net additions in the fourth quarter of 2003. Table 2 shows that in the fourth quarter of 2003, Verizon Wireless and T-Mobile each added more than 1 million customers representing 28 percent and 19 percent respectively of net subscriber additions, while AWS added only 128,000 subscribers, representing just 2 percent of net additions.

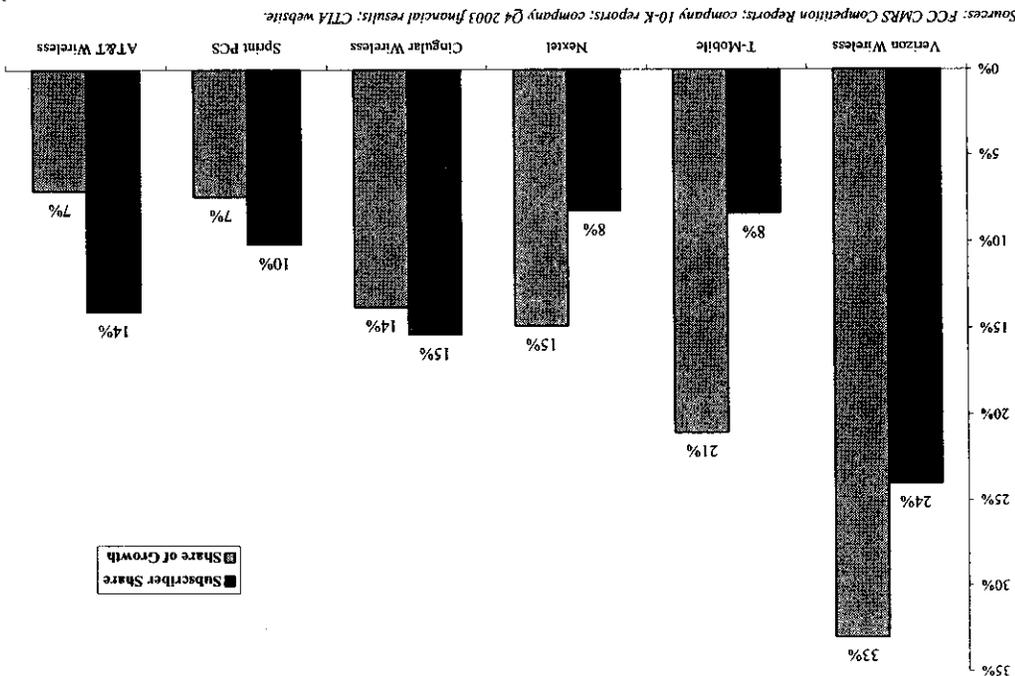


Figure 2: Share of Total Subscribers and Share of Net New Subscribers, 2002-2003

Table 2: Net Subscriber Additions by Carrier¹⁶

Company	Q4 2003	
	Subs ('000)	Share (%)
Verizon Wireless	1,496	28%
T-Mobile	1,015	19%
Cingular Wireless	642	12%
Nextel	553	11%
Sprint PCS	390	7%
AT&T Wireless	128	2%
Regional Carriers	1,029	20%
Total	5,253	100%

17. Incumbency has not shielded Cingular or AWS from the forces of competition. The aggregate positions of both Cingular and AWS have been eroding over the past few years and the pace of this erosion has accelerated. T-Mobile, Nextel and Sprint PCS have become major players in the industry even though they were relatively late entrants. Verizon Wireless stemmed its early loss of aggregate share by introducing and aggressively promoting national calling plans and by achieving a high ranking in terms of network quality. In a J.D. Power 2003 survey of mobile wireless users, Verizon Wireless had the highest service quality rating.¹⁷ T-Mobile's success is due largely to aggressive pricing and promotions.¹⁸
18. Competition and innovation have persisted for mobile wireless services despite large changes in the structure of the industry. The six largest wireless operators' share of all mobile subscribers increased from about 55 percent in the mid-90s to about 80 percent

¹⁶ Q4 2003 Financial Results of named companies; CTIA website.

¹⁷ "J.D. Power and Associates Reports: Verizon Wireless Ranks Highest in Network Quality Performance," *J.D. Power and Associates Press Release*, July 29, 2003. Consumer Reports reached the same conclusion in their 2003 and 2004 surveys. See "Cellular Service Ratings," *Consumer Reports*, February 2003, p. 17 (hereinafter "Consumer Reports 2003"); "Ratings: Cellular Carriers," *Consumer Reports*, February 2004, p. 16 (hereinafter "Consumer Reports 2004").

¹⁸ Meyer, Dan, "T-Mobile USA exploits niche as value leader; Carrier could win in WLNP rollout," *RCR Wireless News*, November 3, 2003.

in 2000,¹⁹ yet prices fell from an average of \$0.43 per minute in 1995 to \$0.11 in 2002.²⁰

III. The merger will strengthen competition by creating a more efficient and effective competitor

19. Without this merger, both Cingular and AWS would be constrained in their abilities to roll out ubiquitous high-speed 3G services to large numbers of consumers in a timely manner.²¹ As a consequence, they would become more distant competitors to Verizon Wireless and possibly other mobile wireless providers that face fewer constraints for upgrading their services. The merger will enable the merged company to increase service quality and roll out high-speed services in more areas. The merger will create a more potent competitor and stimulate competition to the benefit of consumers.
20. The trend in the demand for mobile wireless services is for high quality voice and advanced services, including high-speed data and video services, available over large geographic areas with no roaming charges.²² For Cingular and AWS to compete successfully for mobile wireless customers they must be able to provide advanced services that operate consistently and reliably over large areas. Neither Cingular nor AWS can do this as quickly, if at all, on its own. Both companies face serious spectrum limitations that stem from the evolutionary path of their network technologies and legacy service obligations. Cingular currently has coverage in only 87 of the top 100 MSAs.²³ The merger will allow the combined company to offer facilities-based service in 49 states and in 97 of the top 100 CMAs.
21. Both Cingular and AWS rely on three different technological platforms to offer voice and enhanced data services. They use the older analog cellular AMPS technology to serve customers that have analog phones or subscribe to analog services such as On-

¹⁹ Hazlett, Thomas W., "Is Federal Preemption Efficient in Cellular Phone Regulation?" *Federal Communications Law Journal*, Vol. 56(1):155-238, December 2003, pp. 196-197 (Figure 2).

²⁰ Eighth CMRS Report, Table 9, p. D-11.

²¹ Hogg/Austin Declaration, ¶ 6; Slemons Declaration, ¶ 9.

²² Declaration of Marc P. Lefar, ¶ 4.

²³ Declaration of Marc P. Lefar, ¶ 16.

Star. They offer digital service at 850 and 1900 MHz using the TDMA technology, and they also provide GSM digital voice services and GPRS and EDGE for data services that require faster transmission speeds.²⁴ By combining the spectrum of Cingular and AWS and using spectrum more efficiently, the merger will accelerate the introduction of data services and the evolution toward broadband third generation (3G) services while simultaneously providing improved quality of voice and other current (2.5G) services.

22. Each of these three technologies requires spectrum that is dedicated to that technology. In some areas, Cingular has no more than the original 25MHz of spectrum that was licensed in the first cellular allocations. A typical Cingular urban wireless system with only 25 MHz of spectrum requires about 4 MHz for analog AMPS service and 11 MHz for TDMA digital service. This leaves only 10 MHz available for advanced GSM and GPRS/EDGE services.²⁵
23. GSM carriers require considerable bandwidth to provide advanced wireless services to large numbers of users. High-speed service using the UMTS protocols requires a minimum of 10 MHz of clear spectrum (two paired 5 MHz channels) for a single channel and 30 MHz or more in regions where there is high demand.²⁶ UMTS is the third stage in the evolution to high-speed GSM service after GPRS and EDGE, and should be available at speeds up to 10 Mbps by 2005-06. It would compete with high-speed technologies offered by other carriers, such as 1xEV-DO or 1xEV-DV.²⁷

²⁴ GPRS is an abbreviation for General Packet Radio Service and EDGE is an abbreviation for Enhanced Data rate for Global Evolution. GPRS is referred to as a 2.5G technology, midway between second generation digital and third generation wideband service, while EDGE is an initial stage of 3G technology. See Hogg/Austin Declaration, ¶ 17.

²⁵ According to William Hogg and Mark Austin, absent the merger, Cingular will not be able to meaningfully reduce the amount of spectrum it dedicates to analog service until the FCC eliminates the requirement to provide analog service in 2008. Hogg/Austin Declaration, ¶ 30.

²⁶ See the joint declaration of William Hogg and Mark Austin, ¶ 35. UMTS stands for Universal Mobile Telephone System and provides average download speeds of 200-300 kbps, with maximum download speeds of 2 Mbps to 10 Mbps, depending on whether a technological enhancement known as High Speed Downlink Packet Access (HSDPA) is employed. Hogg/Austin Declaration, ¶ 18.

²⁷ 1xEV-DO and 1xEV-DV are high speed technologies used by CDMA carriers such as Verizon Wireless. Hogg/Austin Declaration, ¶ 20.

24. In many areas, neither Cingular nor AWS, on its own, has sufficient spectrum to provide 3G data service, while also providing voice service to its legacy analog and digital customers. Even after Cingular's acquisition of PCS licenses from NextWave, Cingular will have 25 MHz or less of spectrum in a majority of the top 50 MSAs.²⁸ Without additional spectrum, many consumers will be denied the ability to obtain high-speed UMTS data services from either Cingular or AWS.
25. The merger is an opportunity for both companies to obtain the spectrum needed to offer the advanced services that consumers desire. Both companies rely on the AMPS, TDMA, and GSM technologies to offer analog and digital voice and advanced digital services. They face similar spectrum limitations and in many areas have equipment in place that can be used more efficiently after the merger. The combined companies could aggregate their analog and TDMA service where they have overlapping service. This aggregation would achieve technological economies of scale by reducing required spectrum overhead and by exploiting trunking efficiencies.²⁹
26. Overhead refers to the bandwidth that must be reserved to provide the functions necessary to manage the use of analog, TDMA, or other service. By combining their analog and TDMA customers, the merged company can save spectrum by eliminating some of this overhead.³⁰ Trunking efficiencies refer to the increase in throughput that occurs by aggregating call volumes. With separate networks, a call on AWS's network may be blocked even if capacity is available on Cingular's network, and vice versa. Aggregation ensures that both companies' facilities are available to meet surges in call volumes and, for a given amount of total capacity, increases service quality by reducing the probability of blocked or dropped calls.³¹

²⁸ Hogg/Austin Declaration, ¶ 27.

²⁹ Hogg and Austin estimate that 30% or more of Cingular and AWS sites are either already collocated or sufficiently close to permit combining the sites and trunking their voice channels together. Hogg/Austin Declaration, ¶ 58.

³⁰ Where the companies have overlapping service, the merger would eliminate redundant control channels by reducing the number of networks from six to three. Hogg/Austin estimate that this would save about 7 MHz of bandwidth. Hogg/Austin Declaration, ¶ 60.

³¹ See the Hogg/Austin Declaration for a detailed explanation of these efficiencies.

27. The merger also creates a larger, integrated footprint for the merged company. This makes it easier to roll out advanced services that can be delivered uniformly and consistently to customers at a national level. The larger integrated footprint not only helps with the rollout of advanced services, it also makes it possible to offer voice services (such as voicemail) with consistent functionality across the country. The larger customer base also makes it easier for the combined company to amortize the upfront costs of advanced services.
28. In summary, the merger will improve the utilization of the company's available spectrum. This will allow the company to improve service quality in the short run and will reduce the need to split cell sites to maintain current levels of service quality over the near term (something that is not possible in all areas). Over the longer term, the merged companies can integrate their existing analog, TDMA, and GSM networks, coordinate network enhancements, and rationalize cell sites and network expansion. This will allow the merged firm to offer advanced broadband services sooner and in more places than each company could do on its own.
29. Cingular estimates that the efficiencies from combining the Cingular and AWS networks will generate operating and capital expense savings of more than \$1 billion in 2006 and more than \$2 billion per year in the following years as a merged entity.³²
30. Cingular and AWS differ from other mobile wireless service providers, which either do not have legacy analog customers (Sprint PCS, T-Mobile, and Nextel) or use different technologies that can be continuously upgraded to provide faster transmission speeds (Verizon Wireless, Sprint PCS, and Nextel). Both Cingular and AWS require additional spectrum to allow migration to advanced services on a path compatible with GSM technology while also meeting existing demands for their TDMA and analog services. Carriers such as Verizon Wireless and Sprint PCS that use the CDMA technology can upgrade their service to 3G in a way that is technically compatible with their 2G service and need not set aside blocks of spectrum for serving customers relying on multiple legacy technologies (Sprint has no legacy customers at all, and

³² Declaration of Steve McGaw, ¶ 23.

Verizon has no 2G legacy technology, only analog). Moreover, unlike AWS and Cingular, pure PCS carriers such as T-Mobile and Sprint PCS are not required to provide analog service and, as a pure GSM carrier, T-Mobile does not need the additional spectrum required to provide TDMA service. Nextel is not required to provide analog service because it is licensed as a specialized mobile radio carrier and uses only a single technology, iDEN. Of the two national CDMA carriers, only Verizon Wireless is required to provide analog service. CDMA can be upgraded to provide faster transmission speeds while retaining backward compatibility for existing customers. CDMA networks can therefore deploy high-speed 3G technologies on the same platform as their lower speed data and voice services. This reduces the total amount of spectrum required for deployment of advanced, high-speed services.

31. Verizon Wireless is ahead of Cingular and AWS in the provision of high-speed 3G technologies. Verizon Wireless currently offers EvDO data service in the Washington, D.C. and San Diego, California areas with end-user speeds averaging 300-500 kbps, and has announced plans to introduce this service nationally.³³ Sprint PCS and Verizon Wireless appear to have sufficient spectrum to introduce high-speed 3G service in essentially all urban areas they serve, and T-Mobile has sufficient spectrum to do so in many areas it serves, although it has chosen to pursue a Wi-Fi business strategy for broadband wireless service to date.³⁴ The merger does not change the ability of these other carriers to roll out high-speed services. Absent the merger, each company would still be using its spectrum, and that spectrum would be no more available for use by other carriers than it will be post-merger.
32. Due to spectrum limitations, Cingular will be able to introduce high-speed UMTS service in only 38 of the top 100 metropolitan areas and doing so will place limits on both 2G and 3G services in those areas.³⁵ AWS faces similar constraints; the merger may expand AWS's coverage within its licensed area even if it does not broaden that licensed area. After the merger, Cingular estimates that the combined company will be

³³ "Verizon Wireless Announces Roll Out of National 3G Network," *Verizon News Release*, January 8, 2004. Available at <http://news.vzw.com/news/2004/01/pr2004-01-07.html>. See also Declaration of Steve McGaw,

³⁴ Hogg/Austin Declaration, ¶¶ 38, 66.

able to offer high-speed UMTS service in 75-80 of the top 100 metropolitan areas. The merger will enhance competition in mobile wireless services by allowing Cingular and AWS to close the growing technology gap between their services and the advanced services offered by their competitors.

IV. Principles of market definition

33. Market definition is often a helpful step in antitrust analysis of mergers because it can help to identify where alleged competitive harms may occur and provide a framework to estimate the magnitude of any harm to consumers.
34. Markets have two principal dimensions: product and geographic scope. A product market is a collection of goods or services that consumers consider as substitutes for each other.
35. While there are several different approaches to market definition, the DOJ/FTC Horizontal Merger Guidelines provide a useful approach to market definition that is widely accepted and used by experienced antitrust economists.³⁶ A relevant product market is a product (or group of products) for which a firm that is the sole provider of the product in a geographic area would profitably impose a small but significant and non-transitory increase in price (the SSNIP test), holding constant the terms of sale of all other products. If, in response to a SSNIP, a sufficient number of consumers would substitute other products to make the price increase unprofitable, then the assumed product market is too small to be a relevant product market for antitrust analysis. Competitive effects in such a small market are unlikely if even a hypothetical monopolist could not profitably raise prices. The Merger Guidelines start by applying the SSNIP test to a narrowly defined product and then include other next-best substitutes if the SSNIP is not profitable.³⁷

³⁵ Hogg/Austin Declaration, ¶ 40.

³⁶ See DOJ/FTC, "Market Definition, Measurement and Concentration," *Horizontal Merger Guidelines*, April 2, 1992 (revised April 8, 1997), §1.0. (Hereinafter, "Horizontal Merger Guidelines.")

³⁷ *Id.* at §1.11.

36. The Merger Guidelines SSNIP test is posed from the perspective of a hypothetical monopoly supplier, but the profitability of the price increase clearly depends on the choices available to consumers. In evaluating the SSNIP test, the Agencies note that they take into account evidence including, but not limited to, the following:

- (1) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
- (2) evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
- (3) the influence of downstream competition faced by buyers in their output markets; and
- (4) the timing and costs of switching products.

V. The Relevant Product Markets are Mobile Wireless Voice and Data Service

37. I conclude that there are two relevant product markets for analysis of any competitive effects from the proposed merger: mobile wireless voice services interconnected with the public switched telephone network and mobile wireless data services. These products include services in the cellular frequencies at 850MHz, the PCS frequencies at 1900 MHz, and specialized mobile radio.³⁸

38. As noted by the FCC in its Eighth CMRS Report, “from a customer’s perspective, digital service in the cellular or SMR bands is virtually identical to digital service in the PCS band.”³⁹ It is not necessary that every consumer views cellular, PCS, and SMR as perfect substitutes for each other for these services to be in the same relevant product market. It is only necessary that a sufficient number of consumers are willing to substitute between these services to discipline an attempted price increase. This is the case, as evidenced by the fact that consumer substitution between these mobile wireless services is sufficient to affect business decisions regarding the pricing of these services.

³⁸ All of these technologies, including both analog and digital services, use a series of low-power transmitters to serve relatively small areas (‘cells’), and employ frequency reuse to maximize spectrum efficiency. The introduction of digital technology enabled better sound quality and improved spectral efficiency.

³⁹ Eighth CMRS Report, ¶ 34.

Prices for these services tend to follow each other closely with little difference in prices for cellular, PCS or SMR services, suggesting that these products compete aggressively with each other.

39. Carriers such as Cingular, AWS, Verizon Wireless and others with both cellular and PCS spectrum make no distinction between the two in their national marketing plans, and consumers do not appear to value them differently.
40. Mobile wireless carriers such as Cingular and AWS analyze the price and features offered by competitors and do not distinguish between technologies such as CDMA, GSM or iDEN, or the frequency band over which they are served.⁴⁰ This is further evidence that these services are all close substitutes.
41. The hypothetical monopolist test would not support a conclusion that a relevant product market can be defined narrowly to encompass a single technology (e.g., CDMA) or a single frequency band (e.g., 850 MHz). Consumers could and likely would switch to other technologies or frequencies that they regard as very close substitutes.
42. The hypothetical monopolist test also would not support a conclusion that a relevant product market can be defined narrowly to encompass only one or a few mobile wireless service providers. Switching between alternative mobile wireless providers is relatively easy. Churn data provided by AWS indicates customer churn rates between 2 and 4 percent per month indicating that 20 to 40 percent of customers churn each year. Wireless local number portability, which allows consumers to change mobile wireless providers and keep the same phone number, further reduces the cost of switching providers. Telephia surveys indicate that when customers were asked why they remained with their current provider, 40 percent of respondents selected "I don't want to change my current phone number" as one reason.⁴¹ In addition, the use of one-

⁴⁰ Declaration of Marc P. Lefar, ¶ 8.

⁴¹ "Ex Parte Letter of Michael Mowery, General Counsel for Telephia, Inc.," *In the Matter of Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Before the Federal Communications Commission, WT Docket No. 01-184, January 22, 2002. Available at http://gulfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512980007.

year or two-year contracts by some carriers has not proven to be a significant barrier to customer switching, as demonstrated by the significant industry churn statistics.

43. The hypothetical monopolist test supports the conclusion that mobile wireless voice service interconnected with the public switched telephone network is a relevant product market for antitrust analysis. Few consumers would substitute other telecommunications services, such as wireline, for mobile wireless in response to a small but significant and non-transitory increase in price. It follows that a firm that is a sole supplier of mobile wireless voice services could profitably increase price, and hence mobile wireless voice service is a relevant antitrust product market according to the Merger Guidelines hypothetical monopoly test.
44. The relevant product market for the analysis of this transaction excludes wireline services. Although there is some competition between wireless and wireline service, it is not currently sufficient to conclude that a wireless-only product market is too small for antitrust analysis of this transaction. Specifically, consumer substitution from wireless to wireline would not be sufficient to make unprofitable a small but significant and non-transitory price increase by a hypothetical monopoly supplier of mobile wireless voice services. At the present time, wireline service is sufficiently differentiated from wireless service to exclude wireline from the relevant product market.
45. *Mobile wireless service providers offer multiple rate plans that are differentiated according to the minutes in the rate plan, when these minutes can be used, roaming charges, etc. Some of these plans are targeted to residential users, others to small and large businesses. I have not distinguished these offerings in my analysis of the relevant product market. There is a continuum of possible plans and supply-side substitution between these plans. Each plan, taken alone, would fail the hypothetical monopoly SSNIP test. A hypothetical monopolist could not, for example, raise the price of a 1,000-minute plan because consumers could easily switch to other plans.*
46. *Mobile wireless data service refers to the delivery of non-voice information to a mobile device and includes applications such as short messaging service, email, and access to*

the Internet. Consumers would not substitute mobile wireless voice service in response to a small but significant and non-transitory increase in the price of data services so a hypothetical monopolist could increase the price of data services. For this reason, I conclude that at present there is a separate relevant product market for mobile wireless data services.

47. It is likely that mobile wireless voice and data markets will converge in the near future. Many of the national mobile wireless voice providers offer data services in conjunction with voice services. Furthermore, it is likely that voice and data services will be provided over the same networks as the carriers increase their transmission speeds. Indeed, the FCC has concluded that it is not necessary to treat voice and data service as separate relevant products for antitrust analysis. In analyzing transfers and assignments involving cellular and PCS licenses, the Commission has concluded that the relevant market is “all commercially available two-way, mobile voice and data services providing access to the public switched telephone network via terrestrial systems.”⁴² The Commission also noted that “mobile voice and mobile data services are no longer clearly delineated in the marketplace.”⁴³
48. Treating mobile wireless voice and data services as separate product markets does not affect my conclusion that the proposed merger is unlikely to harm competition. First, many data services (such as short message service and video transmissions) are sold in conjunction with mobile wireless voice service and need not be analyzed separately. Second, all of the national wireless carriers offer stand-alone data services, such as Cingular’s Data Connect, which enables users to connect laptop PCs or PDAs to corporate databases or the Internet. To the extent that similar firms provide similar mobile wireless and data services (including stand-alone services) and consumers’ reactions to price movements for these services are also similar, the analysis of price impacts on stand-alone data services from the proposed transaction parallels the

⁴² “Memorandum Opinion and Order,” *In re Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to subsidiaries of Cingular Wireless LLC*, Before the Federal Communications Commission, WT Docket No. 03-217 (FCC 04-26), February 12, 2004, ¶ 29.

⁴³ Eighth CMRS Report, ¶ 15 (footnote reference omitted).

analysis of impacts on mobile wireless voice services.⁴⁴ I make this assumption in this declaration and focus only on mobile wireless voice service interconnected with the public switched telephone network.

VI. Relevant geographic market

49. I conclude that the proposed merger should be analyzed from the perspective of a national market.
50. The approach to geographic market definition in the *DOJ/FTC Merger Guidelines* parallels the approach to product market definition. The geographic market is the smallest area in which a hypothetical monopolist could profitably impose a small but significant and non-transitory increase in price.
51. In the past, it was generally agreed that there were local relevant geographic markets for mobile wireless service. The number of carriers that market mobile wireless service in a particular locality may limit the plans that are available to consumers in that locality. Similarly, the number of retailers of handsets and related equipment in a region may affect consumer choices. This is not an obvious conclusion. Consumers can, and do, purchase wireless service plans at locations that are remote from where they use the service. Some consumers shop on the Internet.⁴⁵
52. Even if the relevant geographic markets for wireless calling plans and equipment are local, it is my conclusion, for the reasons that I describe below, that the geographic scope of competition in the provision of mobile wireless calling plans should be analyzed as national.
53. *Pricing for mobile wireless plans and equipment is national because consumers prefer plans that have a large geographic scope, and it is efficient for the national mobile*

⁴⁴ Cingular operates a data-only network called Mobitex which is used primarily for business applications such as email. AWS does not have such a network, so services offered on Mobitex are not affected by the merger. Moreover, services provided on the Mobitex network compete with stand-alone data services offered by all national carriers on their PCS/cellular networks.

⁴⁵ According to AWS Chief Market Officer Mike Sievert, 10 percent of purchases are made from the company's website. See also Lefar Declaration, ¶ 13.