**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of: | ) | |
| AT&T Wireless Services, Inc., Transferor, and Cingular Wireless LLC, Transferee, | ) | WT Docket No. 04-70 |
| Applications for Transfer of Control of Licenses and Authorizations | ) | |

# PETITION TO DENY OF THRIFTY CALL, INC.


Danny E. Adams
Joan M. Griffin
W. Joseph Price
Kelley Drye & Warren LLP
8000 Towers Crescent Drive
Suite 1200
Vienna, VA 22182
(703) 918-2317 (voice)
(703) 918-2450 (facsimile)
jprice@kelleydrye.com


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Counsel for Thrifty Call, Inc.

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## SUMMARY

The proposed acquisition of the third largest wireless carrier (AT&T Wireless) by the second largest wireless carrier (Cingular), to leapfrog into position as the largest wireless carrier, is not in the public interest. If permitted, Cingular (1) will hold almost 39 percent of the wireless market, (2) will be 33 percent larger than its second largest rival (Verizon Wireless), and (3) will enjoy many anticompetitive incentives and opportunities by virtue of its ownership by SBC Communications and BellSouth, the dominant ILECs in 22 states. The result will be anticompetitive disruption to both the wireless and wireline markets. There are virtually no countervailing consumer or public benefits from the acquisition. Consequently, the Application fails to make the public interest showing required to justify approval.

**A. Competition in the Wireless Market Will Be Highly Concentrated.**

The analysis in the attached economist report shows a post-acquisition market share (based on subscribers) for Cingular of 39 percent, with Verizon Wireless in second place with a 29 percent share. Thus, the combined entity would be about one-third percent larger than its nearest wireless competitor. Moreover, it would be nearly 300 percent larger than the third largest carrier (Sprint) and more than 400 percent larger than the fourth and fifth largest competitors (Nextel and T-Mobile). There are no other national wireless competitors.

Again using the attached economist report, the Herfindahl-Hirschman Index ("HHI") for the post-acquisition wireless industry would be 2,712, an increase of 748 (30 percent) from its current levels. This level of market concentration substantially exceeds the level which raises competitive concerns. Apparently recognizing this, the Application seeks to base HHI calculation on revenue – which still shows an HHI in excess of 2,000 – and on "flow share." Under the "flow share" methodology, the post-acquisition Cingular would rank fourth of the five

national carriers, and be more than 50 percent smaller than Nextel and somewhat smaller than T-Mobile. The mere statement of this outcome shows the "flow share" method of measurement to be laughable.

**B. Barriers to Entry Will Preclude New Competitors.**

The high level of wireless market concentration is exacerbated by the fact that entry into the market is virtually impossible for new competitors. This is best illustrated by the fact that Cingular is willing to pay $41 billion for AWS to alleviate its alleged spectrum problems. This represents a 37 percent premium – an extra $15 billion – over traditional valuations for AWS. Further, Verizon has already stated publicly that it will bid upwards of $5 billion for new spectrum expected to be auctioned off by the FCC. Obviously, the price of spectrum useful for cellular and PCS type services has eliminated all but the very largest companies from contention. In short, the barriers to entry are almost insurmountable. The Commission can be confident that no new national wireless carriers will emerge in the near term.

**C. The Acquisition Is a Distortion of the Marketplace, Not a Result of Competition.**

While the Application's "flow share" measure is not a proper measure of market concentration, it does illustrate each carrier's current success in the marketplace. Using the information in the Application, consumers currently rank AWS and Cingular as fourth and fifth, respectively, in the field of six national wireless carriers. The Application attributes this low standing to a series of technical and operational problems which cause dropped calls, coverage gaps, poor quality service and difficulty in introducing new services. All of these shortcomings flow primarily from the decision of Cingular and AWS each to operate three networks simultaneously: analog, TDMA and GSM. The result of this decision is inefficiency and spectrum shortages. These problems, in turn, lead to the service quality issues described by the Application and said to be remedied by the acquisition.

In fact, the network configuration which has caused these problems is nothing more than a series of bad business decisions made by Cingular and AWS. Their competitors made different decisions and now the marketplace is rewarding them for their foresight and punishing Cingular and AWS for their poor choices. This is how the marketplace is supposed to work -- the losers must improve their performance, sell out to another provider (as AWS proposes here), or go out of business.

Here, however, Cingular's parents seek approval to defy the market with "the largest all-cash transaction in U.S. history," spending $41 billion to buy Cingular's way out of its poor decision-making. By leveraging the overwhelming financial power of its ILEC parents, Cingular will take its fifth-of-six consumer ranking and leapfrog to a number one position with a 39 percent market share. This is not the marketplace rewarding Verizon Wireless, Nextel and T-Mobile for their successful performance, it is SBC and BellSouth distorting the marketplace. The other, successful carriers will now all be forced, despite their good performance, to seek merger partners of their own, leading to even further market concentration.

**D. Competition in Other Markets Also Will Be Negatively Affected.**

Beyond the wireless market, the Commission must consider the impact on related markets within its jurisdiction as well. These result from (1) the ability of SBC and BellSouth to control the availability and pricing of essential interconnection facilities for both its wireless and wireline competitors, and (2) the accelerating trend toward selling telecom services in "bundled" packages.

Both wireless and wireline competitors (e.g., CLECs and IXCs) are wholly dependent upon interconnection with the ILEC networks to send and receive calls to the public switched telephone network. The Commission needs no reminder of the many serious problems that plague competition in the area of interconnection. These problems affect wireless carriers as well as CLECs, and they will be made worse as SBC and BellSouth increase their wireless market share to 39 percent. Importantly, the post-acquisition Cingular and Verizon Wireless, the two Bell Company owned wireless companies, would collectively hold a 68 percent market position for their wireless services as shown in the attached report. When considering that the SBC, BellSouth and Verizon ILECs collectively represent six of the original seven Regional Bell Companies, plus GTE, Contel and Southern New England Telephone, the scope of their interconnection power is clear.

The bundling of services also will provide a very large and tempting opportunity for SBC and BellSouth to leverage their wireless market position. By making interconnection expensive, Cingular is not harmed relative to its wireless competitors since all need the same ILEC input. But as established sales agents of Cingular, SBC and BellSouth can offer discounts to wireless customers who also buy local telephone, long distance, broadband, and other services from them. Only Verizon can match such a bundled approach. No other competitor will have the ability to provide this whole bundle of services at economic prices.

**E. There Are No Real Public Benefits from the Proposed Acquisition.**

The Application identifies no persuasive public benefit from the proposed acquisition. As described above, there will be no competitive benefits, only competitive harms. The other, non-economic consumer benefits discussed by the Application are wholly unconvincing. For example, the contention that the acquisition is necessary to assist consumers in getting higher quality services is nonsense. As the Application acknowledges, consumers dissatisfied with Cingular's service today can easily overcome their problems by switching to another carrier. Cingular does not cite a single new service or benefit for consumers that is not available today from its competitors, leaving no consumer advancement from the acquisition.

Similarly, Cingular complaints about poor roaming arrangements, tower siting issues and homeland security improvements are all weak attempts to create some reason that the acquisition serves the public interest. All of them fail. There simply is no problem in any of those areas that cannot be addressed more quickly and for less expense – and without the market concentration and anticompetitive effects – than by allowing Cingular to acquire AWS.

### F. History Demonstrates That Conditions Will Not Be Sufficient To Restrain Anti-Competitive Actions if the Acquisition is Approved.

In recent years, the Commission's pattern has been neither to approve nor disapprove mergers or acquisitions in their entirety, but instead to approve with conditions. The success of that model, however, is rooted in the applicants' willingness to abide by the conditions and constraints imposed by the Commission. Over the past 10 years, SBC has shown itself to be completely indifferent to observation of such regulatory requirements.

During the past 10 years, SBC has paid over $1 billion (yes, billion) in fines, penalties and other payments at the direction of regulators. This includes a $6 million fine by the FCC for "willful and repeated" violations of conditions placed on another mega-acquisition – the purchase of Ameritech. It is pointless to impose conditions on a company that has repeatedly ignored prior conditions and requirements, to the point of paying over $1 billion in penalties and being found in "willful and repeated" violations. Having paid $41 billion to acquire AWS, SBC is not going to care a whit about another mere $6 million fine.

The Application should not be approved with conditions, it should be denied.

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| AT&T Wireless Services, Inc., Transferor, and Cingular Wireless LLC, Transferee, | ) | WT Docket No. 04-70 |
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## PETITION TO DENY OF THRIFTY CALL, INC.

Pursuant to sections 214 and 309(d) of the Communications Act of 1934, as amended ("Communications Act"),[1] and section 1.939 of the Commissions rules,[2] Thrifty Call, Inc., by and through counsel, hereby petitions that the Federal Communication's Commission ("FCC" or the "Commission") deny the above-captioned applications to transfer control of licenses presently held by AT&T Wireless Services, Inc. ("AWS") to Cingular Wireless Corporation ("Cingular"),[3] a company owned privately in combination by SBC Communications, Inc. ("SBC") and BellSouth Corporation ("BellSouth").[4]

1 47 U.S.C. §§ 214, 309(d).

2 47 C.F.R. § 1.939.

3 AT&T Wireless Services, Inc., Transferor, and Cingular Wireless LLC, Transferee, Applications for Transfer of Control of Licenses and Authorizations, WT Docket No. 04-70, File Number: 0001656065 (submitted March 18, 2004). Exhibit 1, "Description of Transaction, Public Interest Statement, and Waiver Request," is referred to herein as the "Application."

4 AT&T Wireless Services, Inc. and Cingular Wireless Corporation Seek Consent to Transfer Control of Licenses and Authorizations, *Public Notice*, WT Docket No. 04-70

Thrifty Call, Inc. ("TCI") is a past, and potentially future, competitive local exchange carrier ("CLEC") that is concerned about the likely anticompetitive effects which will be a direct result of the proposed acquisition of the third largest wireless company (AWS) by the second largest wireless company (Cingular), all of which will be controlled by SBC and BellSouth. As a CLEC, TCI has competed (and may again compete in the future) with SBC and BellSouth throughout their ILEC regions. The anticompetitive bundling opportunities and incentives for interconnection restrictions presented by the proposed acquisition of AWS by Cingular constitute a very real threat to present and future CLECs like TCI. As described below, CLECs have a very real interest in the outcome of this Commission deliberation.

## I. INTRODUCTION.

If approved, the proposed acquisition will result in two incumbent local exchange carriers ("ILECs") privately owning the largest nationwide cellular phone service carrier with cellular coverage in 97 of the top 100 markets, and being the dominant ILEC in the local wireline market in 22 states.[5] When viewed in combination with its closest wireless competitor, Verizon, three of the four Bell Companies (six of the original seven, plus GTE, Southern New England and Contel, if prior FCC-approved mergers are considered), would control more than 83 percent of the nation's wireline access lines as the dominant ILEC in 35 states *and* over 68 percent of the wireless market, as described in the attached *Dineley deltaVectors Report*.[6] The economic advantages held by these companies through unmatchable bundling opportunities, and the

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(April 2, 2004) ("*Public Notice*"). The ownership interest is 60 percent SBC and 40 percent BellSouth.

5 Richard Dineley, M.B.A., C.P.A., Scott Atkinson, Ph.D., and Michael Pagano, Ph.D., *A Study of the Proposed Cingular Acquisition of AT&T Wireless* pp. 4-5 (May 2004) ("*Dineley deltaVectors Report*").

6 *Id.* Population figures based on U.S. Census Bureau 2002 estimate. *See* http://quickfacts.census.gov/qfd/.

potential for anticompetitive conduct through their control of essential interconnection and special access facilities for their competitors, are enormous. The Application virtually ignores these facts.

## II. THE ACQUISITION OF AWS BY CINGULAR WOULD RESULT IN SIGNIFICANT PUBLIC INTEREST HARMS THAT ARE NOT OUTWEIGHED BY THE ALLEGED BENEFITS OF THE COMBINED COMPANIES.

Under Sections 310(d) and 214 of the Communications Act of 1934, as amended, Cingular and AWS (together, "Applicants") must demonstrate to the Commission that the proposed transfer of control will serve the public interest. In discharging these statutory responsibilities, the Commission weighs the potential public interest harms of the proposed transactions against the public interest benefits to ensure that, on balance, the transfers of control serve the public interest, convenience and necessity.[7] In making this determination, the Commission considers the competitive effects of the proposed transfers and whether such transfers raise significant anti-competitive issues. Consideration of the competitive effects of the proposed transfer is a key factor in the Commission's public interest analysis.[8] The Commission also considers the efficiencies and other public interest benefits that are likely to result from the

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7 Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Section 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310 of the Communications Act, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, para. 17 (2001).

8 General Motors Corporation and The News Corporation Limited General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order*, para. 16, FCC 03-330, MB Docket No. 03-124 (Jan. 2004) ("*DirecTV Order*").

proposed transfers of control of the licenses and authorizations.[9] The applicants bear the burden of proving that the transaction, on balance, serves the public interest.[10]

### A. Two Product Markets Are Relevant To This Acquisition: The Wireless Market And The Combined Wireless/Wireline Market.

The first step in the Commission's analysis of the competitive effects of the proposed acquisition is to define the market which the combined company will impact. TCI disagrees with the Applicants' limited description of the relevant market.

The relevant market here is not only the domestic U.S. wireless market, as Applicants seek to define it. Rather, the Commission must consider the effects of the proposed merger on the combined wireless/wireline market as well. As described below, and in the attached economist report, the largest impact of the proposed acquisition by SBC and BellSouth may be in the local wireline markets.[11] This is the result of the unmatchable bundling opportunities that the acquisition will give to SBC and BellSouth. In combination with SBC's and BellSouth's control over local telephone interconnection facilities in 22 states, the potential anticompetitive effects of this acquisition are enormous.[12]

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9 Global Crossing Ltd. (Debtor-in-Possession), Transferor and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, International and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, *Order and Authorization*, 18 FCC Rcd 2031, paras. 16-24 (2003).

10 *DirecTV Order* at para. 15.

11 *A Study of the Proposed Cingular Acquisition of AT&T Wireless, consolidation of Power in the Wireless Services Industry and Its Effects on Consumers of Digital Communications Services*, by Richard Dineley, M.B.A., C.P.A., Scott Atkinson, Ph.D., and Michael Pagano, Ph.D., deltaVectors (May 2004), Attached at A (hereinafter "*Dineley deltaVectors Report*.")

12 *Dineley deltaVectors Report* at 7 ("we anticipate that an ILEC such as SBC would therefore have the economic incentive and market 'power' necessary to engage in anti-competitive behavior which ultimately can harm consumers through restricted choices and higher prices."). Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as

It is obvious that two ILECs would not otherwise infuse $41 billion into the purchase of wireless assets – including a $15 billion premium – if they did not anticipate the benefits of an expanded Cingular network that will compliment their already existing dominance in their wireline base across 22 states.[13] Billions of dollars can be invested in any number of ways; for example, in curing the many network defects which Cingular allegedly suffers as identified in the Application. The single reason this investment makes sense to the shareholders of SBC and BellSouth, however, is the powerful manner in which a combined Cingular and AWS will enhance SBC and BellSouth's position in *all* their relevant markets.[14]

It may be true, as Applicants' state, that "[t]he FCC has consistently viewed wireless and wireline services as different product markets, although it has recently recognized a greater degree of intermodal competition."[15] The product market lines, however, are quickly blurring.

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amended, 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets, *Report and Order*, 16 FCC Rcd 7418, para. 25 (2001) (in the context of customer premises equipment, acknowledging that dominant carriers are able to harm competition by offering products below cost), ("*CPE Order*").

13 The importance to the ILECs is highlighted by the fact that they paid a 37 percent premium over their initial bid. *BusinessWeek, Online*, "How the Cingular Deal Helps Verizon," March 1, 2004; "Using cash flow generated from their profitable local phone operations, the ILECs have been able to invest heavily in wireless services and firms such as SBC have made the increased penetration of the wireless market one of their primary strategic objectives. This shift in strategy for the ILECs is in direct response to the growing popularity of wireless services and continuing downtrend in the number of wireline connections." *Dineley deltaVectors Report* at 9-10.

14 "With AT&T Wireless in the fold, [BellSouth and SBC] would enhance their dominant telecom services inside and outside their markets almost overnight, say analysts." *BusinessWeek, Online*, "Why Cingular Won't Ditch This Deal," April 23, 2004. "Cingular and its parents insist the deal makes financial sense despite the hefty price tag. In a joint presentation to investors, SBC and BellSouth execs concede that the acquisition will cause a short-term hit to earnings . . . [they] also will have to take on a major chunk of debt. Of its $21 billion share of the purchase price, SBC can pull together $11 billion in cash but will have to borrow the remaining $10 billion. BellSouth also will have to finance about $10 billion. . . . Still, the companies insist that after that, AT&T Wireless will help turbocharge earnings." *BusinessWeek, Online*, "How the Cingular Deal Helps Verizon," March 1, 2004.

15 Application at 43 (citing *Telephone Number Portability*, CC Docket No. 95-116, *Order*, FCC-0412 (Jan. 16, 2004)).

Indeed, even Applicants acknowledge "the trend towards convergence between wireless and wireline communications."[16] It is, therefore, disingenuous for Applicants to claim that "[t]he merger with AWS will add only insubstantially to Cingular's presence within SBC and BellSouth's wireline territories [and that] there is no reason to believe that the merger will reduce the degree of intermodal competition faced by SBC and BellSouth."[17] For SBC and BellSouth, companies already fined tens of millions of dollars for anticompetitive conduct (*e.g.*, the failure to observe previous merger conditions), *any* additional market power is too much.

Not only are wireline and wireless services increasingly used interchangeably, the two services are interdependent because they share the same backbone controlled by ILECs, such as SBC and BellSouth, at interconnection points. Thus, the Commission must "consider whether, as a result of the transaction, the post–transaction entity will have an increased incentive and ability to engage in anticompetitive" strategies that include potential strategies involving SBC and BellSouth's wireline customer base.[18] Where the Commission "find[s] that the proposed transaction is likely to result in anticompetitive harms, [the Commission] also analyze[s] and explain[s] [its] decision to impose conditions that are narrowly targeted to address those harms."[19] As described below, conditions will be insufficient to prevent anticompetitive conduct in this case.

The Commission cannot properly follow the analytical approach proposed by the Application and consider wireless and wireline markets as separate silos. It is clear that the

16 Application at 43.

17 Application at 43. In fact, Cingular has already announced SBC/BellSouth combined plans. *Cingular Wireless News Release*, "SBC, BellSouth and Cingular Join Forces to Erase Distinction Between Wireline and Wireless Calls, Offering Shared Bucket of Minutes" (June 5, 2003).

18 *See DirectTV Order* at para. 68.

19 *Id.*

ability to bundle services has become a key element to success in telecommunications.[20] Cingular's parents, SBC and BellSouth, have already made substantial efforts to bundle local, long distance and voice mail services into a single offering.[21] Adding wireless to the package would greatly affect *both* the wireless and wireline markets, particularly where its competitors cannot do so economically due to the lack of availability of all the bundled offerings to competitors of SBC and BellSouth.[22] This bundling effect must be included in any competitive analysis.[23]

### B. The Acquisition Will Permit SBC And BellSouth To Engage In Anticompetitive Behavior In The Wireless Market.

In footnote 196, Applicants mention that the Department of Justice *Merger Guidelines* express concern about anticompetitive conduct at a market share of 35 percent;[24] they then posit that the combined company would have a market share of 30 percent based on revenue. To the Applicants, this should be the end of the discussion. In fact, when properly analyzed, the

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20 *See, e.g.*, Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Third Report and Order and Third Further Notice of Proposed Rulemaking*, 17 FCC Rcd 14860, para. 36 (2002) ("We find that telecommunications consumers expect to receive targeted notices from their carriers about innovative telecommunications offerings that may bundle desired telecommunications services and/or products, save the consumer money, and provide other consumer benefits.").

21 For SBC's bundled offerings, see, e.g., http://www01.sbc.com/Products_Services/Residential/Catalog/1,,1--6-3-,00.html; for BellSouth's bundled offerings, see, e.g., http://www.bellsouth.com/apps/ipc/ICReqDispatcher?userEvent=getAllCategoriesEvent&segmentId=2.

22 *See CPE Order* at para. 39 ("As local exchange service becomes more competitive, we also expect the risk associated with cross-subsidization to decrease.").

23 *Dineley deltaVectors Report* at 5 (the trend away from single product solutions "increases the chances that existing large telecommunications companies will increase their market power at the expense of other competitors and, ultimately, consumers.").

24 Application at p. 38 n.196 (citing United States Department of Justice / Federal Trade Commission, *Horizontal Merger Guidelines*, April 1992, § 2.22).

combined entity's market share would actually be 39 percent.[25] When combined with the many bundling opportunities and other advantages of affiliation with two ILECs, even a 30 percent market share should be a serious concern. Compounding the problem, the fact that their largest competitor will be Verizon – and that together the three companies will hold more than 68 percent of the wireless market – cannot simply be ignored.[26]

The Commission should also not be persuaded by the Applicants' statement that "unilateral effects in mobile services are unlikely because of the ease of potential entry."[27] The marketplace has already demonstrated that no other company or investor sees the opportunities or synergies that motivates SBC and BellSouth to invest $41 billion. Indeed, the claim that competitive entry in wireless services is open is completely contradicted by the Application's lengthy discussion about its additional spectrum needs.[28] Moreover, one of the key benefits Cingular sees in the merger is a cure for a perceived shortage of spectrum. It is impossible to reconcile ease of entry with a multi-billion dollar spectrum scarcity, as discussed in more detail below.

Market concentrations combined with barriers to entry indicate that the acquisition should be denied. The wireless market rank before and after the acquisition indicates intense market concentration. Further, there are significant barriers to entry forbidding further competition. Thus, the Acquisition is a distortion of the marketplace, not a result of competition.

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25 *Dineley deltaVectors Report* at 21.

26 *Dineley deltaVectors Report* at 5.

27 Application at 39.

28 Application at 10-25.

### 1. Wireless market concentration pre- and post acquisition.

Applicants assure the Commission that after the acquisition, "five strong competitors will remain offering wireless service on a nationwide basis, and these five competitors will face additional competition from strong regional and local players."[29] Market data and a careful economic analysis, however, indicates that the acquisition will result in a drastic disruption in the wireless market.

The Commission should include in its analysis a realization that "competing wireless providers are evaluated by customers in terms of completeness of their geographic coverage."[30] As the attached *Dineley deltaVectors Report* explains, the concentration analysis should, therefore, "focus on the number of subscribers rather than revenue [as Applicants focus], since firms are distinguished primarily on the basis of their relative advantage in serving different buyers or group of buyers (this is in conformance with Section 1.41 of the DoJ Horizontal Merger Guidelines, Rev. April 8, 1997)."[31] Thus, using the Applicants' Herfindahl-Hirshman Index ("HHI") based on revenue or "flow share," instead of subscribers and geographic coverage, does not accurately reflect the level of post-acquisition concentration that will exist.[32]

The attached *Dineley deltaVectors Report* presents two accurate measures of the HHI index, each based on subscriber count and a different definition of the geographic market. It first assumes a national market, yielding the broadest possible geographic market; the second analysis, which is more appropriate in this context, defines markets corresponding with the

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29 Application at 34-35.

30 *Id.*

31 *Dineley deltaVectors Report* at 18.

32 *Id.*

individual's county of residence. "Interestingly, using either definition of the geographic markets, the HHI indices indicate that the proposed merger will result in a highly concentrated market and that the increase in the HHI is far in excess of 100 points."[33]

Considering the national market, the change in the pre-merger versus post-merger HHI index is 507.5, which is substantially in excess of the 100 point threshold. Thus, even though the national market may not be the most accurate measurement considering subscriber use, the HHI indicates "compelling" evidence that "the merger is likely to create or enhance market power at a nationwide level."[34] An analysis at the county level demonstrates even greater concentration. The change in pre-acquisition versus post-acquisition at the county level substantially exceeds the 100 point threshold by 648.3 points. This change "is powerful evidence that the proposed merger is likely to create or enhance market power in county-wide markets."[35]

The Application itself shows a post-acquisition market share (based on revenue) for Cingular of 30 percent, with Verizon wireless in second position with a 21 percent share.[36] Thus, by the Applicant's own analysis, it would be about 50 percent larger than its nearest wireless competitor on Day One. An even more appropriate analysis, using subscriber numbers instead of revenue and a county geographic market, shows a post-acquisition market share of 39 percent for Cingular and 29 percent for Verizon. Moreover, Cingular would be nearly 300 percent larger than the third largest carrier (Sprint) and more than 400 percent larger than the

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33 *Dineley deltaVectors Report* at 17-20.

34 *Dineley deltaVectors Report* at 19.

35 *Dineley deltaVectors Report* at 21.

36 Application at 36.

fourth largest competitors (Nextel and T-Mobile).[37] There are no other national wireless competitors.

Further, using the Application's own analysis, analyzing revenue instead of subscribers and geographic markets, the HHI for the post-acquisition wireless industry would be 2,023, an increase of 450 (25 percent) from its current levels.[38] The Application also submits that HHI calculation on the basis of revenue is misleading and, instead, an HHI using "flow share" is more appropriate.[39] Using "flow share" as a variable, the post-acquisition Cingular would rank fourth of the five national carriers, and be more than 50 percent smaller than Nextel and somewhat smaller than T-Mobile.[40] This result is absurd and demonstrates the "flow share" approach to be nonsense.

In short, every credible view of HHI measurement – subscribers and geographic markets (national and county) and revenue – indicate a degree of those market concentration strong enough to deny the Application. Particularly when combined with the other factors present here, such as the many anticompetitive incentives and opportunities Cingular will have from its association with its dominant ILEC parents, the guaranteed level of market power is unacceptable.

**2. Barriers to entry.**

The high level of wireless market concentration is exacerbated by the fact that entry into the market is virtually impossible for new competitors. This is best illustrated by the fact that Cingular is willing to pay $41 billion for AWS to alleviate its alleged spectrum problems. This

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37 Application at 36.

38 Application at 36.

39 Application at 37.

40 Application at 37.

represents a 37 percent premium – an extra $15 billion – over traditional valuations for AWS.[41] Further, Verizon has already stated publicly in a letter to the FCC that it will bid upwards of $5 billion for new spectrum expected to be auctioned off by the FCC.[42] Obviously, the price of spectrum useful for cellular and PCS type services has eliminated all but the very largest companies from contention in auctions. The creation of an even larger incumbent wireless carrier, backed by two Bell Companies, will only make it that much more difficult for any new entrant to purchase spectrum. Even resale will not be a factor since the Commission has eliminated the resale obligation for wireless carriers.

In short, the barriers to entry are almost insurmountable. The Commission can be confident that no new national wireless carriers will emerge in the near term. If the market is allowed to shrink from six national carriers to five, as the Application proposes, the market will only get more concentrated as Cingular's remaining competitors decide they too must merge with one another to keep up.

### 3. Concentration in spectrum.

Concentration in spectrum in the post-acquisition company, in addition to other market realities, results in insurmountable barriers for entry by potential competitors. The proposed transaction would create an immense concentration of spectrum in Cingular. The Applicants admit that the addition of AWS' cellular and PCS spectrum to Cingular's holdings, after Cingular closes on its purchase of NextWave spectrum, would mean that Cingular would hold an attributable interest in 80 MHz of spectrum *or more* in a number of markets.[43] The list includes

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41 *BusinessWeek, Online*, "How the Cingular Deal Helps Verizon," March 1, 2004.

42 "Verizon Wireless Prepared to Bid on 10 MHz Spectrum," *Mobile Tech News* (April 2004).

43 Application at 19.

many major markets, including but not limited to Chicago, San Francisco, Dallas/Fort Worth, New York City, and Washington, D.C.[44] An attributable interest of 80 MHz would mean that Cingular would have an interest in almost 50 percent of the available cellular and PCS spectrum.

The Applicants state that Cingular will reduce its holdings to no more than 80 MHz in areas where it will hold an attributable interest in excess of 80 MHz throughout the BTA post-close.[45] However, because the Applicants commit to reducing their holdings only in BTAs where Cingular will hold in excess of 80 MHz *throughout the BTA*, presumably Cingular will not reduce its holdings in those BTAs where it holds less than 80 MHz in even one county. Thus, for example, Cingular will presumably not reduce its holdings in the New York City BTA, where Cingular would hold an attributable interest less than 80 MHz in 3 of 26 counties, or in Dallas/Fort Worth, where Cingular would hold an attributable interest less than 80 MHz in 4 of 25 counties.

The Commission has repeatedly recognized that lack of suitable spectrum creates a barrier to entry. As the Commission's Spectrum Policy Task Force stated in its November 2002 Report, due to the growth in demand for spectrum-based services, many spectrum users are seeking additional spectrum such that spectrum demand is outstripping spectrum supply.[46] The Task Force stated that most prime spectrum has already been assigned to one or more parties, and that it is becoming increasingly difficult to find spectrum that can be made available either for new services or to expand existing ones. The assignment of almost 50 percent of the available PCS and cellular spectrum to Cingular would only exacerbate these problems. While the Commission has attempted to alleviate the spectrum shortage with its new rules facilitating

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44 Application at Attachment 8.

45 Application at 19.

46 Spectrum Policy Task Force, *Report*, ET Docket No. 02-135, rel. Nov. 2002, at 14.

spectrum leases,[47] TCI can find no evidence in the Commission's public documents to suggest that Cingular has leased any of its spectrum to third parties.

### 4. The acquisition distorts the market.

While the Application's "flow share" measure is not a proper measure of market concentration, it does illustrate each carrier's current success in the marketplace. Using the information in the Application, consumers currently rank AWS and Cingular as fourth and fifth, respectively, in the field of six national wireless carriers. The Application attributes this low standing to a series of technical and operational problems which cause dropped calls, coverage gaps, poor quality service and difficulty in introducing new services.

All of these shortcomings flow primarily from the decision of Cingular and AWS each to operate three networks simultaneously: analog, TDMA and GSM. The result of this decision, which other wireless competitors did not follow, is inefficiency and spectrum shortages. These problems, in turn, lead to the service quality issues described by the Application and said to be remedied by the acquisition.

In fact, the network configuration which has caused these problems is nothing more than a series of bad business decisions made by Cingular and AWS. Their competitors made different decisions and now the marketplace is rewarding them for their foresight and punishing Cingular and AWS for their poor choices in network design and deployment. This is how the marketplace is supposed to work. And when this happens, the losers in the marketplace must improve their performance, sell out to another provider (as AWS proposes here), or go out of business. That is

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47 *See* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, FCC 03-113, rel. Oct. 6, 2003.

the marketplace construct which the Commission wishes to have govern the wireless industry (and others that it regulates).

Here, however, we do not see the market operating in this fashion. Instead, the exceedingly deep pockets of Cingular's parents are producing "the largest all cash transaction in U.S. history," handing over $41 billion at a 37 percent premium to buy Cingular's way out of its poor decision-making. By leveraging the overwhelming financial power of its ILEC parents, Cingular will take its fifth-of-six consumer ranking and leapfrog to a number one position with a 39 percent market share. This is not the marketplace rewarding Verizon Wireless, Nextel and T-Mobile for their performance, it is SBC and BellSouth distorting the marketplace. Those successful carriers will now all be forced, despite their good performance, to seek merger partners of their own, leading to even further market concentration.

### C. The Combination Of AWS And Cingular Would Create Significant Opportunities For Anticompetitive Behavior In The Combined Wireless/Wireline Markets.

In reviewing the combined wireless/wireline market, the Commission must consider how the proposed combination will affect carrier interconnection agreements and special access pricing, and the many ways in which bundling of services might be used in an anticompetitive manner. Factoring in the elements of local wireline dominance (interconnection and bundling issues), and in light of (1) the tens of millions of dollars in fines SBC has already paid for violating *SBC/Ameritech Merger* conditions and FCC interconnection and local competition rules,[48] (2) the BellSouth FCC Petition to escape unbundling requirements,[49] and (3) the SBC

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[48] *Infra* section E; *see also* http://www.voicesforchoices.com/voices/.

[49] BellSouth Telecommunications, Inc., Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 04-48, filed Mar. 1, 2004.

Petition to be relieved of UNE bundling requirements,[50] it is obvious that Cingular's parents are already engaged in unilateral anticompetitive acts every day and are planning more. This proposed combination allows SBC and BellSouth increased power to act on those urges.

### 1. The acquisition will permit SBC and BellSouth an opportunity to discriminate against potential competitors in interconnection arrangements and special access services.

In the telecommunications industry, the issue of interconnection to the landline telephone network is paramount for competition in nearly all sectors.[51] Indeed, this was the basis for the 1983 breakup of the Bell System. Wireless is no different. A combination of interconnection agreements and carrier facilities are the backbone of the combined wireline and wireless market. In fact, no other single element is more critical to competition.[52] Despite the fact that interconnection lies at the core of a competitive telecommunications marketplace, the Application does not mention the subject in a meaningful way.

Further, in this case, both SBC and BellSouth are the dominant suppliers of special access throughout their relevant territories. Special access, in turn, is the single highest variable cost input for wireless service. By concentrating the market through the purchase of a large,

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50 SBC Communications Inc., Petition for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 03-260, filed Dec. 18, 2003.

51 Congress has found that "the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, para. 96 (1995) (citing House Report on H.R. 2264 at 261 (1993)).

52 "[A]n incumbent LEC's failure to interconnect expeditiously may frustrate accomplishment of Congress's goal of introducing facilities-based competition to the local telecommunications market. Where interconnection is delayed, a competitive LEC's resources may be wasted, and its reputation may suffer permanent damage because it does not provide the promised service in a timely manner." *Core Communications, Inc. v. SBC Communications Inc., Memorandum Opinion and Order*, 18 FCC Rcd 7568, para. 41 (2003) ("*SBC CLEC Damages Order*").

independent rival, Cingular would be able to effectively facilitate tacit price coordination among the remaining wireless carriers, and – with a dominant market share – would become the natural price leader for the market. The fact that the number two wireless carrier will be Verizon, with all the same abilities and incentives, greatly compounds the risk. Also, as the by-far dominant providers of the single largest retail cost input, SBC and BellSouth may have an effective means with which to discipline any firm that does not promptly follow a Cingular/AWS-initiated retail price increase.

Correspondingly, the acquisition of AWS will eliminate a major non-ILEC purchaser of special access service. This loss will harm the ability of competitive wholesalers of access services to expand in the market, further consolidating the SBC/BellSouth dominance over special access services. Thus, consumers, competitors, and competition are imperiled by this acquisition.

The interconnection example is but one way that market power outside of the narrow wireless market in the ILEC regions affects the potential market power of the combined company. Although Applicants claim that "the transaction will have no adverse effect on competition between wireless and wireline telecommunications services,"[53] a look at the market structure after the merger demonstrates an obvious problem. It would show three companies – SBC, BellSouth and Verizon – holding 68 percent of the wireless market *and* dominant ILEC positions in 35 states.[54] Unlike long distance competition, the reality is that local competition is lagging. Thus, the incentives to discriminate in interconnection arrangements and to divide the market – even in a *de facto* manner – would be substantial.

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53 Application at 28.

54 Application at 36. This will include every state east of the Mississippi River, plus California, Texas, Missouri, Oklahoma, Kansas, Arkansas and Hawaii.

ILECs such as Applicants control over 85 percent of the telecommunications facilities in their local regions.[55] A potential competitor has no other option than to interconnect with SBC and BellSouth. Discrimination in interconnection arrangements, which SBC, for example, has proven capable of in the past,[56] would be very harmful to competition. The incentives and possibilities will be greatly expanded by this acquisition.

### 2. The acquisition will permit SBC and BellSouth an opportunity to bundle services in an anticompetitive manner.

If approved, this acquisition will also present SBC and BellSouth with unprecedented opportunities to bundle wireless, wireline, broadband, long distance and other services in a way that no competitor can match. Except for Verizon, no other market participant will have "similar cost characteristics,"[57] nor the whole bundle of services to sell, nor the potential to discriminate in interconnection arrangements, in two ILEC regions covering 22 states holding 51 percent of the nation's population.[58] As such, Applicants' claim that "[t]his transaction will not have any adverse impact on the bundling of wireless services with other telecommunications services"[59] flies in the face of credulity.

Strangely, while Applicants deny that their ILEC customer base or facilities could be used in coordination with Cingular and AWS for an increased combined wireline and wireless

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55 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 30 CR 1, para. 660 (2003) ("BOCs control 85.9 percent of incumbent LEC local switched access lines. Of the remaining lines, 11.6 percent of the lines are served by certain rural telephone companies that section 251(f) expressly exempts from the unbundling obligations set forth in 251(c).").

56 *See, e.g., SBC CLEC Damages Order* at para. 41.

57 Application at 37.

58 *See* http://quickfacts.census.gov/qfd/.

59 Application at 41.

market share, Applicants contend that other potential competitors *will* draw from their customer base and combine facilities. For example, while Applicants suggest that SBC and BellSouth will not use their dominant status in their ILEC regions to create only one obvious choice for combined service in those areas, they simultaneously claim that Comcast could use its interest in T-Mobile to create incentives for its customers to bundle services.[60] Certainly, the speculative Comcast/T-Mobile example pales in comparison to the proposed combination presented here.

The Commission must acknowledge, therefore, as Applicants do when discussing competitors, that local wireline and wireless customer bases and associated facilities can and will be used to create bundled service offerings that no other provider can match. In fact, both local and wireless services are already sold by SBC in bundles, which include long distance service and voicemail in the same package.[61] There is no reason to believe wireline, broadband and wireless will not soon be bundled as well – by those who are able to do so.

Of their competitors in any market, only Verizon could approach SBC and BellSouth in competitive force. None of the other potential competitors offer more than two of the bundled group, and even there their toehold is tenuous. For example, AT&T and MCI have no wireless products and offer local service mostly as resellers of ILEC services or facilities – and the ILECs are regularly in court and before the Commission to severely restrict that resale ability.[62] Sprint has local service only in very limited geographical locations; Nextel and T-Mobile have no long distance, local wireline or broadband affiliations of significance. Similarly, cable companies that

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60 Application at 42 (citing potential competition from Time Warner Cable).

61 *See* www.bellsouth.com; www.sbc.com for various, combined packages offered. The attached *Dineley deltaVectors Report* shows that 73 percent of SBC customers already have some bundled package. *Dineley deltaVectors Report* at 6.

62 *See, e.g., U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

sell broadband services do not have wireless, long distance or local telephone services to bundle.[63]

The concerns about the anticompetitive use of bundling are real, not theoretical. As mentioned previously, both SBC and BellSouth have petitions pending before the FCC that, if granted as proposed, would restrict their competitors' ability to bundle services by eliminating the ILECs' requirement to make network elements available under section 251 of the Communications Act. If SBC and BellSouth are not required to make network elements available under section 251, CLECs will find it harder and more expensive to purchase the network elements they need to provide data services and thus considerably harder to provide such services to their customers on a competitive basis. Under these circumstances, consumers who elect to purchase their data services from a CLEC and their voice services from SBC or BellSouth will be punished with higher rates in total, and will be forced to purchase a bundled voice and data service from BellSouth or SBC to escape the penalty. Wireless services will likely follow the same path.

The Commission has previously acknowledged and guarded against opportunities for bundled services to be used in an anticompetitive manner.[64] Likewise, the Commission in this instance should create permanent barriers to prevent anticompetitive bundling of services.

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63 Indeed, the Application cites to none. *See* Application at 42. To the extent that VoIP might alleviate this somewhat, it is a nascent industry with much regulatory uncertainty still surrounding it. *See, e.g.*, IP-Enabled Services, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, FCC 04-28 (Mar. 10, 2004).

64 *See, e.g.*, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, *Memorandum Opinion and Order*, 15 FCC Rcd 3160, para. 126 (1999) ("[A combined company] could inflict competitive harm by offering a package of bundled products . . . if the merged firm enjoys a monopoly in one of the bundled services.").

### D. The "Benefits" Of The Proposed Transaction Are Ethereal.

The purported consumer benefit claims are entirely unconvincing. Applicants speak of blocked calls being relieved, new services being added, and so on.[65] But poor service is simply the result of Cingular's bad business decision-making that makes its service less efficient and more costly. Consumers will realize no direct benefit from this acquisition because consumers already can be relieved of the inferior service that Cingular says it and AWS provide by simply switching to Verizon, Nextel, Sprint or T-Mobile.

The competitive concentration caused by this acquisition will do far more to harm consumers than any alleged "benefit" that is not already available to them today from another carrier. If SBC and BellSouth spent half of $41 billion on improving the Cingular network, all the claimed consumer benefits could be achieved with none of the competitive harms of the acquisition.

#### 1. Cingular seeks to use the acquisition to escape the marketplace discipline of its own bad business decisions.

Applicants cite a myriad of Cingular operational and network ailments that the proposed combination will cure.[66] All of these problems could undoubtedly be solved for far less than $41 billion without upending the competitive marketplace in the process. Obviously, SBC and BellSouth are not motivated to purchase AWS by a concern for current technical problems that the combined network might address. The Commission ought not be fooled into believing that the proposed combination is truly meant to fix Cingular's operational problems or that such reasoning should ever be sufficient to ignore potential anticompetitive affects.

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[65] Application at 10, 14, 20, 37, 57.

[66] Application at 10-25 (for example, discussing, network capacity, quality and coverage improvements as a result of the acquisition).

From the Application, it is clear that the marketplace is punishing Cingular for bad business decisions and rewarding Nextel, Sprint, Verizon and T-Mobile.[67] For example, Applicants make much of the claim that the Cingular and AWS networks are falling behind due to the need to maintain three networks, as well as cite to other Cingular network inefficiencies.[68] Applicants claim this causes them to have inferior service quality and higher costs and inhibits their ability to innovate due to spectrum shortages.

What Applicants do not say is that these facts are mostly the result of their own bad business decisions about network design and deployment. Their competitors made different choices and are now in a superior business position. Since Cingular's business decisions have turned out poorly, SBC and BellSouth seek to use their own financial power (which flows from their dominant ILEC revenues) to buy Cingular's way out of its predicament. Other businesses that are punished by the marketplace for bad decision-making must either address their problems directly, sell out to another operator (as AWS is doing), or go out of business. But most businesses do not have parent companies able and willing to spend $41 billion in cash.

This is because no other bidder had a customer-financed legacy network creating access to $41 billion in cash and loans. True, other carriers might be able to compete for AWS' assets, but no other carrier can rely on two ILEC wireline companies to pay for the purchase of AWS. Indeed, even Vodafone found that the price was too rich for it after SBC and BellSouth raised their offer 37 percent from their initial bid,[69] which has been reported as "the largest all-cash transaction in U.S. history."[70] SBC and BellSouth propose to take this step with loans and cash

67 Application at 27.

68 Application at 6, 27.

69 *BusinessWeek, Online,* "How the Cingular Deal Helps Verizon," March 1, 2004.

70 *The Motley Fool,* "Cingular Snags AT&T Wireless," Dave Mock (Feb. 17 2004).

reserves secured from dominant ILEC parents who profited from rate-based secured monopoly profits until 1996 and, since 1996, have steadily worked to thwart competitive local exchange carriers from making any serious encroachment in the marketplace.[71] Tens of millions of dollars in fines tell the tale. Allowing the use of ILEC financial dominance to skew the wireless marketplace by permitting the poor-performing carriers to leapfrog the more successful ones will only harm the market's proper operation.

### 2. Roaming is irrelevant to the acquisition because it is easily fixed contractually.

Nor is the merger justified in any way by Cingular customer problems with roaming.[72] The Application contains no explanation why these alleged problems cannot be overcome contractually rather than through acquisition. Presumably, the wildly successful regional wireless carriers Applicants cite as worthy competitors have somehow succeeded in negotiating acceptable roaming agreements.[73] Cingular, on the one hand, says that competition will still be robust post-acquisition by including regional wireless carriers in its analysis and, on the other hand, uses its alleged dire need for improved roaming agreements and other matters as the basis for its need to acquire AWS. This cannot work both ways. Either regional carriers suffer mightily along with Cingular and do not pose a competitive influence, or there really is nothing to Cingular's claim that roaming agreements and lack of nationwide coverage is a burden. In any event, the Company could buy improved roaming agreements for much less than $41 billion.

71 *See, e.g.*, *SBC CLEC Damages Order* at para. 3 (finding that SBC "violated paragraph 56 of the SBC/Ameritech Merger Order Conditions, and, in this regard, section 201(b) of the Act.").

72 Application at 3 n.1, 15, 21, 31-32.

73 Application at 27 (citing lower carrier churn).

Any alleged benefit from better roaming certainly cannot serve as a basis to justify the competitive threats of this acquisition.

### 3. Tower siting issues are superfluous to the public interest in the acquisition.

Similarly, the suggestion that finding new tower sites for cell splitting has any relevance to whether this merger should be approved is a red herring.[74] Applicants make no effort to explain how this issue affects Cingular differently than any other carrier.[75] Tower siting issues are purely a function of the marketplace which Cingular seeks to skew. All wireless carriers face tower citing problems; the acquisition of AWS will have no impact on this problem.

### 4. There is no homeland security benefit to the acquisition.

Equally unconvincing are Applicants' homeland security claims. All their statements about network redundancy and diversified routing would logically support a national wireless monopoly, or better yet a Pentagon-owned monopoly. The claim that homeland security requires that wireless networks be as large and concentrated as possible is the antithesis of competitive markets. Further, the Application and trade press reports have indicated that Cingular post-close would do away with redundancies in network and workforce in any event.[76] Homeland security has nothing to do with this acquisition.

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[74] Application at 6, 14.

[75] Application at 6, 14.

[76] Application at Exhibit 1, Public Interest Statement, pg. 14, note 50; pg. 22. With an overlap in "some 10% to 20% of their combined cities," Cingular has stated that they see some cash advantages from the sale of duplicate network facilities. *The Street.com*, "Cingular Deal Could Chill Networking Surge," Scott Moritz (Feb. 17, 2004); "For now, Cingular is unwilling to speculate on how many jobs might be eliminated." 'Yes, there will be employees affected by this,' [Cingular CEO Stan] Sigman said." *CBS MarketWatch*, "Cingular to Acquire AT&T Wireless," Emily Church and Jeffrey Bartash (Feb 17, 2004).

### E. SBC Has Explicitly Demonstrated A Propensity To Act Anti-competitively.

In order to effectively gauge potential anticompetitive effects or other purported public interest benefits, the Commission considers hard market data along with evidence of an applicant's particular qualifications because, "as the Commission long ago observed, licensing 'enables future conduct.'"[77] If the proposed combination is approved, it is clear that the parents of Cingular will be provided incentive and opportunity for the proposed mammoth wireless carrier to act discriminately. SBC's enforcement history at the Commission demonstrates that the company does not feel faint at Commission rules, merger conditions, or even large forfeiture amounts, which are paid in stride and could be described as a "cost of doing business."[78]

SBC's indifference to FCC restraints is legendary. By TCI's count in the last ten years, and particularly in the eight short years since the passage of the Telecommunications Act of 1996,[79] SBC and its affiliates have been subject to: one *Order to Show Cause*;[80] entered into five *Consent Decrees* with the Commission;[81] four *Forfeiture Orders*;[82] one section 271 violation;[83]

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77 Policy Regarding Character Qualification in Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees, *Report, Order and Policy Statement*, 102 F.C.C.2d 1179, para. 21 (1986) (subsequent history omitted) ("*Character Policy Statement*").

78 Merrill Lynch analyst Ken Hoexter, who tracks SBC, has explained, "As long as the cost of violating merger agreements is below the cost of allowing competitors to enter the market, it continues to be cheaper to pay the government for violating certain performance targets versus completely opening up the markets to competitors." "Fined Again – SBC Ameritech Sees It As The Cost of Doing Business, Federal and State Will Collect Over $67.8 Million From SBC for Anti-competitive Conduct," *MiACT Press* Release (June 22, 2002).

79 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

80 The Ameritech Telephone Operating Companies, *Order to Show Cause,* 10 FCC Rcd 5606 (1995).

81 Ameritech Corporation Apparent Liability for Forfeiture, *Consent Decree*, 11 FCC Rcd 15476 (1996); The Ameritech Telephone Operating Companies, *Consent Decree Order*, 11 FCC Rcd 14831 (1996); SBC Communications Inc., *Order and Consent Decree*, 14 FCC Rcd 12741 (1999); SBC Communications, Inc., *Order and Consent Decree*, 17 FCC

six *Notices of Apparent Liability*;[84] violated merger conditions causing damages to CLECs;[85] as well as an array of incidents outside of the FCC's purview, including a critical Department of Justice Evaluation in SBC's Michigan 271 application;[86] and an Illinois appeals court finding that SBC violated the collocation requirements of Illinois law.[87]

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Rcd 10780 (2002); SBC Communications Inc., *Order and Consent Decree*, FCC 03-229 (Oct. 1, 2003).

82 SBC Communications Inc., Apparent Liability for Forfeiture, *Order of Forfeiture*, 16 FCC Rcd 5535 (2001); SBC Communications Inc., Apparent Liability for Forfeiture, *Order of Forfeiture*, 16 FCC Rcd 10963 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd 7589 (2002); SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd 19928 (2002); SBC Communications Inc., Apparent Liability for Forfeiture, *Order on Review*, 17 FCC Rcd 4043 (2002).

83 AT&T Corporation, et al., Complainants, v. Ameritech Corporation, Defendant, et al., Complainants, v. U S WEST Communications, Inc., Defendant, *Memorandum Opinion and Order*, 13 FCC Rcd 21438 (1998) ("We conclude, based on this record, that, although certain limited marketing arrangements are permissible under the Act, Ameritech and U S WEST are providing in-region, interLATA service without authorization, in violation of section 271 of the Act. We further conclude that, as discussed below, although the underlying arrangements raise considerable concerns that Ameritech and U S WEST may have violated their equal access and nondiscrimination obligations under section 251(g) of the Act, we need not reach the issue because we have found that the arrangements violate section 271." (internal citation omitted)).

84 Ameritech Corporation Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 10 FCC Rcd 10559 (1995); SBC Communications, Inc.; Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd 1140 (2000); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 16 FCC Rcd 1012 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture and Order*, 24 CR 1225, 2001 FCC LEXIS 5581 (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 24 CR 1388, 2001 FCC (2001); SBC Communications, Inc., Apparent Liability for Forfeiture, *Notice of Apparent Liability for Forfeiture*, 25 CR 902, 2002 FCC LEXIS 322 (2002).

85 *SBC CLEC Damages Order* at para. 5 (finding that SBC "violated paragraph 56 of the SBC/Ameritech Merger Order Conditions, and, in this regard, section 201(b) of the Act.").

86 *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Michigan, Department Raises Questions about Change Management, Line Loss Notification, Billing Errors, and Reliability of Reported Performance Data*, http://www.usdoj.gov/atr/public/press_releases/2003/200803.htm

87 *GlobalCom, Inc. v. Illinois Commerce Commission and Illinois Bell Telephone Co., Inc.*, Ill. App. Ct. (2004).

SBC's $6 million forfeiture for a violation of FCC conditions on a prior acquisition provides the best example. There, the Commission found that the statutory maximum fine was necessary because of "SBC's willful and repeated failure to comply with the *SBC/Ameritech Merger Order*."[88] Of course, the characteristics of the SBC/Ameritech merger are strikingly similar to Cingular's proposed acquisition of AWS. SBC has again asked the Commission to trust that it will not act in an anticompetitive manner. But actions speak louder than words and when it came time for SBC to live up to the promises it made in order to persuade the FCC to approve its Ameritech acquisition, SBC failed to honor its commitments and violated the merger conditions "willfully and repeatedly."

Astonishingly, in the two years since that Commission *Forfeiture Order*, SBC has continued its anticompetitive ways, facing many similar allegations:

- April 17, 2003: The Commission finds that SBC "violated paragraph 56 of the SBC/Ameritech Merger Order Conditions, and, in this regard, section 201(b) of the Act" causing damages to competing local exchange carriers.[89]

- July 16, 2003: The DOJ did not support SBC's 271 Application because of deficiencies in its wholesale billing. DOJ found that SBC had trouble generating accurate bills, and that CLECs spend great resources auditing these bills.[90]

- February 26, 2003: The DOJ questioned SBC's provision of line loss notification procedures, billing errors, and the reliability of its reported performance data, noting that "[s]erious concerns remain in several areas that may affect whether the current state of competition is irreversible...and these concerns merit the FCC's careful attention."[91]

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88 SBC Communications, Inc., Apparent Liability for Forfeiture, *Forfeiture Order*, 17 FCC Rcd 19928, para. 22 (2002).

89 *SBC CLEC Damages Order*, 18 FCC Rcd 7568.

90 *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Michigan, Department Reiterates Concerns About Billing Accuracy*, http://www.usdoj.gov/atr/public/press_releases/2003/201173.htm.

91 *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Michigan, Department Raises Questions about Change Management, Line Loss Notification, Billing Errors, and Reliability of Reported Performance Data*, http://www.usdoj.gov/atr/public/press_releases/2003/200803.htm.

- August 26, 2003: The DOJ did not support SBC's application to provide long distance services in Illinois, Indiana, Ohio and Wisconsin on the basis of its record regarding wholesale billing accuracy, as well as issues related to line-splitting, data integrity, manual handling and pricing.[92]

- July 24, 2003: Four ISPs filed an antitrust suit against SBC in U.S. District Court for Central California alleging that SBC charged inflated DSL rates, making resale of such services impossible.[93]

- October 1, 2003: SBC and FCC entered into an agreement that effectively terminated the FCC's investigation (commenced March 10, 2003) into whether SBC marketed and/or sold in-region long distance services prior to receiving Section 271 authorization. SBC agreed to contribute $1.35 million to U.S. Treasury.[94]

- February 2, 2004: Ascent filed a letter with the Connecticut Attorney General urging an investigation into alleged efforts by the Bell monopolies, including SBC, to force equipment suppliers to contribute a portion of their revenue into a war chest controlled by the Bells. This war chest presumably would be used to undermine competition.[95]

- March 11, 2004: GlobalCom filed suit in Illinois state court alleging that Illinois Bell Telephone Company, now SBC, knowingly engaged in anticompetitive conduct. Specifically, GlobalCom alleged that SBC unlawfully (1) charged early termination fees for the premature cancellation of contracts for certain services and (2) required GlobalCom to pay rent to store its equipment in an SBC facility as a condition for obtaining a new service. The Court concluded that the early termination fees were lawful, but that the collocation requirements violated Illinois law.[96]

Since September 1998, the Commission, state commissions and courts have assessed fines and settlements of at least *$1,163,780,361.00* against SBC and its affiliates for failure to meet performance criteria; failure to meet merger commitments; failure to meet wholesale service standards; violation of Section 271 of the Communications Act of 1934, as amended;

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92 *Justice Department Advises FCC of Concerns About SBC's Application to Provide Long Distance Services in Illinois, Indiana, Ohio and Wisconsin, Department Reiterates Concerns about Billing Accuracy*, http://www.usdoj.gov/atr/public/press_releases/2003/201248.htm.

93 See http://www.bizjournals.com/milwaukee/stories/2003/07/21/daily43.html.

94 SBC Communications Inc., *Order and Consent Decree*, FCC 03-229 (Oct. 1, 2003).

95 See http://www.comptelascent.org/public-policy/state-regulatory/state-filings/alliance/ct_feb2_2004.pdf.

96 *GlobalCom, Inc. v. Illinois Commerce Commission and Illinois Bell Telephone Co., Inc.*, 2004 WL 487948 (Ill. App. 1 Dist.) (March 11, 2004).

provision of substandard service, class action lawsuit settlements, and other violations and omissions.[97]

"The same violations of the Communications Act, Commission rules or Commission policies and adjudicated cases of relevant non-FCC misconduct have a bearing on the qualifications of an applicant entity regardless of the form in which it does business."[98] Further, the Commission has made plain that FCC-related misconduct of those individuals associated with the parent corporation "raises sufficient question regarding the subsidiary's qualifications so that such matters will receive consideration."[99] Cingular's parent, SBC, has demonstrated a strong propensity to act anti-competitively and a total indifference to policies and penalties created to restrain anticompetitive urges. The evidence is stark, as represented by repeated FCC and state pubic utility commission findings and forfeitures.

SBC cannot hide its anti-competitive actions behind the corporate form of Cingular. The Commission has already acknowledged that corporations might be created and led in many ways. In this regard, the Commission must focus on the actual involvement of the parent company.[100] Since SBC has recently demonstrated that its behavior cannot be reigned in with merger conditions, the only way to prevent the substantial anti-competitive threat posed by the acquisition is to deny the Application.

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97 See http://www.voicesforchoices.com/voices/media/sbc.pdf.

98 *Character Policy Statement* at para. 76.

99 *Id.* at para. 81.

100 *Id.* at paras. 78-81.

## III. CONCLUSION.

For all the foregoing reasons, the acquisition of AWS by Cingular is not in the public interest. The acquisition creates the prospect of anticompetitive behavior when two ILECs own the largest nationwide wireless carrier along with the local facilities and dominance in ILEC regions covering 22 states. To allow Applicants to completely change the face of the wireline and wireless marketplace in the manner they have proposed does not further competition. Rather, it undermines it.

The Commission may not ignore the obvious consequences of the acquisition and should, therefore, deny its approval. Conditions on this acquisition will not suffice in light of the FCC's experience with SBC in the SBC/Ameritech case. As the old adage goes, "fool me once, shame on you, fool me twice, shame on me." As such, the parties' Application should be denied.

Respectfully submitted,

Danny E. Adams


Danny E. Adams
Joan Griffin
W. Joseph Price
Kelley Drye & Warren LLP
8000 Towers Crescent Drive, Suite 500
Vienna, VA 22182
(703) 918-2300
(703) 918-2450 (facsimile)
jprice@kelleydrye.com

Counsel for
Counsel for Thrifty Call, Inc.


May 3, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on the foregoing Petition to Deny of Thrifty Call, Inc., this 3rd day of May 2004, by first class mail, postage prepaid (except where noted *), was sent to the following:

David C. Jatlow
AT&T Wireless Services, Inc.
1150 Connecticut Ave., N.W.
4th Floor
Washington, DC 20036
david.jatlow@attws.com

*Qualex International
445 Twelfth Street, S.W.
Washington, DC 20554
qualexint@aol.com

*Susan Singer, Spectrum and
Competition Policy Division
Wireless Telecommunications Bureau
445 Twelfth Street, S.W.
Washington, DC 20554
susan.singer@fcc.gov

*Linda Ray, Broadband Division
Wireless Telecommunications Bureau
445 Twelfth Street, S.W.
Washington, DC 20554
linda.ray@fcc.gov

*David Krech, Policy Division
International Bureau
Wireless Telecommunications Bureau
445 Twelfth Street, S.W.
Washington, DC 20554
david.krech@fcc.gov

David G. Richards
Cingular Wireless LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342

*Erin McGrath
Spectrum and Competition Policy Division,
Wireless Telecommunications
445 Twelfth Street, S.W.
Washington, DC 20554
erin.mcgrath@fcc.gov

*Kathy Harris, Mobility Division
Wireless Telecommunications Bureau
445 Twelfth Street, S.W.
Washington, DC 20554
kathy.harris@fcc.gov

*Jeff Tobias, Public Safety and Critical
Infrastructure Division
Wireless Telecommunications Bureau
445 Twelfth Street, S.W.
Washington, DC 20554
jeff.tobias@fcc.gov

*Neil Dellar, Office of General Counsel
Wireless Telecommunications Bureau
445 Twelfth Street, S.W.
Washington, DC 20554
neil.dellar@fcc.gov

Nancy Lee Boudrot
NANCY LEE BOUDROT

## ATTACHMENT A

# A STUDY OF THE PROPOSED CINGULAR ACQUISITION OF AT&T WIRELESS

## Consolidation of Power in the Wireless Services Industry and its Effects on Consumers of Digital Communications Services

By:

Richard Dineley, M.B.A., C.P.A., Scott Atkinson, Ph.D., and Michael Pagano, Ph.D.

deltaVectors

TEL: 706-752-0092

May, 2004

# A STUDY OF THE PROPOSED CINGULAR ACQUISITION OF AT&T WIRELESS

## OUTLINE

## 1.0 Executive Summary

The pending acquisition of AT&T Wireless (AWE) by Cingular Wireless (Cingular) has the potential to create near monopolistic power for the provision of communications services in some geographic markets of the country and will simultaneously increase the concentration of national market power in the wireless communications services industry segment.

The dynamics of this pending merger are truly groundbreaking. The merger will marry the current 2nd and 3rd largest providers of wireless communications services thereby further concentrating market power in an already highly concentrated market. But perhaps even more ominous, is the fact that the merger will concentrate this market power in the hands of Bell Operating Companies (BOCs) who hold near monopolistic power in 22 states and whose stated strategy is to defend and expand their market share through aggressive wholesale and retail service bundling of wireline, wireless, broadband, and video services. In fact, BellSouth recently filed a Petition for Forbearance with the FCC specifically requesting the Commission to not require unbundling of the broadband element of BellSouth's service offering to competitive local exchange carriers (CLECs)[1].

Given the potential impact of this merger, we examined the stand-alone effect of market power consolidation within the industry segment represented by wireless communications services and we separately looked at the effect the proposed merger will

[1] BellSouth Telecommunications, Inc., Petition for Forbearance, FCC WC Docket No. 04-48, March 1, 2004

have on the public when their consumption of both wireline and wireless digital communications services are considered. Under either scenario, the repercussions on the consuming public are harmful because competition will be significantly reduced.

In our study of the national wireless services industry segment, we employed the Herfindahl-Hirschman Index (HHI), as described more fully in Section 3.1 of this report, to measure the concentration of market power on a pre-merger and post-merger basis. Our HHI analysis shows that the market is, by the standards set in the Department of Justice (DOJ) Horizontal Merger Guidelines[2], highly concentrated even before the merger. Post-merger, the HHI skyrockets to levels unanticipated by even the DOJ and accurately reflects the consolidation of market power that would accrue to the merger partners should this action be approved. Here, the merger concentration increases significantly from a pre-merger level of nearly 1964 to a post-merger level of over 2712, a level that DOJ Guidelines tell us is well above the thresholds that "raise significant competitive concerns[3]".

Not only is the absolute level of the HHI score significant, but the increase in the HHI from pre-merger to post-merger is a staggering 748 points. According to the DOJ Horizontal Merger Guidelines, "Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are

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[2] Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Issued: April 2, 1992, Revised: April 8, 1997

[3] Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Issued: April 2, 1992, Revised: April 8, 1997, ¶ 1.51 (c)

likely to create or enhance market power or facilitate its exercise[4]." The huge increase in the HHI produced by this proposed merger far outstrips that envisioned by the DOJ Guidelines. Based on the HHI measurement of the effect of the proposed merger on the wireless services industry segment alone, it can be concluded that the combination of companies so thoroughly concentrates market power that the result is clearly and unequivocally anti-competitive.

In addition to this concentration of market power in the wireless services industry segment, we believe it is fair to argue that there is a true paradigm shift taking place in the communications services industry as a whole. This shift in market definition and dynamics, which is more thoroughly described in Sections 3.2 and 3.3, centers on the creation and protection of bundled service offerings that elevate the RBOCs and their affiliated companies above, and out of reach of, the competition. At best, the competition can respond with but a small subset of the product set that is being aggressively bundled, and more aggressively priced, so as to provide the consumer strong disincentives to procure even a small portion of the bundle from a competing provider.

We believe the proposed merger provides an abundance of opportunity for BellSouth and Southwestern Bell Communications (SBC) to abuse their position as the Incumbent Local Exchange Carrier (ILEC) in 22 states by bundling wireless services with local access, long distance, broadband, and video services, by cross-subsidizing one product with earnings from another, by using such product subsidies to support targeted and predatory

[4] Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, Issued: April 2, 1992, Revised: April 8, 1997, ¶ 1.51 (c)

pricing and, over time, driving competitors who are unable to provide bundled offerings out of the market to the detriment of the consumer. For these reasons, the application should be denied.

## 2.0 Situation Overview

Cingular Wireless, which is jointly owned by SBC and BellSouth, has offered $15 per share, or $41 Billion to acquire the facilities and customers of AT&T Wireless Services, Inc. The brand name, AT&T Wireless Services, does not transfer under this proposed merger, as AT&T Corporation has retained ownership of that brand name. As of year-end 2002, Cingular Wireless was the 2nd largest wireless service provider in the United States, with 21.9 million subscribers, although AT&T Wireless was a close 3rd with 20.9 million subscribers. Only Verizon Wireless was larger with 32.5 million subscribers. Should the proposed merger be approved, Cingular (the surviving entity) would easily move into the top spot as the nation's largest wireless service provider with 42.8 million subscribers.

Closely paralleled with this is the position of Cingular's parents, SBC and BellSouth. When taken together the two companies also far outdistance all other ILECs by providing some 133.6 million access lines, which represents 51% of the national total of 262.2 million as of year-end 2002[5]. Coincidentally, Verizon Communications, Inc. is

[5] Statistics of Communications Common Carriers, 2002/2003 Edition, Table 2.1, Federal Communications Commission

comparable in size, with 84.8 million access lines representing 32.3% of the national total.

In combination, these three carriers control 83.3% of wireline access lines and, post-merger, could control, 68.1% of all wireless subscribers. The current situation is that dominance by these three carriers in the wireline industry is a fait accompli and similar positioning in the wireless industry awaits the completion or dissolution of this merger. Likewise, the consumers' future ability to secure rational competitive alternatives to these three carriers depends on the disapproval of the proposed merger.

## 3.0 Research Hypotheses

An established trend in the U.S. telecommunications industry is that consumers are moving away from single product solutions, such as purchasing stand-alone local phone service or wireless-only services, and are increasingly being offered bundled, multiple offerings from a single service provider.[6] In turn, this trend increases the chances that existing large telecommunication service companies will increase their market power at the expense of other competitors and, ultimately, consumers.

Market power in this industry is directly affected by the size of a carrier's footprint and the carrier's ability to offer a bundle of services that more securely ties the consumer to the carrier while also pricing this bundle in a manner which reduces competition from

[6] TNS Telecoms, October 21, 2003, "Wireless spending continues increase as wired telecom growth stalls," http://www.tnstelecoms.com/press-10-21-03.html.

potential providers for specific sub-components of the bundle. For example, an incumbent local exchange carrier (ILEC) such as SBC can use the Cingular-AWE merger as a means of increasing its market footprint and penetration while also offering a bundled set of digital communications services (referred to herein as a "DCS package").[7] This DCS package, nominally discounted relative to the aggregate "a la carte" price of the separate services within the entire bundle, yields substantial profits to the carrier and simultaneously creates barriers to entry to smaller carriers which do not offer all components of this package. In its *2004 Q1 Investor Update* conference call, SBC reports that "73% of [SBC] customers have a bundle… [of] two or more vertical features or one or more key services" and that the "ARPU (average revenue per user) for customers in a bundle is *more than double* that of customers without a bundle" (emphasis added).[8]

Our main hypothesis is that ILECs with substantial market power (e.g., SBC if the Cingular-AWE merger is approved) can use the bundling and tying principles underlying a DCS package in order to drive out carriers that operate within one sector of this bundle. We believe that bundling also facilitates and masks product cross-subsidization wherein price increases, or postponed price decreases in a declining cost structure market, are used to offset margin declines due to predatory product pricing in a competitive market until such time as the competitive pressures are lessened with the exit of the targeted

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[7] We define this bundle as a carrier-specific package comprised of the following set of digital communications services: local phone service access via wireline, long distance, wireless phone service, high speed Internet access, and an alternative to CATV video service such as satellite TV.

[8] Excerpted from p. 16 of the *SBC 2004 Q1 Investor Update* PowerPoint presentation to investors and securities analysts.

competitor and/or competitors. Ultimately, this behavior is to the detriment of consumers as individuals may be left with no viable alternatives to the ILEC's DCS package. For example, an ILEC's DCS package can be priced in a manner where independent local phone service providers cannot compete against the local phone price embedded within the bundled price offered by the ILEC. In the long run, the consumer will suffer from not having a wider choice of carriers and services through higher prices on the ILEC's bundled services and by being forced to pay for services that the consumer may not actually want, but is required to receive, in order to obtain the bundled price's "discount".

### 3.1 Market Consolidation and Aggregation of Subscriber Bases in the Wireless Industry

As we demonstrate in Section 5, the market for DCS packages is rapidly consolidating and therefore the market for these services is becoming more concentrated under the control of a relatively small set of key players. Most notably, if the Cingular-AWE merger is approved, we predict SBC's market power will grow substantially. As noted earlier, we anticipate that an ILEC such as SBC would therefore have the economic incentive and market power necessary to engage in anti-competitive behavior which ultimately can harm consumers through restricted choices and higher prices.

This anticipated behavior is not without precedent in the telecommunications industry. Most recently, the Australian Competition and Consumer Commission (ACCC) has filed a Competition Notice[9] related to the anti-competitive actions of Telstra Corporation Limited (Telstra) in its pricing of broadband access. In addition, Telstra's practice of bundling pay TV and telephony services is also drawing regulatory scrutiny. In the Competition Notice, the ACCC noted that Telstra has lowered its retail price for broadband access to a level very close to (or below) the wholesale price it charges to independent broadband access providers. The ACCC has concluded that:

> "Telstra's ability to engage in the conduct described in this Notice was and *is made possible or materially facilitated by its substantial degree of market power* in the Wholesale Broadband Market.
>
> Telstra has taken and is taking advantage of its substantial degree of market power in the Wholesale Broadband Market by engaging in the conduct described in this Notice.
>
> Telstra's conduct described in this Notice, by which it has taken and is taking advantage of its market power in the Wholesale Broadband Market, had and has the effect, or likely effect, of *substantially lessening, preventing or hindering competition* in the Retail Broadband Market..." (emphasis added).[10]

[9] Australian Competition and Consumer Commission, *Competition Notice issued pursuant to subsection 151AKA(2)*, March 19, 2004.

[10] Ibid.

The above passage demonstrates how an Australian telecommunications service provider with sufficient market power is currently using this power to restrict competition in a market that is similar to the U.S. telecommunications industry. In effect, Telstra's behavior is consistent with that of a monopolist (or near-monopolist) that strives to stifle potential competition in order to maximize monopolistic economic rents for Telstra's shareholders.[11] In addition, another result of price increases by a monopolist will be a reduction in output, resulting in a welfare loss to society.

Given this disturbing precedent, we are concerned that the Cingular-AWE merger, if approved, could create similar incentives and engender Telstra-type behavior by ILECs such as SBC and BellSouth. If SBC and/or BellSouth is successful in pursuing such a strategy, then we think that other competitors such as T-Mobile, Sprint PCS, Alltel, US Cellular, and other smaller carriers will not be able to compete effectively in the market for DCS packages.

### 3.2 Consolidation of Power: The Reach of Wireline Providers into Wireless Services

Using cash flow generated from their profitable local phone operations, the ILECs have been able to invest heavily in wireless services and firms such as SBC have made the increased penetration of the wireless market one of their primary strategic objectives.

[11] In H. Varian (1993) *Intermediate Microeconomics: A Modern Approach*, (W.W. Norton & Co.: New York), an economic rent is defined as: "those payments to a factor production that are in excess of the minimum payment necessary to have that factor supplied."

This shift in strategy for the ILECs is in direct response to the growing popularity of wireless services and the continuing downtrend in the number of wireline connections. A recent analysis of the telecommunications billing records from 32,000 U.S. households shows that wireless spending continues to grow while wireline services remain stalled.[12] Most notably, the report stated:

> "The growth in wireless spending appears to be coming at the expense of wired telecom service, which declined by four percent during the same period. ... The wireless market continues to provide the strongest growth in the telecom sector even with 66 percent of U.S. households owning at least one wireless phone."

Thus, the ILECs have the financial strength and economic incentives to continue increasing their presence in the fastest growing segment of the market by expanding their footprint in the wireless marketplace. This increased presence in the wireless arena, coupled with the growing trend of bundling services into a DCS package, suggest that ILECs are already increasing their market power and that the proposed Cingular-AWE deal can concentrate even more power within a handful of large telecommunications service providers.

## 3.3 The Effects of Market Power and Bundled Services

[12] TNS Telecoms, October 21, 2003, "Wireless spending continues increase as wired telecom growth stalls," http://www.tnstelecoms.com/press-10-21-03.html.

The bundling of services and its impact on competition has been studied extensively with many analysts finding that the economic effect of bundling on society in general is based on a trade-off between bundling's potential advantages and disadvantages.[13] A recent Information Paper published by the ACCC describes bundling as:[14]

> "...the situation where two or more products or services are sold as a single package. The price of the bundled package is usually sold at a discount to that of acquiring given amounts of the products separately, and a residential consumer is likely to receive only one bill for all of the services provided in the bundle."

The increased usage of bundling in the U.S. telecommunications industry noted in SBC's *2004 Q1 Investor Update* appears to also be a global trend as the ACCC's report notes that:

> "Bundling is becoming a growing and important aspect of telecommunications service provision for carriers and carriage service providers [in Australia]."

The ACCC paper also explains the potentially conflicting positive and negative effects of bundling on social welfare:[15]

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[13] In economic terms, one can define this effect on society as the change in the aggregate utility of the society's citizens, or "social welfare".

[14] Australian Competition and Consumer Commission, *Bundling in Telecommunications Markets: An ACCC Information Paper*, August, 2003.

[15] Other academic research by Martin (1999) and Bakos and Brynjolfsson (2000) supports these conflicting effects of bundling. See Martin, S., 1999, "Strategic and Welfare Implications of Bundling", *Economics*

*Potential Positive Effects:* "Bundling can allow carriers or CSPs [carriage service providers] to exploit economies of scope between bundled goods, and economies of scale if the bundling conduct has significant impacts on consumer demand. Consumers can gain when these benefits are passed on in the form of lower retail prices or quality improvements."

*Potential Negative Effects:* "Bundling may be anti-competitive if it forecloses or reduces competition by enabling the leveraging of market power from one market to another. In this way bundling may be used strategically to diminish competition or significantly reduce the ability of competitors in a particular market to effectively compete. The pricing of a bundle may also raise anti-competitive conduct concerns, particularly if it is predatory or results in a vertical price squeeze."[16]

A recent academic study by Papandrea, Stoeckl, and Daly (2003) also identifies the trade-offs related to bundling:[17]

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*Letters*, vol. 62, no. 3, pp. 371-376; and Bakos, Y., and E. Brynjolffson, 2000, "Bundling and Competition on the Internet", *Marketing Science*, vol. 19, no. 1, pp. 63-82.

[16] A vertical price squeeze occurs when a wholesaler of a service also becomes a retailer of this service and then prices its retail price at or below the wholesale price it charges its existing retail distributors. In this way, the wholesaler can effectively drive out the current retail distributors and capture the entire retail market for itself. The ACCC's investigation of Telstra noted earlier is an example of this type of anti-competitive behavior in the Australian broadband access market.

[17] Papandrea, F., Stoeckl, N., and A. Daly, 2003, "Bundling in the Australian Telecommunications Industry", *The Australian Economic Review*, vol. 36, no. 1, pp. 41-54.

> "The general literature on bundling suggests that its effect on social welfare depends on several factors such as market structure, the elasticity of demand for the products, the marginal cost of production, economies of distribution and the use of complex menus."

Papandrea et al.'s study is most relevant to our analysis because it focuses on bundling in the Australian telecommunications industry. The authors conclude that:

> "...the potential effects of bundling *on competition* [in the telecommunications industry] *and the information costs imposed on consumers by complex menus of services* seem [to be] the most significant considerations for social welfare. It is desirable that regulatory authorities monitor developments closely, although heavy-handed regulation of bundling seems undesirable." (emphasis added)

The review of the literature noted above suggests that bundling is becoming more pervasive in the telecommunication-information services industry and that there are multiple, potentially conflicting effects on the consumer. However, work by Bakos and Brynjolffson (2000), among others, demonstrate that bundling can reinforce the market power of an incumbent provider and pre-empt the entry of potentially more efficient rivals. These findings are directly relevant to the case of SBC and the proposed Cingular-AWE merger because such a merger, if approved, would increase the combined entity's market power and provide even more powerful economic incentives to use bundling in an anti-competitive manner that diminishes competition for DCS packages and reduces social welfare.

An example of potentially anti-competitive intentions in this market can already be seen by BellSouth Telecommunications' recent filing with the Federal Communications Commission (FCC) to petition the Commission to "forbear from applying any stand-alone unbundling obligations on broadband elements."[18] This petition asks the FCC to relieve BellSouth of any obligation to sell an unbundled network element (UNE) if a procuring competitive local exchange carrier (CLEC) does not wish to purchase the entire bundle offered by BellSouth. This petition, if granted, can harm consumers if there are no viable competitors to BellSouth for a specific UNE in the consumers' geographic area. Another indication of the ILECs' intentions in the DCS market is SBC's statement that two of its key long-term drivers of growth are bundling and further penetration of wireless services.[19] Given these actions by U.S. ILECs and the recent experience of Telstra in Australia, we are concerned that competition will be reduced and consumers harmed by any further increase in market power created by the proposed Cingular-AWE merger.

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[18] Federal Communications Commission, Petition for Forbearance under 47 U.S.C. § 160(c), March 1, 2004, Bellsouth Telecommunications, Inc.

[19] From p. 20 of the *SBC 2004 Q1 Investor Update* PowerPoint presentation to investors and securities analysts.

## 4.0 Research Methodology

The Herfindahl-Hirschman Index (HHI) is a major analytical tool used by the Department of Justice (DOJ) to help determine whether a proposed merger will be anticompetitive. This index is calculated by summing the squares of the individual market shares of all firms in the industry as defined by the relevant product and geographic markets. The HHI index, therefore, gives proportionately greater weight to firms with larger market shares, since their market power is greater.

The product market is defined by considering the set of all substitutable products for which a hypothetical monopolist could impose a small but significant and non-transitory price increase and thereby increase profits. That is, the monopolist must have sufficiently captured the hypothetical product market so that he is able to increase profits through the imposition of this price increase on the products comprising the product market. If instead, this price increase would reduce profits, it can be assumed that consumers have turned to substitute products outside this hypothetical product market. Therefore, the product market needs to be enlarged. These additional products need to be included in the expanded definition of the product market, since they are viable substitutes.

The geographic market is defined by considering the region where a hypothetical monopolist produces the relevant product and could profitably impose a small but significant and non-transitory price increase. That is, the monopolist must be able to increase profits through the imposition of this price increase on the product in the assumed geographic market. If instead, this price increase reduces profits, it can be assumed that consumers have turned to other regions outside this hypothetical geographic market. Therefore, these regions need to be included in the expanded geographic market definition.

Once the product and geographic markets have been defined, the DOJ *Horizontal Merger Guidelines* call for the computation of the HHI index by summing the squared market shares (expressed as percentages of total market sales or revenues) of all firms in the relevant product and geographic markets. One must compute both pre and post-merger HHI indices. If the post-merger HHI exceeds 1800, this industry is characterized as highly concentrated. One then computes the pre to post-merger change in the HHI. An increase in the pre-merger HHI of 50 points or more raises significant competitive concerns, while an increase of 100 points or more is likely to create or enhance market power or facilitate its exercise.

## 5.0 Research Findings

Before calculating HHI indices for the proposed Cingular/AT&T wireless merger, we must first determine the most reasonable product and geographic markets. Clearly, wireless and wireline service are partial but not complete substitutes. However, since the FCC has not supplied data on the degree of such substitution or the degree of substitution among broadband, wireless, and wireline service, we define our product market as wireless phone service.

In the following analysis we present two measures of the HHI index, each based on a different definition of the geographic market. We first assume a national market, which yields the broadest possible geographic market of 25 wireless providers and, hence, the smallest possible HHI index. This market definition yields the most favorable support possible for the proposed Cingular/AWE merger.

The second geographic market is defined as the individual's county of residence. For the vast majority of the population, we argue that a county geographic market is more appropriate than a national geographic market. According to paragraph 84 of the Federal Communication Commission (FCC) *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, July 14, 2003 (FCC, 2003), 5% of the U.S. population have 2 or fewer wireless providers in the counties where they live, 17% have 4 or fewer wireless providers, and 75% have 6 or fewer wireless providers. Thus, a national market comprised of the 25 largest wireless providers considers a market that has more suppliers than are available to the vast majority of consumers in the U.S.

Interestingly, using either definition of the geographic market, the HHI indices indicate that the proposed merger will result in a highly concentrated market and that the increase in the HHI is far in excess of 100 points. As expected, the results are more extreme using the county definition of the geographic market than using the national market definition.

We define market share in both the county and national markets for wireless phone service based on the total number of domestic subscribers for wireless service by each provider. We focus on the number of subscribers rather than revenue, since firms are distinguished primarily on the basis of their relative advantage in serving different buyers or groups of buyers (this is in conformance with Section 1.41 of the DOJ Horizontal Merger Guidelines, Rev. April 8, 1997). That is, competing wireless providers are evaluated by customers in terms of the completeness of their geographic coverage.

**Table 1-Herfindahl-Hirschman Index Calculation for U.S. Domestic Wireless Service Providers--Proposed Cingular/AT&T Wireless (Widest Geographic Market Definition)**

| Col. 1<br>Wireless Service Provider | Col. 2<br>Number of Subscribers, in Millions, Year End 2002* | Col.3<br>Market Share | Col.4<br>Pre-Merger Market Share Squared | Col.5<br>Post-Merger Market Share Squared | Col.6<br>Change in HHI |
|---|---|---|---|---|---|
| Verizon | 32.5 | 24.2% | 585.6 | 585.6 | |
| Cingular | 21.9 | 16.3% | 265.9 | 1015.6 | |
| AT&T | 20.9 | 15.6% | 242.2 | | |
| Sprint | 14.8 | 11.0% | 121.4 | 121.4 | |
| Nextel | 10.6 | 7.9% | 62.3 | 62.3 | |
| T-Mobile | 9.9 | 7.4% | 54.3 | 54.3 | |
| Alltel | 7.6 | 5.7% | 32.0 | 32.0 | |
| US Cellular | 4.1 | 3.1% | 9.3 | 9.3 | |
| Leap Wireless | 1.5 | 1.1% | 1.2 | 1.2 | |
| Western Wireless | 1.2 | 0.9% | 0.8 | 0.8 | |
| Qwest | 1 | 0.7% | 0.6 | 0.6 | |
| Centennial | 0.9 | 0.7% | 0.4 | 0.4 | |
| Nextel Partners | 0.9 | 0.7% | 0.4 | 0.4 | |
| Triton PCS | 0.8 | 0.6% | 0.4 | 0.4 | |
| Dobson Comm. | 0.8 | 0.6% | 0.4 | 0.4 | |
| Rural Cellular | 0.7 | 0.5% | 0.3 | 0.3 | |
| American Cellular | 0.7 | 0.5% | 0.3 | 0.3 | |
| Alamosa PCS | 0.6 | 0.4% | 0.2 | 0.2 | |
| AirGate | 0.6 | 0.4% | 0.2 | 0.2 | |
| US Unwired | 0.6 | 0.4% | 0.2 | 0.2 | |
| Broadwing | 0.5 | 0.4% | 0.1 | 0.1 | |
| Midwestern Wireless | 0.3 | 0.2% | 0.0 | 0.0 | |
| Horizon PCS | 0.3 | 0.2% | 0.0 | 0.0 | |
| Ntelos | 0.3 | 0.2% | 0.0 | 0.0 | |
| Southern LINC | 0.3 | 0.2% | 0.0 | 0.0 | |
| Total | 134.3 | 100.0% | | | |
| HHI | | | 1378.8 | 1886.4 | |
| PRE TO POST-MERGER CHANGE IN HHI | | | 507.5 | | |

*Source: Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Services, FCC, July, 2003.

In Table 1 we specify the national market to include the largest 25 wireless service providers, as reported in the *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC (July 2003). The pre-merger HHI index of 1378.8 is computed by summing the squares of the 25 individual market shares as shown in column 4 of the Table 1. To compute the post-merger HHI, we add together the pre-merger market shares of Cingular and AT&T and square this sum. The squared market shares for the non-merging companies remain unchanged from their pre-merger values. By summing all the post-merger squared market shares, we obtain an HHI post-merger index of 1886.4. The change in the pre-merger versus post-merger HHI index is 1886.4 - 1378.8 = 507.5, which is substantially in excess of the 100 point threshold. This is compelling evidence that the merger is likely to create or enhance market power at a nationwide level.

In Table 2 we employ a county geographic market definition. While we lack market share data at this level of disaggregation, we include the largest 6 wireless service providers (Verizon, Cingular, AT&T, Sprint, Nextel, and T-Mobile) on the grounds that FCC (2003) indicates that 75% of wireless customers have 6 or fewer wireless service providers in their communities. Thus, by considering the 6 largest wireless service providers in this calculation of the HHI, we provide a measure of the HHI that is more applicable to the vast majority of subscribers in county geographic markets. However, our measure of the HHI will still be an understatement of its true effect in communities where there are fewer than 6 wireless service providers. That is, in some counties, the true HHI will be larger than what we calculate using this methodology, so that the true anti-competitiveness of the proposed merger is larger than calculated.

**Table 2-Herfindahl-Hirschman Index for U.S. Domestic Wireless Service Providers--Proposed Cingular/AT&T Wireless Merger (Narrower Geographic Market Definition)**

| Col. 1<br>Wireless Service Provider | Col. 2<br>Number of Subscribers, in Millions, Year End 2002* | Col.3<br>Market Share | Col.4<br>Pre-Merger Market Share Squared | Col.5<br>Post-Merger Market Share Squared | Col.6<br>Change in HHI |
|---|---|---|---|---|---|
| Verizon | 32.5 | 29.4% | 863.5 | 863.5 | |
| Cingular | 21.9 | 19.8% | 392.1 | 1497.5 | |
| AT&T | 20.9 | 18.9% | 357.1 | | |
| Sprint | 14.8 | 13.4% | 179.1 | 179.1 | |
| Nextel | 10.6 | 9.6% | 91.9 | 91.9 | |
| T-Mobile | 9.9 | 9.0% | 80.1 | 80.1 | |
| Total | 110.6 | 100.0% | | | |
| HHI | | | 1963.8 | 2712.1 | |
| Change in HHI | | | 748.3 | | |

*Source: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC, July, 2003.

Using this county geographic market definition of the largest six wireless service providers, we find that the pre-merger HHI index equals 1963.8, as computed by summing the squares of the 6 individual market shares as shown in column 4 of the Table 2. To compute the post-merger HHI, we first add the pre-merger market share of Cingular to that of AT&T Wireless and square this sum. The squared market shares for the non-merging companies remain equal to their pre-merger values. We then sum all the post-merger squared market shares to obtain an HHI index of 2712.1, which is 826 points larger than the post-merger HHI computed in Table 1 using a national geographic market.

The change in the pre-merger versus post-merger HHI index is computed as 2712.1 - 1963.8 = 748.3, which substantially exceeds the 100 point threshold by 648.3 points and the 507.5 point change in the HHI calculated for a national market in Table 1. This is powerful evidence that the proposed merger is likely to create or enhance market power in county-wide markets.

## 6.0 Conclusions

In our opinion, the anticompetitive effects that would result from an acquisition of AT&T Wireless by Cingular Wireless are both significant and obvious. The consolidation of market power raises significant competitive concerns, as measured by the post-merger HHI index being 50% above the DOJ threshold that defines a highly concentrated market. In fact, the Cingular-AWE post merger market share would be an amazing 38.7%, almost 10 percentage points higher than its nearest competitor, Verizon Wireless with 29.4%.

In addition to the market power consolidation that would occur in the wireless services industry segment, it is important to appreciate the next level of market power consolidation that occurs when wireless services become an integral part of a wireline carrier's strategy to increase ARPU, lower customer churn, and increase market penetration. If there is any doubt as to the ability of SBC and/or BellSouth to do this, one needs only look as far as the 2002/2003 Edition of the Statistics of Common Carriers produced by the FCC. In Table 2.1 of that report we find that SBC and BellSouth combined provide 133.6 million access lines of a national total of 262.2 million or an amazing 51% (see Table 3 below).

If Verizon is thrown into the mix, those three carriers (BellSouth, SBC, and Verizon) alone account of over 83% on wireline access lines and will account for over 68% of wireless subscribers should the merger be approved. Approval of the merger would put the communications fate of 7 out of 10 Americans in the hands of these three companies. Clearly, approval of such a merger is not in the best interest of the American consumer.

**Table 3 - Local Exchange Carrier Market Share as measured by Access Lines Provided**

| Local Exchange Carrier | Access Lines as of December 31, 2002 |
|---|---|
| BellSouth | 41,430,379 |
| Qwest | 22,915,669 |
| SBC | 92,222,161 |
| Verizon | 84,773,776 |
| Other LECs | 20,898,256 |
| TOTAL | 262,240,241 |
| **Market Share:** | |
| BellSouth | 15.8% |
| Qwest | 8.7% |
| SBC | 35.2% |
| Verizon | 32.3% |
| Other LECs | 8.0% |
| TOTAL | 100.0% |

## APPENDIX: The Research Team

**Richard L. Dineley** founded deltaVectors in 1993 to focus on telecommunications product and service strategy. With deltaVectors, he has consulted to major telecommunications companies in the United States, Europe, and Asia. Prior to founding deltaVectors, Mr. Dineley led the Strategic Marketing efforts of Syncordia, the British Telecom global data network outsourcing subsidiary that evolved into the BT/AT&T joint venture, Concert. Earlier, he served as a Corporate Officer at Sprint Corporation, filling the role of Vice President, Business Product Marketing. Prior to his term at Sprint Corporation, Mr. Dineley served in a variety of officer-level Finance and Administration positions for COMSAT Corporation, including Corporate Controller and Vice President, Finance and Administration. He began his telecom career with Rockwell Collins, leading the business support team on a project to build the national telecommunications infrastructure for Saudi Arabia. Mr. Dineley received both his Bachelor of Science degree with High Honors and his M.B.A. degree, with concentrations in Finance and International Business from the Robert H. Smith School of Business at the University of Maryland in College Park, Maryland. Dineley was awarded his C.P.A. by the State of Virginia in 1987 and completed a course of study in Modern Standard and Egyptian Dialect Arabic through the Defense Language Institute in 1971.

**Scott E. Atkinson** is a Professor of Economics at the University of Georgia, teaching Econometrics, Industrial Organization, Resource Economics, and Micro Economics. He earned a Ph.D. in Economics from the University of Colorado in 1972. His numerous published articles on econometric methods of measuring technical change, firm efficiency, and market power have appeared in the top economics journals, such as *the Rand Journal*, the *Review of Economics and Statistics*, the *Journal of Political Economy*, the *Journal of Econometrics*, the *International Economic Review*, and the *Journal of Productivity Analysis* among others. Econometric research has appeared in the *Review of Economics and Statistics, Econometric Theory*, and *the Journal of Econometrics* among others. Research on environmental economics topics has appeared in *Resources and Energy* and the *Journal of Economics and Environmental Management.* Based on total number of citations to his published articles, Prof. Atkinson is listed *Who's Who in Economics, 2003*

**Michael S. Pagano** is a Professor of Finance at Villanova University. Dr. Pagano has conducted several empirical analyses related to various issues in market microstructure, risk management, cost of capital estimation, interest rate determination, as well as capital allocation in the financial services industry. He has published in numerous finance journals such as the *Journal of Financial Economics, Journal of Banking and Finance*, and the *Financial Analysts Journal.* Dr. Pagano also has been a Fulbright Scholar at the University of Costa Rica and has received awards for teaching and academic scholarship.

Prior to earning his doctorate from Rutgers University and joining the Villanova University faculty, Dr. Pagano spent over 10 years in the financial services industry. He holds the Chartered Financial Analyst (CFA®) designation and has experience both in commercial lending activities at Citibank and in investment valuation analysis at a financial consulting firm, International Capital Markets Corp., as well as Reuters PLC. In addition to his duties at Villanova University, Dr. Pagano has been a consultant to several companies including Citibank, PaineWebber, Fidelity Investments, GTE Investments, Philadelphia Suburban Corp., Diamond Wireless, and Bank Julius Baer.

# Declaration of Richard L. Dineley

I, Richard L. Dineley, do hereby attest and state as follows:

1. I am Richard L. Dineley. I am President of deltaVectors, LLC.

2. I have read the foregoing Petition to Deny, and I have personal knowledge of the facts stated therein concerning the competitive impact of the AT&T Wireless/Cingular merger.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 3, 2004.

Richard L. Dineley

Subscribed and sworn to me this 3 day of May, 2004

Savannah Jade Huff

A notary public of ______________

My commission expires:

SAVANNAH JADE HUFF
Notary Public, Morgan County, Georgia
My Commission expires October 22, 2007
Date Notarized: 5-3-04