

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)

Application for the Transfer of Control of)
Licenses and Authorizations from AT&T Wireless)
Services, Inc., and Its Subsidiaries to Cingular)
Wireless Corporation)

WT Docket No. 04-70

PETITION TO DENY

of

CONSUMER FEDERATION OF AMERICA

and

CONSUMERS UNION

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SUMMARY

The Consumer Federation of America and Consumers Union respectfully submit this petition to deny the proposed merger between AT&T Wireless and Cingular. Consumer groups have relied upon the data submitted by the merging parties, corrected for obvious misstatements about the number of competitors in particular wireless markets, and find that both local and national wireless markets would suffer from the level of consolidation proposed in this transaction. This merger will result in enormous local concentration both of spectrum and subscribers. It is an anti-competitive spectrum grab that will be rewarding vastly inefficient companies for their bad stewardship of spectrum.

This merger proposes an unacceptable level of concentration at the national level, clearly in violation of the *Merger Guidelines*. But the anti-competitive effects this merger will have on local markets is of even greater concern. Cingular and AT&T Wireless are the second and third largest carriers nationally, but in many local markets where Cingular's parent companies are the monopoly landline telephone providers, these companies are the number one and number two players—a combination that proper antitrust scrutiny would surely block.

Wireless service is a local mobility product and spectrum is a local input. The benefits the merging parties cite for this transaction are about filling local holes in networks. Spectrum in Tallahassee is simply not a substitute for spectrum in Topeka. The merged companies' market power will stem from the immense amount of local spectrum they would control if they combined. Furthermore, consumers buy and use wireless as a local product. When subscribers buy service they expect to be given a local number. Approximately 70

percent of wireless calls and 60 percent of wireless minutes are intraLATA, and approximately 80 percent of all wireless calls and 70 percent of all minutes are intrastate.

Even assuming the Commission accepts the theory that wireless is a strictly national product, the levels of concentration proposed by this transaction are well beyond acceptable bounds under the *Merger Guidelines*. Cingular and AT&T claim that there are six national competitors and a set of regional carriers, however, a close look at their own data shows that this set of competitors is almost never present in even the largest 100 markets. In eighty-five percent of the top 100 markets, at least one of the national competitors is absent or none of the major regional carriers identified by CAWS is present. HHI analysis of the national wireless market that corrects for this error finds this industry is in the “highly concentrated” zone, and consequently a merger of this magnitude would easily blow through the *Merger Guidelines*.

The Commission can easily find adequate grounds for rejecting this merger using traditional competitive guidelines, both under antitrust standards and the FCC’s public interest standard. However, should the Commission fail to do so, the agency will have chalked a baseline that will dictate approval of the next several wireless combinations. The net result would be a massive consolidation in the wireless market leading to higher prices and diminished quality of service.

Because this transaction is not in the public interest, we therefore respectfully petition the agency to deny the transfer of control of the licenses at issue.

INTRODUCTION

The Consumer Federation of America¹ and Consumers Union² respectfully submit this *Petition to Deny the Application for Transfer of Control of Licenses* in the acquisition of AT&T Wireless Services, Inc. by Cingular Wireless, LLC, joint venture of Southwestern Bell Corporation (SBC) and BellSouth. For the reasons set forth below, grant of the applications would be contrary to the public interest, and should therefore be denied.

In order for the Commission to find that this transaction would be in the public interest, it must be significantly restructured to avoid the anti-competitive harms that will be caused by this merger, undue concentration within the wireless market (both locally and nationally) and diminished wireless competition against landline telephone monopolies.

The heart of the merging parties' merger theory relies on the FCC finding that the wireless market is strictly national. They do this because were the FCC to analyze the incremental harms to local wireless competition as a result of this merger, the agency would find that the proposed concentration well beyond palatable levels. We find the companies' national market theory unpersuasive and incorrect; but even assuming for argument that it is correct, the Commission must still deny the merger based on purely horizontal anti-competitive effects.

Based on the amount of spectrum the parties here wish to consolidate, the Commission must conclude either that Cingular/AT&T Wireless (hereafter CAWS) are remarkably inefficient spectrum hogs, or that the cellular industry is headed toward, at best, a weak

¹ The Consumer Federation of America (CFA) is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members. CFA is online at www.consumerfed.org.

triopoly. CAWS claims to need three to eight times as much spectrum as its competitors have to deliver the full array of wireless services that it says will define the market in the near future. Either the competitors are substantially more efficient and far-sighted than CAWS, or this is an effort by CAWS to grab so much spectrum that it will be able to stifle competition. Under no circumstances may the Commission approve an anti-competitive, anti-consumer merger to bail CAWS out of strategic mistakes and bad business practices.

To the extent that CAWS needs more spectrum than its competitors, that is the result of a strategic error they made a few years ago. In order to beat the competition into the market, they chose a quick, but less forward-looking technology.³ They now plead spectrum scarcity because their shortsighted decision has locked them into a technology that is more difficult to upgrade. Unlike their competitors, who have made the investments to utilize a much smaller amount of spectrum efficiently, CAWS claims the only way for it to compete is acquire both spectrum and infrastructure. If the FCC allows the CAWS merger to go forward, it will allow them to take the easy way out. It will allow the number two and three firms to merge in markets where there are typically six or fewer firms and entry is constrained by the scarcity of an essential input, spectrum. Public policy generally frowns on such mergers, because they “are likely to create or enhance market power or facilitate its exercise.”⁴ The enhanced ability to exercise market power is not in the public interest since it entails “the ability to profitably maintain prices above competitive levels for a significant period of

² Consumers Union (CU), publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers. CU is online at www.consumersunion.org.

³ Application, at 11, notes that Verizon chose a different technology and is not now burdened by the gift of a cellular license, as Cingular-ATT are.

⁴ Department of Justice, Federal Trade Commission, *Merger Guidelines, 1997*, at section .01, referring to mergers that raise the HHI concentration ratio by 50 points and result in highly concentrated markets. As discussed below, the increase in concentration caused by the proposed merger is nine times as large as the threshold that triggers antitrust concerns.

time... [or] lessen competition on dimensions other than price, such as product quality, service or innovation.”⁵ and the public will lose one of only six national competitors.

Bad business decisions afflict CAWS in other ways. For example, the failure to get national coverage is a function of the failure to sign roaming agreements, a business decision.⁶ CAWS has not shown it cannot collocate on existing infrastructure; therefore having to build infrastructure such as towers is an onerous burden it cannot bear as a competitor, but promises to sell collocation space to others once it has become the dominant cellular provider.⁷ A failure to keep up with customers reflects a late start, mismanagement of churn, poor customer care, etc. The claim that only a post-merger company would be large enough to achieve economies of scale in handset devices bodes ill for the industry.⁸ By this reasoning, the industry will support only three firms.

While we certainly wish the two companies were better competitors, the improvements that they promise will result from the merger come at too high a price to the consumer interest in competition in wireless services and the public interest in efficient management and use of spectrum. We share the Commission’s goal of eliciting the best, most efficient uses of spectrum, but to approve this transaction would be to give the FCC’s stamp of approval for bad spectrum stewardship and signal to markets that instead of spending money deploying efficient technology, simply sitting on outmoded technology and buying up one’s competitors is a viable long-term strategy.

Moreover, the Commission must be highly skeptical of the projections CAWS makes about benefits to consumers and, especially competition that would flow from the merger.

⁵ Id., at Section 1.51.

⁶ Application at 15.

⁷ Application at 14.

The parent companies of two of the three entities involved in this merger have a miserable track record of promising regulators the moon and stars, if only the merger is approved and then failing to deliver. SBC's much ballyhooed plan to compete for local telephone service outside of its service territory (known as its national local initiative) in exchange for being allowed to acquire Ameritech is a joke. It never effectively competed for local services outside of its home service territory. SBC exited the cable business soon after acquiring Ameritech, the only Bell company that had a stomach to take on cable. AT&T promised vigorous head-to-head circuit-switched telephone competition with its newly acquired cable plant, but accomplished little before selling itself to Comcast, which promptly abandoned circuit-switched telephony altogether.

In other words, these companies talk competition but they buy market power. The fact that Cingular has offered a price that is more than twice the actual cost of building a new cellular network (i.e. the reproduction cost of cellular networks) suggests to us that it is not simply buying capacity, but that it is buying market power in the form of a spectrum grab that will enable it to lock out the competition. It may be trying to recover from management mistakes that have put it in a bind, but bad management should not be rewarded by allowing it to lock-down some of the most valuable swaths of the public's airwaves.

MARKET STRUCTURE ANALYSIS

MARKET DEFINITION

The merging parties rely heavily on the fact that a handful of companies buy national advertising and charge a relatively uniform national price. The FCC should reject a national market definition. Wireless is sold as a local product. At the heart of the matter is the fact

⁸ Application at 23.

that spectrum is an essential local input for what is essentially a local service. The bundle of services, wireless and wireline, voice and data, that may evolve in the future, will still have access to a local telecommunications facility (i.e. the last mile) at its core in the form of access to the network. The last mile is the gateway through which all services flow. It sets the pace of competition.

On the supply side, spectrum is a local input. You cannot sell wireless service to a customer in Dallas with spectrum in Houston. You need spectrum in Dallas to make the “last mile” connection in Dallas. To the extent that competing regional and national carriers must rely on roaming to deliver service where they do not hold a license to spectrum, they must rely on making a deal with a holder of local spectrum. The power of CAWS to raise a rival's costs stems from the share of spectrum it controls in local markets.

On the demand-side, consumers buy and use wireless as a local product. When customers visit local stores in Dallas for wireless, they expect local accounts. They never ask for Houston numbers. Approximately 70 percent of wireless calls and 60 percent of wireless minutes are intralata. Approximately 80 percent of all wireless calls and 70 percent of all minutes are intrastate. National coverage and calling plans are one characteristic of the service, but it is sold and bought at the local level.

To the extent that wireless competes with wireline or might someday (the companies cannot seem to make up their mind), the competition will be essentially local. For residential customers, a bundled local and wireless package from Cingular will involve its monopoly wireline facility (it has over 90 percent market share in the home service territories of the SBC and Bell South), with the dominant wireless service provider in that area.

To the extent that wireless could be a competitor for wireline high-speed Internet, the spectrum to which AWS holds a license could be an independent competitor for the incumbent local exchange companies (SBC and BS). The merger will remove that potentially independent competitor in a product space where there are, today, only two and in many places only one wireline provider. No matter how one views the product – local wireless voice, local wireless data, local connectivity for voice and data – the fact that Cingular is owned by an incumbent local exchange carrier and would be a huge holder of spectrum licenses in which it has a dominant position in the wireline market makes the merger unacceptable. It is not in the public interest.

MARKET CONCENTRATION ON THE DEMAND SIDE

Even if the Commission were to view this as a national service, it would have to reject the merger. This is a merger between a number two and a number three firm in a market that is already moderately concentrated. The post-merger market would be highly concentrated and the increase in concentration exceeds the *Merger Guidelines* by a very substantial margin.

If the Commission views this as a predominantly local merger, the conclusion that the merger must be rejected is even stronger. While CAWS points to six national carriers and a set of regional carriers, a close look at its own data shows that this set of competitors is almost never present in even the largest 100 markets. In eighty-five percent of the top 100 markets, at least one of the national competitors is absent or none of the major regional carriers identified by CAWS is present.

More importantly, looking at the major cities where the parents of Cingular are the dominant incumbent local exchange carriers, we find an even more troubling outcome. In

two-thirds of the SBC/BellSouth local markets where both Cingular and AT&T wireless are present today, at least one of the national/regional wireless entities is not present. In these two thirds of the SBC/BellSouth local markets, the merger represents a movement from six to five or five to four competitors. As the Commission knows, the threshold of six, equal-sized competitors is the key dividing line for antitrust merger analysis, as it marks the point at which markets move from being considered moderately concentrated to highly concentrated.

Although CAWS provides no local market data, a simple sensitivity analysis shows that the failure to recognize that wireless is sold on a local basis is important. Since a regional company cannot have a market share where it does not sell service, we assume, very cautiously, that the other major players in the market pick up the shares that the major regional player does not have. We consider two alternative scenarios.

First we assume that the national carriers in the market equally divide up the market share that has been incorrectly attributed to the regional player. Second, we assume that they gain market share in proportion to their share of the national market. These are cautious approaches that are likely to underestimate the actual situation in markets where Cingular is a subsidiary of the dominant wireline Bell company, since they are likely have a larger market share in their home territories.

Table 1 shows the impact of correcting the market structure analysis for the entities that are not there, based on the merging parties submissions in this proceeding

Table 1: Change in Revenue-based HHI Adjusted for Absent Regional Provider

	HHI ANALYSIS		
	PRE	POST	CHANGE
NATIONAL AVERAGE	1573	2023	449
ADJUSTED FOR ABSENT REGIONAL EQUAL SHARE PICK-UP	1785	2454	669
PROPORTIONATE PICK-UP	1840	2535	695

Source: *Declaration of Richard J. Gilbert*, p. 25.

The *Merger Guidelines*⁹ state that a 50-point increase in the HHI for a market that would be above 1800 post-merger is a sufficient large increase to raise concerns. An increase of 449 fractures that threshold. When we adjust the HHI for the absent providers, we find that the pre-merger concentration is considerably higher (200-270 points). The impact of the merger is much greater as well, increasing the HHI by over 650 points.

The Commission should not be dissuaded from doing this basic market structure analysis by the CAWS efforts to divert attention to other matters. For example, the claim that the underlying structure is secondary to the flow of subscribers might have been very important in the past, but as the industry has matured; it no longer has as much weight. New subscribers have declined sharply in the past several years (see Figure 1). Moreover, since the industry moved to uniform pricing, market shares and industry rankings have become quite stable (See Figure 2).

MARKET CONCENTRATION ON THE SUPPLY-SIDE

The above analysis looks at concentration of customer accounts. The merger is also a concern in terms of its concentration on the supply-side of spectrum. Separately Cingular and

⁹ Section 1.51.

AWE have more spectrum today than many of the other wireless license holders. Combined they will have a dominant holding of spectrum in many markets, as much as 120 MHz in one case.

Figure 3 plots the increase in the HHI resulting from the merger against the post-merger holdings of Cingular. At 40 MHz holdings for Cingular post-merger, the spectrum market is above the moderately concentrated threshold. The merger increases the concentration by 175 points or more. A full service wireless voice and data offering is certainly possible at 40 MHz. At this level, the current allocation of spectrum would allow at least 4 full service offerings. If a single entity is larger than 40 MHz, the number could decline to 3. The merger would require divestiture of spectrum in a majority of the markets where these companies serve. This pervasive problem indicates the merger should not be approved.

This analysis underestimates the advantage CAWS would have. As the holder of cellular licenses, its spectrum provides better coverage.¹⁰

OTHER MARKETS

The previous discussion has focused on the structure of the wireless voice market. To the extent that other neighboring markets are considered, the anticompetitive picture becomes even more ominous. CAWS stresses the fact that the merger must be allowed because the convergence of voice and high-speed Internet data in wireless networks requires it to provide both services. At the same time, it dismisses competition between wireless and wireline. The reason it does not want to consider these cross technology effects is that there are few competitors available and the merger eliminates a competitor in 87 markets.

¹⁰ Application at 15, noting the superior coverage characteristics of spectrum at 850 MHz.

The largest impact would be in the markets where the parent companies of Cingular are the incumbent local exchange carriers (ILECs). As the dominant local exchange carrier SBC/BellSouth still have an 85 percent share of local lines. In the residential market, it is even higher. If the basis is the ownership of facilities, the figure is probably above 95 percent for the residential market.

Cingular and its parents have such a dominant position in the local connectivity market that the merger between AT&T wireless and this dominant firm would violate the *Merger Guidelines* by a mile. The market for local connectivity is highly concentrated (HHI just under 4000) and the merger would raise the HHI by about 800 points, more than 15 times the threshold.

From the point of view of “last mile” facilities for residential customers, the high speed Internet is similarly concentrated. At present, there are generally two facilities available. The HHI for this market is over 4000, indicating a duopoly. One of the duopolists is the incumbent local exchange carrier. Preserving potential competitors in this market is critical.

THE COSTS AND BENEFITS OF THE MERGER

Given that the merger violates the standards of competitive review by such a wide margin, the licensee bears a particularly heavy burden to demonstrate that the merger is in the public interest. We find that they have failed to bear that burden. Here we turn our attention from broader concerns about market structure to the specific anti-competitive and anti-consumer harms of this transaction.

WIRELESS VOICE

The current position of customer accounts in the local markets in which these firms have a leading position raises traditional antitrust concerns. The move from the equivalent of six to five or five to four equal sized firms should cause a great deal of concern. The recent introduction of Local Number Portability (LNP) into the industry provides no solace. The inability to port numbers between carriers in the wireless product space was a unique switching cost that had afflicted the wireless market. In most markets, when a consumer decides to change suppliers, she can do so without having to tell the old supplier or solicit the cooperation of the old supplier. She can just vote with her feet. Requiring LNP simply moves the wireless market toward the normal situation that exists in most markets. The *Merger Guidelines* were crafted for such normal markets. In other words, with the injection of LNP the wireless market is merely normal. The existence of LNP is not excuse to relax the *Guidelines*. The strong concern that the *Guidelines* express involving a merger between a two and three firms apply to the wireless market with number portability.

Eliminating a competitor in a market with five reduces pricing pressures. For this product, the fact that some of the companies are dependent on competitors for wholesale access to the market (i.e. roaming agreements), the concern is compounded. To the extent that CAWS is the dominant spectrum holder, it has an incentive to withhold roaming agreements or to raise the cost of roaming to its rivals. CAWS profits doubly from such a strategy, once from the increased revenues for roaming and once from the ability to raise prices for its own service, should the competitors feel compelled to pass through increased roaming charges.

WIRELESS DATA

The concern about the abuse of market power extends with even greater force to wireless data services. CAWS would control substantially greater spectrum than its competitors in many of its markets. Its claim to need these large swaths of spectrum suggests that the wireless data market will be considerably less competitive than the wireless voice market. Cingular suggests that these two product markets will converge into one market. The merger results in a concentration of spectrum that will result in too few competitors. CAWS's claims suggest that, given current allocations of spectrum, there will be no more than four full service competitors. Because CAWS controls so much spectrum, in many of its markets there will be no more than three. The Commission cannot accept this outcome as sufficiently competitive to protect the public interest.

BUNDLING VOICE

Because Cingular would be both the dominant holder of spectrum licenses and the dominant provider of wireline access in the service territories of its two parent companies, the merger raises significant cross-technology concerns. In the voice market the companies are schizophrenic about wireless-wireline competition. In this proceeding they have produced a witness who claims that wireless and wireline are not substitutes. In virtually every other proceeding the parent wireline companies maintain that they are substitutes. If they are viewed as substitutes the merger eliminates a facilities-based last mile competitor. Counting wireless as a facilities-based competitor in a last mile connectivity market, we again find five or six and eliminating a competitor is a source of concern.

BUNDLING DATA

Viewing wireless as a data distribution technology, we find an even greater concern. The parent companies of Cingular are, at present, one of only two ubiquitous, high-speed data last mile facilities available. That facility is somewhat limited in its capacity. Allowing the merger puts one of the more promising new entrant high-speed Internet access facilities into the hands of one of the current last mile owners. In this market, the prospects for numerous competitors are more troubling than in the voice market. The merger takes a serious bite out of potential competition in this product market.

BUNDLING VOICE AND DATA, WIRELESS AND WIRELINE

Controlling one of a small number of technologies to deliver both voice and data and wireless and wireline, in the hands of a company with a near monopoly position in the wireline market and a dominant position in the wireless market, raises major concerns about the prospects of leveraging bundles of services. The parent companies of Cingular could bundle all four services and substantially reduce competitive pressures. This reflects both the fact that they control the facilities to deliver and especially large bundle, while competitors must act a CLEC to achieve a similar bundle. The parent companies of Cingular have made CLEC life miserable in gaining access to their facilities. They would have much greater leverage over integrated voice and data, wireless and wireline bundles.

UNLEASHING A MERGER WAVE

One of the problems with approving a merger between the number two and the number three firms in an industry such as this is that it would be extremely difficult to oppose the next couple of mergers.

Table 2: The Inevitable Merger Wave

	Post Merger Market Share	HHI	HHI Change
CAWS	30	2023	449
Verizon-Sprint	32.8	2525	502
Nextel-T-Mobile	17.5	2626	101

For example, in terms of subscribers CAWS would now be 50 percent larger than Verizon and three to four times as large as Sprint, T-Mobile and Nextel. In terms of spectrum, it would be between two and eight times as large. Verizon, now would be number two but a lot smaller than CAWS and with a lot less spectrum. If it proposes to merge with the number three firm the HHI would increase by 500 points, not that much different from the CAWS merger, as calculated by CAWS. How does one say no, having given CAWS such a huge advantage? How does one draw the line at ten times the threshold in the *Merger Guidelines* but not nine times? There are still four national providers and large regional providers. A Verizon-Sprint merger also fits with the Verizon-CAWS business model of being both a dominant ILEC and the leading wireless company.

The top two firms now dwarf the new number three and four firms. Even combined, they would be a little more than half the size of the industry leaders. If scale is as important as CAWS claims, they have to make a defensive merger. Compared to the dominant firms, they are really spectrum starved and scale challenged. How do antitrust authorities say no, having placed them at such a disadvantage? The increase in the HHI is only 101 points, small

compared to the other mergers that have been approved. We still have three national providers and a regional provider in most markets.

It was precisely such a failure to stop the critical merger in the local telephone market and cable markets that led to the wave of defensive mergers. Consumers have suffered from a lack of competition and they would certainly suffer a similar fate in the wireless industry.

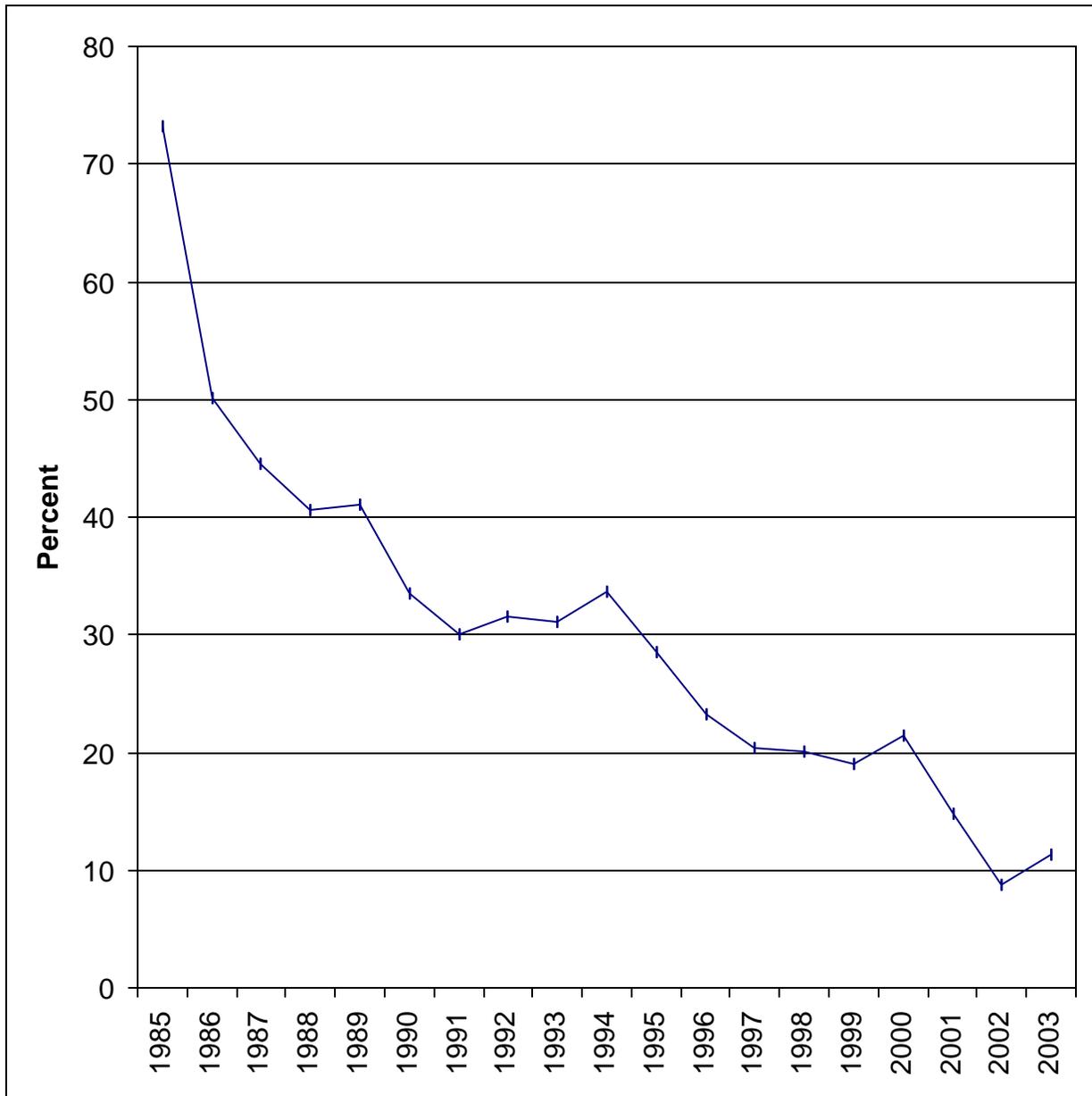
CONCLUSION

Ironically, after declaring how difficult it is for CAWS to obtain spectrum and infrastructure, which make the merger an urgent necessity, it then turns around and claims that “unilateral effects in the context of mobile services also are unlikely because of the ease of potential entry.”¹¹ The pro-competitive, pro-consumer answer for the FCC is to turn down this merger and stop two large competitors from merging into one giant. The agency should invite both Cingular and AT&T Wireless to use their spectrum more efficiently, sign roaming contracts and collocations agreements, if need be, and avail themselves of the opportunity to acquire more spectrum, when and if it becomes available. In other words, they have the opportunity to compete the way the handful of other firms in the industry do.

For the forgoing reasons, the Commission should deny the transfer of the licenses.

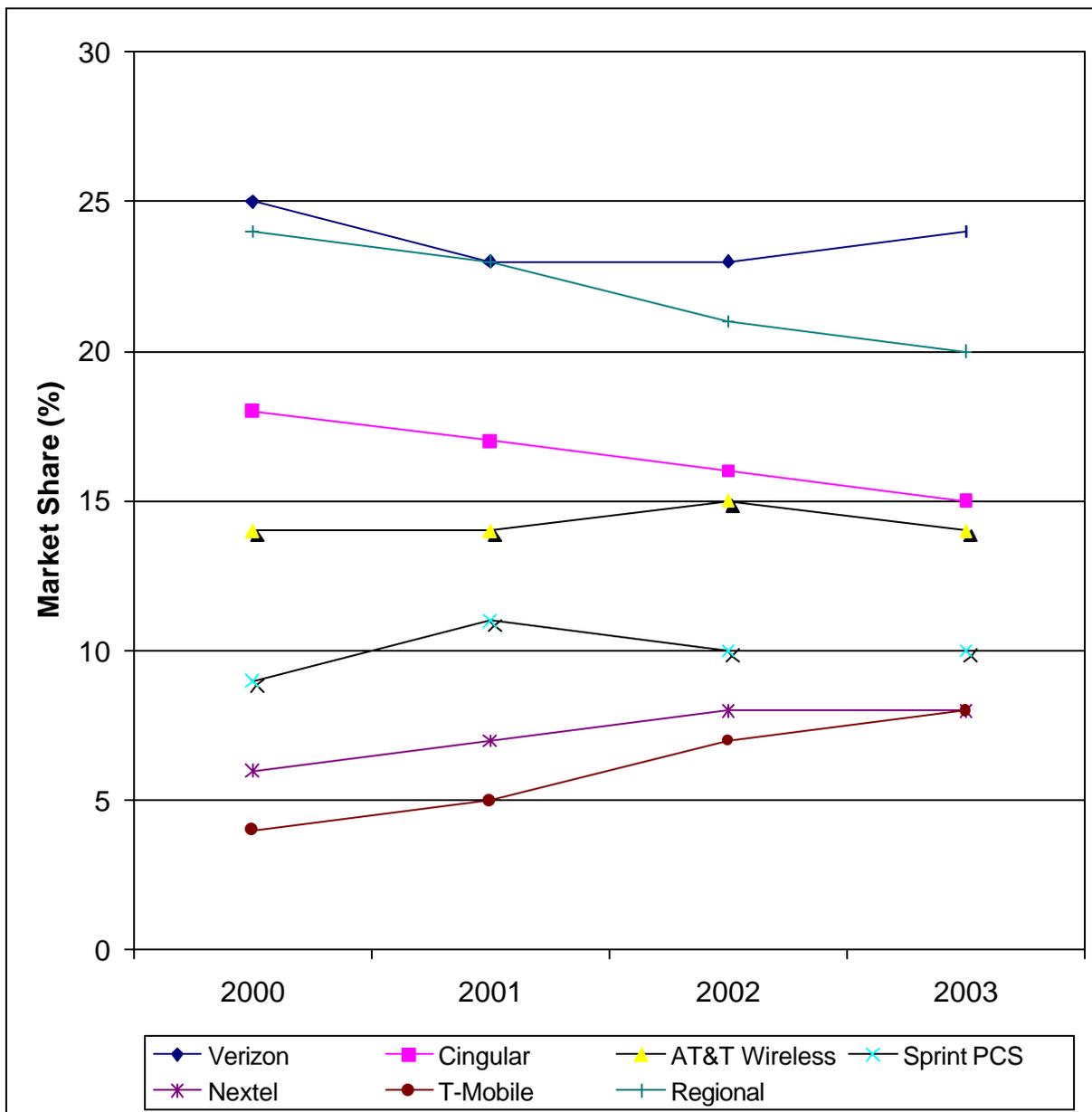
¹¹ Application at 39.

Figure 1: New Subscribers as a Percent of Year-End Total Customers



Source: Eight Annual Report, CTIA 2003 Report.

Figure 2: Market Shares Since National Pricing



Source: Source: Declaration of Richard J. Gilbert, p. 5.

Figure 3: Spectrum Concentration Resulting from the Cingular-AWE Merger

