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Before the  
Federal Communications Commission  
Washington, DC 20554

In the Matter of )  
)  
AT&T Wireless Services, Inc. and ) WT Docket No. 04-70  
Cingular Wireless Corporation )  
Seek FCC Consent to Transfer Control of )  
Licenses and Authorizations )

To: The Commission

**JOINT OPPOSITION TO PETITIONS  
TO DENY AND COMMENTS**

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## SUMMARY

The proposed merger of Cingular Wireless and AT&T Wireless is in the public interest, will serve to promote and enhance competition in the U.S. wireless industry, and will deliver numerous consumer benefits that cannot and will not occur as quickly, if at all, absent the merger. Accordingly, the Transfer Applications should be approved promptly.

As demonstrated in the Transfer Applications and in this Opposition, the merger is clearly in the public interest. Without harming competition, it will permit the combined company to deliver the following benefits faster and more broadly than either company could on a stand-alone basis:

- Significantly improve the quality of existing voice and basic data services,
- Deploy 3G services on a national scale and without customer disruption through the acquisition of necessary spectrum,
- Create more value for consumers and a more viable competitor by substantially expanding the coverage of each of the companies,
- Achieve economies of scale and scope that will enhance the combined company's ability to compete more effectively, and
- Improve homeland security by increasing the coverage, redundancy, scope and capacity available for Wireless Priority Service.

This merger has met with very little opposition. Indeed, no wireless carrier – or, for that matter, no telecommunications company of any type – has opposed the merger. The only telecommunications company that made a filing, United States Cellular Corporation, stated that the merger is in the public interest, as did the Communications Workers of America, which filed strongly supportive comments.

The eight oppositions that were filed came from: a shell corporation that, years ago, was a wireline CLEC; two consumer organizations; parties with unrelated private disputes with one or the other of the Applicants; and a few individuals. No opponent demonstrated that it has standing as required by Section 309(d) of the Act, and none makes a substantial and material showing warranting the delay or denial of the Transfer Applications.

Foremost, the Objecting Parties do not and cannot contest the benefits demonstrated in the Transfer Applications that will result from the merger. Nor do they dispute that the merger will allow Cingular and AWS to meet the technical challenges associated with supporting AMPS, TDMA, and GSM networks simultaneously while also attempting to roll out UMTS without customer disruption. Instead, they assert other ways the Objecting Parties would rather have the two companies respond to the market – assertions that are as erroneous as they are irrelevant to review of the transaction that *is* presented by the Transfer Applications.

The Objecting Parties also provide no basis on which to deny the Applicants' request for a waiver of the cellular cross-interest rule in 11 RSAs; they advance implausible theories about how the merger will affect roaming rates and availability; and they do not undermine the obvious benefits of the merger for homeland security. Their arguments fall far short of demonstrating

that grant of the Transfer Applications would be *prima facie* inconsistent with the public interest, convenience, and necessity; they should be rejected.

Some Objecting Parties raise misguided and incorrect claims that the merger will harm competition. The arguments proceed from an inappropriately mechanistic analysis of market shares to draw conclusions that are at odds with, and thus ignore, the richly dynamic, competitive nature of the wireless industry; an analysis that is inconsistent with FCC precedent and the DOJ/FTC Merger Guidelines. Moreover, the opponents distort market share data, misapply the Merger Guidelines, and make unsupportable claims regarding new entry into the wireless industry that are inconsistent with plain, observable facts. The dispositive fact is that the merger will allow Cingular and AWS to become *better* competitors while preserving the full range of incentives and opportunities in today's market for existing and new entrants likewise to offer better quality and value to their customers, and to constrain any attempt by the merging companies (or any other wireless firm) to raise price or limit output anticompetitively.

The reality is that the merger will strengthen the combined company as a competitor able to provide robust advanced services that represent the future of the wireless telecommunications industry, and that would not otherwise be available on a timely basis absent the merger. It will do so without diminishing the vigor of competition in the wireless industry. After the merger, five nationwide facilities-based carriers and numerous regional carriers will remain, along with MVNOs and resellers. Downward pricing trends, expansion of networks, high rates of investment and increased penetration will continue. Even the AT&T brand will survive, as AT&T Corp. enters the wireless market as a MVNO. It is clear that this transaction, rather than diminishing competition, will have significant competitive benefits. Consumers will be the winners.

Contrary to the claims of the Objecting Parties, the merger will not permit the merged company's parents to use their ILEC affiliates to foreclose wireless or wireline competition. Among other flaws, the Objecting Parties ignore that Cingular is already offering wireless services nearly everywhere that its parents' ILEC affiliates offer local wireline service, yet none of the supposed anticompetitive practices about which some parties speculate has materialized. Nothing about the merger will change the nature or extent of the current relationship between Cingular and its parents. Nor is there any basis to question the continuing ability of market forces and regulatory oversight to preclude the imagined misconduct with respect to the special access market.

The remaining scattershot arguments raised by the opponents are precisely the kind the Commission has long recognized to be immaterial to merger reviews such as this and should be summarily rejected. The Commission traditionally has excluded allegations of misconduct that have nothing to do with the effects of a merger; illegitimate efforts by opportunists to extract personal gain by seeking to hold up a merger; and suggestions for new rules that should, if at all, be considered across an entire industry (and not just for the merging companies). No legitimate interest is served by delaying or expanding this proceeding to accommodate such claims. The Applicants therefore respectfully request that the Commission approve the Transfer Applications swiftly.

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**JOINT OPPOSITION TO PETITIONS  
TO DENY AND COMMENTS**

Cingular Wireless Corporation (“Cingular”) and AT&T Wireless Services, Inc. (“AWS”)<sup>1</sup> hereby oppose the petitions to deny and opposing comments that have been filed against the above-captioned applications (“Transfer Applications”).<sup>2</sup> In the Transfer Applications, Cingular and AWS established that the merger will significantly improve the quality, coverage, and array of wireless services and speed the deployment of third-generation (“3G”) wireless services throughout the nation – without compromising the robustly competitive wireless industry. The Applicants also demonstrated that the merger will enhance competition.

Against this strong showing, the few Objecting Parties provide no basis to question these conclusions, or to contradict the Applicants’ ultimate showing that the merger will serve the public interest. The Objecting Parties have not met their initial burden to allege facts, supported by affidavits based on personal knowledge, that a grant would be *prima facie*

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<sup>1</sup> Cingular and AWS are jointly referred to as the Applicants.

<sup>2</sup> Petitions to deny or informal objections were filed by the following eight parties (the “Objecting Parties”): Consumers Federation of America and Consumers Union (“CFA/CU”); Thrifty Call, Inc. (“Thrifty”); Cellular Emergency Alert Services association (“CEASa”); AW Acquisition Corp. *et al.* (“Agents”); Richard Giandomenico; Donald R. Newcomb; Craig Paul; and Andrew J. Shepherd. Two parties filed supporting comments – the Communications Workers Association of America (“CWA”) and United States Cellular Corporation (“USCC”).

inconsistent with the public interest.<sup>3</sup> Viewing the totality of the record, no substantial and material questions of fact have been raised which would require an evidentiary hearing into the public interest benefits of the transfer.<sup>4</sup> Indeed, the well-supported showings in the Transfer Applications that the merger will produce significant public interest benefits without countervailing risks to competition remain steadfast.

## **I. THE PUBLIC INTEREST BENEFITS OF THE MERGER ARE CLEAR**

In the Transfer Applications, Cingular and AWS demonstrated that the public interest benefits of the merger are straightforward and compelling. Specifically, the combined company will be able to deliver the following benefits faster and more broadly than either company could on a stand alone basis, without harming competition:

- Significantly improve the quality of existing voice and basic data services;

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<sup>3</sup> 47 U.S.C. § 309(d); *see Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Affidavits that consist of “ultimate, conclusionary facts or more general allegations . . . are not sufficient” to establish a *prima facie* case under the first prong of the Section 309(d) analysis. *See Gencom, Inc. v. FCC*, 832 F.2d 171, 181 n.11 (D.C. Cir. 1987) (citation omitted). Petitioners “bear[] the burden of pleading sufficient facts to establish a *prima facie* case and these facts must be supported by an affidavit from persons with personal knowledge.” *Nextband Communications, LLC*, 14 F.C.C.R. 7647, 7650 (PSPWD/WTB 1999) (citing 47 U.S.C. § 309(d)(2); 47 C.F.R. § 1.2108(b) (emphasis in the original)); *see also Bell Atlantic New Zealand Holdings, Inc.*, 18 F.C.C.R. 23140, 23161 (IB/WCB/WTB 2003). Congress specifically amended Section 309(d) “to significantly heighten the burden a petitioner must satisfy.” *Gencom*, 832 F.2d at 180. Thrifty was the only party to make a colorable attempt to satisfy this standard. Thrifty submitted a single declaration from an economic consultant, but this declaration failed (i) to demonstrate how the merger would affect Thrifty, and (ii) to support Thrifty’s non-economic arguments, such as challenges to the public interest benefits of the merger. *See Thrifty Petition*, App. A, at 25 (Declaration of Richard L. Dineley).

<sup>4</sup> *See* 47 U.S.C. § 309(e) (stating that a substantial and material question must be raised before the FCC is required to hold a hearing in lieu of a grant). Moreover, as discussed in Section IV *infra*, the Objecting Parties ignore the statutorily required declaration explaining how they will be aggrieved by the transfer. 47 U.S.C. § 309(d). Therefore, they lack standing. Many of the petitions/comments are also procedurally defective because they include no proof of service. *See* 47 C.F.R. § 1.939(c) (cross-referencing 47 C.F.R. § 1.47(g) (stating that absent proof of service, the relief requested will not be considered)). Of the eight Objecting Parties, only Thrifty and the Agents include a certificate of service with their filing.

- Deploy the kinds of advanced, 3G services in the U.S. that are now being enjoyed in other nations, without customer disruption, through the acquisition of necessary spectrum;
- Create more value for consumers and a more viable nationwide competitor by substantially expanding coverage;
- Achieve economies of scope and scale that will enhance the ability of the combined company to compete more effectively; and
- Improve homeland security by increasing the coverage and capacity of Wireless Priority Service (“WPS”).

Significantly, the few parties who seek to challenge the public benefits flowing from the merger really do not dispute any of the facts and conclusions presented in the Transfer Applications. Instead, they argue that similar benefits might be available to consumers from other providers or by other means; or that the merging companies should be “punished” by forbidding them to bring these benefits to market.

Only Thrifty, a self-styled “past, and potentially future” CLEC,<sup>5</sup> makes general, unsubstantiated attacks on *all* the public interest benefits.<sup>6</sup> Thrifty states that the service improvements that would result from the transaction are not public interest benefits because the merger interferes with the operation of market forces.<sup>7</sup> Thrifty ignores Section 310(d), which specifically prohibits the FCC from second-guessing a decision by an applicant to merge with a

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<sup>5</sup> Thrifty Petition at 2. Although Thrifty claims to have an interest in this proceeding as a CLEC, this claim is questionable. Cingular is not aware of any jurisdiction in the country in which Thrifty operates as a CLEC — a status Thrifty admits by calling itself a “past, and potentially future, competitive local exchange carrier.” Thrifty Petition at 2. Thrifty appears to have exited the CLEC business and sold its telecommunications assets years ago. *See Grande Communications, Press Release, Grande Communications Acquires Thrifty Call, July 7, 2000, at <[http:// www.grandecom.com/About/pressroom\\_release.jsp?PR\\_ID=\\_PR195](http://www.grandecom.com/About/pressroom_release.jsp?PR_ID=_PR195)>*.

<sup>6</sup> Thrifty Petition at iv-v, 21-24.

<sup>7</sup> Thrifty Petition at 21-23; *see* CFA/CU Petition at 2-3.

particular company.<sup>8</sup> The merger will not permit Cingular to escape hard economic facts.<sup>9</sup> If the deal struck is uneconomic and the public interest/consumer benefits are not realized, the combined company will rapidly lose market share. As the Commission is well aware, AWS lost more than 350,000 subscribers last quarter.<sup>10</sup> The public interest benefits asserted by the Applicants must be realized if the combined company is to succeed in the market.

CFA/CU challenge some of the public interest benefits, but the filing reveals their true agenda. The real concern is not this transaction; it is that the Commission will “chalk[] a baseline that will dictate approval of the next several wireless combinations.”<sup>11</sup> Concern over future mergers, however, is not a legitimate basis for denying *this* transaction. The FCC eliminated the spectrum cap in favor of a case-by-case approach to each transaction.<sup>12</sup> Grant of the Transfer Applications will be based on unique facts, and therefore will not dictate the course of future regulatory action.

As discussed below, all other challenges to the public interest benefits of the merger are without merit.

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<sup>8</sup> See 47 U.S.C. § 310(d) (stating that “in acting [on transfer applications,] the Commission may not consider whether the public interest . . . might be served by the transfer, assignment, or disposal of the . . . license to a person other than the proposed transferee”).

<sup>9</sup> See Thrifty Petition at 21-23.

<sup>10</sup> See News Release, AT&T Wireless, *AT&T Wireless Pre-Announces First Quarter Services Revenue and Subscriber Results*, Apr. 20, 2004, at <[http://www.attwireless.com/press/releases/2004\\_releases/042004.jhtml](http://www.attwireless.com/press/releases/2004_releases/042004.jhtml)>.

<sup>11</sup> CFA/CU Petition at 3; *see id.* at 13 (noting that approval of this merger would make it “extremely difficult to oppose the next couple of mergers”).

<sup>12</sup> See *2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, Report and Order*, 16 F.C.C.R. 22668, 22669-70 (2001).

**A. The Objecting Parties Seek To Hamstring the Merged Entity’s Ability to Make High-Quality Voice, Data and Advanced Services Available to the Public**

Several of the Objecting Parties argue that the undisputed problems faced by Cingular and AWS are the result of “bad” business decisions for which Cingular should be “punished” by the market and that the Applicants have inflated their spectrum needs. These claims are unfounded. Moreover, denying the Transfer Applications would punish consumers by denying them the benefits of the expanded and expedited availability of new services.

There is no genuine dispute that Cingular and AWS face significant constraints because they must simultaneously support analog, TDMA and GSM networks, while also preparing to offer 3G services over the Universal Mobile Telecommunications System (“UMTS”). This predicament was not created by “bad” business decisions. Cingular and AWS were market leaders in the deployment of digital (2G) technology and, at the time of their deployment, the only available digital solution was TDMA.<sup>13</sup> Both carriers faced market pressure to lead in digital deployment because they were constrained in capacity and needed the greater spectral efficiency digital technology offered to prevent a precipitous decline in service quality. History has demonstrated that the migration to digital technologies served the public interest. Digital technologies brought many consumer benefits – smaller and lighter handsets, longer battery life,

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<sup>13</sup> GSM was not available in the U.S. on 850 MHz cellular frequencies, and CDMA was unproven and unavailable for commercial deployment. *See* Description of Transaction, Public Interest Statement and Waiver Request of Cingular Wireless Corporation, FCC Form 603, Ex. 1, WT Docket No. 04-70, at 10 (filed Mar. 18, 2004) (“Public Interest Statement”); Public Interest Statement, Attachment 2, Declaration of William Hogg and Mark Austin, at 3 (“Hogg/Austin Declaration”).

and messaging capabilities.<sup>14</sup> Its spectral efficiency also is responsible for the ability of U.S. providers to serve more than 160 million customers today.<sup>15</sup>

Moreover, contrary to allegations that Cingular is sitting on antiquated technology,<sup>16</sup> the company has maintained an aggressive approach to technology advancement. It has upgraded its networks to support GSM and GPRS,<sup>17</sup> which offer greater spectral efficiency and permit customers much broader international compatibility than CDMA. It is in the process of rolling out EDGE,<sup>18</sup> and is seeking additional spectrum to fully deploy next-generation digital technologies. AWS also is currently offering GSM, GPRS, and EDGE, and will be introducing UMTS in four cities later this year.<sup>19</sup>

The Objecting Parties have raised no substantive challenge to the detailed explanation in the Public Interest Statement, supported by expert testimony, of the merged entity's spectrum needs to provide a full menu of competitive voice and data services. Those needs will vary somewhat by area, with the greatest spectrum need (80 MHz) in the areas currently served by both Cingular and AWS.<sup>20</sup>

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<sup>14</sup> Public Interest Statement at 4, 32; Hogg/Austin Declaration at 3.

<sup>15</sup> See Comments of CTIA in Docket No. 04-111, at 6 (filed Apr. 26, 2004).

<sup>16</sup> CFU/CU Petition at 2.

<sup>17</sup> Hogg/Austin Declaration at 6-7.

<sup>18</sup> *Id.* See, e.g., Press Release, Cingular Wireless, *Cingular Is First to the EDGE*, June 30, 2003, available at <[http://www.cingular.com/about/latest\\_news/03\\_06\\_30](http://www.cingular.com/about/latest_news/03_06_30)> (last visited May 12, 2004)>.

<sup>19</sup> See *AWS Details UMTS Launch Plans*, RCR WIRELESS NEWS, Mar. 22, 2004, at <<http://www.rcrnews.com/cgi-bin/news.pl?newsId+17406>> (“Our UMTS service will turn these market[s] into giant ‘hotspots,’ providing our customers with connection speeds rivaling those of some broadband services,” said Rod Nelson, Chief Technology Officer at AWS. “With the support of our vendors, we’re on schedule to deliver 3G services before the end of the year.”); see also Slemons Declaration at 2.

<sup>20</sup> Public Interest Statement at 19; see generally Hogg/Austin Declaration.

As the Public Interest Statement showed, at least 50 MHz will be needed initially to continue providing both companies' existing customers with the currently offered analog and digital services and to accommodate new customers as the networks are combined and rationalized. Once the networks are fully combined, the technical efficiencies gained thereby and the continued migration to efficient digital technologies (including the ultimate phase-out of analog and TDMA technologies) will allow even more customers to be served within that 50MHz. A customer base for existing voice and data services that would have required 60-80 MHz for the two separate companies to accommodate will be served with greater efficiency and improved quality in about 50 MHz of spectrum.<sup>21</sup> In short, by combining the two companies' current networks, Cingular will be able to remedy the "overloaded circuits," for which CU elsewhere has criticized both AWS and Cingular,<sup>22</sup> while freeing up 30 MHz of spectrum for more advanced services.

The remaining 30 MHz of the 80 MHz of spectrum, which will be cleared over time as current-technology customers are consolidated in 50 MHz, then will become available for high-speed 3G digital service using UMTS technology. An initial roll-out of UMTS may be done in some areas with only 10 MHz of spectrum,<sup>23</sup> which will be insufficient for the provision of high-

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<sup>21</sup> See Hogg/Austin Declaration at 20-21; *see also id.* at 7-12, 18-19; Public Interest Statement at 19. The Commission's rules require that Cingular maintain its analog service until 2008. Cingular currently needs about 4 MHz to comply with the analog service requirement, about 11 MHz to provide TDMA service and 10 MHz for Cingular's provision of GSM service, including GPRS/EDGE, to meet the demands of existing customers served via a 25 MHz system in urban areas. Hogg/Austin Declaration at 7-8. The precise allocation of spectrum varies from area to area. *Id.* Furthermore, it will take several years for Cingular to be able to rationalize its network and fully migrate to GSM and phase out TDMA service.

<sup>22</sup> See *Cingular Priority: Improving Customer Satisfaction*, ASSOCIATED PRESS, Feb. 19, 2004 (citing Feb. Consumer Reports survey), cited in Public Interest Statement at 12.

<sup>23</sup> Hogg/Austin Declaration at 10.

speed service once the customer base begins to grow beyond an initial stage.<sup>24</sup> Even after High Speed Downlink Packet Access (“HSDPA”) technology is implemented, a UMTS network limited to only 10 or even 20 MHz of additional spectrum would provide a total capacity of 10 to 20 Mbps to be shared among all users of a UMTS site.<sup>25</sup> This capacity is insufficient to support a substantial customer base with competitive, high-speed access.<sup>26</sup>

Other nations have recognized the need for providers to have large amounts of 3G spectrum to provide a mass-market service, even when they have substantial spectrum for their 2G networks.<sup>27</sup> For example, in the U.K., two incumbents (T-Mobile and Orange) each have 60 MHz of 2G spectrum and 25 MHz of 3G spectrum – a total of 85 MHz for their GSM/UMTS networks.<sup>28</sup> NTT DoCoMo has 86 MHz in Japan.<sup>29</sup> The unsupported arguments that less spectrum would be sufficient for the combined company are wholly without merit.<sup>30</sup>

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<sup>24</sup> *Id.* at 10-11, 22-23.

<sup>25</sup> The limitations of the single UMTS channel are ignored by the only commenter who deems a single channel sufficient to meet all of the demands of the combined company. *See* Paul Comment at 1.

<sup>26</sup> *See* Hogg/Austin Declaration, Fig. 3 (graph depicting the number of simultaneous UMTS users than can be supported at various data rates with 10 MHz, 20 MHz, or 30 MHz of spectrum). One of the Objecting Parties argues that Cingular may be able to find a different 3G technology that can be integrated into GSM spectrum, thereby eliminating the need for separate blocks of 3G spectrum. Paul Comment at 1. Cingular, however, must base its business decisions on the technology that currently exists that can fulfill the objectives it is trying to accomplish. As Mr. Paul acknowledges might be the case, Cingular is unaware of any vendor with current plans to release technology that can provide for an integrated high-speed data and voice solution on a GSM network; EDGE does not provide the necessary speed and capacity. UMTS is the standard for broadband 3G migration for GSM providers.

<sup>27</sup> *See* UMTS World, UMTS/3G Licenses, <<http://www.umtsworld.com/industry/licenses.htm>> (visited May 8, 2004) (showing that many countries have granted licenses for as much as 40 MHz of UMTS spectrum).

<sup>28</sup> *See* Merrill Lynch, *European Wireless: If We Go to Bigger Buckets, What about Capex?*, Oct. 6, 2003, at 4.

<sup>29</sup> Prepared Testimony of Thorpe “Chip” Kelly, Senior Vice President for Sales & Marketing, Western Wireless Corp., Before the House Small Business Committee, Regulatory

Thus, for consumers to realize the benefits of this merger, 50 MHz of spectrum are needed in those areas currently served by both Cingular and AWS to meet the demand for existing voice and data services, plus an additional 30 MHz to meet demand for more advanced services – a total of 80 MHz. This transaction will enable the combined company to address these spectrum needs in most areas.

Thrifty claims that the Applicants' statement that the combined company will divest spectrum which exceeds 80 MHz resulting from the transfer is vague.<sup>31</sup> The Applicants hereby clarify that the combined company will divest spectrum in excess of 80 MHz in any county in which it has interests in more than 80 MHz of cellular and Broadband PCS spectrum.<sup>32</sup>

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Reform and Oversight Committee, Rural Enterprises, Agriculture and Technology Subcommittee, *Eliminating the Digital Divide: Who Will Wire Rural America?*, FEDERAL NEWS SERVICE, May 24, 2001 (noting 86 MHz assigned nationally in Japan to NTT DoCoMo). Cingular has consistently taken the position that substantial blocks of spectrum would be needed for UMTS. In the Advanced Wireless Services docket, Cingular noted that there was 200 MHz less spectrum available than the ITU estimated would be needed for analog, 2G and 3G services in the United States. Comments of Cingular Wireless LLC in ET Docket No. 00-258, at 2-3 (filed Oct. 22, 2001). Accordingly, Cingular urged the Commission to allocate 180 MHz for advanced wireless services, because "large contiguous spectrum blocks, rather than slivers of spectrum, are needed to support advanced wireless services." Reply Comments of Cingular Wireless LLC in ET Docket No. 00-258, at 3 (filed Nov. 8, 2001). More recently, Cingular stated that allowing for large blocks of 20-30 MHz of spectrum per license would provide "sufficient bandwidth to enable licensees to offer advanced services without having to resort to secondary market mechanisms to acquire additional spectrum." Reply Comments of Cingular Wireless LLC in WT Docket No. 02-353, at 7-8 (filed Mar. 14, 2003).

<sup>30</sup> CFA/CU argue, without any technical support or explanation, that 40 MHz is sufficient to provide all the voice and data services demanded by consumers. CFA/CU Petition at 9. No attempt is made to address Cingular's technical showing and, absent a supporting declaration, the argument must be rejected. *See, e.g., Gencom*, 832 F.2d at 181 n.11.

<sup>31</sup> *See* Thrifty Petition at 13.

<sup>32</sup> In calculating the 80 MHz, Cingular will include spectrum held by any entity (with the exception of Cingular Interactive) it controls or in which it holds a 10 percent or greater equity interest. Cingular Interactive operates a separate, dedicated data network using less than 1.5 MHz of SMR spectrum. *See Cingular Wireless LLC; Request for Waiver of the CMRS Spectrum Aggregation Limits in Section 20.6(a) of the Commission's Rules*, 16 F.C.C.R. 17564 (2001).

Requiring the merged entity to make do with some arbitrary, lesser amount of spectrum will deprive consumers of service quality and the prospect of advanced services, as well as undermine the health of the overall CMRS marketplace. Failure to grant the merger as proposed will prevent Cingular from competing as a market leader in network quality today; it also will prevent it from competing effectively with the new 3G services being offered by Verizon Wireless and by other carriers in the near future.<sup>33</sup> Cingular needs to deploy UMTS to provide data services at comparable speeds and remain competitive.<sup>34</sup> By allowing Cingular to obtain up to 80 MHz of spectrum, the Commission will create an additional provider of data service with a transmission rate of 2 Mbps or more and pave the way for the deployment of 3G services expeditiously and over a wider footprint. Grant of the Transfer Applications will allow increased competition in the provision of 3G services at a level that would not have been possible without the merger and, therefore, consumers will have additional choices for high-speed broadband services. As President Bush recently noted:

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<sup>33</sup> Verizon Wireless currently offers the CDMA-based 1xEV-DO “BroadbandAccess” data service in the Washington, D.C. and San Diego, California areas, with a maximum speed of 2.4 Mbps and average end-user speeds of 300-500 kbps, and has announced plans to introduce this service nationally, starting in “many major U.S. cities” this summer. See News Release, Verizon Wireless, *Verizon Wireless Announces Roll Out of National 3G Network*, Jan. 8, 2004, at <<http://news.vzw.com/news/2004/01/pr2004-01-07.html>>; Walter S. Mossberg, *Verizon Is Crossing the U.S. with Speedy, True Wireless Access*, WALL STREET JOURNAL, Apr. 8, 2004, at B1. Verizon Wireless currently has no competition for wireless data applications at these very high speeds. See Rob Pegoraro, *Verizon Wireless Lets You Get Online and Get Out – Quickly*, THE WASHINGTON POST, Mar. 14, 2004, at F7. Nextel, however, has announced that it has entered the second phase of its wireless broadband trial and will be giving customers in Raleigh/Durham, NC, the opportunity to try the service. See Susan Rush, *Nextel Takes Wireless Broadband Trial Commercial*, WIRELESS WEEK, Apr. 14, 2004, at <[http://www.wirelessweek.com/index.asp?layout=documentPrint&doc\\_id=132542](http://www.wirelessweek.com/index.asp?layout=documentPrint&doc_id=132542)>.

<sup>34</sup> See Hogg/Austin Declaration at 5; UMTS World, WCDMA (UMTS), at <<http://www.umtsworld.com/technology/wcdma.htm>> (visited Mar. 16, 2004); UMTS World, HSPDA in W-CDMA, at <<http://www.umtsworld.com/technology/hsdpa.htm>> (visited Mar. 16, 2004).

[T]o make sure that we're the innovative society of the world . . . we [must] have access to . . . broadband technology in every part of our country. [When] I was the governor of Texas[,] . . . I remember talking about access to information and there was always a group of people saying, that's fine, big cities get it but rural people don't. I'm talking about broadband technology to every corner of our country by the year 2007 with competition shortly thereafter. . . .

[A] proper role for the government is to clear regulatory hurdles so those who are going to make investments [in broadband technology] do so. Broadband is going to spread because it's going to make sense for private sector companies to spread it so long as the regulatory burden is reduced — in other words, *so long as policy at the government level encourages people to invest, not discourages investment*. . . . Listen, one of the technologies that's coming is wireless. . . . [W]ireless technology is going to change all that so long as government policy makes sense.<sup>35</sup>

Approval of the merger represents a strong step toward encouraging investment in these new advanced wireless services nationwide.

Ignoring the benefits of additional 3G competition, two of the Objecting Parties assert that permitting Cingular to keep 80 MHz of spectrum will prevent Cingular's competitors from having access to additional spectrum.<sup>36</sup> Tellingly, not a single wireless competitor objected to this merger – let alone on the ground that it would keep them from obtaining additional needed spectrum. Cingular's competitors simply do not face the same spectrum constraints<sup>37</sup> because

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<sup>35</sup> President George W. Bush, President Unveils Tech Initiatives for Energy, Health Care and Internet, Remarks at American Association of Community Colleges Annual Convention (Apr. 26, 2004) (emphasis added), at <<http://www.whitehouse.gov/news/releases/2004/04/print/20040426-6.html>>.

<sup>36</sup> Newcomb Comment at 1; Paul Comment at 1 (arguing that Cingular should be required to divest the spectrum, and then the spectrum should be “re-auctioned to wireless service providers who would provide competition to incumbent wireless carriers”).

<sup>37</sup> Cingular's PCS competitors do not have to comply with an analog service requirement and other nationwide competitors only have to support a single 2G technology, whereas Cingular must support TDMA and GSM in addition to analog. The analog service requirement contained in Section 22.901(b) of the Commission's rules only applies to *cellular* systems (*i.e.*, those operating at 850 MHz), and neither T-Mobile nor Sprint holds such licenses. Although Verizon

they do not have to set aside blocks of spectrum for the deployment of 3G services.<sup>38</sup> Indeed, some have already begun deploying 3G services.<sup>39</sup> As the Hogg/Austin Declaration demonstrated, carriers using 1xRTT CDMA networks with 20 MHz of spectrum have more than 4 times the capacity of a TDMA network with the same amount of spectrum and approximately 25% more capacity than GSM-AMR.<sup>40</sup> Thus, Cingular's competitors using CDMA technology have substantially more flexibility to use their existing spectrum to offer new and advanced services while continuing to serve their existing customer bases. Those carriers can effectively compete with substantially less spectrum than Cingular.

If, and to the extent that, competitors eventually need additional capacity, the Commission has indicated that it will continue to make spectrum available to wireless carriers. Not counting the NextWave spectrum,<sup>41</sup> the Commission plans to bring online as much as 150 to 170 MHz of spectrum for advanced wireless services over the next several years – an amount which approaches the roughly 196 MHz currently allocated to cellular, broadband PCS and

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is subject to this requirement in some areas, it does not have to maintain multiple digital networks, because it uses only CDMA as its 2G technology. *See* Hogg/Austin Declaration at 3, 25-26.

<sup>38</sup> CDMA carriers can deploy voice and 3G services on an integrated basis.

<sup>39</sup> As stated, Verizon Wireless and Sprint already have begun deploying 3G technologies. Despite this competition, one commenter argues that Cingular only will need additional spectrum for UMTS in the major metropolitan areas where the combined entity must provide 3G offerings by the end of 2005 due to previous commitments made by AT&T Wireless to NTT DoCoMo. Paul Comment at 1. The combined company will need to deploy UMTS as widely as possible to compete with carriers such as Verizon Wireless and Sprint who have already begun rolling out 3G services.

<sup>40</sup> *See* Hogg/Austin Declaration at 9 & Fig. 2.

<sup>41</sup> *See* News Release, FCC, *FCC Announces NextWave Settlement Agreement* (rel. Apr. 20, 2004), at <[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-246284A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-246284A1.pdf)> (“*Nextwave News Release*”) (announcing that NextWave – which holds spectrum in 95 BTAs (including licenses covering each of the 10 largest MSAs) – would immediately return at least 90% of its spectrum for re-auction).

enhanced specialized mobile radio (“ESMR”) services.<sup>42</sup> In addition, the Commission has sought comment on rechannelizing the 2500-2690 MHz band to permit the deployment of low-powered, cellularized systems to facilitate the provision of advanced wireless services using MMDS and Instructional Television Fixed Service (“ITFS”) spectrum. If the Commission goes forward and allows that spectrum to be used for wireless services, it will have made available up to 380 MHz for wireless services.<sup>43</sup> Consequently, new entrants and Cingular’s existing competitors have ample opportunity to obtain any additional spectrum they might need or want.

The merger, as proposed, will equip the merged entity with sufficient spectrum resources to improve the health of the CMRS marketplace by creating a strong new competitor in network quality and advanced services. These capabilities will inure to the benefit of consumers. Therefore, it will be primarily consumers who will be “punished” if the merged entity is forced to engage in additional, arbitrary spectrum divestitures.

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<sup>42</sup> This figure includes the 26 or more MHz that Nextel claims to have in most major metropolitan areas. See Nextel Communications, Inc., SEC Form 10-K, 2003 Annual Report at 9, Mar. 11, 2004, available at < <http://phx.corporate-ir.net/phoenix.zhtml?c=63347&p=iro1-sec> > (“We now have about 22 MHz of spectrum in the 800 and 900 MHz bands in most of the top 100 U.S. markets and about 4 MHz of spectrum in the 700 MHz band in most major U.S. metropolitan markets, which spectrum is not currently in use.”).

<sup>43</sup> In that connection, Nextel has acquired MMDS/MDS licenses from WorldCom and from Nucentrix, see *Wireless Telecommunications Bureau Grants Consent to Assign Multipoint Distribution Service Station Licenses, Public Notice*, DA 04-969 (WTB rel. Apr. 7, 2004); *Applications to Assign Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., Memorandum Opinion and Order*, WT Docket No. 03-203, DA 04-945 (WTB/MB rel. Apr. 2, 2004), and has indicated that it plans to use the spectrum for mobile voice and advanced services, *Applications of Nucentrix Spectrum Resources, Inc. (Debtor-in-Possession) & Nextel Spectrum Acquisition Corp.*, WT Docket No. 04-40, Public Interest Statement at 6-9 (filed Jan. 15, 2004); *Applications of WorldCom, Inc. (Debtor-in-Possession) & Nextel Spectrum Acquisition Corp.*, WT Docket No. 03-203, Public Interest Statement at 5 (filed Aug. 15, 2003). As part of the WorldCom transaction, Nextel also will acquire a number of leases for ITFS spectrum in the same frequency band.

**B. Cingular Should Be Permitted To Hold Each of the Cellular Licenses Subject to the Transaction**

Unsubstantiated claims that control by one carrier of both cellular licenses in a single area could result in a “cellular monopoly” are without merit because cellular constitutes only one portion of mobile telephony. The Commission has previously concluded that cellular carriers compete in the mobile telephony segment with PCS and ESMR providers, among others.<sup>44</sup> Thus, even if there is only one cellular provider, competition will remain robust in the relevant market – which includes all CMRS wireless services.

With regard to allegations that the acquisition of both cellular properties in a Cellular Market Area (“CMA”) will “create a ‘coverage monopoly,’”<sup>45</sup> the Commission previously rejected these concerns when it repealed the cellular cross-ownership prohibition for MSAs. The Commission determined that “the cellular-cross interest rule is no longer necessary in urban markets, given the presence of numerous competitive choices for consumers in such markets.”<sup>46</sup>

Focusing properly on competition among wireless providers, the Applicants have demonstrated that a waiver of the cellular cross-interest rule is justified in the 11 RSAs where both Cingular and AWS provide cellular service. As was the case when the Commission

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<sup>44</sup> See, e.g., *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Eighth Report*, 18 F.C.C.R. 14783, 14802-03 (2003) (noting that “[f]rom a customer’s perspective, digital service in the cellular band or SMR bands is virtually identical to digital service in the PCS band”); see also *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Seventh Report*, 17 F.C.C.R. 12985, 12993 (2002) (“*Seventh CMRS Competition Report*”).

<sup>45</sup> Newcomb Comment at 2 (arguing that the FCC should prove that the cross-ownership of “any” cellular license will not create a coverage monopoly); Shepherd Petition at 1 (claiming that “the proposed transfer would dissolve the current Cellular duopolies, resulting in [] monopolistic control of all [cellular] spectrum”).

<sup>46</sup> *2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, Report and Order*, 16 F.C.C.R. 22668, 22707 (2001) (“*2000 Biennial Regulatory Review*”).

eliminated the rule in MSAs, numerous competitive choices will remain in each of the RSA overlap areas after the merger.<sup>47</sup>

No petitioner addresses the merits of the Applicants' waiver showing with respect to the cellular cross-interest prohibition. Instead, two individuals express general reservations.<sup>48</sup> Mr. Shepherd merely argues – without any analysis – that the public interest would be served by maintaining the cellular duopolies.<sup>49</sup> Similarly, Mr. Newcomb states that the waiver request should be denied absent “proof” that customers in these 11 RSAs “will have access to native, facilities based, coverage of at least two carriers.”<sup>50</sup> The objections of both parties are without merit.

As a preliminary matter, Messrs. Shepherd and Newcomb ignore the relevant public interest standard for assessing whether a waiver is appropriate. As discussed in the waiver request, the Commission has stated that it would “entertain and be *inclined to grant waivers* of the rule for those RSAs that exhibit market conditions under which cellular cross-interests may be permissible without significant likelihood of substantial competitive harm.”<sup>51</sup> This standard

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<sup>47</sup> See Public Interest Statement at 48-57; *infra* text accompanying notes 57-61. The term “RSA overlap area” refers to the aggregate counties (or portions thereof) within a given RSA in which the Cellular Geographic Service Areas (“CGSAs”) of Cingular and AWS overlap. Because many RSAs have been partitioned in different ways as between the A and B Blocks and the Applicants’ CGSAs do not coincide completely, the overlap area in many cases does not include every county within the RSA. For example, the Texas 11 - Cherokee RSA was originally comprised of 8 counties (Angelina, Cherokee, Nacogdoches, Panola, Rusk, Sabine, San Augustine and Shelby), but the CGSAs of Cingular and AWS overlap only in 5 of these counties (Angelina, Nacogdoches, Sabine, San Augustine and Shelby). These 5 counties together comprise the “RSA overlap area” for Texas 11. See Public Interest Statement at 52-57; Attachment A, RSA Competition Chart.

<sup>48</sup> Newcomb Comment at 1; Shepherd Petition at 1-2.

<sup>49</sup> Shepherd Petition at 1-2.

<sup>50</sup> Newcomb Comment at 1.

<sup>51</sup> *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22670 (emphasis added), cited in Public Interest Statement at 47.

requires an assessment of the competitive effects of the proposed transaction in the relevant area.<sup>52</sup> In assessing competitive effects, the Commission has found the presence of four or more competitors<sup>53</sup> an appropriate yardstick to ensure adequate competition and guard against competitive harm.<sup>54</sup> The Commission has also made clear that an assessment of competitive effects under the “substantial competitive harm” standard entails examining actual as well as *potential* competition.<sup>55</sup>

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<sup>52</sup> See Public Interest Statement at 47 (citing *CenturyTel Request for a Waiver of Cellular Cross-Interest Rule, Memorandum Opinion and Order*, 18 F.C.C.R. 1260, 1263 (WTB 2003) (“*CenturyTel*”).

<sup>53</sup> Competitors in the mobile telephony segment include cellular, PCS and ESMR providers, as well as resellers and MSS licensees. See *Seventh CMRS Competition Report*, 17 F.C.C.R. at 12993; see also Public Interest Statement at 38, 49.

<sup>54</sup> See Public Interest Statement at 45-46. Specifically, the Commission eliminated the cellular cross-interest rule in MSAs because of the presence of 4 or more competitors in most MSA counties, *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22707-08, and has proposed to “eliminate the cellular cross-interest rule for RSAs with greater than three competitors,” *Facilitating the Provision of Spectrum-Based Services to Rural Areas, Notice of Proposed Rulemaking*, 18 F.C.C.R. 20802, 20848 (2003) (“*Rural NPRM*”). The former 45 MHz CMRS spectrum cap was also designed to ensure that there would be at least 4 competitors (including both existing providers and new entrants) in any BTA. See *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22703; *1998 Biennial Regulatory Review, Memorandum Opinion and Order on Reconsideration*, 15 F.C.C.R. 22072, 22074 (2000) (citing *1998 Biennial Regulatory Review, Report and Order*, 15 F.C.C.R. 9219, 9254-55 (1999) (“*1998 Biennial Report & Order*”) (concluding that “the 45 MHz aggregation cap (in most areas), which allows for at least four mobile service providers in each area, struck an appropriate balance between the efficiencies and economies of aggregation and the risk of undue concentration”).

<sup>55</sup> See Public Interest Statement at 48 n.252; *Establishment of Rules and Policies for LMDS, Third Report and Order and Memorandum Opinion and Order*, 15 F.C.C.R. 11857, 11858, 11860-61 (2000) (determination of whether there is a “significant likelihood of substantial competitive harm” entails examining a number of factors, including “entry barriers[] and potential competition”), cited in *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22709 n.257; see also *Applications of Vanguard Cellular Systems, Inc. and Winston, Inc.*, 14 F.C.C.R. 3844, 3849 (WTB 1999) (noting that the Commission’s analysis of competitive effects under its public interest standard takes into account, *inter alia*, identification of “current and potential participants in each relevant market”) (emphasis added). Potential sources of competition include licensed PCS providers who have not yet built out in a particular area (for whom barriers to entry are low and consist mainly of the costs to build out or lease infrastructure and market the network in that area), as well as entities acquiring spectrum in future auctions (for whom barriers

The Applicants showed in their waiver request that the relevant product market is mobile telephony and the relevant geographic market is nationwide or, at a minimum for purposes of the rule, the BTA(s) in which each of the RSA overlap areas occur.<sup>56</sup> Whether using a nationwide or BTA-wide market, the conclusion is the same: there are at least four other authorized carriers (excluding Cingular), and no carrier will have the ability to set prices or otherwise conduct its business unconstrained by competition.<sup>57</sup> Even in each of the handful of individual counties that comprise the RSA overlaps – areas too small to comprise the relevant market<sup>58</sup> – there will be at least 4 and in most cases at least 5 authorized cellular, PCS, and/or ESMR carriers post-merger when Cingular is included in the calculus.<sup>59</sup> Neither Mr. Shepherd nor Mr. Newcomb rebuts these facts.

While both Mr. Shepherd and Mr. Newcomb ignore the waiver standard and related case law, the “proof” Mr. Newcomb seeks that at least two facilities-based carriers are actually providing service in each of the 11 RSAs is satisfied. As Attachment A shows, each RSA

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to entry include license acquisition costs at auction as more spectrum comes on line, as well as network construction and marketing costs). *See supra* notes 41-43, 111-12 and accompanying text; *see also 2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22704 (noting that concern about increased concentration is “materially reduced by the possibility of additional allocations of spectrum” in the near term).

<sup>56</sup> *See* Public Interest Statement at 48-52.

<sup>57</sup> *See* Public Interest Statement at 48; *see also id.* at 48-57.

<sup>58</sup> *See CenturyTel*, 18 F.C.C.R. at 1263-64; *see also* Petition for Partial Waiver of the Cellular Cross-Interest Rule of CenturyTel Wireless, Inc. in WT Docket No. 02-325, at 10 (Oct. 4, 2002) (stating that an area consisting of less than a single parish – county-equivalent in Louisiana – with fewer than 30,000 POPs “could scarcely be considered large enough to be a relevant geographic market”).

<sup>59</sup> *See* Public Interest Statement at 50 & n.264 (noting the presence of 4 authorized competitors other than Cingular post-merger in 51 of the 53 counties comprising the RSA overlap areas, and 3 authorized competitors other than Cingular in the remaining 2 counties). “Authorized” carriers in this context include operational licensees as well as licensed facilities-based carriers who have yet to build out in a given overlap county.

overlap area in which the cellular cross interests occur will have at least 4 licensed, facilities-based carriers, including Cingular, actually providing service after the merger.<sup>60</sup> These numbers do not take into account additional competition provided by licensed competitors that have not yet built-out in the overlap areas, non-facilities based competitors (*e.g.*, resellers) and other mobile telephony providers (*e.g.*, MSS) or potential new entrants following future auctions.<sup>61</sup> Nor do they take into account that the combined company will have more than 100 domestic roaming agreements with other carriers, providing additional sources of competition in the overlap areas.

It is only at the *county* level where the number of facilities-based competitors providing service post-merger will be less than 4 in a limited number of RSA overlap areas. As Attachment A shows, even in these discrete counties, additional competition is provided by resellers, MVNOs, and MSS licensees and the potential for further competition exists with numerous other licensed PCS spectrum holders. A few of these counties are extremely rural, however, and may not be able to sustain multiple facilities-based competitors.<sup>62</sup> For example, in McMullen County, Texas, the population is 851 persons with less than 1 (0.8) person per square mile. Notably, only three counties will have less than the 2 facilities-based competitors after the

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<sup>60</sup> See Attachment A.

<sup>61</sup> See *supra* notes 53, 55.

<sup>62</sup> See, *e.g.*, 1998 Biennial Report and Order, 15 F.C.C.R. at 9256-57 (“We find . . . that the economics of serving rural areas are different . . . [T]he economics of serving high-cost and low-density areas makes it is [*sic*] unreasonable to expect a large number of independent carriers to be viable. As a result, the opportunity cost of rural spectrum rights is likely near zero, and the risks of anticompetitive conduct by foreclosing entry through the monopolization of spectrum are low.”) (raising the former CMRS spectrum cap limit to 55 MHz in RSAs) (citations omitted).

merger espoused by Mr. Newcomb.<sup>63</sup> In any event, it simply is not the case that the relevant market is a single county, as this is not the level at which prices are set.<sup>64</sup>

### **C. The Homeland Security Benefits of the Merger Are Substantial**

Thrifty challenges the homeland security benefits of the merger on the ground that the benefits would be available from any company of a similar size.<sup>65</sup> Again, Thrifty misses the point. It is uncontested that the merger would benefit homeland security by improving the coverage and capacity of WPS. In fact, on March 9, 2004, Cingular entered into an agreement to provide WPS to emergency personnel. The capacity and coverage advantages represented by a combination of the facilities and spectrum of Cingular and AWS will provide immeasurable benefits to this Homeland Security program. WPS will have far greater coverage and communications capacity in times of emergencies. Rather than rebut these showings, Thrifty merely alleges WPS cannot be a public interest benefit because any WPS improvements flow

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<sup>63</sup> They include: Edwards County, TX (2,162 residents; 1 person/sq. mi.), which is 1 of the 12 counties making up the TX 18 - Edwards RSA overlap area; and Sabine County, TX (10,469 residents; 21.4 people/sq. mi.) and San Augustine County, TX (8,946 residents; 16.9 people/sq. mi.), which comprise 2 of the 5 counties making up the TX 11 - Cherokee RSA overlap area.

<sup>64</sup> See Public Interest Statement at 30-34; Public Interest Statement, Attachment 1, Declaration of Professor Richard Gilbert, at 19-20, 21, 23 (“Gilbert Declaration”); Public Interest Statement, Attachment 4, Declaration of Marc P. Lefar, at 7 (“Lefar Declaration”). Mr. Newcomb also asserts that the facts of the *CenturyTel* case are inapposite. Newcomb Comment at 1; *CenturyTel*, 18 F.C.C.R. at 1260. While Mr. Newcomb dismissively claims that the overlap in *CenturyTel* involved “a cellular license overlap of a few square miles, mostly in the Atchafalya swamp, an area populated primarily by nutria and alligators,” in fact, the overlap area was nearly 400 square miles and included some 30,000 residents (approximately 75 people per square mile) as well as the city of Plaquemine, the county seat for Iberville Parish. In the instant case, those select overlap counties that will have less than 4 facilities-based competitors are even more rural than the overlap area in *CenturyTel*, as measured by POPs per square mile, ranging from Maverick County, Texas (the most “densely” populated of these counties with 36.9 people per square mile) to McMullen County, Texas (0.8 people per square mile). See Attachment A. The real importance of *CenturyTel* is that it recognizes that a single county (parish in Louisiana) cannot be viewed in isolation and must be examined as part of the larger community of interest. *CenturyTel*, 18 F.C.C.R. at 1263-64.

<sup>65</sup> Thrifty Petition at 24.

from the size of the combined company. Public interest benefits cannot be dismissed, however, based simply on the size of the company that would produce them.<sup>66</sup> Indeed, size may be necessary for those benefits to be generated.

## **II. THE MERGER WILL ENHANCE, RATHER THAN HARM, COMPETITION**

In the Transfer Applications, the Applicants demonstrated not only numerous pro-competitive benefits to be derived from the merger, but also that the merger would not harm competition. As evidenced in the applications, the merger will not harm competition because wireless competition will remain vigorous after the merger with numerous well-established, well-funded national competitors (as well as numerous regional competitors). This is true whether the geographic market is considered “national” or “local.” Competition in wireline services, bundled services and special access will also be unaffected by the merger.

None of the Objecting Parties’ contrary theories on how the merger will harm competition has merit. The Objecting Parties inappropriately apply a mechanistic approach to competitive analysis that is inconsistent with the DOJ/FTC Merger Guidelines<sup>67</sup> and with Commission precedent. Moreover, they distort market share data, misapply the Merger Guidelines, and make the erroneous claim that new entry into the wireless market is virtually impossible (but do not claim and cannot show that the current robust level of wireless competition will diminish; customers will continue to have the widest array of choices at the best possible value). The Objecting Parties also claim that the merger will foreclose competition as a

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<sup>66</sup> See *Applications of Pac. Telesis Group, Memorandum Opinion and Order*, 12 F.C.C.R. 2624, 2654-55 (1997).

<sup>67</sup> United States Dep’t of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Apr. 1992, at § 1.51 *available at* <[http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html)> (“Merger Guidelines”).

result of bundling, but those claims are unsupported and groundless.<sup>68</sup> Moreover, despite the allegations of the Objecting Parties, the merged company's incentives to enter into roaming agreements will not be reduced as a result of the merger. Finally, claims that the merger might materially affect competition for special access services are unfounded.

**A. The Commission Should Ignore the Objecting Parties' Misapplication of the Merger Guidelines and Distortions of Market Share Data**

The Objecting Parties try to attack the Transfer Applications by misapplying and otherwise taking out of context portions of the Merger Guidelines. These errors may be summarized as follows:

- Both Thrifty and CFA/CU mechanically apply the Herfindahl-Hirschman Index (“HHI”) thresholds as outcome determinative, ignoring both the text of the Merger Guidelines and the published views of the antitrust agencies, which make clear that the HHIs are a starting, not ending, point in a competitive analysis of the relevant market.
- Neither Thrifty nor CFA/CU undertakes the competitive effects analysis required by FCC precedent and the Merger Guidelines: there is no discussion of any of the non-structural elements of wireless competition or whether the conditions required for coordinated interaction effects (product and firm homogeneity, transactional transparency) are present; nor is there a discussion whether the conditions required for unilateral anticompetitive effects (that AWS and Cingular be next best substitutes and that other firms cannot reposition their offerings) are present.
- Thrifty distorts the clear language of Section 1.41 of the Merger Guidelines for the proposition that subscribers rather than revenue “flow share” should be used to measure market share. In truth, Section 1.41 makes clear that market share should be measured using metrics that capture future – not historical – competitive conditions. Flow shares are a far more accurate measure of current competitive conditions, and therefore are better predictors of future competitive conditions than historical market shares.

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<sup>68</sup> Under the Merger Guidelines the proper market for assessing the competitive effects of a merger of two wireless carriers would be the market for wireless services. *See* Merger Guidelines at § 1.11. This is so because in response to a small but significant non-transitory price increase, customers of mobile wireless service would not switch in significant numbers to wireline service since the principal feature of wireless service is “mobility.”

- Neither Thrifty nor CFA/CU uses the Merger Guidelines’ test to define geographic markets. Instead they assume, without evidence, narrow markets that exclude regional competitors without justification and assign market shares based upon either outdated or assumed data.
- In arguing for local markets, neither Thrifty nor CFA/CU accounts for the fact that pricing does not vary with their measure of local concentration, a fact that would not follow if their chosen local markets described the boundaries of wireless competition.

### **1. HHIs Should Not Be Mechanically Applied**

Thrifty and CFA/CU base their conclusion that Cingular’s acquisition of AWS would be anti-competitive solely upon a mechanical application of the post-merger HHI. Specifically, using a subscriber metric for market concentration in a national market, Thrifty and its consultant argue that a post-merger HHI of 1886.4 and a delta of 507.5 are “compelling evidence that the merger is likely to create or enhance market power at a nationwide level.”<sup>69</sup> CFA/CU argues that a post-merger HHI of 2023 and a delta of 449 create “unacceptable levels of concentration at the national level, clearly in violation of the Merger Guidelines.”<sup>70</sup>

Such a mechanical application of the numerical thresholds of the Merger Guidelines is in direct contravention of both the text of the Guidelines and the public statements of antitrust authorities. The Merger Guidelines themselves make clear that calculation of the HHIs provides a starting point for competitive analysis and, if a merger falls within the HHI “safe harbor” standards, may obviate the need for further analysis. Otherwise, calculation of the HHIs does not compel any conclusion other than that further inquiry into the risks of unilateral or coordinated

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<sup>69</sup> Thrifty Petition, deltaVectors Report at 19 (hereinafter “deltaVectors Report”). Thrifty also claims that the post-merger HHI would be 2748 with a delta of 712 if counties were the relevant geographic market. *Id.* at 20. As discussed *infra* at 28-31, there is no basis by which counties can be considered proper geographic markets.

<sup>70</sup> CFA/CU Petition at 2, 8. CFA/CU likewise claims that the post-merger HHI would be higher (2535. with a delta of 695) if shares were adjusted to account for what they claim is an “absent” regional competitor. As discussed *infra* at 26-28, CFA/CU’s claim that Professor Gilbert has understated share levels is misleading and factually incorrect.

effects may be required.<sup>71</sup> As discussed below and in great detail in the Gilbert Declaration, coordinated and unilateral effects are extremely unlikely after the merger.

The Commission has likewise rejected the kind of “by the numbers” analysis promoted by CFA/CU and Thrifty. For example, throughout its analysis in *WorldCom/MCI*,<sup>72</sup> the FCC downplayed the importance of the high HHI numbers that resulted from a combination of MCI and WorldCom in a number of product markets, noting that:

HHI analysis is intended to provide guidance regarding the potential anticompetitive effects of a merger, but is not meant to be conclusive. Indeed, an HHI analysis alone is not determinative and does not substitute for our more detailed examination of the competitiveness in a given market.<sup>73</sup>

The antitrust authorities also have criticized the kind of analysis undertaken by both CFA/CU and Thrifty. As Chairman Muris of the Federal Trade Commission recently stated,

[T]he preeminence that some would continue to give to concentration or HHI numbers is misplaced. State-of-the-art merger analysis has moved well beyond a simplistic causality of high concentration leading to anticompetitive effects. The number of competitors is certainly important — 4 to 3 gets our attention quicker than 6 to 5 — but current merger practice does not elevate a single fact or number to dispositive significance. The totality of the evidence must point to an increased likelihood of anti-competitive effects before we will act.<sup>74</sup>

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<sup>71</sup> Merger Guidelines at § 1.51.

<sup>72</sup> *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control*, 13 F.C.C.R. 18025 (1998) (“*WorldCom/MCI*”).

<sup>73</sup> *Id.* at 18100-01; *see also id.* at 18050 (“We agree that an HHI analysis alone is not determinative and does not substitute for our more detailed examination of competitive concerns.”); *id.* at 18048 (“As the 1992 Horizontal Merger Guidelines make clear, this HHI analysis provides guidance regarding the potential anticompetitive effects of a merger, but is not meant to be conclusive. We also note that, given the unique economic, legal, and technical circumstances that color the telecommunications industry, we will not rigidly adhere to the results of this analysis where our independent expert analysis suggests a different outcome.”) (citations omitted).

<sup>74</sup> Prepared Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, Workshop on Horizontal Merger Guidelines Federal Trade Commission/Department of Justice,

## 2. Coordinated and Unilateral Anticompetitive Effects Are Unlikely

Rather than mechanically apply the HHI thresholds, the Merger Guidelines direct a reviewing antitrust agency to conduct a fact-specific inquiry into whether coordinated or unilateral anticompetitive effects are likely. The Commission's precedent requires the same analysis; the Commission must consider "whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants."<sup>75</sup> This is an inquiry that both Thrifty and CFA/CU fail to undertake.

As Professor Gilbert explains,<sup>76</sup> coordinated interaction is a plausible risk in a highly concentrated market only when all of the following conditions are met:

- The relative costs and benefits of coordination must be comparable across all of the coordinating firms; otherwise some firms would defect from the coordinated conduct;
- Non-coordinating firms must face limits on their ability to expand capacity;
- Firms must be able to monitor the coordination in price or output by other firms;
- Coordinating firms must be able to punish firms that fail to coordinate their price or output; and
- Firms cannot have opportunities for product or other service innovations that would allow them to achieve discrete competitive advantages while escaping punishment by other firms.

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Washington, DC (Feb. 17, 2004). *Accord* Attachment B, Supplemental Declaration of Richard J. Gilbert at 6-7 ("[T]he mere fact that a merger exceeds the HHI threshold does not demonstrate that the merger is anticompetitive. High market shares are necessary, but not sufficient, to exercise market power.") ("Gilbert Supplement").

<sup>75</sup> See, e.g., *WorldCom/MCI*, 13 F.C.C.R. at 18047.

<sup>76</sup> Gilbert Declaration at 27.

As explained more fully in the Gilbert Declaration, none of these conditions is present here.<sup>77</sup> Wireless competitors are differentiated from each other on the basis of network quality, pricing philosophy, service feature packages, and marketing approaches. As a result, firms do not have equal incentives to restrict output. Moreover, wireless voice service is an extremely differentiated product, where competitors sell numerous different pricing plans, each with its own pricing and features. Consequently, it would be very difficult to reach terms of coordination and to monitor those terms. The demonstrated and rapid growth of Sprint, T-Mobile, Nextel, and MetroPCS (not to mention Mobile Virtual Network Operators (“MVNOs”) such as Virgin Mobile and AT&T’s own aggressive estimates of its anticipated success as an MVNO) shows that expansion of output is easy and there is no limit on the ability of non-coordinating firms to expand output in response to a price increase.

Finally, unilateral anticompetitive effects are unlikely. A necessary condition for unilateral price effects is that a significant number of customers regard Cingular and AWS as their first and second choices.<sup>78</sup> Neither Thrifty nor CFA/CU provides any evidence that a significant number of customers regard Cingular and AWS as next best substitutes for the other. To the contrary, all available evidence suggests that Cingular or AWS customers who choose wireless carriers on price are likely to regard T-Mobile, the low price leader, as the preferred alternative in the event of a price increase by either Cingular or AWS,<sup>79</sup> and customers who chose wireless carriers on quality are likely to regard Verizon as the preferred alternative in the event of a price increase or quality degradation by either Cingular or AWS.<sup>80</sup> Churn data

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<sup>77</sup> *Id.* at 27-28.

<sup>78</sup> Merger Guidelines at § 2.211.

<sup>79</sup> Gilbert Declaration at 8.

<sup>80</sup> *Id.* at 30.

demonstrate that consumers leaving AWS or Cingular do not regard the other carrier as its next best substitute. On the contrary, departing customers of each carrier choose the other carrier less frequently than their market shares would indicate.<sup>81</sup>

### **3. The Objecting Parties Distort Section 1.41 of the Merger Guidelines**

In an effort to deflect attention from the fact that the merger will leave five robust national wireless competitors plus many vigorous regional firms, Thrifty quibbles with the way that the Applicants calculated market shares. Erroneously relying on Section 1.41 of the Merger Guidelines, Thrifty argues that the Applicants should have used subscriber counts instead of revenue flow share in order to calculate market shares. However, a proper reading of Section 1.41 strongly supports the Applicants' use of revenue flow share as the appropriate metric.

First, Section 1.41 of the Merger Guidelines states that “[m]arket shares will be calculated using the best indicator of firms’ future competitive significance.” As the Commission noted in *WorldCom/MCI*, the Merger Guidelines “explicitly recognize . . . that recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm’s future competitive significance.”<sup>82</sup> In the wireless industry, “subscriber shares are largely determined by the past performance of firms, and do not indicate which firms are gaining or losing in the current market.”<sup>83</sup> In contrast, flow share

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<sup>81</sup> Gilbert Declaration at 28 n.67.

<sup>82</sup> *WorldCom/MCI*, 13 F.C.C.R. at 18036 (internal quotation omitted) (citation omitted).

<sup>83</sup> Gilbert Supplement at 3. As Professor Gilbert notes:

For example, in the mid-1990s, total market shares supported the conclusion that Netscape’s Internet browser was of equal or greater significance than Microsoft’s Internet Explorer. The total installed base of Netscape users was larger than the installed base of Internet Explorer users in large part because it had been available earlier than Internet Explorer. However, a closer look at flow

measures the share of new customers that a firm captures. It is, therefore, a more accurate indicator of firms' future competitive significance than simple counts of customers, which shows where customers have been, not where they are going. This metric is particularly appropriate given the dynamic nature of wireless services, evidenced by high churn rates and the advent of wireless number portability, which now allows customers to switch even more easily to any carrier that offers attractive technologies, features, or prices.<sup>84</sup> Simplistic reliance on current subscriber counts to determine shares amounts to nothing more than a static look at an ever-changing, legacy customer base.

Second, Thrifty's argument that a static subscriber count is the appropriate metric has nothing to do with whether flow share should be used, because flow share could be measured by either revenue or subscribers. The Applicants used revenue flow share because it correctly weights carriers with higher average revenue per unit ("ARPU") more than carriers with lower ARPUs, thus more accurately reflecting the true competitive strengths of wireless competitors and the utilization of their networks.<sup>85</sup> However, as indicated in Tables 1 and 2 of the Gilbert Declaration,<sup>86</sup> measuring the share of new subscribers also would provide the same picture as measuring share of revenue from new subscribers, namely, that Cingular and AWS are obtaining a lower share of new subscribers than their current share of total subscribers, and T-Mobile,

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shares would have revealed that the market dynamic strongly favored Internet Explorer. The striking change in the competitive conditions in this market would have been difficult to discern using total market shares, but was plainly obvious using flow shares.

*Id.* at 4.

<sup>84</sup> See Gilbert Declaration at 3-4; Gilbert Supplement at 4-5.

<sup>85</sup> See Gilbert Supplement 2 (noting that "a firm's share of subscribers need not be proportional to its share of output, which is the more relevant variable for assessing competition").

<sup>86</sup> Gilbert Declaration at 5, Table 1; *id.* at 8, Table 2.

Nextel, and Verizon Wireless have a higher share of new subscribers than their current share of total subscribers.

Third, Section 1.41 of the Merger Guidelines does not suggest that revenue shares should not be used. Specifically, Section 1.41 states that *unit sales* should be used to calculate market shares where firms are “distinguished primarily on the basis of their relative advantages in serving different buyers or groups of buyers” and *revenue* should be used where firms are “distinguished primarily by differentiation of their products.” Unit sales in the context of wireless service would not be subscribers, but rather minutes of use.<sup>87</sup> Moreover, because wireless carriers are differentiated with respect to quality, value and features, revenue flow share typically would be the preferred measure as opposed to unit sales.<sup>88</sup>

#### **4. The Objecting Parties’ Concentration Analyses Are Without Empirical Foundation**

Thrifty argues that the Commission should consider each county in the United States to be a separate geographic market, despite the fact that the FCC has never licensed spectrum on such a basis and no data are presented on a county-by-county basis. In fact, Thrifty concedes it does not have county-based market share statistics.<sup>89</sup> As a substitute, citing the FCC finding in 2003 that “75% of wireless customers have 6 or fewer wireless service providers in their

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<sup>87</sup> See Gilbert Supplement 3 (“The Guidelines do not recommend using customer counts to measure market shares. In the wireless industry, unit sales consist of minutes of use.”).

<sup>88</sup> Although revenue flow share may be the appropriate metric, there is nothing in the Merger Guidelines to suggest that subscriber flow share may not be used as long as it is noted that subscriber flow share may overstate the market share of these carriers, such as Cingular, who have lower ARPU than the industry average. *Cf. U.S. v. SBC Communications Inc.*, 1999 WL 1211458, at \*15 n.4 (D.D.C. Aug. 2, 1999) (“The United States has used subscriber data here to estimate market shares because those data are more readily available. In some contexts, however, other measures of market share may provide a more precise indication of market concentration or a firm’s competitive significance.”). As of the 1<sup>st</sup> Quarter of 2004, Cingular’s ARPU was the industry lowest at \$47.95 according to its quarterly earnings report.

<sup>89</sup> deltaVectors Report at 19.

community,” Thrifty invents a hypothetical county where there are 6 carriers, including both Cingular and AWS.

The flaws in this methodology are obvious:

- First, and foremost, there is no reason to believe that a county is an appropriate geographic market. Markets conform to current economic realities, not geopolitical boundaries. This is one reason why the FCC has used different and increasingly larger geographic areas for licensing wireless services.
- Second, Thrifty presents no evidence that Cingular and AWS are both present in each of the 75% of counties where there are 6 or fewer wireless carriers. In fact, either Cingular, AWS, or both are absent in a considerable number of these counties. As pointed out in Table A-2 of the Gilbert Declaration, Cingular serves only 8 of the smallest 40 BTAs. AWS serves 10 of the smallest 40 BTAs, and the combination of Cingular and AWS only occurs in 5 of the smallest 40 BTAs. Hence, 35 of the smallest 40 BTAs will not lose a competitor post-merger. Thus, there is no merit to Thrifty’s hypothetical concerns.
- Third, even if Cingular and AWS were both present in these hypothetical “markets,” it is misleading to use out-of-date 2002 data to assign Cingular and AWS 19.8% and 18.9% market shares, respectively.<sup>90</sup> As pointed out in the Gilbert Declaration, Cingular’s share of new subscribers in the fourth quarter of 2003 was only 12%, and AWS’s share of new subscribers in this time period was 2%.<sup>91</sup> Thus, even excluding regional competitors as Thrifty argues is appropriate, current data do not justify the shares used by Thrifty in its HHI calculation.

CFA/CU’s market concentration analysis is even more flawed. Their analysis excludes regional competitors on the assertion that 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 [Cingular and AWS] is present.”<sup>92</sup> This statement is both misleading and factually incorrect.

Table A-1 of the Gilbert Declaration shows that the combination of Cingular and AWS is present in only 74 of the top 100 Cellular Market Areas (“CMAs”). The remaining 26 CMAs will experience no possible increase in concentration resulting from the merger. Sixty-five of the

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<sup>90</sup> deltaVectors Report at 20.

<sup>91</sup> Gilbert Declaration at 8, Table 2.

<sup>92</sup> CFA/CU Petition at 6.

74 CMAs served by both Cingular and AWS also are served by all four of the other national carriers. Either ALLTEL or US Cellular, the two largest regional carriers, serves 7 of the remaining 9 CMAs that are missing a national carrier. In sum, in the 74 CMAs that included both Cingular and AWS before the merger, 65 will have 5 national carriers (with some of these also served by regional carriers) and 7 will have 4 national plus one substantial regional carrier post-merger.

Furthermore, Table A-1 of the Gilbert Declaration only includes a small number of regional carriers such as ALLTEL, US Cellular, and MetroPCS. The supplemental Gilbert Declaration identifies a source listing 400 U.S. firms offering mobile wireless service.<sup>93</sup> Including coverage from this multitude of carriers would greatly increase the number of CMAs with one or more regional carriers.

Contrary to CFA/CU's suggestion, the other national carriers have nearly national footprints. Nextel serves "294 of the top 300 U.S. markets where about 251 million people live or work."<sup>94</sup> Verizon Wireless "provides service in . . . areas where . . . approximately 236 million people[] reside and in 49 of the 50 and 97 of the 100 most populated U.S. metropolitan areas."<sup>95</sup> Sprint has "licenses to provide service to the entire United States population, including Puerto Rico and the U.S. Virgin Islands" and "operates PCS systems in over 300 metropolitan markets, including the 100 largest U.S. metropolitan areas," and thus "reaches a quarter billion

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<sup>93</sup> Gilbert Supplement at 7-8.

<sup>94</sup> Company Profile, Nextel Communications, Inc., at <<http://www.nextel.com/about/corporateinfo/profile.shtml>> (last visited May 12, 2004).

<sup>95</sup> Cellco Partnership, SEC Form 10-K, 2003 Annual Report at 1, available at <[http://www.sec.gov/Archives/edgar/data/1175215/000095010304000384/mar1004\\_10k.htm](http://www.sec.gov/Archives/edgar/data/1175215/000095010304000384/mar1004_10k.htm)>.

people.”<sup>96</sup> T-Mobile “covers 217.9 million people in 24 of the top 25 markets and 46 of the top 50 markets.”<sup>97</sup>

## **5. Neither Thrifty Nor CFA/CU Disputes the Gilbert Pricing Analysis**

Thrifty and CFA/CU’s sole dispute concerning market definition is whether the relevant geographic market is national or local.<sup>98</sup> Although Thrifty and CFA/CU both argue for local markets, neither refutes the basic contention of the Gilbert Declaration – pricing of national plans does not vary geographically and pricing of regional plans does not systematically vary based on local market concentration.

More specifically, Professor Gilbert’s analysis demonstrates that the pricing is the same in local areas where there are 6 or more competitors as it is in areas where there are 4 or fewer competitors. Neither Thrifty nor CFA/CU explains how this finding – which they do not dispute – is consistent with their assertion that an increase in concentration in some hypothetical local markets will lead to higher prices in those markets.

### **B. The Objecting Parties’ Claims That Entry Is Virtually Impossible for New Competitors Are Wrong and Immaterial**

Under the Merger Guidelines, it is only necessary to resort to an analysis of the likelihood of entry if a merger would result in higher prices without such entry.<sup>99</sup> For the reasons we described above, there is no plausible theory of either unilateral effects or coordinated interaction after the merger that would result in higher prices. Nevertheless, we respond briefly in this

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<sup>96</sup> Sprint Corp., SEC Form 10-K, 2003 Annual Report, *available at* <<http://www.sec.gov/cgi-bin/browse-edgar?action=getcompany&CIK=0000101830&owner=exclude>>.

<sup>97</sup> T-Mobile USA, Inc., SEC Form 10-K, 2003 Annual Report, *available at* <<http://www.sec.gov/Archives/edgar/data/1097609/000089102003000720/v88048ore10vk.htm>>.

<sup>98</sup> *See* deltaVectors Report at 16.

<sup>99</sup> *See* Merger Guidelines at §§ 2.0, 3.0.

section to Thrifty’s argument that “[t]he high level of wireless market concentration is exacerbated by the fact that entry into the market is virtually impossible for new competitors.”<sup>100</sup>

The sole fact alleged in support of this proposition that entry is “impossible” is that “Cingular is willing to pay \$41 billion for AWS to alleviate its alleged spectrum problems.”<sup>101</sup> This *non sequitur* cannot obscure the fact that new carriers continually enter and expand their services in the wireless industry, and that new or existing competitors could readily replace any hypothetical lost competition presented by the pending transaction.

Most fundamentally, Thrifty simply ignores the Merger Guidelines’ recognition that hypothetical anticompetitive effects of a merger can be defeated by expansion or repositioning by existing competitors as well as by *de novo* entry.<sup>102</sup> There are no limits on the ability of competing wireless firms to win and serve new customers if Cingular were to attempt to raise prices after the merger. As described in detail in the Transfer Applications and in this Opposition, Cingular’s competitors have rapidly grown their businesses (primarily at the expense of Cingular and AWS), and there is no basis to believe that they will be unable to continue to expand after the merger.

Existing wireless competitors are also able to reposition their offerings to defeat any hypothetical price increase.<sup>103</sup> While, as Professor Gilbert explained in his Declaration, there is no evidence that Cingular and AWS are regarded as particularly close substitutes for the

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<sup>100</sup> Thrifty Petition at 11.

<sup>101</sup> *Id.*

<sup>102</sup> *See* Merger Guidelines at § 2.212 (“A merger is not likely to lead to unilateral elevation of prices of differentiated products if, in response to such an effect, rival sellers likely would replace any localized competition lost through the merger by repositioning their product lines.”).

<sup>103</sup> Anticompetitive effects concerns related to branded services are typically predicated on the ability of an owner of two differentiated brands regarded by customers as next-best substitutes to raise one brand’s prices profitably because customers seeking to avoid the price increase will be diverted to the next-best substitute brand. *See* Gilbert Declaration at 28.

purposes of the merger analysis, even if they were, other carriers could easily reposition their services to replicate any alleged reduction in competition.

Although it is not necessary to reach the question of whether *de novo* entry would discipline a post-merger price increase, it is similarly clear that a large number of firms are planning on entering the wireless business with or without Cingular's acquisition of AWS.<sup>104</sup>

Firms including AT&T, Disney, EarthLink, Qwest and 7-Eleven are entering or planning to enter the wireless industry through resale and MVNO arrangements, which require little or no capital expenditure.<sup>105</sup>

AT&T has repeatedly trumpeted its plans to enter the wireless market. As explained in a May 6 *Wall Street Journal* article:

AT&T Corp. plans to launch its own wireless business – using the AT&T name – just as Cingular Wireless closes its \$41 billion acquisition of AT&T Wireless Services Inc. this year. “We’ll be back in wireless, probably the next day,” AT&T Chairman and Chief Executive David Dorman said recently. . . . By then, AT&T intends to have a contract to resell another wireless company’s service. The company already is negotiating with several carriers and hopes to model its success after Virgin Mobile . . . and other wireless companies that are expanding quickly by leasing network capacity from others. . . . Analysts say the success of a wireless reseller ultimately depends on the brand name of a company, its marketing and the customer base that a reseller brings with it. In those areas, AT&T will have a huge head start.<sup>106</sup>

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<sup>104</sup> Under the Merger Guidelines, likely resale entrants, such as AT&T and Disney, should also be viewed as part of the body of competitors currently influencing the market due to their ability to launch services rapidly, with minimal capital expense, in response to changes in competitive conditions. See Merger Guidelines at § 1.32.

<sup>105</sup> See *Big Gulp and a Phone*, RCR WIRELESS NEWS, May 3, 2004; *MVNO EarthLink Finds its Mobile Voice*, TELEPHONY, Mar. 22, 2004; *Rivals Could Join Virgin Mobile in Renting Space on Sprint’s Wireless Network*, KNIGHT-RIDDER-TRIBUNE BUSINESS NEWS, Mar. 10, 2004.

<sup>106</sup> *Get Ready for a New Cellphone Service — with an Old Name*, WALL STREET JOURNAL, May 6, 2004, at B1.

Contrary to Thrifty's unsupported assertion that "resale will not be a factor,"<sup>107</sup> resellers and MVNOs clearly are a vigorous and growing segment of the competitive wireless landscape in which the participants and potential entrants enjoy substantial choices among wholesale providers.<sup>108</sup> Indeed, two resale/MVNO firms, Tracfone and Virgin Mobile, rank among the ten largest U.S. wireless providers by subscribers.<sup>109</sup>

Entry using a more traditional facilities-based approach is also far easier than Thrifty claims, particularly at the local level at which Thrifty argues that the merger is likely to threaten competition. Available capacity is highly relevant to this entry analysis.<sup>110</sup> As demonstrated in the Transfer Applications, substantial additional capacity soon will be available from the Commission.<sup>111</sup> Moreover, the FCC recently announced that most of the spectrum held by

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<sup>107</sup> Thrifty Petition at 12.

<sup>108</sup> In this regard, some resellers and MVNOs already are adding more new subscribers than Sprint in certain areas. David Hayes and Suzanne King, *Sprint Writes Off \$1.2 Billion Investment in Fixed Wireless Internet Service*, THE KANSAS CITY STAR, Oct. 24, 2003 ("Sprint's PCS wireless division reported adding 496,000 customers during the [third quarter of 2003], but reseller Virgin Mobile USA accounted for almost 59 percent of the additional customers."); Dan Meyer, *Sprint PCS 4Q beats street*, RCR WIRELESS NEWS, Feb. 10, 2003, at 15 (noting that Sprint PCS signed up 250,000 net customers during the final three months of 2002, but resellers using Sprint's network, dominated by mobile virtual network operator Virgin Mobile USA L.L.C., added 264,000 net customers during the same quarter).

<sup>109</sup> See Press Release, TracFone Wireless, *TracFone Wireless Reaches 3 Million Customers and Lowers Airtime Rates for 2004*, Feb. 3, 2004, at <<http://www.tracfone.com/about.jsp?task=about&currentView=3million>>; Press Release, Virgin Mobile, *Virgin Mobile USA Passes 1.75 Million Subscriber Mark*, Mar. 15, 2004, at <<http://www.virginmobileusa.com/corporate/media.do#media12>> (stating that Virgin Mobile has more than 1.75 million subscribers, and "has now claimed a spot in the 'Top 10' list of U.S. wireless providers").

<sup>110</sup> See IV AREEDA, HOVENKAMP & SOLOW, ANTITRUST LAW, ¶ 941e at 180 (1998).

<sup>111</sup> See Public Interest Statement at 39.

NextWave – which controls spectrum in 95 BTAs (including licenses covering each of the 10 largest MSAs) – will be returned to the FCC shortly and re-auctioned.<sup>112</sup>

**C. The Transaction Will Not Permit the Merged Company’s Parents To Use Their ILEC Affiliates to Foreclose Competition From Existing Wireless Providers**

Thrifty and CFA/CU worry that Cingular’s parents will use their ILEC affiliates to foreclose wireless competition. But the Commission and Congress long ago decided that wireless providers could be owned by wireline companies, and that obviously has not kept the wireless industry from growing and flourishing. Indeed, Section 601(d) of the Telecommunications Act of 1996 specifically provides that ILECs may sell or bundle wireless service.<sup>113</sup> To the degree that the ILEC affiliates of Cingular’s parents might have any incentive to try to favor their wireless affiliate or disadvantage wireless competitors of their affiliates, they already would have had that same incentive prior to the proposed merger. The continuing success of Cingular’s competitors is proof that the ILECs neither can nor would successfully undercut CMRS competition.

It is particularly noteworthy that *none* of Cingular’s wireless competitors, including those without any affiliation with an ILEC (such as Nextel and T-Mobile), has opposed this transaction.

- USCC, the only wireless carrier to file comments, states that “it believes the Cingular-AT&T Wireless Merger will serve the public interest.”<sup>114</sup>
- Nextel CEO Timothy Donahue told the Dallas Morning news that “the deal would benefit the industry by creating a company that had more wireless spectrum, better

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<sup>112</sup> See *Nextwave News Release*.

<sup>113</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(d), 110 Stat. 56 (1996).

<sup>114</sup> USCC Comments at 1.

coverage and a larger reach” and that “[a]s a result . . . you will have a better network . . . .”<sup>115</sup>

- Verizon Wireless CEO Denny Strigl said, “I don't think consolidation [from the acquisition] has any impact on the industry at all.’ . . . ‘Choice remains huge for the consumer.”<sup>116</sup>
- Deutsche Telekom CEO Kai-Uwe Ricke told Dow Jones that T-Mobile USA’s chances of exceeding its growth forecast this year have actually increased due to the planned Cingular/AWS merger.<sup>117</sup>
- Virgin Mobile CEO Dan Schulman told the *Wall Street Journal*, that even after the merger “competition . . . will still be fierce as we look forward.”<sup>118</sup>

Thus, Thrifty’s and CFA/CU’s supposed fear of ILEC foreclosure of Cingular’s competitors is misplaced.

### **1. Evidence from the Market Shows That the ILEC Affiliates of Cingular’s Parents Have Not Forestalled Entry by Competing Wireless Carriers**

There is no evidence in the record suggesting that wireline subsidiaries of Cingular’s parents have actually tried to foreclose wireless carriers that compete with Cingular. Indeed, the market realities demonstrate that there has been no such foreclosure. If affiliates of Cingular’s parents really were able to foreclose competing wireless firms, one would expect Cingular to have a dominant and growing share in those ILEC regions. But the data show quite the opposite – Cingular has lost share, while unaffiliated carriers have grown quickly. According to Professor

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<sup>115</sup> Vikas Bajaj, *Wireless Phone Leaders Say They’re Not Worried about Coming Merger*, DALLAS MORNING NEWS, Mar. 25, 2004, at 1D (internal citation omitted).

<sup>116</sup> Erin Joyce, *U.S. Carriers: 3G Has Caught Up Here*, INTERNETNEWS.COM, Mar. 24, 2004, at <<http://internetnews.com/wireless/article.php/3330771>>; see also Marie Lingblom, *Top Carrier Executives Share Stage at CTIA*, CHANNELWEB, Mar. 24, 2004, at <<http://www.channelweb.com/sections/Newscenters/Article.asp?newscenterID=60&ArticleID=48880>> (quoting Strigl as stating that “[h]aving one fewer competitor is nothing.”).

<sup>117</sup> Taska Manzaroli, *Deutsche Telekom CEO: No Need for U.S. Mobile Partner*, DOW JONES INT’L NEWS, Mar. 10, 2004.

<sup>118</sup> Jesse Drucker, *Busy Circuits: Big-Name Mergers Won’t Ease Crowding in Cellphone Industry*, WALL ST. J., Feb. 13, 2004, at A1.

Gilbert's analysis of the flow share statistics, there are a number of cities within the SBC/BellSouth affiliates' ILEC territory where Cingular has a very low share of net new subscribers.<sup>119</sup> Indeed, of the 26 in-region cities where flow share information for March 2004 is available, Cingular's share of net new subscribers is 10% or less in 12 of the cities, and in three cities (Sacramento, Memphis, and Miami), Cingular has a negative flow share, *i.e.* its total number of subscribers declined.<sup>120</sup> These facts are inconsistent with the wireline affiliates of SBC and BellSouth having the ability to discriminate systematically against Cingular's rivals.

## **2. This Merger Is Not the Appropriate Forum to Address General Issues of Special Access Provisioning**

Although Thrifty claims that ILEC affiliates of Cingular's parents have an "incentive" to discriminate in the provision of special access services against wireless firms that compete with Cingular, Thrifty does not even discuss whether they have the *ability* to engage in such discrimination, nor does Thrifty attempt to show how this merger changes the existing market.

In fact, a plethora of statutory provisions prevent discriminatory conduct:

- ILECs remain subject to the foundational nondiscrimination requirements of Sections 201 and 202 of the Communications Act.<sup>121</sup>
- Section 203(c) bars ILECs from deviating from their tariffed prices for special access services.<sup>122</sup>
- Sections 251(c)(5) and 251(g)<sup>123</sup> and the Commission's rules imposing network disclosure and equal access requirements<sup>124</sup> obligate ILECs to provide special access on a nondiscriminatory basis.

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<sup>119</sup> Gilbert Supplement at 13.

<sup>120</sup> *Id.* The other nine cities are Birmingham, Hartford, Los Angeles, Houston, Milwaukee, Detroit, Atlanta, San Francisco and West Palm Beach. In these 12 cities, the average of the highest share of net new subscribers was 38.1%, whereas Cingular's average is 2.6% for these cities. *Id.* at 13-14.

<sup>121</sup> 47 U.S.C. §§ 201-02.

<sup>122</sup> *Id.* § 203(c).

- Sections 272(e)(1) and (e)(3) impose parity of performance and access charge obligations on the provision of special access services by Regional Bell Operating Companies (“BOCs”).<sup>125</sup>
- In addition, various state statutes include similar prohibitions on discrimination.<sup>126</sup>

Taken together, these provisions make it illegal for ILECs to advantage Cingular or disadvantage its competitors in the supply of special access services. Moreover, wireless use of special access service is only a small part of its overall provisioning, and such users are sophisticated purchasers.

Any asserted concern that these protections are insufficient to deter discrimination or inadequate special access provisioning is currently being addressed in the Commission’s pending proceeding on special access performance metrics.<sup>127</sup> As discussed below, the Commission’s precedents hold that it is inappropriate to deal with those concerns in a merger proceeding absent a merger-specific effect. As noted above, there is no such effect here.

### **3. The Merger Will Have No Adverse Effect on the Provision of Special Access Services to Unaffiliated Wireless Carriers**

Even if the Commission chooses to address the special access issue in the context of this merger, it must conclude that Thrifty’s claims that this transaction will somehow expand the ability and incentives for ILEC affiliates of BellSouth and SBC to discriminate against

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<sup>123</sup> *Id.* §§ 251(c)(5), (g); *see Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, Order on Remand*, 15 F.C.C.R. 385, 406 (1999) (subsequent history omitted) (stating that special access services are included within the broader category of exchange access services) (“*Advanced Capability Remand Order*”).

<sup>124</sup> 47 C.F.R. §§ 51.321(a), 51.325-51.335.

<sup>125</sup> 47 U.S.C. §§ 272(e)(1), (e)(3); *see Advanced Capability Remand Order*, 15 F.C.C.R. at 406.

<sup>126</sup> *Implementation of the Non-Accounting Safeguards, First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 21905, 22004 n.509 (1996) (subsequent history omitted) (“*Non-Accounting Safeguards Order*”).

<sup>127</sup> *Performance Measurements & Standards for Interstate Special Access Servs., Notice of Proposed Rulemaking*, 16 F.C.C.R. 20896 (2001).

Cingular’s wireless competitors are both unsupported and unsupportable.<sup>128</sup> Tellingly, this allegation is not even discussed by Thrifty’s consultant.

Thrifty’s claim that Cingular’s acquisition of AWS somehow increases the ability of ILEC affiliates of Cingular’s parents to discriminate is demonstrably wrong. As a threshold matter, AWS is not a competing provider of special access services and the merger therefore does not remove a rival for special access customers.

There is no serious argument that the merger creates any additional incentive for ILECs associated with Cingular’s parents to engage in such conduct. To the contrary, the wireline subsidiaries of Cingular’s parents will have no greater incentive to discriminate in favor of an affiliated wireless carrier with a post-merger 16.3 percent flow share than they do to discriminate in favor of Cingular today, with its 6.8 percent flow share.<sup>129</sup> Absent a merger-specific effect, speculative concerns about discrimination should play no role in the Commission’s consideration of this transaction,<sup>130</sup> and are in conflict with previous Commission findings.<sup>131</sup>

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<sup>128</sup> Thrifty Petition at 17-18.

<sup>129</sup> See Gilbert Supplement at 11-12.

<sup>130</sup> See, e.g., *Assignment Applications of NextWave and Cingular Wireless LLC*, 19 F.C.C.R. 2570, 2579-80 (2004) (“*Cingular/NextWave Order*”); *Applications of Alaska Native Wireless, L.L.C., Order*, 18 F.C.C.R. 11640, 11644 (2003) (“*Alaska Native Wireless*”).

<sup>131</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, 17205 (2003) (“*Triennial Review Order*”), *rev’d on other grounds sub nom. USTA v. FCC*, 359 F.3d 554; see also Indus. Analysis & Tech. Div., FCC, Telecommunications Provider Locator at 4, Table 1 (Feb. 2004) (563 carriers provided competitive access services); 2002 UNE Fact Report at III-7 (there are at least 1800 CLEC fiber networks in the 150 largest MSAs, which contain 70 percent of the U.S. population; 91 of the top 100 are served by at least 3 CLEC fiber networks, 77 by at least 7, and 59 by at least 10); *id.* at III-8 (competitors accounted for between 28 and 39 percent of all special access revenues); ALTS, *The State of Local Competition 2003*, at 8 (Apr. 2003) (“[T]he CLECs that remain have steadily increased their customers and revenue.”); *cf. Triennial Review Order*, 18 F.C.C.R. at 17204 (discussing the use of third-party alternative transport).

#### 4. The Merger Will Not Harm Non-ILEC Providers of Special Access Service

Thrifty asserts that “the acquisition of AWS will eliminate a major non-ILEC purchaser of special access service,” which “will harm the ability of competitive wholesalers of access services to expand in the market.”<sup>132</sup> This assertion, too, is supported neither by economic theory nor the facts.<sup>133</sup> Vertical mergers rarely raise concern and are typically viewed as being beneficial to the extent that they result in efficiencies.<sup>134</sup> Thrifty’s assertion assumes that AWS purchases enough special access services that the elimination of it as an independent purchaser will “harm the ability of competitive wholesalers of access services to expand in the market.”<sup>135</sup> In fact, however, special access purchases by AWS represent only approximately 3% of the \$12.84 billion of total RBOC carrier-to-carrier special access revenue in the country and only about 30% of these purchases were from SBC or BellSouth’s service area.<sup>136</sup>

Even assuming that post-merger Cingular were to obtain all of its special access service from its parents’ affiliates in areas where they operate as ILECs, AWS’s demand for special access services is such a small percentage of the overall purchases for such services that

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<sup>132</sup> Thrifty Petition at 17.

<sup>133</sup> Thrifty’s assertion also masks another flaw in its theory of harm. Contrary to its suggestion, the merger will not result in the elimination of a currently meaningful source of revenues for these non-ILEC suppliers of access services because AWS today purchases the vast majority of its special access services from ILECs rather than the “competitive wholesalers” that Thrifty suggests will be foreclosed.

<sup>134</sup> See, e.g., ROBERT BORK, *THE ANTITRUST PARADOX* 226, 237 (1978) (“Vertical mergers are means of creating efficiency, not of injuring competition.”); Herbert Hovenkamp, *Merger Actions for Damages*, 35 *HASTINGS L.REV.* 937, 961 (1984) (of all mergers, vertical acquisitions are the most likely to produce efficiencies and the least likely to enhance the market power of the merging firms).

<sup>135</sup> Thrifty Petition at 17.

<sup>136</sup> See Gilbert Supplement at 16; see also FCC, *Statistics of Communications Common Carriers 2002-2003*, Table 2.8 at 46, at <[http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/SOCC/02socc.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/SOCC/02socc.pdf)>.

foreclosure of access to AWS would not, in itself, deter competition by other providers of such access services. Thrifty's assertion of harm to "consumers, competitors, and competition" arising from AWS's purchases of special access service<sup>137</sup> is therefore unwarranted.

**D. There Is No Basis for Concern That This Transaction Will Facilitate Anticompetitive Wireless/Wireline Bundling or Entrench the Positions of ILECs Affiliated with Cingular's Parents**

CFA/CU and Thrifty express fear that bundling of Cingular's wireless service with wireline service offered by ILEC affiliates of Cingular's parents will somehow harm either wireless or wireline competition.<sup>138</sup> The Objecting Parties offer no coherent theory of why bundling is or could be bad for consumers or how Cingular's acquisition of AWS would even facilitate bundling.

**1. This Merger Will Not Facilitate Bundling That Will Foreclose Wireless Competition.**

Both Congress and the Commission have recognized that bundling is procompetitive.<sup>139</sup> Thrifty nevertheless complains that this acquisition will "present SBC and BellSouth with unprecedented opportunities to bundle wireless, wireline, broadband, long distance and other

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<sup>137</sup> Thrifty Petition at 17.

<sup>138</sup> See CFA/CU Petition at 12-13; Thrifty Petition at 18-20.

<sup>139</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(d), 110 Stat. 56 (1996); *1998 Biennial Regulatory Review – Review of Customer Premises Equipment & Enhanced Servs. Unbundling Rules, Report and Order*, 16 F.C.C.R. 7418, 7443 (2001) (finding that "the benefits of bundling come from allowing consumers to purchase an all-inclusive bundle at a single price" that consists of a variety of telecommunications services, enhanced services and CPE); *id.* at 7426 ("[A]llowing all carriers to bundle products and services is generally procompetitive and beneficial to consumers. Bundling encourages competition by giving carriers flexibility both to differentiate themselves from their competitors and to target segments of the consumer market with product offerings designed to meet the needs of individual customers."); Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers, *Range Effects: The United States Perspective*, at 3 (Oct. 2001) (noting that "efficient bundling ... voluntary bundling through discounts or otherwise ... benefits customers by offering them the improved products, lower prices and lower transactions costs they desire").

services.”<sup>140</sup> But, as Thrifty acknowledges on the very next page, ILEC affiliates of Cingular’s parents *already* have the opportunity to offer such bundles. Thus, the merger will not impact such ability. Bundling concerns thus may not form a basis for blocking the transaction because this transaction will have no impact on the ability of wireline subsidiaries of Cingular’s parents to bundle. The Commission made precisely this point in the AT&T/MediaOne transaction:

If we were to accept *arguendo* these commenters’ contention that the Applicants (and other cable operators) enjoy a monopoly in their local MVPD markets, then, even without the merger, AT&T and MediaOne each already would have the ability to require buyers of MVPD service to buy telephony and Internet services in their respective markets. Commenters have not alleged that either AT&T or MediaOne have engaged in such practices. As the Commission recognized in the *AT&T-TCI Order*, the merger is not the cause of this alleged competitive threat, and the merger license transfer proceeding thus is not the appropriate forum to address this issue.<sup>141</sup>

Regardless, there is no basis in fact or economic theory for concern that wireline/wireless bundling will foreclose wireless competition. For bundling to be a potential cause for concern, the number of customers that would pick a bundled offering must be so large that the remaining demand for wireless service would be inadequate to support Cingular’s competitors.<sup>142</sup> But fewer than 5% of Cingular’s subscribers have selected Cingular as part of bundled wireline/wireless plans.<sup>143</sup> These bundled pricing plans offer discounts on wireless service of 3 to 17%, discounts that are justified by economies of scope from joint provision of

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<sup>140</sup> Thrifty Petition at 18.

<sup>141</sup> *Applications of MediaOne Group, Inc. & AT&T Corp., Memorandum Opinion and Order*, 15 F.C.C.R. 9816, 9878-79 (2000) (“*MediaOne Group Order*”).

<sup>142</sup> *See* Gilbert Supplement at 9. The claims of high demand for bundled offerings (*see* Thrifty Petition at 6) are based not on the take rate of bundles including wireless service, but of bundled wireline services such as voicemail or caller ID.

<sup>143</sup> *Id.* at 9.

telecommunications services.<sup>144</sup> Even if Cingular’s competitors were somehow unable to compete for Cingular’s customers that buy bundled service offerings – and this is plainly not the case – a bundle that forecloses Cingular’s competitors from less than 1% of the total market (the 5% of customers that take the bundle multiplied by Cingular’s 15% share of subscribers)<sup>145</sup> could not possibly create competitive concern. No wireless carrier is going to go out of business because it is able to compete to serve only 99 percent of wireless subscribers.

Thrifty suggests that Sprint, Nextel, and T-Mobile are at a competitive disadvantage because they cannot (or have limited ability to) bundle their wireless service with wireline service.<sup>146</sup> But both the low take rate on bundled offerings and the success of Cingular’s competitors show that competing wireless carriers do not need a relationship with an ILEC to be able to compete effectively. Cingular’s subscriber share has dropped by 21 percent over the last five years notwithstanding its ILEC affiliation. Indeed, it is the firms not affiliated with BOCs that have seen their shares grow rapidly over the last five years, with Sprint<sup>147</sup> up 42 percent, Nextel’s subscriber share up 60 percent, and T-Mobile’s subscriber share up a whopping 167 percent over the last five years.<sup>148</sup> If an affiliation with an ILEC were really so essential to the competitive viability of wireless companies, one would not expect Cingular’s share to have decreased over the last five years while the share of unaffiliated T-Mobile skyrocketed over the same period.

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<sup>144</sup> *Id.* at 9-10.

<sup>145</sup> *See* Gilbert Declaration at 5, Table 1.

<sup>146</sup> Thrifty Petition at 19.

<sup>147</sup> Although Sprint is an ILEC in some places, its territory is sufficiently small relative to its nationwide CMRS footprint that it seems more appropriate to classify it in the “not affiliated with ILECs” group.

<sup>148</sup> *See* Gilbert Declaration at 5.

Thrifty claims that somehow the *Telstra* case buttresses its concern that ILEC affiliates of Cingular's parents would engage in anticompetitive bundling.<sup>149</sup> But, as Professor Gilbert discusses in his Supplemental Declaration, the *Telstra* case “bears no relation to this merger. The alleged conduct involves different services (wholesale and retail broadband access), in a different country (Australia), and does not involve bundling. “The example has nothing to do with the bundling of wireline and wireless service in the United States and says nothing about the potential for exclusion of competitors by bundling wireless and wireline services.”<sup>150</sup>

**2. This Merger Will Not Facilitate Bundling That Will Foreclose Wireline Competition.**

Thrifty and CFA/CU also express concern that wireline competition will somehow be harmed because CLECs will be unable to bundle wireless services with their offerings. This claim is unsupported speculation that ignores the simple fact that a CLEC can purchase wireless service as a wholesale customer and resell that service in a bundle with wireline service. The Chairman and CEO of AT&T, one of the largest CLECs, recently stated: “[T]here will be six large wireless providers in the U.S. . . . [I]t’s an abundance, and . . . we like the idea of being able to go to the marketplace and say, hey, if we buy billions of minutes what can we buy them for.”<sup>151</sup>

CFA/CU claims Cingular could bundle wireless with voice, data, and video from the ILEC affiliates of its parents, and that this would somehow “substantially reduce competitive

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<sup>149</sup> See deltaVectors Report at 7-9 (citing Australian Competition and Consumer Commission, *Competition Notice Issued Pursuant to Subsection 151AKA(2)*, Mar. 19, 2004, at <<http://www.accc.gov.au/content/index.phtml/itemID/490789/fromItemId/459302>> (“*Telstra*”).

<sup>150</sup> Gilbert Supplement at 9.

<sup>151</sup> *AT&T's Dorman on Industry Outlook*, BLOOMBERG, Feb. 25, 2004.

pressures” that its parents’ ILECs face from CLECs.<sup>152</sup> CFA/CU do not describe how this could be the case, and the suggestion is implausible. Only through tying — forcing customers who wish to buy Cingular wireless service also to buy service from the ILEC affiliates of Cingular’s parents — could competitors be foreclosed.<sup>153</sup> As the Commission has held:

[E]ven if the merged firm decided to condition the purchase of one service on the purchase of another, it could inflict competitive harm only if it had sufficient market power in the provision of one of the bundled services. So long as the merged firm lacks such market power, consumers will not be harmed, because they have the ability to choose from a number of alternative providers for each of these services.<sup>154</sup>

Cingular cannot control its customers in this way before the merger, and it will have no ability to force its customers to buy wireline service from the ILEC affiliates of Cingular’s parents after the merger either. If Cingular tried to require its customers to buy wireline service from its parents’ affiliated ILECs, wireless customers who wanted to buy wireline service from a CLEC would simply choose wireless service from Verizon, Sprint, T-Mobile, Nextel, or one of the many regional carriers (or even from AT&T acting as a MVNO after this acquisition closes). Cingular has no ability to control its customers to the benefit of its parents’ ILEC affiliates.

Thrifty’s consultant suggests that bundling can create a barrier to entry to carriers that are unable to offer all components of the bundled package.<sup>155</sup> This concern is implausible given the

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<sup>152</sup> CFA/CU Petition at 13.

<sup>153</sup> *Cf. Bundling of Cellular Premises Equipment and Cellular Service, Report and Order*, 7 F.C.C.R. 4028, 4029-31 (1992) (finding that it is in the public interest to allow cellular service and CPE to be offered on a bundled basis, provided that the cellular service also is available separately on a nondiscriminatory basis).

<sup>154</sup> *MediaOne Group Order*, 15 F.C.C.R. at 9878.

<sup>155</sup> *deltaVectors Report* at 6. Thrifty and deltaVector, in a transparent effort to create a “bundle” that artificially raises the entry bar to smaller competitors, devise a digital communications service (“DCS”) package that could be offered by an ILEC that includes various telecommunications services and “an alternative to CATV video services such as satellite TV.”

success of CLECs that have rapidly taken customers away from ILECs without offering a bundle that includes wireless services. Even if including wireless in a bundle becomes important, however, there will be a multitude of bundling alternatives available to these CLECs.

This transaction does not meaningfully limit the bundling partners available to CLECs. No CLEC has complained in this proceeding about a lack of wireless bundling partners, and wireline firms have had no problem to date finding bundling partners other than Cingular and AWS. For example, Qwest today offers packages with a \$5 monthly discount on selected Qwest Choice™ Wireless calling plans when combined with Qwest local service on one bill (Qwest's wireless service uses Sprint facilities).<sup>156</sup>

The loss of AWS as a potential bundling partner cannot harm CLEC competition because CLECs have not, to date, seen much need to utilize AWS as a bundling partner. Only two CLECs – AT&T and McLeod USA – resell AWS service.<sup>157</sup> In fact, although AT&T has had the right to offer a bundle with AWS since the spin-off of its wireless business, no plans for such a bundle were announced until May 2003, and such bundled offerings have had only modest success.<sup>158</sup>

Finally, CLECs will remain able to offer bundles of wireline and wireless service by reselling Cingular's own wireless service. Cingular is serious about winning business with the

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deltaVectors Report at 6 n.7. There is no explanation as to why this bundle is harmful or not beneficial to consumers, even when the bundle includes CATV or an alternative. Such artificial efforts to distort the economic benefits of this merger should be rejected.

<sup>156</sup> See Press Release, Qwest Communications, *Qwest Communications Introduces Nationwide Wireless Calling*, Mar. 1, 2004, at <[www.qwest.com/about/media/pressroom/1%2C1720%2C1457\\_current%2C00.html](http://www.qwest.com/about/media/pressroom/1%2C1720%2C1457_current%2C00.html)>.

<sup>157</sup> See Ryan Naraine, *AT&T to Offer Wireless Bundle*, INTERNETNEWS.COM, May 27, 2003, at <<http://www.internetnews.com/wireless/article.php/2212581>> (“*AT&T Offers Wireless Bundle*”); *McLeodUSA, AT&T Wireless Strike Wholesale Deal*, WIRELESS WEEK, Sept. 15, 2003, at <<http://www.wirelessweek.com/article/CA322423?spacedesc=Departments&stt=001>>.

<sup>158</sup> See *AT&T Offers Wireless Bundle*.

growing number of MVNOs like Virgin Mobile and Disney and must offer attractive prices in order to win that business. CLECs are the beneficiary of the intense competition for MVNO business, as they will be able to bundle with these MVNOs in addition to Cingular and other licensed CMRS carriers.

**E. The Merged Company’s Incentives to Enter into Roaming Agreements Will Not Be Diminished**

Contrary to the allegations of a few commenters, the merger will not create a monopoly that will permit the combined company to refuse to enter into roaming agreements or to charge excessive roaming rates.<sup>159</sup> Cingular generally enters into nationwide roaming agreements and does not set roaming rates for smaller geographic areas. Pricing for these nationwide roaming agreements must remain competitive with the rates available from other carriers.<sup>160</sup> Thus, Cingular would have no incentive to leverage its spectrum holdings in isolated areas into higher nationwide roaming rates, because this would merely cause Cingular to lose revenue as smaller carriers shifted their roaming traffic to other nationwide or regional wireless carriers.

Even assuming, *arguendo*, that Cingular did set roaming rates on a local basis, it would not have any incentive to seek higher rates or eliminate the availability of roaming agreements:

- Cingular’s customers demand wireless service when they are outside the area covered by Cingular’s network. The only way Cingular can do this is through reciprocal roaming agreements.
- Roaming rates are reciprocal (*i.e.* under any given roaming agreement, Cingular pays the same price for its customers to roam on another carrier’s network as that carrier pays for its customers to roam on Cingular’s network). Because Cingular

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<sup>159</sup> See Newcomb Comment at 1-2 (noting that “[u]nless the broadband PCS licenses are so well developed as to provide near 100% coverage, control of both cellular licenses in a given market grants a monopoly on roaming”); Thrifty Petition at 21-25; CFA/CU Petition at 2-9.

<sup>160</sup> The Commission has a pending notice of proposed rulemaking that could require PCS carriers to build out their networks further, which would increase the number of firms competing to offer roaming contracts in any given area. *Facilitating the Provision of Spectrum-Based Services to Rural Areas, Notice of Proposed Rulemaking*, 18 F.C.C.R. 20802, 20820-23 (2003).

is a net payor under virtually all of its roaming agreements (*i.e.*, Cingular subscribers roam more on the other carrier's network than the other carrier's subscribers roam on Cingular's network), lower roaming rates reduce Cingular's total roaming costs, while higher roaming rates increase Cingular's total roaming costs.

- The merger will not reverse Cingular's powerful incentives to seek low roaming rates. If anything, the merger will strengthen those incentives because the merged company will have more subscribers roaming on other carriers' networks, and hence greater net costs for roaming.

Grant of the Transfer Applications should not be delayed based on purely speculative allegations.<sup>161</sup> If a carrier believes it is being charged unreasonable roaming rates by the combined company, that carrier can seek relief by filing a Section 208 complaint with the FCC.<sup>162</sup> That process is the appropriate vehicle for resolving existing or *potential* roaming disputes.

Finally, Thrifty's Petition totally misconceives the Applicants' position when it argues that problems encountered by customers roaming on the networks of other carriers can be "overcome contractually rather than through acquisition."<sup>163</sup> Roaming agreements are vital to the ability of a CMRS carrier to offer its subscribers service when traveling in areas not fully serviced by the carrier. However, while roaming, the subscriber is usually not able to utilize all the features available on the carrier's network, such as short message service or voicemail

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<sup>161</sup> See, e.g., *Gencom*, 832 F.2d at 181 n.11.

<sup>162</sup> *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Third Report and Order and Memorandum Opinion and Order on Reconsideration*, 15 F.C.C.R. 15975, 15982 (2000) ("Carriers should be on notice that, pursuant to Section 208, unjust or unreasonable behavior in the face of a request for manual roaming will swiftly be addressed by the Commission, and appropriate enforcement action taken."); *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Report and Order and Third Notice of Proposed Rulemaking*, 11 F.C.C.R. 9462, 9469 (1996); see also US Cellular Comment at 4 (noting that the FCC's anti-discrimination and formal complaint rules coupled with a "limited requirement to conduct good faith negotiations ... may be the best means" to protect carriers against unreasonable roaming charges).

<sup>163</sup> Thrifty Petition at 23.

notifications.<sup>164</sup> Moreover, the subscriber's carrier is unable to guarantee the *quality* of the user's experience when the user is roaming on another carrier's network. In all events, this claim, like most of Thrifty's other contentions, amounts to mere second guessing of Applicants' business decisions that is immaterial to this proceeding.

### **III. ALL REMAINING OBJECTIONS ARE BASELESS AND ARE NOT APPROPRIATELY CONSIDERED IN THIS PROCEEDING**

#### **A. The Commission Does Not Consider Private Contractual Matters or Mere Allegations of Non-FCC Misconduct as a Basis for Denying a Merger**

Mr. Giandomenico and the Agents urge the Commission to deny or condition the merger based on private contractual disputes and allegations of non-FCC misconduct. These arguments should be summarily dismissed because the Commission has long held that these matters are irrelevant in the context of a merger review.<sup>165</sup>

The letter filed by Mr. Giandomenico is merely an attempt to obtain money from Cingular and should be rejected.<sup>166</sup> Mr. Giandomenico voices two concerns: He wants to ensure that he continues to receive the same annual dividends for his minority shareholder interests in

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<sup>164</sup> See Hogg/Austin Declaration at 22 n.26; Public Interest Statement, Attachment 3, Declaration of Steve McGaw, at 3; Lefar Declaration at 9.

<sup>165</sup> *Applications of Centel Corporation and Sprint Corporation, Memorandum Opinion and Order*, 8 F.C.C.R. 1829, 1831 (CCB 1993) ("*Centel Order*") ("[T]he alleged violation of the partnership agreements amounts to a contractual dispute ... and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them." (citation omitted)); *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987); see *Character Policy Statement*, 102 F.C.C.2d, 1179, 1205 (1986) ("*Character Policy*"); *Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. 3252, 3252-53, 7 F.C.C.R. 6564, 6565-66 (1990, 1992) ("*Character Qualifications*") (relevant non-FCC misconduct typically includes only *adjudicated* felonies, or adjudications of fraudulent misrepresentations to governmental units, or adjudicated criminal misconduct involving false statements or dishonesty).

<sup>166</sup> See Giandomenico Comment at 1.

Melbourne Cellular Telephone Company (“Melbourne Cellular”), the licensee for KNKA617,<sup>167</sup> MSA 137, Melbourne-Titusville-Palm Bay, FL, as he does today with the company under AWS’ majority control. Second, he wants to have his interest purchased. These concerns are irrelevant to the Commission’s consideration of the merger; they are private matters beyond the Commission’s jurisdiction. Mr. Giandomenico’s rights, if any, as a minority shareholder in Melbourne Cellular to receive dividends<sup>168</sup> or to have his stock bought out depend on the corporate charter, bylaws, and any applicable shareholder agreements; they are a matter of state corporate and/or contract law. The Commission has properly made clear that it has no jurisdiction to consider such matters.<sup>169</sup>

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<sup>167</sup> Notably, the ultimate majority ownership of KNKA617 has changed three times – when McCaw acquired it in 1988, when AT&T acquired McCaw in 1994, and when AWS was spun off from AT&T in 2000. Mr. Giandomenico appears not to have challenged any of these previous changes in control. *See, e.g., Applications of Craig O. McCaw & AT&T*, 9 F.C.C.R. 5836, 5933-35, App. A (1994), *aff’d sub nom., SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (“*AT&T/McCaw*”).

<sup>168</sup> Mr. Giandomenico’s expressed concern about continuing to receive dividends because of the debt load associated with the merger misapprehends the facts. No shares in Melbourne Cellular will change hands as a result of the merger; the AWS subsidiary that currently holds the majority interest will continue to do so, but it will become a Cingular subsidiary. The merger is not being financed by Melbourne Cellular.

<sup>169</sup> *See Sonderling Broadcasting Co.*, 46 Rad. Reg. 2d (P&F) 889, 894 (1979) (“The Commission has consistently taken the position that it is not the proper forum for the resolution of private contractual disputes and that such matters are appropriately left to the courts or other forums which have the jurisdiction to resolve them.”); *John R. Kingsberry*, 71 F.C.C.2d 1173, 1174 (1979) (Commission refuses to consider minority shareholder’s allegation of breach of fiduciary duty); *Robert J. Kile*, 3 F.C.C.R. 1087, 1087 (CCB 1988) (“The Commission has held that minority owners cannot prevent the transfer of control of facilities on the basis that the transfer will cause them monetary harm. That is a matter for a private cause of action and generally does not fall within the jurisdiction of this Commission.”), *aff’d*, 5 F.C.C.R. 513 (1990); *Centel Order*, 8 F.C.C.R. at 1831 (“[T]he alleged violation of the partnership agreements amounts to a contractual dispute between Orwell and Centel, and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them.”); *Transfer Application of Cellular, Inc. and Pacific Telecom*, 8 F.C.C.R. 5091, 5092 (CCB 1993); *Jackson Cellular Telephone Co.*, 5 F.C.C.R. 96,

The Agents urge the Commission to deny the transaction based on pending lawsuits alleging contractual and non-FCC misconduct pending before other tribunals.<sup>170</sup> As stated above, however, it is well established that the Commission is not the proper forum for resolving private contractual disputes, and that the Commission will not defer action on transfer applications pending litigation of such disputes.<sup>171</sup> Moreover, “[t]he Commission’s Character Qualification Policy Statement *prohibits* licensing decisions ‘based on mere allegations of . . . non-FCC misconduct.’”<sup>172</sup> Thus, neither Mr. Giandomenico nor the Agents have established a basis upon which the Transfer Applications can be denied.

**B. CEASa’s Proposal Is Properly Addressed (If at All) in a Rulemaking, Not in the Context of a Merger**

The Commission should not condition the approval of this merger on issues unrelated to the specifics of this transaction. CEASa requests that merger approval be conditioned on giving authorized government agencies access to the GSM “cell broadcast” (“CB”) channel for transmission of certain emergency messages, essentially equivalent to the Commission’s emergency alert system.<sup>173</sup> If enabled, CB is a GSM feature that would send a mass notification to all handsets within a given cell; the notification would be displayed in a text format. CEASa

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97 (CCB 1990); *Rodney A. McDaniel*, 4 F.C.C.R. 1736 (1989); *see also Mid-Missouri Telephone Co., Inc.*, 14 F.C.C.R. 18613, 18615 (WTB 1999).

<sup>170</sup> Joint Petition at 1.

<sup>171</sup> *See, e.g., General Motors Corp. and Hughes Electronics Corp. (Transferors) and The News Corp. Ltd. (Transferee) for Authority To Transfer Control, Memorandum Opinion and Order*, 19 F.C.C.R. 473, 609 (2004); *Margaret Jackson*, 18 F.C.C.R. 26403, 26404-05 (2003); *Decatur Telecasting, Inc.*, 7 F.C.C.R. 8622, 8624 (1992). Thrifty’s attempts to raise pending litigation fail for this same reason. *See* Thrifty Petition at 27.

<sup>172</sup> *See Character Qualifications*, 5 F.C.C.R. at 3252 (citing *Character Policy*, 102 F.C.C.2d at 1204-05 (1986)) (emphasis added).

<sup>173</sup> *See* CEASa Petition. CEASa fails to note that its founder claims to have invented a technology that can be used to complete such cell broadcasts.

states that requiring Cingular to allow use of the CB channel “is consistent with, and an extension of” the FCC’s rules under Part 11.<sup>174</sup> However, as CEASa acknowledges, the Part 11 rules *currently do not* impose such requirements on wireless carriers.<sup>175</sup> There is no provision requiring common carriers to transmit EAS messages to end users. Any decision to impose an EAS participation requirement on CMRS operators should be made as part of a rulemaking where all common carriers are put on notice and have an opportunity to participate.<sup>176</sup> As the rules stand now, there is no basis for requiring Cingular in particular to participate in EAS through the CB channel as a condition of the merger.

Moreover, CEASa’s proposal would require action inconsistent with the Commission’s policy of technological neutrality<sup>177</sup> because (i) the proposal would require the participation of

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<sup>174</sup> *Id.* at 1 (emphasis added).

<sup>175</sup> Part 11 imposes Emergency Alert System (“EAS”) participation requirements on broadcasters, cable operators, and a limited number of other licensees. 47 C.F.R. § 11.11(a). Part 11 also provides an opt-in mechanism for satellite broadcasters and certain others, not including CMRS. *Id.* § 11.11(e).

<sup>176</sup> *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) (noting that a “rulemaking is generally a ‘better, fairer, and a more effective’ method of implementing a new industrywide policy than is the uneven application of conditions in isolated [adjudicatory] proceedings”); *Applications of S. New Eng. Telecomms. Corp. & SBC Communications Inc., Memorandum Opinion and Order*, 13 F.C.C.R. 21292, 21306 (1998) (declining to require SBC to provide support for calling party pays service since that issue should be addressed in a proceeding of general applicability); *In re Merger of MCI Communications Corp. & British Telecomms. plc., Memorandum Opinion and Order*, 12 F.C.C.R. 15351, 15472-73 (1997) (declining requests to impose structural separations between MCI and its affiliated foreign carrier because such structural separations were the subject of a then-pending rulemaking); *AT&T/McCaw*, 9 F.C.C.R. at 5877-78 (deferring consideration of equal access obligations for CMRS providers to a pending rulemaking); *id.* at 5887 (deferring to a pending rulemaking consideration of whether CMRS providers must provide, on reasonable and nondiscriminatory terms and conditions, the information that interexchange carriers need to bill their customers); *id.* at 5889 (stating that, instead of petitioning the Commission to impose regulatory parity on cellular resale through conditions on the merger, the BOCs should seek relief from the MFJ court or through “a rulemaking of general applicability”).

<sup>177</sup> 47 C.F.R. § 22.901(a) (“In providing cellular services, each cellular system may incorporate any technology that meets all applicable technical requirements in this part.”); *see*

only a single GSM carrier — a carrier that already faces unique spectrum constraints — and (ii) it would reduce Cingular’s network capacity. If Cingular were required to reconfigure its network to utilize a CB channel, it would reduce existing signaling channel resources assigned to normal voice and text services by 12.5% to 25%, significantly affecting its ability to compete with other wireless carriers.<sup>178</sup> Accordingly, CEASa’s proposal should be denied.

### **C. Alleged Acts of SBC Are Irrelevant to this Proceeding**

Two of the Objecting Parties – CFA/CU and Thrifty – wrongly claim that the Commission should deny the Transfer Applications based on the alleged actions of SBC, one of Cingular’s parents.<sup>179</sup> The alleged activities involving SBC are overstated, exaggerated and irrelevant to this proceeding. Given that none of the allegations raises any claims that specifically arise because of the merger, it would be inappropriate for the Commission to address them in this proceeding or deny the Transfer Applications based on such allegations.<sup>180</sup>

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*also Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Third Report and Order*, 14 F.C.C.R. 17388, 17397 (1999) (“[T]he Commission intended and expected that those rules would be technologically and competitively neutral.”).

<sup>178</sup> See Attachment C, Declaration of Kristin S. Rinne, Vice President – Technology and Product Realization, Cingular Wireless LLC, at 1. Moreover, even if Cingular utilized the CB channel, CEASa’s proposal would be unworkable until extensive work by vendors and GSM standardization groups is completed. *Id.* at 1-2.

<sup>179</sup> See, e.g., CFA/CU Petition at 4; Thrifty Petition at 25-29. While Thrifty questions SBC’s qualifications, it fails to disclose a lawsuit that has been filed against it by certain SBC affiliates involving allegations of criminal activity and fraud. See *Indiana Bell Tel. Co. Inc. v. Lacy Ward et al.*, No. IP 02-0170 C -- T/K (S.D. Ind. filed Jan. 28, 2002) (alleging that Thrifty’s long-distance calls were disguised as local calls to avoid long-distance termination charges).

<sup>180</sup> It is well established that the Commission “will not consider arguments in [merger] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora, including the [courts] and the Congress.” *AT&T/McCaw*, 9 F.C.C.R. at 5904. See, e.g., *Applications of VoiceStream Wireless Corp., Powertel, Inc., & Deutsche Telekom AG, et al., Memorandum Opinion and Order*, 16 F.C.C.R. 9779, 9831-34 (2001) (declining to impose rural service obligations beyond those contained the FCC’s rules); *WorldCom/MCI*, 13 F.C.C.R. at

As a threshold matter, the allegations regarding SBC are a matter of public record and are well-known to the Commission (some even predate the creation of Cingular).<sup>181</sup> Nevertheless, the Commission has repeatedly found that Cingular, BellSouth and SBC are well-qualified to hold FCC authorizations.<sup>182</sup> Only three months ago, in February 2004 – the same month that the merger agreement that is subject to the Transfer Applications was filed – the Commission noted that “the Bureau has found Cingular to be qualified to acquire licenses numerous times” in its order approving the acquisition by Cingular of licenses held by NextWave.<sup>183</sup> The two Objecting Parties did not raise their allegations concerning SBC in that proceeding, and did not seek reconsideration of the resulting decision reaffirming Cingular’s qualifications to be a licensee. There are no new allegations transpiring within the last three months that should cause a change in the Commission’s recent findings.<sup>184</sup>

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18115 (declining to adopt nondiscriminatory peering requirements to address interconnection difficulties).

<sup>181</sup> For example, 6 of the 19 FCC orders cited by Thrifty pre-date the FCC order approving the creation of Cingular. *See The Ameritech Telephone Operating Companies, Order to Show Cause*, 10 F.C.C.R. 5606 (1995) (“1995 Show Cause Order”); *Ameritech Corporation Apparent Liability for Forfeiture, Consent Decree*, 11 F.C.C.R. 15476 (1996); *The Ameritech Telephone Operating Companies, Consent Decree Order*, 11 F.C.C.R. 14831 (1996) (“Ameritech Consent Decree Order”); *SBC Communications Inc., Order*, 14 F.C.C.R. 12741 (1999); *AT&T Corporation, et al., Complainants, v. Ameritech Corporation, Defendant, et al., Complainants, v. US West Communications, Inc., Defendant, Memorandum Opinion and Order*, 13 F.C.C.R. 21438 (1998) (“AT&T Order”); *Ameritech Corporation Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 10 F.C.C.R. 10559 (1995).

<sup>182</sup> *See, e.g., Applications of SBC Communications Inc. and BellSouth Corporation, Memorandum Opinion and Order*, 15 F.C.C.R. 25459, 25466 (WTB/IB 2000); *Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in Possession, to Subsidiaries of Cingular Wireless LLC, Memorandum Opinion and Order*, 19 F.C.C.R. 2570, 2583 (2004) (“Cingular/NextWave Order”).

<sup>183</sup> *See Cingular/NextWave Order*, 19 F.C.C.R. at 2583.

<sup>184</sup> In any event, when determining a subsidiary’s qualifications to be an FCC licensee, the FCC typically deems not relevant allegations about the non-FCC-related activities of a parent. *See Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company*, 10

Moreover, many of the allegations raised by CFA/CU and Thrifty are stale, have been resolved, or are in the process of being resolved by the FCC or other adjudicatory bodies.<sup>185</sup> Others involve consent decrees, which the FCC has found to be irrelevant to assessing character qualifications,<sup>186</sup> or enforcement proceedings against Ameritech *before* the SBC/Ameritech merger, which have no relevance to this proceeding.<sup>187</sup> Thrifty also cites to two or more orders from a single proceeding, thus overstating the extent of SBC's involvement in such proceedings.<sup>188</sup>

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F.C.C.R. 13368, 13380 (1995) (holding that allegations of non-FCC-related misconduct by the parent corporation should not be imputed to the subsidiary because the petitioner failed to show that the companies shared common principals that actively participated in the day-to-day operations of the subsidiary). Even with respect to FCC-related allegations, the FCC at most will “consider” the actions of a corporate parent when evaluating the character qualifications of a subsidiary. *Character Policy*, 102 F.C.C.2d at 1218-19.

<sup>185</sup> For example, Thrifty cites to the FCC's imposition on SBC of a \$6 million forfeiture for violating paragraph 56 of the SBC/Ameritech Merger Order Conditions. See Thrifty Petition at 27. The FCC and SBC currently are litigating what is the proper interpretation of this provision before the United States Court of Appeals for the D.C. Circuit. See *SBC Communications Inc. v. FCC*, No. 03-1118 (D.C. Cir., filed Apr. 28, 2003). Similarly, *LinkLine Comm. Inc. v. SBC California Inc.*, No. 2:03CV05265 (C.D. Cal. filed July 24, 2003), is still in discovery and has resulted in no findings by the court on the plaintiff's allegations regarding SBC's DSL service, and SBC recently appealed the Illinois state court's decision in *GlobalCom Inc. v. Illinois Commerce Commission*, Nos. 1-02-3605, 1-03-0068, 2004 WL 487948 (Ill. Ct. App. Mar. 11, 2004). Thrifty also points to the complaint letter from Comptel/ASCENT Alliance to the Connecticut Attorney General as evidence of SBC's alleged anticompetitive behavior, but neither Connecticut nor any other state has initiated a formal investigation in response to the letters – much less come to a final resolution. In fact, the Texas Attorney General specifically declined to institute a formal investigation. See Letter from Mark Tobey, Asst. Attorney General, State of Texas, to H. Russell Frisby, CEO, CompTel/ASCENT Alliance, et. al. (Feb. 2, 2004).

<sup>186</sup> See *1995 Show Cause Order*, 10 F.C.C.R. 5606, *terminated by Ameritech Consent Decree Order*, 11 F.C.C.R. 14831. The Commission has held that “consent decrees will not be considered as adjudicated misconduct for the purposes of assessing an applicant's character.” See *Character Policy*, 102 F.C.C.2d at 1204-06.

<sup>187</sup> See, e.g., *AT&T Order*, 13 F.C.C.R. 21438; *1995 Show Cause Order*, 10 F.C.C.R. 5606.

<sup>188</sup> See *1995 Show Cause Order*, 10 F.C.C.R. 5606, *terminated by Ameritech Consent Decree Order*, 11 F.C.C.R. 14831; see also *SBC Communications Inc., Apparent Liability for Forfeiture, Order of Forfeiture*, 16 F.C.C.R. 10963 (2001) *liability reduced upon review by SBC*

Thrifty's statement that SBC has incurred "fines and settlements" of at least \$1.16 billion<sup>189</sup> is also inaccurate and misleading.<sup>190</sup> The vast majority of the monies included in this amount do *not* represent any fines, forfeitures, or penalties imposed on SBC.<sup>191</sup> Indeed, the

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*Communications Inc., Apparent Liability for Forfeiture, Order on Review*, 17 F.C.C.R. 4043 (2002).

<sup>189</sup> Thrifty Petition at 28-29. This figure is taken from a website maintained by Voices for Choices – a trade association and not a consumers' group. See *AT&T Communications of Ill., Inc. v. Ill. Bell Tel. Co. & Ameritech Corp.*, 349 F.3d 402, 408 (7th Cir. 2003) ("AT&T tried to give the suit a public-interest patina by making 'Voices for Choices' – which despite its name is a trade association rather than a consumers' group – the lead plaintiff. The appellate brief reveals that AT&T's lawyers also represent Voices for Choices, which presents no arguments on its own behalf.").

<sup>190</sup> Cingular will not attempt to refute each and every entry on the Voice for Choices chart. However, a review of the list reveals that just a few of the numerous inaccuracies grossly overstate the amount SBC has paid. For example, of the \$1.16 billion, almost half represents a combination of: (a) money never ordered by a state commission or paid by SBC, and (b) merger savings passed on to consumers. The vast majority of the remaining payments are not penalties, forfeitures, or fines. First, \$350 million relates to a California audit prepared by an outside consultant, but the California PUC never adopted the audit, it never ordered any refunds to consumers and SBC never made any payments as a result of this proceeding. *Interim Opinion Regarding Selected Issues Related to the Audit of SBC Pacific Bell Telephone Company*, R.01-09-001/I.01-09-002, No. 04-02-063 (Cal. Pub. Serv. Comm'n Feb. 26, 2004). Second, Voices for Choices includes an amount of \$224 million that was related to credits given to Illinois customers for "net merger savings" resulting from the SBC-Ameritech merger. The Illinois Commerce Commission approved the issuance of these credits in satisfaction of the requirement established in the Illinois SBC/Ameritech merger order that 50% of the net merger savings be shared with customers. *Interim Order*, Docket Nos. 98-0252/98-0335/00-0764 Consol. (Ill. Comm. Comm'n Aug. 13, 2002). In addition, Voices for Choices includes \$2.5 million in March, 2003 that is identified as "[a]greed to pay fine to end FCC investigation into compliance with reporting conditions set forth in SBC/Ameritech merger." In fact, SBC made a voluntary contribution to the U.S. Treasury in the amount of only \$250,000. See *SBC Communications Inc.*, 18 F.C.C.R. 4997, 4997 (EB 2003) ("*SBC Communications*").

<sup>191</sup> Many of these payments arise out of detailed and complex performance measurement conditions imposed on SBC as a result of the FCC's approval of the SBC/Ameritech merger, or by states as part of the Section 271 process, and did not result in denial of the Section 271 applications. In fact, the Commission has approved SBC's Section 271 application for California and Michigan and its joint application for Illinois, Indiana, Ohio and Wisconsin. Thrifty's related claim that SBC has a propensity to act anticompetitively based upon the DOJ's Evaluations of the Michigan, Illinois, Indiana, Ohio and Wisconsin Section 271 applications is simply a "red herring." While the DOJ concluded that "the Department is not in a position to support this application based on the current record," it "d[id] not . . . foreclose the possibility

Commission made clear that certain payments by SBC pursuant to the SBC/Ameritech merger order should not be interpreted as fines, forfeitures, or penalties nor an indication of any wrongdoing by SBC.<sup>192</sup> Any limited fines or forfeitures SBC may have been subject to in the past clearly do not disqualify SBC (let alone Cingular) from holding FCC authorizations, as the FCC has never so found. In fact, SBC takes its federal and state obligations quite seriously.<sup>193</sup>

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that the Commission may be able to satisfy itself regarding these questions prior to the conclusion of its review.” *Evaluation of the U.S. Department of Justice, SBC’s Section 271 Application for Michigan*, July 16, 2003, at 15, available at <<http://www.usdoj.gov/atr/public/comments/sec271/sbc/201251.pdf>>; *Evaluation of the U.S. Department of Justice, SBC’s Section 271 Application for Illinois/Indiana/Ohio/ Wisconsin*, Aug. 26, 2003, at 20, available at <<http://www.usdoj.gov/atr/public/comments/sec271/sbc/201250.pdf>>. In fact, the Commission did so and granted SBC’s applications to provide in-region long distance services in these states. See *Application by SBC Communications Inc., Michigan Bell Telephone Company and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order*, 18 F.C.C.R. 19024, 19027-28, 19086-87, 19101-103 & nn.281, 326, 388 (2003); *Joint Application for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, Memorandum Opinion and Order*, 18 F.C.C.R. 21543, 21548-49, 21623-24, 21626-27, 21634 (2003).

<sup>192</sup> See, e.g., *SBC/Ameritech Order* at 15046 (App. C, Attachment A) (making clear that payments for voluntary performance payments are neither fines nor penalties). Moreover, in a Consent Decree approved by the Commission on March 19, 2003 that disposed of alleged performance measurement reporting discrepancies, the Commission noted that with respect to the amounts paid the U.S. Treasury under the Carrier-to-Carrier Performance Plan (Including Performance Measurements) in the SBC/Ameritech Merger Conditions, “[s]uch payments are voluntary performance measurements payments and are not fines, penalties, or forfeitures.” See *SBC Communications*, 18 F.C.C.R. at 4997.

<sup>193</sup> For example, while CFA/CU state that SBC failed to effectively carry out its National-Local Initiative to compete for local telephone service outside of the SBC service regions, see CFA/CU Petition at 4, SBC has met the SBC/Ameritech merger conditions of entering at least 30 major markets as a facilities-based competitive provider of local services to business and residential customers. See, e.g., Letter from Caryn Moir, Vice President – Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 21, 2002); Letter from Caryn Moir, Vice President – Federal Regulatory, SBC, to William F. Caton, Secretary, Federal Communications Commission (Mar. 11, 2002); Letter from Caryn Moir, Vice President – Federal Regulatory, SBC, to William F. Caton, Secretary, Federal Communications Commission (Mar. 5, 2002); Letter from Caryn Moir, Vice President – Federal Regulatory, SBC, to William F. Caton, Secretary, Federal Communications Commission (Mar. 5, 2002) (one of two letters on this date); Letter from Sandra Wagner, Vice President – Federal Regulatory, SBC, to Magalie R. Salas, Secretary, Federal Communications Commission (Sept. 28, 2001); Letter from Sandra Wagner, Vice President – Federal Regulatory, SBC, to Magalie R. Salas, Secretary,

For these reasons, the allegations by CFA and Thrifty about SBC are overstated and exaggerated and they do not have any bearing on Cingular’s qualifications to hold control of the AWS authorizations. As the Commission has made clear, such non-merger-specific allegations should not be addressed in a merger proceeding.

#### **IV. THE OBJECTING PARTIES LACK STANDING**

In addition to their failure to raise any substantive grounds to delay or condition the merger, the Objecting Parties have failed to satisfy the threshold requirements of Section 309(d). A petitioner must show by affidavit or declaration that it is a “party in interest.”<sup>194</sup> None of the Objecting Parties has complied with this threshold requirement. This showing requires “specific allegations of fact sufficient to demonstrate that grant of the challenged assignment applications would cause the petitioner to suffer a direct injury” and “must establish that it is likely, as opposed to merely speculative, that the alleged injury would be prevented or redressed if these . . . applications are denied.”<sup>195</sup>

Thrifty provides no affidavit or declaration concerning how it will be affected by the merger – nor could it, given that it is not currently in any line of business at all, let alone one that

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Federal Communications Commission (Apr. 9, 2001); Letter from Sandra Wagner, Vice President – Federal Regulatory, SBC, to Magalie R. Salas, Secretary, Federal Communications Commission (Mar. 28, 2001); Letter from Marian Dyer, Vice President – Federal Regulatory, SBC, to Magalie R. Salas, Secretary, Federal Communications Commission (Oct. 12, 2000). Although CFA/CU also criticizes SBC for exiting the cable business soon after acquiring Ameritech, SBC was not required as a condition of the Ameritech merger to continue operating Ameritech New Media’s cable overbuild business, and the Commission has acknowledged as much. *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, Memorandum Opinion and Order*, 14 F.C.C.R. 14712, 14944 (1999).

<sup>194</sup> 47 U.S.C. § 309(d)(1).

<sup>195</sup> *Cingular/Nextwave Order*, 19 F.C.C.R. at 2580; *see also Alaska Native Wireless*, 18 F.C.C.R. 11640, 11644 (2003). Comments objecting to an application also do not meet this standard and constitute only an informal objection. *See Knox Broadcasting, Inc.*, 12 F.C.C.R. 3337, 3338 (1997); *see also Infinity Holdings Corp.*, 11 F.C.C.R. 17813, 17816 n.10 (1996); *National Broadcasting Co.*, 11 F.C.C.R. 10779, 10779 (1996).

would be affected by this transaction.<sup>196</sup> The Agents include affidavits, but those affidavits do not allege the type of direct consequences needed to confer standing to challenge the merger.<sup>197</sup>

CFA and CU supply no affidavits or declarations and do not even attempt to satisfy the additional requirements for demonstrating “associational standing.”<sup>198</sup> The remaining Objecting

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<sup>196</sup> By its own admission, Thrifty never was and is not currently a competitor in the CMRS industry – it is “a past, and potentially future, competitive local exchange carrier.” Thrifty Petition at 2. The Commission and the courts have found that a mere statement that one may someday be a potential competitor is not enough to confer standing. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977) (citing *Broadcasters, Inc. v. Morristown Broadcasting Corp.*, 185 F. Supp. 641 (D. N.J. 1960)); *220 MHz Non-Nationwide Licensees, Order*, 15 F.C.C.R. 4569, 4573 (CWD/WTB 2000) (refusing to grant standing to petitioners who were not Commission applicants or licensees); *Sevier Valley Broadcasting, Inc. (Assignor) and Mid-Utah Radio, Inc., (Assignee), Memorandum Opinion and Order*, 10 F.C.C.R. 9795, 9796 (1995) (finding that an applicant is only a “potential competitor” and therefore lacks standing). According to the D.C. Circuit: “a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so.” *Hecht*, 570 F.2d at 994 (emphasis in original) (citation omitted). Thrifty cannot make this showing. In 2000, Thrifty sold all of its assets to Grande Communications and currently exists only as a shell company. See Press Release, Grande Communications, *Grande Communications Acquires Thrifty Call*, July 7, 2000, at <[http://www.grandecom.com/About/pressroom\\_release.jsp?PR\\_ID=\\_PR195](http://www.grandecom.com/About/pressroom_release.jsp?PR_ID=_PR195)>; see also Ron Orol, *Consumer Groups Pan Telecom Deal*, DAILY DEAL, May 5, 2004 (calling Thrifty Call a “defunct Bell company rival”). A shell company with no assets simply is not prepared to be a competitor in the market, and therefore should be denied standing.

<sup>197</sup> Most of the individual Agents claim only that if the merger is approved, they will “face a bigger opponent” in their lawsuits over conduct completely unrelated to the merger. As noted above, Commission precedent makes these claims non-cognizable. *Centel Order*, 8 F.C.C.R. at 1831 (“[T]he alleged violation of the partnership agreements amounts to a contractual dispute . . . and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them.” (citation omitted)); see also *Listeners’ Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987). Contrary to Agents’ claim, Cingular was not required to report the pending litigation in response to Items 76 and 77 of the FCC Form 603. Items 76 and 77 are limited to monopolization claims, which are absent from the pending litigation. The Agents also fail to inform the Commission that many of the claims referenced in the petition have already been dismissed.

<sup>198</sup> *Friends of the Earth, Inc.*, 18 F.C.C.R. 23622, 23623 (2003) (citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)). Associational standing requires an organization to supply affidavits from one or more individual members demonstrating that such members will in fact be adversely affected by grant of the application, and the organization

Parties supply no affidavits or declarations and do not claim to have standing as petitioners to deny the Transfer Applications.

### CONCLUSION

For the foregoing reasons, the filings made in opposition to the merger should be dismissed or denied. At most, these filings should be treated as informal comments. Nevertheless, even if the filings are considered, they fail to justify a denial of the Transfer Applications. For the foregoing reasons, the Transfer Applications and waiver requests should be granted promptly.

Respectfully submitted,

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must be qualified to represent the interests of such members. *See United States Telecommunications Ass'n v. FCC*, 359 F.3d 554, 593-94 (D.C. Cir. 2004) (citing *Hunt*, 432 U.S. 344-45; *Sierra Club v. EPA*, 292 F.3d 895, 899-901 (D.C. Cir. 2002); *Fund Democracy, LLC v. SEC*, 278 F.3d 21, 25-26 (D.C. Cir. 2002); *American Legal Foundation v. FCC*, 808 F.2d 84, 89-90 (D.C. Cir. 1987)).

**ATTACHMENT A**

**ATTACHMENT A -- RSA COMPETITION CHART**

***Assessment of Post-Merger Competitive Conditions in the 11 Cellular RSA Overlap Areas<sup>1</sup>***

<b>CMA</b>	<b>CMA Name</b>	<b>Overlap County</b>	<b>POPs in County</b>	<b>People per sq. mi. in County</b>	<b>County now part of Metropolitan Statistical Area?</b>	<b>County now part of Micropolitan Statistical Area?</b>	<b>Licensed Competitors in County Post Merger</b> <i>[competitors providing service denoted in bold]</i>	<b>Other Competitors (e.g., Resellers, MVNOs) Where 3 or Fewer Licensed Competitors Providing Service</b>	<b>BTA</b>	<b>BTA Name</b>
357	CT 1 - Litchfield	Litchfield	182,193	198.1	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	318	New Haven-Waterbury-Meriden, CT
360	FL 1 - Collier	Hendry <i>[overlap in NE portion only due to partitioning]</i>	36,210	31.4	No	Clewiston	<b>ALLTEL*</b> <b>Cingular</b> GWI PCS <b>Nextel</b> <b>Sprint</b> T-Mobile <b>Verizon</b>	N/A	151	Ft. Meyers, FL
361	FL 2 - Glades	Glades <i>[overlap in SE portion only due to partitioning]</i>	10,576	13.7	No	No	<b>ALLTEL*</b> <b>Cingular</b> GWI PCS <b>Nextel</b> <b>Sprint</b> T-Mobile <b>Verizon</b>	N/A	151	Ft. Meyers, FL
361	FL 2 - Glades	Indian River	112,947	224.4	Vero Beach, FL MSA	No	<b>Cingular</b> GWI PCS <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	152	Ft. Pierce-Vero Beach-Stuart, FL

<sup>1</sup> See notes following table for explanation of headings and table content.

<b>CMA</b>	<b>CMA Name</b>	<b>Overlap County</b>	<b>POPs in County</b>	<b>People per sq. mi. in County</b>	<b>County now part of Metropolitan Statistical Area?</b>	<b>County now part of Micropolitan Statistical Area?</b>	<b>Licensed Competitors in County Post Merger</b> <i>[competitors providing service denoted in bold]</i>	<b>Other Competitors (e.g., Resellers, MVNOs) Where 3 or Fewer Licensed Competitors Providing Service</b>	<b>BTA</b>	<b>BTA Name</b>
361	FL 2 - Glades	Okeechobee	35,910	46.4	No	Okeechobee	<b>ALLTEL**</b> <b>Cingular</b> GWI PCS <b>Nextel</b> <b>Sprint</b> T-Mobile <b>Verizon</b>	N/A	469	West Palm Beach-Boca Raton, FL
363	FL 4 - Citrus	Lake	210,528	220.9	Orlando, FL MSA	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	336	Orlando, FL
364	FL 5 - Putnam	Flagler	49,832	102.7	No	Palm Coast	Am Wireless Group <b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b> X-10 Wireless	N/A	107	Daytona Beach, FL
364	FL 5 - Putnam	Putnam <i>[overlap in eastern portion only due to partitioning]</i>	70,423	97.6	No	Palatka	<b>ALLTEL</b> <b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	212	Jacksonville, FL
598	OK 3 - Grant	Kay	48,080	52.3	No	Ponca City	<b>Cingular</b> Dobson <b>Sprint</b> <b>T-Mobile</b> <b>US Cellular</b>	N/A	354	Ponca City, OK
598	OK 3 - Grant	Lincoln	32,080	33.5	Oklahoma City, OK MSA	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>US Cellular</b>	N/A	329	Oklahoma City, OK

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598	OK 3 - Grant	Logan	33,924	45.6	Oklahoma City, OK MSA	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>US Cellular</b>	N/A	329	Oklahoma City, OK
598	OK 3 - Grant	Noble	11,411	15.6	No	No	<b>Cingular</b> MBO (Sprocket) <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>US Cellular</b>	N/A	433	Stillwater, OK
598	OK 3 - Grant	Pawnee	16,612	29.2	Tulsa, OK MSA	No	<b>Cingular</b> <b>Cricket</b> NextWave <b>Sprint</b> <b>T-Mobile</b>	N/A	448	Tulsa, OK
598	OK 3 - Grant	Payne	68,190	99.4	No	Stillwater	<b>Cingular</b> <b>MBO (Sprocket)</b> <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>US Cellular</b>	N/A	433	Stillwater, OK
657	TX 6 - Jack	Cooke	36,363	41.6	No	Gainesville	<b>Cingular</b> <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	101	Dallas-Fort Worth, TX
657	TX 6 - Jack	Jack	8,763	9.6	No	No	<b>Cingular</b> Choice Wireless <b>Sprint</b> T-Mobile Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>Virgin Mobile</b>	473	Wichita Falls, TX
657	TX 6 - Jack	Montague	19,117	20.5	No	No	<b>Cingular</b> Choice Wireless <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	473	Wichita Falls, TX

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657	TX 6 - Jack	Palo Pinto	27,026	28.4	No	Mineral Wells	<b>Cingular</b> <b>Dobson***</b> <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	101	Dallas-Fort Worth, TX
662	TX 11 - Cherokee	Angelina	80,130	100.0	No	Lufkin	<b>Cingular</b> Cricket <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b> Von Donop Inlet PCS	N/A	265	Lufkin-Nacogdoches, TX
662	TX 11 - Cherokee	Nacogdoches	59,203	62.5	No	Nacogdoches	<b>Cingular</b> <b>Nextel</b> Cricket <b>Sprint</b> <b>T-Mobile</b> Verizon Von Donop Inlet PCS	N/A	265	Lufkin-Nacogdoches, TX
662	TX 11 - Cherokee	Sabine	10,469	21.4	No	No	<b>Cingular</b> Sprint T-Mobile Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Tracfone</b>	034	Beaumont-Port Arthur, TX
662	TX 11 - Cherokee	San Augustine	8,946	16.9	No	No	<b>Cingular</b> Cricket Sprint T-Mobile Verizon Von Donop Inlet PCS	<b>Globalstar</b> <b>Iridium</b> <b>Tracfone</b>	265	Lufkin-Nacogdoches, TX
662	TX 11 - Cherokee	Shelby	25,224	31.8	No	No	<b>Cingular</b> <b>Sprint</b> T-Mobile Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>Virgin Mobile</b>	419	Shreveport, LA
669	TX 18 - Edwards	Bandera	17,645	22.3	San Antonio, TX MSA	No	<b>Cingular</b> NextWave <b>Sprint</b> T-Mobile <b>Verizon</b>	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	401	San Antonio, TX

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669	TX 18 - Edwards	Dimmit	10,248	7.7	No	No	<b>Cingular</b> Cricket <b>Sprint</b> <b>T-Mobile</b> Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	121	Eagle Pass-Del Rio, TX
669	TX 18 - Edwards	Edwards	2,162	1.0	No	No	<b>Cingular</b> CT Cube Sprint T-Mobile Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Tracfone</b> <b>US Cellular</b>	400	San Angelo, TX
669	TX 18 - Edwards	Frio	16,252	14.3	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	401	San Antonio, TX
669	TX 18 - Edwards	Kinney	3,379	2.5	No	No	<b>Cingular</b> Cricket <b>Sprint</b> <b>T-Mobile</b> Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	121	Eagle Pass-Del Rio, TX
669	TX 18 - Edwards	La Salle	5,866	3.9	No	No	<b>Cingular</b> Elitel <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	242	Laredo, TX
669	TX 18 - Edwards	Maverick	47,297	36.9	No	Eagle Pass	<b>Cingular</b> Cricket <b>Sprint</b> <b>T-Mobile</b> Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	121	Eagle Pass-Del Rio, TX
669	TX 18 - Edwards	Medina	39,304	29.6	San Antonio, TX MSA	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	401	San Antonio, TX

<b>CMA</b>	<b>CMA Name</b>	<b>Overlap County</b>	<b>POPs in County</b>	<b>People per sq. mi. in County</b>	<b>County now part of Metropolitan Statistical Area?</b>	<b>County now part of Micropolitan Statistical Area?</b>	<b>Licensed Competitors in County Post Merger</b> <i>[competitors providing service denoted in bold]</i>	<b>Other Competitors (e.g., Resellers, MVNOs) Where 3 or Fewer Licensed Competitors Providing Service</b>	<b>BTA</b>	<b>BTA Name</b>
669	TX 18 - Edwards	Real	3,047	4.4	No	No	<b>Cingular</b> NextWave Sprint T-Mobile <b>Verizon</b>	<b>Globalstar</b> <b>Iridium</b> <b>Tracfone</b> <b>US Cellular</b>	401	San Antonio, TX
669	TX 18 - Edwards	Uvalde	25,926	16.7	No	Uvalde	<b>Cingular</b> NextWave Sprint <b>T-Mobile</b> <b>Verizon</b>	<b>Globalstar</b> <b>Iridium</b> <b>Tracfone</b> <b>US Cellular</b>	401	San Antonio, TX
669	TX 18 - Edwards	Val Verde	44,856	14.1	No	Del Rio	<b>Cingular</b> Cricket <b>Sprint</b> <b>T-Mobile</b> Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	121	Eagle Pass-Del Rio, TX
669	TX 18 - Edwards	Zavala	11,600	8.9	No	No	<b>Cingular</b> Cricket <b>Sprint</b> <b>T-Mobile</b> Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	121	Eagle Pass-Del Rio, TX
670	TX 19 - Atascosa	Atascosa	38,628	31.4	San Antonio, TX	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	401	San Antonio, TX
670	TX 19 - Atascosa	Brooks	7,976	8.5	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
670	TX 19 - Atascosa	Duval	13,120	7.3	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> Verizon	N/A	099	Corpus Christi, TX

<b>CMA</b>	<b>CMA Name</b>	<b>Overlap County</b>	<b>POPs in County</b>	<b>People per sq. mi. in County</b>	<b>County now part of Metropolitan Statistical Area?</b>	<b>County now part of Micropolitan Statistical Area?</b>	<b>Licensed Competitors in County Post Merger</b> <i>[competitors providing service denoted in bold]</i>	<b>Other Competitors (e.g., Resellers, MVNOs) Where 3 or Fewer Licensed Competitors Providing Service</b>	<b>BTA</b>	<b>BTA Name</b>
670	TX 19 - Atascosa	Jim Hogg	5,281	4.6	No	No	<b>Cingular</b> Elitel <b>Nextel</b> <b>Sprint</b> T-Mobile Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>US Cellular</b> <b>Virgin Mobile</b>	242	Laredo, TX
670	TX 19 - Atascosa	Jim Wells	39,326	45.5	No	Alice	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
670	TX 19 - Atascosa	Kenedy	414	0.3	No	Kingsville	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
670	TX 19 - Atascosa	Kleberg	31,549	36.2	No	Kingsville	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
670	TX 19 - Atascosa	Live Oak	12,309	11.9	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
670	TX 19 - Atascosa	McMullen	851	0.8	No	No	<b>Cingular</b> NextWave <b>Sprint</b> T-Mobile Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	401	San Antonio, TX

<b>CMA</b>	<b>CMA Name</b>	<b>Overlap County</b>	<b>POPs in County</b>	<b>People per sq. mi. in County</b>	<b>County now part of Metropolitan Statistical Area?</b>	<b>County now part of Micropolitan Statistical Area?</b>	<b>Licensed Competitors in County Post Merger</b> <i>[competitors providing service denoted in bold]</i>	<b>Other Competitors (e.g., Resellers, MVNOs) Where 3 or Fewer Licensed Competitors Providing Service</b>	<b>BTA</b>	<b>BTA Name</b>
670	TX 19 - Atascosa	Starr	53,597	43.8	No	Rio Grande City	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	268	McAllen, TX
670	TX 19 - Atascosa	Willacy	20,082	33.7	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	056	Brownsville-Harlingen, TX
670	TX 19 - Atascosa	Zapata	12,182	12.2	No	No	<b>Cingular</b> Elitel <b>Nextel</b> <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	242	Laredo, TX
671	TX 20 - Wilson	Aransas	22,497	89.3	Corpus Christi, TX MSA	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
671	TX 20 - Wilson	Bee	32,359	36.8	No	Beeville	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> Verizon	N/A	099	Corpus Christi, TX
671	TX 20 - Wilson	Karnes	15,446	20.6	No	No	<b>Cingular</b> NextWave <b>Sprint</b> <b>T-Mobile</b> Verizon	<b>Globalstar</b> <b>Iridium</b> <b>Liberty Wireless</b> <b>Tracfone</b> <b>US Cellular</b> <b>Virgin Mobile</b>	401	San Antonio, TX

CMA	CMA Name	Overlap County	POPs in County	People per sq. mi. in County	County now part of Metropolitan Statistical Area?	County now part of Micropolitan Statistical Area?	Licensed Competitors in County Post Merger <i>[competitors providing service denoted in bold]</i>	Other Competitors (e.g., Resellers, MVNOs) Where 3 or Fewer Licensed Competitors Providing Service	BTA	BTA Name
671	TX 20 - Wilson	Refugio <i>[overlap in southern portion only due to partitioning]</i>	7,828	10.2	No	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>La Ward Cellular*</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	099	Corpus Christi, TX
671	TX 20 - Wilson	Wilson	32,408	40.2	San Antonio, TX MSA	No	<b>Cingular</b> <b>Nextel</b> NextWave <b>Sprint</b> <b>T-Mobile</b> <b>Verizon</b>	N/A	401	San Antonio, TX

Notes:

- **BTA** = Basic Trading Area in which the particular overlap county is located. Information regarding competitors in a given BTA can be found in Attachment 9 to the lead FCC application, File No. 0001656065.
- References to **Cingular** are post-merger with AWS.
- **CMA** = Cellular Market Area.
- Information regarding **Licensed Competitors**, including whether such competitors are providing service, was obtained from ECFS and publicly available sources (web site research and/or calls to customer service representatives for the listed entity) during the last two weeks of April 2004 and the first two weeks of May 2004. Listed entity is the real party in interest or, where not known or inapplicable, the licensee, and is the holder of a cellular, PCS and/or enhanced SMR license. Entities denoted in bold were determined to be providing service in all or part of the applicable county using the methodology described above.
- Information regarding **Other Competitors**, where applicable, was obtained from publicly available sources (web site research and/or yellow pages searches followed by calls to local dealers or customer service representatives) during the last two weeks of April 2004 and the first two weeks of May 2004. This category includes non-facilities-based providers, notably resellers of cellular, PCS and/or enhanced SMR services or MVNOs. While not included in the chart, the combined company will also have more than 100 domestic roaming agreements with other carriers, providing further sources of competition in the overlap counties.
- **Overlap County** = County in RSA where Cingular and AWS have overlapping CGSAs.
- **Metropolitan Statistical Area** = As defined by OMB, areas that have at least one urbanized area with a population of 50,000 or more, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.
- **Micropolitan Statistical Area** = As defined by OMB, areas that have at least one urban cluster with a population of at least 10,000 but less than 50,000, plus adjacent territory that has a high degree of social and economic integration with the core as measured by commuting ties.
- **POPs in County** and **People per sq. mi.** are based on 2000 Census figures.
- “\*” = Because of partitioning, this cellular provider is licensed (and providing service if in bold) in this county but outside of the overlap area.
- “\*\*” = Authorized in adjacent county but has facilities (and providing service if in bold pursuant to service area boundary extension(s)) in the subject county appearing on its license.
- “\*\*\*” = Has significant CGSA boundary extension into SW portion of county and is providing service there.

**ATTACHMENT B**

## Supplemental Declaration of Richard J. Gilbert

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

My name is Richard J. Gilbert. I am submitting this declaration to supplement the declaration I filed in this proceeding on March 17, 2004 to respond to arguments made by the Consumer Federation of America, Consumers Union, and Thrifty Call. My qualifications are described in my March 17 declaration, and my curriculum vitae is attached to that declaration.

Petitioners Consumer Federation of America and Consumers Union and Thrifty Call make the following arguments concerning my analysis of the competitive effects of the merger of Cingular and AWS.

1. The use of revenue flow shares incorrectly assesses the effect of the merger on market concentration. Instead, HHIs should be calculated based on subscriber shares.
2. The HHIs, however calculated, lead to the conclusion that the merger is anticompetitive.
3. The merger will allow Cingular to exclude competition by bundling wireless and wireline services.
4. The merger will cause SBC and BellSouth to discriminate against potential competitors in interconnection and special access services.

In this reply I examine these arguments in detail and show that they are without merit.

### **I. Market shares should be based on data that indicate firms' future competitive significance.**

1. Both petitioners criticize the use of revenue flow shares and argue that the correct measure of market shares to assess the combination of Cingular and AWS is the share

of total subscribers. I disagree. The measurement of market shares is one step in the process of analyzing competition in an industry. The DOJ/FTC Horizontal Merger Guidelines note that the Agencies will calculate market shares “using the best indicator of firms’ future competitive significance.”<sup>1</sup> The wireless industry has experienced dramatic change since the deployment of PCS services in 1996. The shares of the cellular carriers, whether measured in subscribers, minutes, or revenues, have declined as consumers turned to new PCS services. In 1999, Verizon, Cingular and AT&T Wireless accounted for 61 percent of all wireless subscribers. By 2003, their collective share had declined to 53 percent.<sup>2</sup>

2. A snapshot of subscriber shares is not a particularly good measure of the likely future structure of the industry for wireless services, for two main reasons. First, a firm’s share of subscribers need not be proportional to its share of output, which is the more relevant variable for assessing competition. In other words, unlike revenue measures, the number of subscribers does not necessarily reflect the actual utilization of a network. Second, subscriber shares do not measure a firm’s success in attracting and retaining customers. The second problem can be addressed by calculating a flow index that measures a firm’s net change in subscriber shares. However, this does not address the problem that subscriber shares fail to account for differences in average revenues per customer across firms. A firm could have a customer base that is comprised mostly of subscribers with very low call volumes. Another firm could have a much smaller share of total subscribers, but its customers could be very high volume users, resulting in higher average revenues per user. The second firm could be a much more significant competitor in wireless services.

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<sup>1</sup> See DOJ/FTC, “Market Definition, Measurement and Concentration,” *Horizontal Merger Guidelines*, April 2, 1992 (revised April 8, 1997), §1.41. (Hereinafter, “Horizontal Merger Guidelines.”).

<sup>2</sup> The decline occurred despite the fact that by 2003 these carriers had augmented their networks using PCS spectrum and facilities. See Cellco Partnership d/b/a Verizon Wireless 2003 10-K, AT&T Wireless 2003 10-K, Cingular Wireless 2003 10-K. See also “Declaration of Richard J. Gilbert,” *In the Matter of Application for the Transfer of Control Licenses and Authorization from AT&T Wireless Services, Inc. to Cingular Wireless Corporation*, WT Docket No. 04-70, 3/17/2004, Table 1. (Hereinafter “Gilbert Declaration”).

3. The DOJ/FTC Horizontal Merger Guidelines recognize that output is the relevant measure of competitive significance and note that the Agencies may use either unit sales or the dollar value of sales or shipments to measure market shares.<sup>3</sup> The Guidelines do not recommend using customer counts to measure market shares. In the wireless industry, unit sales consist of minutes of use. Furthermore, where firms sell differentiated products, the Guidelines specifically recommend the use of the dollar value of sales or shipments.<sup>4</sup> As I noted in my Declaration accompanying the Transfer Applications, there is some product differentiation in the provision of wireless services,<sup>5</sup> which is evidenced by differences in average revenue per subscriber across firms. This supports the use of revenue rather than subscriber shares, when revenue data are available.
  
4. In the wireless services industry, subscriber shares are largely determined by the past performance of firms, and do not indicate which firms are gaining or losing in the current market. They are not particularly good measures, even in this limited respect, because they do not account for differences in customer usage. The use of subscriber shares to measure market concentration is warranted under some circumstances and may be necessary when more relevant data are not available. However, it is plainly wrong to criticize the use of revenue flow shares merely because they paint a picture of market concentration that differs from observations using subscriber shares. Flow shares provide evidence of the future competitive significance of a firm and the difference in concentration measurements using revenue flow data provides essential information about the nature of competition in the wireless industry. This difference is appropriately emphasized in a study of the likely effects of the merger.<sup>6</sup>

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<sup>3</sup> *Horizontal Merger Guidelines*, §1.4.

<sup>4</sup> *Horizontal Merger Guidelines*, §1.4.

<sup>5</sup> *Gilbert Declaration*, ¶ 76.

<sup>6</sup> Although the Merger Guidelines note that the Agency normally would calculate market shares based on total output or capacity, the Guidelines also note that “recent or ongoing changes in the market may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance,” and that “The Agency will consider

5. Total shares, whether based on subscriber counts or revenues, are particularly unreliable indicators of the future competitive significance of firms in an industry when there are reasons to believe that competitive dynamics are leading to market structures that differ from present conditions. For example, in the mid-1990s, total market shares supported the conclusion that Netscape's Internet browser was of equal or greater significance than Microsoft's Internet Explorer.<sup>7</sup> The total installed base of Netscape users was larger than the installed base of Internet Explorer users in large part because it had been available earlier than Internet Explorer. However, a closer look at flow shares would have revealed that the market dynamic strongly favored Internet Explorer. The striking change in the competitive conditions in this market would have been difficult to discern using total market shares, but was plainly obvious using flow shares.
  
6. The high rates of customer turnover ("churn") in the wireless industry (approximately 20- 40% per annum) imply that historical subscriber counts are not accurate predictors of future competitive significance.<sup>8</sup> The wireless industry today is in a state of change. Flow shares are a good indicator of the direction of that change. The flow shares demonstrate that both Cingular and AWS are falling behind in the struggle to attract and retain customers. Moreover, the technical difficulties that both carriers face are likely to be a continuing obstacle to their success on a stand-alone basis. Flow shares identify this trend and are a good indicator of the firms' likely future competitive significance. The fact that flow shares identify Cingular and AWS as the fourth and fifth largest national wireless providers is not a reason to reject this measure of market shares. Indeed, Cingular and AWS are lagging the rest of the national wireless

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reasonably predictable effects of recent or ongoing changes in market conditions in interpreting market concentration and market share data." This is consistent with the use of revenue flow shares. See *Horizontal Merger Guidelines*, §1.5.

<sup>7</sup> See, for example, "Internet Explorer continues to gain momentum over Navigator," *InfoWorld*, Vol . 18, Issue 40, 9/30/1996.

<sup>8</sup> *Gilbert Declaration*, ¶ 42.

providers in attracting and retaining customers. This is exactly the type of information that a valid measure of market shares should communicate.<sup>9</sup>

7. Even if one were to reject current flow share as a measure of a firm's future competitive significance, the evidence is that in just the past few years, T-Mobile, Sprint, and Nextel have joined the ranks of Verizon, Cingular and AWS as major national wireless providers and that smaller firms such as US Cellular and MetroPCS have also managed to survive and grow. It is reasonable to conclude that without the merger the future wireless marketplace would be likely to be comprised of roughly six major national carriers and a large number of regional providers.<sup>10</sup> In that case, the merger raises the HHI from about 1,667 to 2,000.<sup>11</sup> These are not large numbers relative to other mergers in the telecommunications industry that have attracted antitrust scrutiny and, as discussed below, not sufficient to create concern about possible anticompetitive effects in light of the structural and behavioral characteristics of the wireless industry.<sup>12</sup>

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<sup>9</sup> Michael Katz, former Chief Economist at the FCC and the DOJ, reaches a similar conclusion in his analysis of competition in the CMRS industry. "Thus, in this example, a more accurate picture of competition might be obtained by considering a service provider's share of customers who are either new to the industry or recently switched among carriers." See "Measuring Competition Effectively: Report of Michael L. Katz," Reply Comments of the Cellular Telecommunications & Internet Association, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1996 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Before the Federal Communications Commission, WT Docket No. 04-111, May 10, 2004. at para. 35.

<sup>10</sup> Michael Katz notes that measuring concentration by counting service providers and treating all of them as being of equal competitive significance can be appropriate when each service provider is equally able to compete for new business, there is little product differentiation, and consumers' costs of switching among service providers is low. *Ibid.*, para. 36.

<sup>11</sup> These numbers also approximate wireless service industry HHIs based on 2003 national revenue shares. See *Gilbert Declaration*, Table 3.

<sup>12</sup> The U.S. antitrust agencies challenged mergers in the telecommunications industry that affected 214 product markets during FY 1999-2003. Only one of these markets had a post-merger HHI below 2,400. See U.S. Department of Justice and Federal Trade Commission, Merger Challenges Data, Fiscal Years 1999—2003, December 18, 2003, Table 6. Available at <http://www.usdoj.gov/atr/public/201898.htm>.

**II. HHIs, however calculated, do not lead to the conclusion that the merger is anticompetitive.**

8. Petitioners CFA and CU conclude that the merger of Cingular and AWS will raise the HHI by as much as 695 points and lead to a post-merger HHI of 2,535.<sup>13</sup> Petitioner Thrifty Call concludes that that the merger of Cingular and AWS will raise the HHI by as much as 748 points and lead to a post-merger HHI of 2,712.<sup>14</sup> Based on these statistics, both petitioners conclude that the merger is anticompetitive.
9. As I discuss in the previous section, the petitioners choose measures of market shares that do not indicate the likely future competitive significance of the firms in the wireless industry. Putting this flaw aside, their use of HHI statistics reveals a fundamental misunderstanding of competition analysis.
10. The petitioners advocate a mechanical and overly simplistic application of the HHI thresholds in the DOJ/FTC Horizontal Merger Guidelines. The HHI thresholds are intended to be no more than a means to screen mergers that may raise concerns about impacts on competition.<sup>15</sup> Contrary to what the petitioners appear to conclude, the HHI thresholds are not sufficient statistics to ascertain when a merger will harm competition. Mergers that fall below the HHI thresholds are unlikely to harm competition and typically require little additional formal analysis. Mergers that exceed the thresholds require further analysis. However, the mere fact that a merger exceeds

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<sup>13</sup> “Petition to Deny of Consumer Federation of America and Consumers Union,” *In the Matter of Application for the Transfer of Control Licenses and Authorization from AT&T Wireless Services, Inc. to Cingular Wireless Corporation*,” WT Docket No. 04-70, 5/3/2004, pp. 8-9, 14. (Hereinafter “CFA/CU Petition”).

<sup>14</sup> Dineley, Richard, et al., “A Study of the Proposed Cingular Acquisition of AT&T Wireless,” Petition to Deny of Thrifty Call, Inc., *In the Matter of Application for the Transfer of Control Licenses and Authorization from AT&T Wireless Services, Inc. to Cingular Wireless Corporation*,” WT Docket No. 04-70, 5/3/2004, Attachment A, pp. 20-21. (Hereinafter “Dineley Declaration”).

<sup>15</sup> *Horizontal Merger Guidelines*, §1.5.

the HHI threshold does not demonstrate that the merger is anticompetitive. High market shares are necessary, but not sufficient, to exercise market power.<sup>16</sup>

11. If a merger exceeds the HHI thresholds in properly defined markets, the next step is to assess whether competitive conditions allow the combined firm to raise prices through the exercise of unilateral or coordinated market power. I explain in my Declaration why the merger of Cingular and AWS is unlikely to raise prices through the coordinated exercise of market power.<sup>17</sup> The merger is also unlikely to result in significant competitive effects from unilateral conduct. Today, over 80 percent of wireless customers in the nation can access service from 5 or more wireless providers.<sup>18</sup> The FCC's Eighth Report shows that over 70 percent of the US population is served by 6 or more carriers, more than double the FCC estimate of 35 percent only three years earlier.<sup>19</sup> Even if a customer cannot easily shop the wireless offerings of all of the major carriers, including the combined Cingular-AWS, Verizon, T-Mobile, Nextel, and Sprint, the fact is that many customers can and do switch among a large enough number of carriers so that the prices of each carrier exert a pro-competitive influence on the prices of all others in the market. In addition, regional wireless carriers offer services in many areas that are not served by all of the major national carriers.<sup>20</sup>
12. The data collected in the web survey described in my Declaration likely understates the extent of competition in wireless services. The survey only tracked a small number of regional carriers. The Dineley/deltaVectors report shows a listing of 25 wireless carriers taken from the FCC's Eighth Report on CMRS competition.<sup>21</sup> A wireless

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<sup>16</sup> *Horizontal Merger Guidelines*, §1.5.

<sup>17</sup> *Gilbert Declaration*, Section VII.

<sup>18</sup> FCC, "Eighth Report," *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, July 14, 2003, Table 10. (Hereinafter "FCC Eighth CMRS Report").

<sup>19</sup> *FCC Eighth CMRS Report*, Table 10.

<sup>20</sup> *Gilbert Declaration*, Tables A-1, A-2, A-3.

<sup>21</sup> *Dineley Declaration*, pp. 18-19; *FCC Eighth CMRS Report*, Table 4.

industry website lists nearly 400 US firms offering mobile wireless service.<sup>22</sup> Although I have not exhaustively examined each carrier's coverage maps, I have identified many regional carriers that serve rural areas with cellular or PCS services.<sup>23</sup> It is also important to note that the many areas not currently served by both AWS and Cingular will not lose a competitor and will not be affected by the merger.

### **III. Cingular will not be able to exclude competition by bundling wireless and wireline services.**

13. The petitioners allege that the merger will harm competition by encouraging the merged firm to exclude competitors by bundling wireless and wireline services.<sup>24</sup> Current industry practice and economic theory offer no support for this conclusion.
14. The Dineley/deltaVectors offers an example as evidence of the potential for competitive harm from bundling that may arise from the merger of Cingular and AWS.<sup>25</sup> The allegation is that a supplier of both wholesale and retail broadband access services excluded competition by charging prices that did not allow wholesale customers to purchase and resell wholesale broadband access at a profit. The example bears no relation to this merger. The alleged conduct involves different services (wholesale and retail broadband access), in a different country (Australia), and does not

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<sup>22</sup> "Resources: U.S. Wireless Carriers – Alphabetical Guide," *www.WirelessAdvisor.com*, visited on 5/5/04.

<sup>23</sup> For example, Dobson Communications, Western Wireless, Epic PCS, Einstein PCS, Telispire PCS, One Link PCS, Kiwi PCS, Alamosa PCS, AirGate PCS, UbiquiTel, Clear Talk, Snake River PCS, US Unwired, Horizon PCS, Cellular 2000, Xit Cellular, Valley Telecom Cellular, Union Cellular, Pioneer/Enid Cellular, Sagebrush Cellular, Mid-Tex Cellular, Mountain Cellular, Illinois Valley Cellular, Golden State Cellular, First Cellular of Southern Illinois, Cellular 29 Plus, Bristol Bay Cellular, Bluegrass Cellular, Brazos Cellular, Inland Cellular, Caprock Cellular, and Appalachian Wireless.

<sup>24</sup> "Petition to Deny of Thrifty Call, Inc.," *In the Matter of Application for the Transfer of Control Licenses and Authorization from AT&T Wireless Services, Inc. to Cingular Wireless Corporation*, WT Docket No. 04-70, 5/3/2004, pp. 18-20 (Hereinafter, "Thrifty Call Petition."); CFA/CU Petition, p. 13; Dineley Declaration, § 3.0.

<sup>25</sup> *Dineley Declaration*, pp. 11-14.

involve bundling. The example has nothing to do with the bundling of wireline and wireless service in the United States and says nothing about the potential for exclusion of competitors by bundling wireless and wireline services.

15. It is extremely unlikely that bundling could exclude competitors for wireless services. At the present time, RBOCs currently offer bundles that include wireless services. The “take rate” rate for these bundles is very low. As of March 2004 only 3.6 percent of Cingular subscribers in SBC’s local service areas and 1.7 percent in BellSouth’s local areas were subscribed to a wireless/wireline package.<sup>26</sup>
16. Based on the BellSouth and SBC experiences, bundling reduces the demand that is available for competing service providers by only a few percent, and only for service in the BellSouth and SBC territories. Thus, bundling by Cingular’s parents accounts for only a trivial amount of demand, and could not make the difference between viable and non-viable competition for wireless services.<sup>27</sup>
17. Even if bundling had a greater impact on total wireless demand, it would not exclude competing wireless service providers. Most of the assets required to offer wireless service (such as wireless spectrum, switching and trunking facilities) are durable. These assets would quickly be made available to other wireless suppliers even if an existing supplier were to exit the market. Even under the assumption that a bundling strategy could eliminate a wireless competitor, which is highly implausible given the observed take rates and discounts in wireless bundles, any subsequent attempt to raise wireless prices would result in the redeployment of the competitor’s durable assets, either by the original wireless provider or by a new firm.
18. The evidence is that the bundling of wireline and wireless that has occurred in the industry has had only modest effects on wireless prices. Typical discounts are about 3

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<sup>26</sup> Based on billing data provided by Cingular.

<sup>27</sup> *FCC Local Competition Report*, Table 13 provides total mobile wireless telephone subscribers in BellSouth and SBC states; multiplied by Cingular market share, multiplied by the take rate for wireless-wireline bundles yields trivial demand for such an offering.. Calculation based on billing data provided by Cingular and Gilbert Declaration, Table 1.

to 17 percent depending on the price point of the wireless plan included. Table 1 provides a summary of wireless/wireline plans offered by SBC, Verizon, Qwest and BellSouth. These discounts can be justified by the economies of scope from joint provision of telecommunications services. For example, no commission is paid when wireless service is sold as part of a package by SBC or Bell South.

**Table 1: Wireline/Wireless Bundle Discounts**

	Wireless Offering Available		Discount with	
	with Package	Standalone Prices	Package	Discount %
<b>SBC Total Connections</b> <sup>(1)</sup>	<i>Cingular GSM Nation</i>	\$29.99 - \$59.99	\$5.00	8.3% - 16.7%
<b>BellSouth Answers</b> <sup>(2)</sup>	<i>Cingular GSM Bundle Nation</i>	\$39.99 - \$49.99	\$5.00	10.0% - 12.5%
<b>Verizon</b> <sup>(3)</sup>	<i>America's Choice</i>	\$39.99 - \$299.99	10.0%	10.0%
<b>Qwest</b>	<i>Qwest Wireless Cross Country</i>	\$29.99 - \$139.99	\$5.00	3.6% - 16.7%

Notes: Results based on a sampling of cities within each carrier's incumbent territory.

(1) \$5.00 discount is offered to new customers; Current Cingular subscribers receive a \$3.00 discount.

(2) A larger discount (\$10.00) is available if customer purchases unlimited wireline long distance; Current BellSouth customers receive a \$2.00 discount.

(3) Verizon offers a 10.0% discount on all wireless plans of \$39.99 per month or more.

Sources : Company websites and press releases.

19. Even if bundling could dramatically lower the effective price of wireless service, it would not be rational for BellSouth or SBC to attempt to use bundling to exclude wireless competitors. The companies would have to sacrifice profits by offering bundles with deep discounts for wireless. Furthermore, bundling would not allow BellSouth or SBC to profit by excluding wireless competitors. As discussed above, most of the assets required to provide wireless service are durable and would be redeployed if a wireless provider were to exit the market. If Cingular attempted to acquire the assets of a failed rival, the license transfer would have to be approved by the FCC and would be subject to antitrust review by the DOJ and possibly others. It is unlikely that these agencies would allow Cingular to profit from a predatory bundling strategy. The net result is that an attempted predatory bundling strategy would incur large costs in the short run and have no benefit in the long run.
  
20. Furthermore, should bundling become more important in the future, MVNO and resale wireless services for bundling are readily available. For example, Qwest will no longer be providing wireless service on its own network, having opted to resell Sprint service

under the Qwest name.<sup>28</sup> AWS provides wireless service to McLeod and it is my understanding that it has not turned down any request to provide service to other CLECs.<sup>29</sup> Cingular is currently negotiating with other carriers.<sup>30</sup> Should bundles become so popular as to make stand-alone offers non-viable, there are means by which firms can now, and will later, be able to obtain either wireline or wireless capabilities from others and package them to create competing bundles. The recent entry of the Bell Operating Companies into long distance was predicated on the establishment of competition in the provision of local wireline service. The growing success of virtual mobile operators likewise confirms the viability of providing retail wireless service using the underlying facilities of others. Together these conditions make it possible for either wireline or wireless carriers to offer wireline/wireless bundles.

**IV. The merger will not cause SBC and BellSouth to discriminate against potential competitors in interconnection and special access services.**

21. The merger will have no effect on either the incentives or abilities of BellSouth and SBC to discriminate against potential competitors in interconnection and special access services. The incentive and ability to discriminate against rival wireless providers depend on the extent of competition in access services and on the extent of competition in wireless services. As I described in my Declaration, the merger will not harm competition for wireless services.<sup>31</sup> Indeed, it will benefit consumers by improving the ability of the combined company to provide high quality, ubiquitous, and high-speed wireless services that consumers desire. The wireless services industry is competitive and will remain so after the merger. Any price effects that may occur from the exclusion of a rival wireless provider should not be substantially different after the merger and therefore the merger should not substantially affect incentives to engage in

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<sup>28</sup> Qwest 2003 10-K, p. 68.

<sup>29</sup> “McLeodUSA to Provide Wireless Voice Service through Agreement with AT&T Wireless Service,” *Business Wire*, 9-3-2003.

<sup>30</sup> <http://www.cttel.com/cellular.htm>, downloaded 5/7/2004 .

<sup>31</sup> *Gilbert Declaration*, Section III.

exclusion by discriminating against rivals in the provision of interconnection or special access services.

22. The merger has no effect at all on the structure of the marketplace in which wireline services are offered and would not affect competition in the provision of interconnection and special access services. The ILECs face competition from numerous other access providers including self-supply by wireless providers and other major carriers. The merger does not change this situation.
23. Nor will the merger have any significant effect on the total market available to special access providers that are actual or potential competitors of BellSouth or SBC. The amount of special access purchased by AWS in the ILEC regions of BellSouth and SBC is a very small percentage of the special access requirements of all carriers. Furthermore, AWS currently purchases the bulk of its special access services from the ILECs, not only in SBC's and BellSouth's region, but elsewhere as well.<sup>32</sup>
24. The only effect of the merger on incentives to discriminate is a very slight increase in the number of customers in the ILEC home territories who would be able to purchase wireless service from an affiliated wireless supplier. Currently, more than 95 percent of the customers in the BellSouth and SBC service areas have access to wireless service from Cingular.<sup>33</sup> The merger would increase this number by a very small amount. To the extent that either BellSouth or SBC desired to discriminate in ways that made Cingular more attractive to their customers, they could have done so without the merger for nearly all of their customers. The addition of AWS does almost nothing to change these incentives. Furthermore, the merger of AWS and Cingular does little to change wireless competition within the BellSouth and SBC footprints. Most

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<sup>32</sup> Information provided by AWS indicates that it spent about three percent of national carrier-to-carrier special access revenue. Carrier-to-carrier local private line and special access revenues in 2002 were \$13 billion. See FCC, "Revenues From Telecommunications Service Provided for Resale," *Telecommunications Industry Revenues 2002*, March 2004, Table 5, p. 17.

<sup>33</sup> Telephia population data, LECG web survey.

consumers will still be able to choose service from among five or more wireless providers.<sup>34</sup>

25. The evidence supports the conclusion that BellSouth and SBC have not discriminated against rival wireless service providers. A useful metric to assess discrimination is a comparison of Cingular's share of wireless customers or revenues in-region to its nationwide average market share. It would be reasonable to expect that Cingular's share in-region would exceed its national average share, even in the absence of any discrimination by BellSouth or SBC. There could be several reasons for this, including the fact that BellSouth and SBC, prior to the formation of Cingular, were well-established cellular carriers using well-recognized brand names, and have established and extensive distribution in these areas. Thus, holding prices constant, it is not surprising that a larger fraction of consumers in the BellSouth and SBC home territories would choose Cingular than in other regions.
26. If BellSouth and SBC were discriminating against rival wireless service providers, I would expect that in every metropolitan area within the BellSouth or SBC service territories, Cingular's share of subscribers or revenues would exceed its share outside the BellSouth and SBC service territories. In fact, I have identified several cities in the SBC/BellSouth ILEC territory where Cingular has a subscriber share below Cingular's national average. Moreover, of the 26 in-region cities where I have net flow share information for March 2004, Cingular's share of net new subscribers is 10 percent or less in 12 of the cities. In three cities, Sacramento, Memphis, and Miami, Cingular has a negative flow share, i.e. its total number of subscribers declined. The other nine cities are Birmingham, Hartford, Los Angeles, Houston, Milwaukee, Detroit, Atlanta, San Francisco and West Palm Beach. In these 12 cities, the average of the highest share of net new subscribers was 38.1 percent, whereas Cingular's average is 2.6

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<sup>34</sup> *FCC Eighth CMRS Report*, Table 10.

percent for these cities.<sup>35</sup> These facts are inconsistent with SBC and BellSouth having the ability to discriminate systematically against Cingular's rivals.

27. Furthermore, Cingular has not discriminated in the roll-out of advanced wireless services in the BellSouth or SBC service territories. For example, only seven months after completing the first GSM call on its network, Cingular had deployed GSM and GPRS to more than 50 percent of potential subscribers nationwide.<sup>36</sup> New York, Rhode Island and Philadelphia, all areas outside of SBC-BellSouth territory, were among the first areas to receive these advanced services.<sup>37</sup> In addition, in the earliest stages of GSM deployment, AT&T Wireless and Cingular formed a joint venture to enable customers in Arizona, Colorado, Minnesota, New Mexico, Nebraska and Utah, all within Qwest's service area, to have access to GSM/GPRS technology for the first time.<sup>38</sup>
28. Over the past several years, the share of wireless revenues sold by the legacy cellular carriers – Cingular, AWS, and Verizon – has been decreasing and the share of revenues sold by new PCS carriers has been increasing.<sup>39</sup> Cingular and Verizon are affiliated with ILECs. The PCS carriers, T-Mobile and Sprint, as well as Nextel have little or no ILEC affiliation.<sup>40</sup> If the ILECs were engaged in systematic discrimination against rival, unaffiliated wireless providers, these carriers would not have experienced the tremendous growth in revenues that they have achieved over the past few years. This

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<sup>35</sup> Telephia data provided by Cingular.

<sup>36</sup> "Cingular Makes First GSM 850 MHz Call," *Cingular News Release*, 5/9/2002; "Cingular Meets 2002 Commitment: Expands GSM/GPRS Network," *Cingular News Release*, 12/17/2002.

<sup>37</sup> "Cingular Meets 2002 Commitment: Expands GSM/GPRS Network," *Cingular News Release*, 12/17/2002.

<sup>38</sup> "AT&T Wireless and Cingular Wireless Announce Major Expansion of GSM/GPRS Network Coverage Via New Joint Venture," *Cingular News Release*, 1/28/2002.

<sup>39</sup> Gilbert Declaration, Table 3.

<sup>40</sup> Although Sprint is an ILEC in some areas, its territory is relatively small compared to its nationwide CMRS footprint.

history of the wireless industry is inconsistent with a pattern of discrimination in special access and interconnection services by ILECs against rival wireless providers.

29. The provision of interconnection and special access services by local exchange carriers has been an issue addressed by the FCC and state regulators since the breakup of the Bell system. These services are purchased by interexchange carriers and CLECs as well as by CMRS carriers and scrutiny at the federal and state level is substantial. For example, with regard to special access service quality, ILECs provide total trouble reports and average intervals “in hours to the nearest tenth based on a stopped clock, from the time of the reporting carrier’s receipt of the trouble report to the time of acceptance by the complaining interexchange carrier/customer” for high speed special access.<sup>41</sup> In addition, the RBOCs serving California, Colorado, Florida, Georgia, Maine, Minnesota, New Hampshire, New York, Tennessee, Texas, Utah and Washington are required by their respective state commissions to report special access performance on an ongoing basis, and in Illinois a proceeding has been initiated but the docket is still open and no decision date has been set.<sup>42</sup> On the Federal level alleged discrimination related to provisioning and repair is being addressed in the Performance Measurement Docket.<sup>43</sup> The level of scrutiny applied to interconnection and special access services at the state and federal levels and the reporting requirements in place make it unlikely that Cingular could discriminate against rival wireless providers without attracting negative consequences.

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<sup>41</sup> “ARMIS Report 43-05 Instructions: Table I Row Instructions,” *FCC website*, Rows 120 and 121, available at <http://www.fcc.gov/wcb/armis/instructions/2002/definitions05.htm>.

<sup>42</sup> Joint Competitive Industry Group (JCIG) Ex Parte Presentation, “Status of State Actions: Measurement of ILEC Special Access Performance,” *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, Before the Federal Communications Commission, CC Docket No. 01-321, November 14, 2003.

<sup>43</sup> See “Notice of Proposed Rulemaking,” *In the Matter of Performance Measurements and Standards for Interstate Special Access Services, et. al.*, CC Docket Nos. 01-321, 00-51, 98-147, 96-98, 98-141, 96-149, 00-229, 11/19/2001.

30. Thrifty Call argues that the acquisition of AWS by Cingular will harm the ability of competitive wholesalers of access services to expand.<sup>44</sup> This is highly implausible. The acquisition of AWS by Cingular will not significantly change the landscape for these services and will not afford SBC and BellSouth any new opportunities for discrimination. The FCC reported that carrier-to-carrier local private line and special access revenues totaled \$13 billion in 2002.<sup>45</sup> Special access purchases by AWS represent only approximately three percent of carrier-to-carrier special access revenue in the country and only about 30 percent of these purchases were from SBC or BellSouth's service area.<sup>46</sup>
31. Thrifty Call also alleges that because special access is "the single highest variable cost input for wireless service,"<sup>47</sup> Cingular will have the ability to coordinate prices of all wireless carriers and, apparently through SBC and BellSouth, to discipline that coordination through its provision of special access. This argument does not hold sway given the small magnitude of special access costs relative to the total operating costs of wireless service providers and the relatively small percentage of industry special access services sold to wireless carriers. Industry information indicates that special access represents only a few percent of a wireless carrier's operating costs<sup>48</sup> and approximately 25 percent of all demand for special access services.<sup>49</sup> Because special

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<sup>44</sup> Thrifty Call Petition, pp. 16-17.

<sup>45</sup> See FCC, "Revenues From Telecommunications Service Provided for Resale," *Telecommunications Industry Revenues 2002*, March 2004, Table 5, p. 17.

<sup>46</sup> AWS data indicates that its spending on special access service accounts for approximately three percent of carrier-to-carrier special access revenue in the country based on carrier-to-carrier local private line and special access revenues in 2002 of \$13 billion. See FCC, "Revenues From Telecommunications Service Provided for Resale," *Telecommunications Industry Revenues 2002*, March 2004, Table 5, p. 17.

<sup>47</sup> Thrifty Call Petition, p. 16.

<sup>48</sup> For example, in 2003, special access was less than three percent of total operating expenses for AWS.

<sup>49</sup> This estimate assumes that the six national wireless carriers spend about as much on special access services as AWS and aggregate regional carrier expenditures on special access are about half that of the six national carriers combined.

access is a small part of a wireless service provider's total operating cost, the price of special access would be an ineffective instrument for disciplining uncooperative wireless carriers. Changes in the price of special access would have little effect on a wireless service provider's costs, and therefore would not be a practical device to coordinate industry conduct. In addition, because wireless carriers account for only about a quarter of the special access revenues earned by BellSouth and SBC, it would be irrational for BellSouth and SBC to change their special access pricing to discipline competing wireless carriers, because large changes in the provision of special access services would adversely affect the majority of SBC and BellSouth's special access business. A more sensible conclusion is that BellSouth or SBC would choose special access policies that are appropriate for all of its special access customers and would not tailor its policies merely to affect competition in wireless services. Even if BellSouth or SBC did choose to let the tail wag the dog in this respect, it is still the case that special access services account for a very small fraction of operating costs in the wireless industry, and even a large increase in the price of special access would have only a small effect on operating costs for wireless competitors.

## **V. Concluding Remarks**

32. Petitioners Consumer Federation of America and Consumers Union and Thrifty Call advance the proposition that the merger of Cingular and AWS should be rejected simply because a calculation of HHIs using total subscriber shares exceeds the thresholds in the DOJ/FTC Horizontal Merger Guidelines. Their mechanical and simplistic treatment of concentration ratios totally ignores decades of learning by economists and antitrust practitioners, which rejects the notion that concentration ratios alone can assess the state of competition in an industry. The current FTC chairman, Timothy Muris, recently affirmed this well-established principle:

Thus, the preeminence that some would continue to give to concentration or HHI numbers is misplaced. State-of-the-art merger analysis has moved well beyond a simplistic causality of high concentration leading to anticompetitive effects. The number of competitors is certainly important -

4 to 3 gets our attention quicker than 6 to 5 - but current merger practice does not elevate a single fact or number to dispositive significance. The totality of the evidence must point to an increased likelihood of anticompetitive effects before we will act.<sup>50</sup>

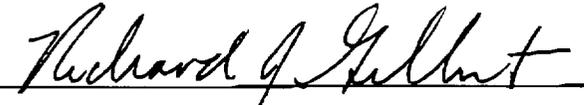
33. The petitioners make no effort to analyze the extent of either unilateral or coordinated competitive conduct in the wireless industry. They do not disprove the FCC conclusion that the wireless industry is vigorously competitive. They provide no evidence to rebut my conclusion that coordinated conduct is extremely unlikely in this industry, nor do they provide any direct evidence to contradict my conclusion that the merger is unlikely to result in higher prices as a consequence of unilateral competitive effects. Most wireless consumers can choose from several wireless providers, and that will continue to be true after the merger. Furthermore, the strategic plan of AT&T Corporation to compete in the wireless industry as a reseller using the AT&T Wireless brand after the merger is yet another reason to expect that the merger will not harm competition in the wireless industry. The petitioners also ignore the technical and economic efficiency gains that are possible with the merger. These efficiencies will add consumer value by enhancing the quality of the merged company's network and by allowing the company to roll-out high speed voice and data services. These efficiencies will make the combined company a stronger competitor than the sum total of the pre-merger Cingular and AWS.
34. The petitioners also claim that the merger will allow Cingular to exclude competition by bundling wireless and wireline services. Bundling has had a de minimis effect on competition in the wireless industry. The take rate for bundles that include wireless service is low and the implied discounts are too low to exclude competition. Even if bundling could exclude a competitor, it would not exclude competition because the competitor's durable assets would not simply disappear. Instead, they would be re-deployed by the same or another competitor. The petitioners also argue that the merger

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<sup>50</sup> Prepared Remarks of Timothy J. Muris, Chairman, Federal Trade Commission, Workshop on Horizontal Merger Guidelines Federal Trade Commission/Department of Justice, Washington, DC, February 17, 2004.

will cause BellSouth and SBC to discriminate against rivals of Cingular in the provision of special access and interconnection services. However, the fact is that the merger does not materially change the RBOC's incentives or abilities to discriminate in these services.

I declare under penalty of perjury that the forgoing is true and correct.

  
Richard J. Gilbert

Executed May 12, 2004

**ATTACHMENT C**

## DECLARATION OF KRISTIN S. RINNE

I, Kristin S. Rinne, Vice President – Technology and Product Realization of Cingular Wireless LLC (“Cingular”) make this declaration in support of the “Joint Opposition to Petitions to Deny and Comments” (“Opposition”). In particular, this declaration describes why the condition proposed by the Cellular Emergency Alert Services association (“CEASa”) is without merit.

In my role as Vice President – Technology and Product Realization, I am personally familiar with the capabilities of the technologies deployed on Cingular’s networks. In particular, I am familiar with the capabilities of GSM. I have reviewed the portion of the Opposition addressing CEASa’s claims and declare under penalty of perjury that the information contained therein is accurate to the best of my knowledge, information and belief.

More specifically, I hereby declare as follows:

The cell broadcast channel referenced in the CEASa petition is an optional GSM signaling channel that may or may not be deployed by a GSM operator. Its presence is dependent on the operator’s GSM signaling configuration and Cingular does not reserve capacity for cell broadcast usage. Instead, the cell broadcast channel has been reassigned for signaling traffic supporting:

- Call Setup
- Authentication
- Network Registration
- Point-to-Point Short Messaging (SMS)

Deployment of a cell broadcast channel in Cingular’s network would have a significant adverse impact on normal voice and text service operations. The cell broadcast channel would utilize 12.5% to 25% of existing signaling channel resources that are currently assigned to normal voice and text services.

Moreover, even if the cell broadcast channel were deployed, it is unclear whether the purported benefits described by CEASa are even possible. Current GSM handset certification procedures only contain limited tests of the cell broadcast feature, so the level of support for cell broadcast in GSM devices is unknown. The cell broadcast standards do not address the user interface of devices. Thus, it is not known if each handset vendors could effectively support the requirements of an emergency alerting service.

Further, before a cell broadcast channel could be utilized to support a Wireless National Alerting type service; a government driven industry-wide supported effort would required to take the initial GSM Cell Broadcast feature and develop a standardized GSM Wireless National Alerting solution in much the same way as Wireless Priority Service (“WPS”) was standardized around the GSM Enhanced Multi-Level Precedence and Pre-emption feature (“eMLPP”). Any

such standardization effort would need to address the following issues that currently prevent GSM Cell Broadcast use as a National Alerting solution:

- Standardize the mobile terminal user interface for the National Alerting service to define consistent terminal behavior when receiving and displaying an alert.
- Standardize the range of message identifiers that relate to the National Alerting service and define specific meaning to each message identifier value.
- Define geographic Alert Area boundaries (National, Regional, *etc.*) and define a system for managing these geographic areas.
- Standardize the minimum required message size and number of message updates the service shall support.
- Define an interface to, and the type of, governmental organizations that would be responsible for generating and sending the alerts.

Based on the foregoing, it would be premature to consider use of the Cell Broadcast channel in the manner described by CEASa.

The undersigned declares under penalty of perjury that the foregoing is true and correct.

Executed May 13, 2004

  
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Kristin S. Rinne  
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## CERTIFICATE OF SERVICE

I, Maria R. Waters, hereby certify that copies of the foregoing “Joint Opposition to Petitions to Deny and Comments” were served this 13<sup>th</sup> day of May, 2004, as follows:

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