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

In the matter of	)	
	)	
Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation	)	
	)	
For Consent to Transfer Control of Licenses and Authorizations	)	WT Docket No. 04-70
	)	
File Nos. 0001656065, *et al.*	)	
	)	
and	)	
	)	
Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation	)	
	)	
For Consent to Assignment and Long-Term *De Facto* Lease of Licenses	)	WT Docket No. 04-254
	)	
File Nos. 0001771442, 0001757186, and 0001757204	)	
	)	
and	)	
	)	
Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC	)	
	)	
For Consent to Assignment of Licenses	)	WT Docket No. 04-323
	)	
File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04	)	
	)	

MEMORANDUM OPINION & ORDER

Adopted: October 22, 2004 **Released: October 26, 2004**

By the Commission: Chairman Powell and Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein approving in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In this Order, we consider a set of applications filed by AT&T Wireless Services, Inc. ("AT&T Wireless") and Cingular Wireless Corporation ("Cingular") (collectively, the "Applicants") for consent to transfer control of all licenses and authorizations held by AT&T Wireless and its subsidiaries to Cingular. These licenses and authorizations include, most notably, many enabling the provision of mobile telephone service. This transfer of control would take place as a result of a proposed merger whereby AT&T Wireless would become an indirect, wholly-owned subsidiary of Cingular. The Applicants contemplate that the operations of AT&T Wireless and Cingular would be merged and that the merged entity would continue to provide mobile telephony under the Cingular brand name. The proposed merged entity would be jointly owned, as Cingular is today, by SBC Communications Inc. ("SBC") and

BellSouth Corporation ("BellSouth"). Additionally, various entities in which AT&T Wireless holds non-controlling interests have filed applications for *pro forma* transfers of control.[1]

2. In addition, we consider two related sets of applications. Consummation of these proposed transactions is contingent upon the consummation of the proposed transfer of control of AT&T Wireless to Cingular. First, we consider applications filed by T-Mobile USA, Inc. ("T-Mobile") and Cingular as part of a larger transaction in which Cingular and T-Mobile propose to unwind a network infrastructure joint venture ("Joint Venture Unwind") in portions of California, Nevada, and New York. These applications seek approval for (1) the assignment of broadband Personal Communications Services ("PCS") spectrum from a subsidiary of Cingular to a subsidiary of T-Mobile, and (2) a long-term *de facto* transfer leasing arrangement between various subsidiaries of Cingular and a subsidiary of T-Mobile. Second, we consider applications filed by Triton PCS, Inc. ("Triton PCS") and AT&T Wireless to exchange spectrum in portions of North Carolina and Georgia.[2] As part of this transaction, AT&T Wireless "will relinquish all of its equity in Triton [PCS]" and will no longer have the right to appoint a director to Triton PCS's board of directors.[3]

3. In two ways, the proposed AT&T Wireless-Cingular transaction marks a watershed for the Federal Communications Commission ("Commission"). It presents the Commission for the first time with the challenge of examining the potential consequences of a proposed merger between two large national wireless carriers that is largely horizontal in nature. Many earlier combinations in this sector were aimed at creating competing national systems, while what the Applicants propose is to combine the largely, but not entirely, overlapping second and third largest systems nationwide. Cingular has determined to spend $41 billion in cash to acquire AT&T Wireless. The Applicants assert that this merger will fill gaps in their footprints and provide necessary resources to enable the merged entity to compete effectively in the current marketplace with a speed that is both essential and unobtainable by alternative means. The Applicants further argue that the merger will combine two less effective competitors into a much more vigorous competitor while leaving ample alternatives and opportunities to sustain competitive pressures in the marketplace, thus benefiting consumers.

4. Second, the proposed transaction marks a turning point because it is the first large license-transfer proceeding since the removal of prophylactic thresholds, including a Commercial Mobile Radio Services ("CMRS") spectrum aggregation limit, which the Commission had employed to encourage new entry and prevent undue concentration of limited resources in the developing mobile telephony sector. Thus, for the first time in this sector, we articulate and apply our public interest standard by undertaking a case-by-case analysis of a large transaction without the presence of a bright-line rule related to spectrum aggregation.

5. Pursuant to sections 214(a) and 310(d) of the Communications Act, we must determine whether the Applicants have demonstrated that the proposed acquisition of AT&T Wireless will serve the public interest, convenience, and necessity. Based on the record before us, we find that the Applicants

[1] As part of this transaction, Cingular will receive from AT&T Wireless additional, non-controlling ownership interests in entities in which AT&T Wireless holds less than 50 percent of the total ownership interests. The transfer of these interests to Cingular may not require the submission of an application or notification to the Commission. *See* 47 C.F.R. § 1.948. For the full list of interests to be transferred from AT&T Wireless to Cingular, compare AT&T Wireless Services, Inc., FCC Ownership Disclosure Form 602 (filed Mar. 16, 2004) ("AT&T Wireless Form 602") with Cingular Wireless Corporation, FCC Ownership Disclosure Form 602 (filed Mar. 30, 2004) ("Post-Transaction Form 602").

[2] As part of this transaction, Triton PCS will acquire spectrum from Lafayette Communications Company LLC. Triton PCS will then include the Lafayette spectrum as part of the spectrum exchange with AT&T Wireless.

[3] Application, ULS File No. 0001810683, Exhibit 1, at 1 (filed July 21, 2004).

have generally met that burden. Competitive harm is unlikely in most mobile telephony markets, primarily because of the presence of multiple other carriers who have the capacity to add subscribers and the ability to supplement their current capacity, as well. Thus, despite concentration that appears high in many markets when measured based on firms' current shares of subscribers, other operators will nonetheless be an effective competitive constraint on the behavior of the merged entity.

6. With regard to 22 local areas, however, our case-by-case analysis shows that likely competitive harms exceed likely benefits of the transaction. In these areas, we are imposing remedy conditions that will effectively ameliorate the expected harm. Thus, in no area of the country will harm to users of mobile telephony services result from this acquisition.

7. Because these applications result in the acquisition of an independent mobile provider by a joint venture controlled by two large wireline telephone companies, issues of intermodal competition arise as well. We find that this transaction raises novel competitive issues surrounding the differing incentives that wireless providers may have to engage in robust competition against the wireline operations of incumbent local exchange carriers. We consider whether this transaction diminishes intermodal competition for mass market voice telecommunications services, and conclude that any potential public interest harm arising from the loss of AT&T Wireless as an independent competitor is mitigated by the limited level of wireless-wireline competition at this point in time, and by the continued existence of a number of independent national and regional wireless carriers in the markets relevant to this transaction.[4] We also find that any potential harm is outweighed by the potential benefits that the merged entity could bring to the majority of mass market consumers.

II. BACKGROUND

A. Description of the Applicants

1. AT&T Wireless Services, Inc.

8. AT&T Wireless is a publicly-traded Delaware corporation, headquartered in Redmond, Washington. AT&T Wireless and its subsidiaries construct and operate wireless telecommunications systems throughout much of the United States.[5] It primarily provides analog and digital wireless voice and data services on 850 MHz band cellular licenses and on 1900 MHz band PCS licenses.[6] AT&T Wireless subsidiaries are also authorized to operate Wireless Communications Service, Local Multipoint

[4] Our conclusion is based on compliance with any conditions necessary to address horizontal concentration in individual wireless markets, as discussed elsewhere in this Order.

[5] Application, ULS File No. 0001656065, Exhibit 1, at 7 (filed Mar. 19, 2004) ("Application"). This Application has been designated the lead Application for this transaction. *See* AT&T Wireless Services, Inc. and Cingular Wireless Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, *Public Notice*, 19 FCC Rcd. 6185, 6186 n.8 (2004) ("Comment Public Notice").

[6] *See* A&T Wireless Services, Inc., Annual Report 2003, at 4-5 ("AT&T Wireless Annual Report"), *available at* https://www.attwireless.com/press/annual_2003/ (visited July 22, 2004); AT&T Wireless Services, Inc., Form 10-K, at 5, 6, 11 (Mar. 3, 2004) ("AT&T Wireless 10-K"), *available at* http://www.sec.gov/Archives/edgar/data/1138234/000095012404000701/0000950124-04-000701-index.htm. AT&T Wireless's cellular and PCS licenses, including licenses held by entities in which AT&T Wireless holds a greater than 50% voting interest, cover 279 million POPs, or 96 percent of the United States population. *See* Letter from Douglas I. Brandon, Vice President, Federal Affairs, AT&T Wireless, Inc., and Brian F. Fontes, Vice President – Federal Relations, Cingular Wireless Corporation, to Erin McGrath, Assistant Division Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, at 2, Attachment A (Oct. 5, 2004) ("October 5, Letter"); *see also* AT&T Wireless 10-K at 11.

Distribution Service, Industrial/Business Pool Service, and Point-to-Point Microwave Service licenses in various markets throughout the United States.[7] AT&T Wireless also owns and operates a Wi-Fi network.[8] Additionally, AT&T Wireless holds interests in other wireless telecommunications providers throughout the United States[9] and internationally.[10]

9. AT&T Wireless was formed on July 9, 2001, when AT&T Corp. spun off AT&T Wireless to its shareholders to create an independent, publicly-traded company.[11] AT&T Wireless's largest investor, NTT DoCoMo, Inc. ("DoCoMo"),[12] acquired its interest in AT&T Wireless during this spin off from AT&T Corp.[13] DoCoMo, a Japanese wireless communications company, holds a 16 percent indirect ownership interest in AT&T Wireless.[14] No other investor holds more than a 10 percent ownership interest in AT&T Wireless.[15]

10. Today, AT&T Wireless is the second largest provider of wireless communications services in the United States based on revenues.[16] AT&T Wireless had 22 million customers as of December 31, 2003, and reported $16.7 billion in revenues for 2003.[17] AT&T Wireless provides its customers wireless voice and data services over two separate networks utilizing time division multiple access ("TDMA")[18] and global system for mobile communications ("GSM") technologies.[19] In 2001,

[7] *See* Comment Public Notice at 6185.

[8] AT&T Wireless 10-K at 5, 6; AT&T Wireless Annual Report at 4-5.

[9] These entities include Alaska Native Wireless, LLC, Cascade Wireless, LLC, Cincinnati Bell Wireless, LLC, GSM Corridor, LLC, and Triton PCS Holdings, Inc. *See* AT&T Wireless Annual Report at 67.

[10] *See* AT&T Wireless Annual Report at 16-17, 67; AT&T Wireless 10-K at 7-8 (stating that AT&T Wireless has investments in companies in Canada, Caribbean, Asia, and Europe).

[11] *See* AT&T Wireless Annual Report at 48; AT&T Wireless 10-K, at 18, 21; *see also* Application, ULS File No. 0000545809, Exhibit 1 (filed Aug. 1, 2001). To effectuate this split, AT&T Corp. created AT&T Wireless Group tracking stock, which was a class of AT&T Corp. common stock intended to provide financial returns based "on the financial performance and economic value of AT&T Corp.'s wireless services businesses." AT&T Wireless Annual Report at 48. The spinoff of AT&T Wireless from AT&T Corp., which occurred in July 2001, was effectuated by AT&T Corp.'s conversion of all shares of AT&T Wireless Group tracking stock into shares of AT&T Wireless common stock on a one-for-one basis and AT&T Corp.'s distribution of AT&T Wireless common stock to AT&T Corp. shareholders in the form of a stock dividend. *See id.*

[12] *See* AT&T Wireless Form 602. Nippon Telephone and Telegraph owns approximately 61% of DoCoMo. *See* AT&T Wireless Form 602, Exhibit A.

[13] AT&T Wireless Annual Report at 62. *See also* AT&T Wireless 10-K at 20.

[14] *See* AT&T Wireless Form 602. DoCoMo held an AT&T Corp. security that tracked the performance and value of the AT&T Wireless Group. *See* AT&T Wireless Annual Report at 62; *see also* AT&T Wireless 10-K at 20. In July 2001, DoCoMo's investment was converted into 16 percent of AT&T Wireless's common stock. *See* AT&T Wireless Annual Report at 62; AT&T Wireless 10-K at 20. As part of this investment, DoCoMo sits on AT&T Wireless's board of directors, and AT&T Wireless and DoCoMo have executed a technology agreement, creating "a strategic alliance to develop the next generation of mobile multimedia services on a global-standard, high-speed wireless network." AT&T Wireless 10-K at 20.

[15] *See* AT&T Wireless Form 602.

[16] AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4.

[17] AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4.

[18] AT&T Wireless's TDMA network covers an aggregate population ("POPs") of 207 million, or 71 percent of the population. AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4.

AT&T Wireless started overlaying a GSM network on top of its TDMA network, so that it would be able to offer enhanced wireless voice and data capabilities.[20] AT&T Wireless continued this upgrade in 2003 by overlaying GSM throughout its 850 MHz TDMA network.[21] On its GSM network, AT&T Wireless provides voice services, along with enhanced data services using general packet radio services ("GPRS")[22] and enhanced data rates for global evolution ("EDGE") technologies.[23] AT&T Wireless also provides voice services on an analog network and data services over a network utilizing packet switched data technology ("CDPD").[24] In the aggregate, the AT&T Wireless networks cover approximately 226 million POPs, or 78 percent of the population, and operate in 87 of the top 100 metropolitan areas.[25] AT&T Wireless increases its coverage area by entering into roaming agreements both within the United States and internationally.[26]

2. Cingular Wireless Corporation

11. Cingular is incorporated under the laws of the state of Delaware and headquartered in Atlanta, Georgia.[27] Through various subsidiaries and affiliates, Cingular constructs, operates, and holds interests in numerous wireless telecommunications systems throughout much of the United States.[28] Cingular provides analog and digital cellular services on 850 MHz band licenses and digital PCS services on 1900 MHz band licenses.[29] Although Cingular primarily provides wireless voice and data services

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[19] AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4. The AT&T Wireless GSM network covers approximately 220 million POPs, or 76 percent of the population. AT&T Wireless 10-K at 2-3; AT&T Wireless Annual Report at 4.

[20] AT&T Wireless 10-K at 4, 9.

[21] *Id.* at 4, 9 (stating that AT&T Wireless will continue to upgrade this system throughout 2004).

[22] AT&T Wireless offers its wireless data service, mMode™, to subscribers on its GSM/GPRS network. mMode provides subscribers information and entertainment services, such as games, ringtones, messaging services, and access to Internet sites.

[23] AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4. AT&T Wireless launched EDGE, a high-speed data network, in 2003. EDGE has been certified as 3G technology by the International Telecommunications Union (ITU). AT&T Wireless 10-K at 5.

[24] AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4. The CDPD network is being phased out as the data capabilities are increased on the GSM/GPRS/EDGE network. *See id.*

[25] AT&T Wireless Annual Report at 4. *See also* October 5 Letter at Attachment A.

[26] AT&T Wireless Annual Report at 4; AT&T Wireless 10-K at 2, 4. Roaming agreements allow AT&T Wireless to provide TDMA coverage throughout the United States and provide GSM coverage to 255 million POPs, or approximately 88 percent of the population. *See* AT&T Wireless Annual Report at 4; AT&T Wireless 10-K at 2, 4; *see also* October 5 Letter at Attachment A. Furthermore, through roaming agreements, AT&T Wireless can provide GPRS on its GSM network to over 241 million POPs, or 83 percent, of the population. *See* AT&T Wireless Annual Report at 4; AT&T Wireless 10-K at 2, 4. AT&T Wireless has also entered into international roaming agreements allowing its customers to obtain voice services in 130 countries and access to data services in more than 45 countries. *See* AT&T Wireless Annual Report at 4; AT&T Wireless 10-K at 4.

[27] Cingular Wireless LLC, Form 10-K, at 3 (filed Apr. 22, 4004) ("Cingular 10-K"), *available at* http://www.sec.gov/Archives/edgar/data/1138234/000095012404000701/0000950124-04-000701-index.htm.

[28] Application, Exhibit 1, at 7.

[29] Cingular 10-K at 6. Cingular has "access to licenses, either through owned licenses or licenses owned by joint ventures and affiliates, to provide cellular or PCS wireless communications services covering an aggregate of 236 million [POPs], or approximately 81 [percent] of the U.S. population, including 45 of the 50 largest U.S. metropolitan areas." Cingular 10-K at 2, 6. *See also* October 5 Letter at Attachment A.

using its cellular and PCS licenses, it also offers corporate messaging services on its Mobitex Data Network operating on 900 MHz SMR licenses using packet-switched technology.[30] Cingular subsidiaries and affiliates also have authority to operate systems using other licenses, including Wireless Communications Service, Paging and Radiotelephone, Multipoint Distribution System, Industrial/Business Pool Service, and Point-to-Point Microwave licenses, in various markets in the United States. Additionally, Cingular provides wholesale services to resellers.[31]

12. Cingular was formed in 2000 as a joint venture between SBC and BellSouth.[32] Cingular remains jointly owned and controlled by SBC and BellSouth, each of which holds a 50 percent economic and voting interest in Cingular.[33] Cingular, which serves solely as a holding company, controls Commission licenses and authorizations directly and indirectly through Cingular Wireless LLC, a Delaware limited liability company.[34]

13. Currently, Cingular is the second largest provider of wireless voice and data services in the United States in terms of subscribership.[35] Cingular had 24 million customers as of December 31, 2003 and reported $15.5 billion in revenues for 2003.[36] Cingular provides a wide range of digital wireless voice and data communication services over TDMA and GSM networks.[37] In October 2001, Cingular started overlaying a GSM network on top of its TDMA network to upgrade its wireless voice and data capabilities.[38] On its GSM network, Cingular provides enhanced voice and high-speed data communications using GPRS and EDGE technologies.[39] In the aggregate, Cingular's TDMA and GSM

[30] Cingular 10-K at 5-6, 9. Cingular's Mobitex data network covers over 90 percent of the U.S. metropolitan population, and provides coverage in 99 of the 100 largest metropolitan areas. *Id.* at 5, 6. .

[31] *Id.* at 4. Resellers represented approximately 5 percent of Cingular's total customers as of December 31, 2003. *See id.*

[32] *See* Cingular 10-K at 2; *see also* Applications of SBC Communications Inc. and BellSouth Corporation, WT Docket No. 00-81, *Memorandum Opinion and Order*, 15 FCC Rcd. 25,459 (WTB, IB 2000) ("*SBC-BellSouth Order*"). In October 2000, SBC and BellSouth contributed substantially all of their U.S. wireless businesses to Cingular. *See* Cingular 10-K at 2.

[33] *See* Cingular Wireless LLC, FCC Ownership Disclosure Form 602, Exhibit 1 (filed Mar. 12, 2004) ("Cingular Wireless LLC Form 602"); Cingular 10-K at 3.

[34] *See* Cingular Wireless Corporation, FCC Ownership Disclosure Form 602, Exhibit 1 (filed Mar. 30, 2004) ("Post-Transaction Form 602"); Cingular Wireless LLC Form 602, Exhibit 1; *see also* Cingular 10-K at 2. Cingular holds less than one percent of the membership units of Cingular Wireless LLC. *See* Cingular 10-K at 3 (stating that Cingular holds a 0.0000001% economic interest in Cingular Wireless LLC); *see also* Post-Transaction Form 602, Exhibit 1; Cingular Wireless LLC Form 602, Exhibit 1. Despite Cingular's *de minimis* ownership interest in Cingular Wireless LLC, Cingular is the manager of Cingular Wireless LLC and controls its management and operations. SBC and BellSouth indirectly hold 60 percent and 40 percent, respectively, of the economic ownership interests of Cingular Wireless LLC; however, both SBC and BellSouth exercise *de facto* control of Cingular Wireless LLC through Cingular, the manager. *See* Cingular 10-K at 3 (noting that Cingular Wireless LLC's officers are appointed by the board of directors of Cingular). Post-Transaction Form 602, Exhibit 1; *see also* Cingular Wireless LLC Form 602, Exhibit 1.

[35] Cingular 10-K at 2.

[36] *Id.* at 2.

[37] *Id.* at 2, 7. Cingular also maintains an analog network in those areas where it holds cellular licenses, pursuant to the Commission's rules. *See id.* at 6.

[38] *Id.* at 7.

networks directly provide service in 43 of the 50 largest metropolitan areas.[40] Cingular increases its coverage area by entering into roaming agreements within the United States.[41]

3. SBC Communications Inc.

14. SBC is a publicly-traded Delaware corporation, headquartered in San Antonio, Texas.[42] SBC provides communications services and products to businesses and consumers in the United States.[43] SBC's products and services vary by market, and include local exchange services, wireless communications, long-distance services, internet services, telecommunications equipment, network access, and directory advertising and publishing.[44] SBC also offers satellite television services through an arrangement with EchoStar Communications Corp.[45] Additionally, SBC has investments in communications companies in more than 25 countries, including Denmark, Switzerland, Lithuania, Poland, Austria, Germany, the Czech Republic, Hungary, Finland, Norway, Sweden, Belgium, South Africa, and Mexico.[46]

15. SBC was created as one of several regional holding companies created to hold AT&T Corp's local telephone companies.[47] Originally, SBC operated in five southwestern states, but it expanded its operation to 13 states through mergers with Pacific Telesis Group, Southern New England Telecommunications Corporation, and Ameritech Corporation in 1997, 1998, and 1999, respectively.[48] Currently, SBC provides telecommunications services in Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, Oklahoma, Texas, and Wisconsin,[49] and serves a total of 54.7 million access lines within its region.[50]

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[39] *Id.* at 5, 7. As of December 31, 2003, 93 percent of Cingular's POPs with cellular or PCS service had access to the GSM network, and Cingular plans to complete the overlay of its GSM network throughout its coverage area in 2004. *See Id.* at 7.

[40] *Id.* at 2, 6.

[41] *Id.* at 6. These roaming agreements allow Cingular's customers to receive wireless services "in virtually all areas in the United States where cellular/PCS wireless service is available." *Id.*

[42] SBC Communications Inc., Form 10-K, at 1 (filed Mar. 11, 2004) ("SBC 10-K"), *available at* http://www.sec.gov/Archives/edgar/data/732717/000073271704000205/0000732717-04-000205-index.htm.

[43] *Id.* at 1.

[44] *Id.* SBC publishes Yellow and White Pages directories and electronic directories. *See id.* at 6.

[45] *Id.* at 1, 5.

[46] *Id.* at 1, 6-7. The international investments include companies that provide local and long-distance telephone services, wireless communications, voice messaging, data services, internet access, telecommunications equipment, and directory publishing. *See id.* at 6.

[47] *Id.* at 1. On January 1, 1984, SBC was spun off from AT&T Corp. as a result of a 1982 antitrust consent decree. *See id.*

[47] *Id.* at 3.

[48] *Id.* at 1.

[49] *Id.*

[50] *Id.* at 4. SBC serves 28.8 million retail consumer, 18.3 million retail business, 7.1 million wholesale, and 0.5 million other access lines. *See id.*

16. SBC provides landline telecommunications services, including local and long-distance voice, data, and messaging services, on a retail and wholesale basis.[51] SBC offers interLATA (long distance calls) and intraLATA (local toll calls) long-distance voice services to its consumers.[52] Although SBC is authorized to offer long-distance services nationwide,[53] it provides long-distance services primarily to customers in its region and to customers in selected areas outside of its wireline subsidiaries' operating areas.[54] SBC also provides various data services, such as switched and dedicated transport, internet access and network integration, and data equipment sales.[55] SBC's internet offerings include basic dial-up access service, dedicated access, web hosting, e-mail, and high-speed access, such as broadband digital subscriber line ("DSL"), services.[56] SBC markets many of its services, including local and long distance, DSL, and satellite television, along with Cingular wireless service, as a bundled offering.[57]

4. BellSouth Corporation

17. BellSouth is a publicly-traded Georgia corporation, headquartered in Atlanta. BellSouth offers local, long distance, Internet, and wireless services to 45 million customers in the United States and thirteen other countries.[58] BellSouth's products and services vary by market, and include advanced voice features, DSL high-speed Internet access and broadband data services, e-commerce solutions, network access, switching and interconnection, and online and directory advertising and publishing services.[59] BellSouth also plans to add video entertainment services to its product offerings in 2004.[60] Additionally, BellSouth has investments in international telecommunications companies,[61] including investments in wireless service providers operating in Argentina, Chile, Nicaragua, Peru, and Venezuela.[62]

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[51] *Id.*

[52] *Id.* at 5. SBC has a total of 14.4 million long distance lines and is capable of offering long distance service in fifty states. See SBC Communications Inc., 2003 Annual Report, at 2 ("SBC Annual Report"), *available at* http://www.sbc.com/investor_relations/company_reports_and_sec_filings/2003_AR.pdf (visited July 22, 2004).

[53] SBC Annual Report at 2.

[54] SBC 10-K at 2.

[55] *Id.* at 4. Network integration services include installation of business data systems, local area networking, and other data networking offerings. *See id.*

[56] *Id.* at 4. SBC had approximately 3.5 million digital subscriber lines ("DSL") at the end of 2003 and is in the process of upgrading its network to make broadband DSL services available to approximately 80% of its wireline customers by early 2004. SBC 10-K at 2; SBC Annual Report at 2. SBC has formed an alliance with Yahoo! to create SBC Yahoo! DSL. SBC, through SBC Yahoo! DSL, is also in the process of rolling out a Wi-Fi network. *See* SBC 10-K at 1, 5; SBC Annual Report at 2.

[57] SBC Annual Report at 2.

[58] BellSouth Corporation, Form 10-K, at 3 (Feb. 24, 2004) ("BellSouth 10-K"), *available at* http://www.sec.gov/Archives/edgar/data/732713/000095014404001649/0000950144-04-001649-index.htm.

[59] *Id.* at 3-5. BellSouth owns companies that publish, print, sell advertising, and perform related services concerning alphabetical and classified telephone directories in paper and electronic formats, including white and yellow pages on CD-ROM format and on the Internet. *See* BellSouth 10-K at 15-16.

[60] BellSouth Corporation, 2003 Annual Report, at 6 ("BellSouth Annual Report"), *available at* http://www.bellsouth.com/investor/pdf/annualrpt03.pdf (visited July 22, 2004).

[61] BellSouth 10-K at 3.

[62] *Id.* at 13; BellSouth Annual Report at 16-17, 36 (stating that BellSouth holds investments in wireless providers in ten Latin American countries). In March 2004, BellSouth agreed to sell its interests in its Latin American (continued....)

18. BellSouth was created as one of several regional holding companies created to hold AT&T Corp's local telephone companies.[63] Today, BellSouth provides wireline communications service in the southeastern United States, serving substantial portions of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.[64]

19. BellSouth offers local and long-distance voice, data, and Internet services to consumers within its nine state region.[65] BellSouth has a variety of data offerings, including DSL, ISDN, and transport products. BellSouth's DSL offerings include a full range of Internet access products, from dial-up access to high-speed data services.[66] BellSouth also markets many of its services, including local and long distance, and DSL, along with Cingular wireless service, as a bundled offering.[67]

5. T-Mobile USA, Inc.

20. T-Mobile is incorporated under the laws of the State of Delaware and headquartered in Bellevue, Washington.[68] T-Mobile, through its subsidiaries and affiliates, constructs and operates broadband PCS systems throughout the United States.[69] It provides digital PCS voice and data services on 1900 MHz band licenses over a GSM/GPRS network.[70] T-Mobile also owns and operates a Wi-Fi network.[71]

21. T-Mobile was created in May 2001 when Deutsche Telekom acquired VoiceStream Wireless Corporation and Powertel, Inc.[72] T-Mobile is a wholly-owned, indirect subsidiary of Deutsche

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Operations to Telefonica Moviles. *See* BellSouth Signs Definitive Agreement to Sell Its Latin America Operations to Telefonica Moviles, News Release, at 1 (Mar. 8, 2004), *available at* http://bellsouthcorp.policy.net/proactive/newsroom/release.vtml?id=45087. BellSouth and Telefonica Moviles completed the transfer of BellSouth's ownership interests in wireless operations in Ecuador, Guatemala, and Panama on October 14, 2002. *See* BellSouth and Telefonica Moviles Close on BellSouth Operation in 3 Latin American Countries, *News Release*, at 1, *available at* http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=47809.

[63] BellSouth 10-K at 3. BellSouth was incorporated and became a publicly traded company in December 1983 when it was spun off from AT&T Corp. as a result of a 1982 antitrust consent decree. *See id.*

[64] *Id.* at 4.

[65] *Id.* at 3, 5. As of December 31, 2003, BellSouth had long distance penetration of 28 percent among its residential customers and 39 percent among its mass market business customers. *See id.*

[66] *Id.* at 6. As of December 31, 2003, BellSouth had over 1.46 million DSL subscribers, and 70% of the households in BellSouth's franchise area were qualified to receive DSL. *See id.* at 5.

[67] BellSouth Annual Report at 10, 14, 15.

[68] *See* Application, ULS File No. 0001771442, Exhibit 1, at 1 (filed June 16, 2004) ("T-Mobile-Cingular Application"); T-Mobile-Cingular Application, Exhibit 1, at 1; T-Mobile International Reports First Quarter 2004 Results of U.S. Operations, Financial Releases, at 7 ("T-Mobile First Quarter 2004 Financial Release"), *available at* http://www.t-mobile.com/company/investors/financial_releases/2003_Q4_sub.asp (visited Aug. 31, 2004).

[69] T-Mobile-Cingular Application, Exhibit 1, at 1.

[70] T-Mobile First Quarter 2004 Financial Release at 1; T-Mobile USA Adds More Than 1 Million Net New Customers in Q4, Financial Releases, at 2 (Jan. 27, 2004) ("T-Mobile 2003 Financial Release"), *available at* http://www.t-mobile.com/company/investors/financial_releases/2003_Q4_sub.asp.

[71] T-Mobile 2003 Financial Release at 2.

[72] *See* Deutsche Telekom 20-F at 38 (Mar. 30, 20040) ("Deutsche Telekom 2003 20-F"), *available at* http://www.sec.gov/Archives/edgar/data/946770/000095013604000944/file001.htm; *see also* Transferors, and
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Telekom AG ("Deutsche Telekom"), a corporation organized under the laws of the Federal Republic of Germany.[73] Deutsche Telekom offers fixed-line voice telephony products and services, mobile communications, Internet, and other services, primarily in Europe.[74] Deutsche Telekom holds its interest in T-Mobile USA through T-Mobile International AG & Co. KG ("T-Mobile International"), which is the mobile communications subsidiary of Deutsche Telekom.[75] T-Mobile International serves a total of 61 million mobile customers in Europe and the United States.[76]

22. As of December 31, 2003, T-Mobile had a total of 13.1 million U.S. subscribers.[77] T-Mobile's facilities-based networks cover 225 million POPs, and it operates in 46 of the top 50 metropolitan areas.[78] T-Mobile increases its coverage area by entering into roaming agreements within the United States.[79]

6. Triton PCS, Inc.

23. Triton PCS is a publicly-traded Delaware corporation, headquartered in Berwyn, Pennsylvania.[80] Triton PCS provides wireless communications services in the southeastern United States.[81] Specifically, Triton PCS provides service "in a contiguous geographic area encompassing portions of Virginia, North Carolina, South Carolina, Tennessee, Georgia and Kentucky."[82] Triton PCS reported total revenues of approximately $810 million in 2003.[83] Triton PCS provides wireless digital voice and data services on 1900 MHz band PCS licenses over TDMA and GSM/GPRS networks.[84]

24. In February 1998, Triton PCS entered into a joint venture with AT&T Wireless's predecessor AT&T Corp. As part of the joint venture, AT&T Wireless contributed licenses to Triton PCS in exchange for an equity position in Triton PCS Holdings, Inc., which wholly owns Triton PCS.[85] Triton PCS is also AT&T Wireless's exclusive provider of wireless mobility services within Triton PCS's region and is the preferred provider of wireless services to AT&T Wireless's digital wireless customers who

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Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9789 ¶ 17 (2001) ("*Deutsche Telekom-VoiceStream Order*").

[73] T-Mobile-Cingular Application, Exhibit 1, at 1.

[74] Deutsche Telekom-VoiceStream Press Release (May 31, 2001).

[75] T-Mobile 2003 Financial Release at 2.

[76] *Id.*

[77] Deutsche Telekom 2003 20-F at 38; T-Mobile 2003 Financial Release at 1.

[78] T-Mobile-Cingular Application, Exhibit 1, at 1-2.

[79] *Id.* Roaming agreements allow T-Mobile to provide coverage to an additional 29 million people, for a total coverage area of 254 million POPs. *See id.*

[80] Triton PCS, Inc, Form 10-K, at 4 (Mar. 19, 2004) ("Triton PCS 10-K"), *available at* http://www.sec.gov/Archives/edgar/data/1064735/000119312504045442/d10k.htm.

[81] *Id.* at 4.

[82] *Id.* Triton PCS's licenses cover approximately 13.6 million POPs and include 10 of the top 100 markets in the country. *See id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* AT&T Wireless holds Triton PCS Series A preferred stock. *See id.* at 5.

roam in Triton PCS's region.[86] Triton PCS markets service within its region under the SunCom brand name and logo and under AT&T Wireless's brand name and logo. Triton PCS provides nationwide coverage through its relationship with AT&T Wireless and through roaming agreements.[87]

B. Description of Transactions

1. Cingular – AT&T Wireless

25. On February 17, 2004, Cingular and AT&T Wireless entered into a merger agreement ("Merger Agreement").[88] According to the terms and conditions of the Merger Agreement, a wholly-owned subsidiary of Cingular, Links I Corporation, created for the sole purpose of the merger, will be merged into AT&T Wireless.[89] Post-Transaction, AT&T Wireless will survive and continue to exist as a wholly-owned subsidiary of Cingular.[90] Pursuant to the Merger Agreement, each share of AT&T Wireless stock will be converted into a right to receive cash and then canceled.[91] AT&T Wireless's common shareholders will receive $15 cash per share, and the preferred shareholders will receive the applicable liquidation preference of their preferred shares, for a total value of approximately $41 billion in cash.[92] SBC and BellSouth have committed funding to Cingular for the all-cash deal.[93] SBC and BellSouth have agreed to guarantee 60 percent and 40 percent of the funding, or $25 billion and $16 billion, respectively, that Cingular needs to acquire AT&T Wireless.[94]

26. Upon consummation of the proposed transaction, SBC and BellSouth will acquire additional non-voting preferred stock in Cingular.[95] As a result, SBC and BellSouth will hold 60 percent and 40 percent, respectively, of post-merger Cingular's economic ownership interests, but each will continue to have negative control of and continue to exercise *de facto* control over Cingular by virtue of holding 50 percent of Cingular's voting interests. Post-transaction, AT&T Wireless and its licensing

[86] *Id.* at 4-5.

[87] *Id.* at 5 (stating that this coverage allows Triton PCS the ability to offer competitive national rate plans).

[88] *See* Cingular 10-K at 2, 11; AT&T Wireless Annual Report at 6, 83; *see also* Cingular To Acquire AT&T Wireless, Create Nation's Premier Carrier, News Release, at http://www.attwireless.com/press/releases/2004_releases/021704.jhtml (Feb. 17, 2004) ("February 12, 2004 News Release").

[89] AT&T Wireless Services, Inc., Schedule 14A, at 3, 7, 24 (Mar. 22, 2004) ("AT&T Wireless Proxy Statement"), *available at* http://www.sec.gov/Archives/edgar/data/1138234/000095012304003552/0000950123-04-003552-index.htm.

[90] AT&T Wireless Proxy Statement at 24.

[91] Application, Exhibit 1, at 8. The Applicants state that, as a result of this conversion, DoCoMo's ownership interests in AT&T Wireless will be extinguished. *Id.* at 8 n.9.

[92] AT&T Wireless Proxy Statement at 1-2, 7, 24; Cingular 10-K at 2, 11; AT&T Wireless Annual Report at 6, 83; February 12, 2004 News Release, at 1. The amount of the Series C and Series E preferred stock liquidation preference is $286,010,148 and $9,825,134, respectively, as of March 31, 2004. AT&T Wireless Proxy Statement at 24.

[93] *See* Cingular 10-K at 11, SBC 10-K at 9, BellSouth 10-K at 43; Bell South Annual Report at 88; *see also* February 12, 2004 News Release, at 1.

[94] *See* SBC 10-K at 9; BellSouth 10-K at 43; Bell South Annual Report at 88; AT&T Wireless Proxy Statement at 33; *see also* February 12, 2004 News Release, at 1.

[95] *See* Application, File No. 0001874690, Exhibit 1, at 1 (filed Sept. 21, 2004).

subsidiaries will become indirect, wholly-owned subsidiaries of Cingular.[96] This proposed transaction would create spectrum and service overlaps in many geographic areas,[97] including overlaps in the Los Angeles and Indianapolis Major Trading Areas ("MTAs"). Cingular was required to divest spectrum in these two markets in 2000, as a condition of the approval of the transaction creating Cingular,[98] in order to come into compliance with the Commission's spectrum aggregation rule.[99]

27. The Applicants' current spectrum holdings are set out in detail in the Application.[100] AT&T Wireless currently holds spectrum in all but 26 of the 493 BTAs, and its spectrum aggregation ranges up to 80 MHz. Cingular currently holds spectrum in all but 132 of the 493 BTAs, and its spectrum aggregation ranges up to 55 MHz. Notable among the areas in which Cingular does not currently hold spectrum are Denver (BTA110), Minneapolis (BTA298), and Phoenix (BTA347), which are among the 20 most populous BTAs.[101] As a result of this transaction, Cingular will hold spectrum in 475 of the 493 BTAs,[102] including the Denver, Minneapolis, and Phoenix BTAs. The combination of the two companies' spectrum holdings would result in overlaps between their current holdings in 352 BTAs, and it would also result in Cingular expanding its licensed footprint into 114 other BTAs in which it does not currently hold spectrum. Post-transaction, Cingular would have spectrum holdings ranging up to 80 MHz,[103] with 80 MHz in 58 counties in 18 BTAs, 75 MHz in 28 counties in 8 BTAs, 70 MHz in 181 counties in 28 BTAs, 65 MHz in 373 counties in 70 BTAs, and 60 MHz in 125 counties in 34 BTAs.[104]

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[96] *See* Post-Transaction Form 602, Exhibit 1 and Ownership Chart. The Applicants state that, since AT&T Wireless will continue to exist post-transaction, the relationship between AT&T Wireless and its subscribers will continue unchanged and that there is no need to transition these customers to Cingular. Application, Exhibit 1, at 8.

[97] Application, Exhibit 1, at Attachment 8, Attachment 9.

[98] *See SBC-BellSouth Order*, 15 FCC Rcd. at 25,468-70 ¶¶ 20-26; *see also* Wireless Telecommunications Bureau Grants Consent to SBC Communications Inc., Ameritech Wireless Communications, Inc., AT&T Wireless PCS, LLC, and Indiana Acquisition, L.L.C. to Transfer Control of or to Assign Wireless Licenses, WT Docket No. 00-81, *Public Notice*, 15 FCC Rcd. 18,128 (2000).

[99] *See* 47 C.F.R. § 20.6, repealed January 1, 2003.

[100] *See* Application, Appendix 8, as amended August 10, 2004. For the purpose of characterizing the effect of this transaction on spectrum aggregation, we do not include in AT&T Wireless's spectrum holdings the licenses of Triton PCS in which AT&T Wireless currently holds a 10% or greater equity interest in Triton PCS, because AT&T Wireless and Triton have reached a separate agreement, described in Section II.B.3., below, whereby AT&T Wireless will relinquish that interest. For present purposes, we include in the carriers' current spectrum holdings any BTA in which they hold spectrum in any part of the BTA.

[101] The Phoenix, Arizona BTA is ranked 13th, with a population of 3.5 million; the Minneapolis, Minnesota BTA is ranked 14th, with a population of 3.3 million; and the Denver, Colorado BTA is ranked 19th, with a population of 2.7 million. Population figures are based on the 2000 US Census.

[102] Post-merger, Cingular will not hold spectrum in BTA037 (Bemidji, MN), BTA053 (Bozeman, MT), BTA054 (Brainerd, MN), BTA069 (Casper-Gillette, WY), BTA119 (Duluth, MN), BTA138 (Fargo, ND), BTA166 (Grand Forks, ND), BTA207 (Ironwood, MI), BTA231 (Klamath Falls, OR), BTA301 (Mitchell, SD), BTA375 (Riverton, WY), BTA376 (Roanoke, VA), BTA381 (Rock Springs, WY), BTA477 (Willmar-Marshall, MN), BTA481 (Worthington, MN), BTA490 (Guam), BTA492 (American Samoa), and BTA493 (Northern Mariana Islands).

[103] See Application, Appendix 8, as amended August 10, 2004. In some areas, where Cingular would have held more than 80 MHz as a result of this transaction, Cingular has committed to divesting down to 80 MHz in each case. Cingular Opposition at 9; *see also* Application at 19 n.82. (The highest such aggregation would have been 120 MHz, in Sabine County, Texas.) We are conditioning grant of this transaction on fulfillment of this commitment, as described in Section V.A.3.d., below.

[104] Prior to its elimination, the Commission's spectrum aggregation limit, 47 C.F.R. § 20.6, permitted aggregation of up to 55 MHz of applicable spectrum.

28. Upon consummation of the proposed transaction, the merged company will be internally reorganized.[105] This reorganization will be effectuated by post-merger Cingular transferring control of AT&T Wireless, along with its subsidiaries and interests, to Cingular Wireless LLC.[106] A new subsidiary ("Newco"), which will be directly owned by AT&T Wireless and Cingular Wireless LLC, will be created. AT&T Wireless's and Cingular Wireless LLC's operating subsidiaries will be directly held by Newco.[107] The controlling and non-controlling interests that AT&T Wireless holds in other Commission-regulated businesseses will remain with AT&T Wireless and will not be contributed to Newco.[108] During this reorganization, Cingular will redeem the non-voting preferred stock given to SBC and BellSouth at the consummation of the transfer of control of AT&T Wireless to Cingular.[109] As a result, post-reorganization, SBC and BellSouth will each hold a 50 percent voting and equity interest in Cingular.[110]

29. The Applicants assert that approval of the proposed transaction is in the public interest, stating that the increased network and spectrum capacity in areas where Cingular and AT&T Wireless are already providing service will greatly improve service quality and coverage[111] and allow for the rapid deployment of advanced wireless services, including in rural areas.[112] Specifically, the Applicants claim that post-transaction Cingular will require 80 MHz of spectrum to provide a full menu of competitive voice and data services.[113] They also state that the transaction will allow Cingular to expand its facilities-based footprint to 49 of the top 50 markets and 97 of the top 100 metropolitan areas (excluding only Richmond, Norfolk, and Newport News, VA).[114] Further, the Applicants estimate that the combined entity's licenses will cover 284 million POPs,[115] and its GSM network will cover 250 million POPs.[116]

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[105] *See, e.g.*, Application, File No. 0001874690, Exhibit 1, at 1 (filed Sept. 21, 2004).

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See id.*; *see also supra* note 95 and accompanying text.

[110] *See, e.g.*, Application, File No. 0001874690, Exhibit 1, at 2.

[111] Application, Exhibit 1, at 9, 10-15. The Applicants state that this increased capacity is needed in order to ensure service quality (*i.e.*, a reduction in blocked and dropped calls), because both Cingular and AT&T Wireless divide their spectrum in order to operate separate analog, TDMA, and GSM networks. *See* Application, Exhibit 1, at 11, 12.

[112] *Id.* at 9, 15-19. The Applicants claim that the combined spectrum of Cingular and AT&T Wireless is necessary in order to upgrade their systems to permit high-speed data transmissions, because they will have to set aside a minimum of 10 MHz of spectrum, separate from the analog, TDMA, and GSM spectrum, to introduce Universal Mobile Telecommunications Systems ("UMTS") service. *See id.* at 18.

[113] *Id.* at 19. The Applicants further state that in areas where, upon consummation of the proposed transaction, Cingular "would hold an attributable interest in more than 80 MHz throughout a BTA," Cingular will reduce the amount of spectrum it holds "to no more than 80 MHz." *Id.* at 19 n.82; *see also* Cingular Opposition at 9.

[114] Application, Exhibit 1, at 9, 20-22; Cingular 10-K at 2; February 17, 2004 News Release at 1.

[115] *See* October 5 Letter at Attachment A. The Applicants state that "[t]his figure may not accurately reflect the actual total licensed population coverage after consummation of the merger, as this figure is not adjusted for transactions that may occur closely after or may be required as conditions to such consummation, and may not reconcile back to pre-combination numbers due to difference in methods of calculating licensed population coverage between [AT&T Wireless] and [Cingular]." *See id.* at 2-3. The Applicants explain that "[l]icense coverage figures of a carrier vary, depending on (i) the data sources of and methods used to calculate U.S. population, (ii) the estimated propagation characteristics of its network transmitters and the related measurement methodologies and (iii) the counting of proportionate license interests." *See id.* at 1-2.

Additionally, the Applicants allege that the merger will create economies of scale and scope that will allow Cingular to be a more effective competitor,[117] and that the transaction will improve homeland security and public safety.[118] The Applicants allege that these consumer benefits cannot be realized quickly by acquiring spectrum in a piecemeal fashion.[119] They state that Cingular must acquire both spectrum and infrastructure to make improvements in coverage, capacity, and quality without substantial delays.[120]

30. The Applicants further state that the proposed transaction would not harm competition.[121] The Applicants argue that the competitive effects of this transaction should be evaluated based on its impact on a nationwide mobile voice and data market.[122] The Applicants conclude that the proposed transaction would strengthen competition in the mobile voice and data product market, and that there would be no adverse effects on competition between wireless and wireline telecommunications services or on the provision of bundled services.[123]

2. T-Mobile USA – Cingular Joint Venture Unwind

31. VoiceStream PCS II License Corporation, a wholly-owned subsidiary of T-Mobile, and Pacific Telesis Mobile Services, LLC ("PacTel"), a wholly-owned subsidiary of Cingular, have entered into a series of agreements to unwind a network infrastructure sharing joint venture.[124] In November 2001, Cingular and T-Mobile USA entered into a joint venture agreement to share the ownership and operation of certain GSM network infrastructures ("Joint Venture Networks").[125] T-Mobile contributed its network assets in a partitioned portion of the New York Metropolitan Trading Area ("MTA") consisting of the New York Basic Trading Area ("BTA"), and Cingular contributed its network assets in the Los Angeles and San Francisco MTAs, which cover most of California and parts of Nevada.[126] Currently, T-Mobile and Cingular state that they jointly own and control the PCS networks in the Los

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[116] *See id.* at 3, Attachment A. The Applicants state that this figure "may not be reconcilable back to pre-merger numbers provided by either company," because "network coverage estimates can vary depending on the population statistics relied on at a point in time and on an estimate of the network propagation characteristics and measurement tools." *Id.* at 3. As an example, the Applicants state that Cingular uses a -98 dBm field strength and AT&T Wireless uses a -95 dBm field strength in their propagation estimates. *See id.*

[117] Application, Exhibit 1, at 9, 22-23; Cingular 10-K at 2. The Applicants allege that economies of scale and scope that will be achieved include trunking efficiency, greater purchasing and billing system efficiencies, and reductions in common expenses, such as network expansion, maintenance, operating, and administrative costs. *See id.* at 22.

[118] *Id.* at 5, 9, 23-24. The Applicants claim that the proposed transaction will allow for more widespread deployment of Wireless Priority Service ("WPS"), and provide for diversified routing, greater redundancy, and increased reliability in signaling and data networks, which will improve network functionality during an emergency. *See* Application, Exhibit 1, at 24.

[119] *Id.* at 5.

[120] *Id.* at 6, 21.

[121] *Id.* at 25-41.

[122] *Id.* at 28-34.

[123] *Id.* at 25-28, 41-43.

[124] T-Mobile-Cingular Application, Exhibit 1, at 2.

[125] Deutsche Telekom 2003 20-F at 39.

[126] *Id.* The Applicants state that they retained ownership and control of their spectrum licenses. *See id.*

Angeles and San Francisco MTAs and the New York BTA.[127] After the Joint Venture Unwind, T-Mobile and Cingular will operate separate networks.[128] This transaction "is conditioned upon consummation of the proposed merger between Cingular Wireless Corporation . . . and AT&T Wireless Services, Inc."[129]

32. As part of the Joint Venture Unwind, T-Mobile will purchase from PacTel 10 MHz of PCS spectrum in the San Francisco BTA, Sacramento BTA, and Las Vegas BTA for $180 million.[130] Additionally, T-Mobile will acquire 100 percent ownership in the Joint Venture by purchasing Cingular's interest in the Joint Venture for $2.3 billion.[131] T-Mobile and Cingular have also entered into a long-term *de facto* spectrum leasing arrangement whereby Cingular will lease spectrum to T-Mobile in the Los Angeles and San Francisco MTAs and New York BTA to allow for the transition of Cingular's customers off the Joint Venture Networks.[132] Further, pursuant to a Wholesale Agreement, T-Mobile will use its spectrum, along with the spectrum leased from Cingular, to provide voice and data services to Cingular in the Los Angeles and San Francisco MTAs and New York BTA until Cingular's customers are transitioned from the Joint Venture Networks to the networks Cingular is acquiring as part of the proposed Cingular-AT&T Wireless transaction.[133]

3. Triton PCS – AT&T Wireless

33. Triton PCS and AT&T Wireless have entered into agreements to exchange PCS spectrum in various markets located primarily in Georgia and North Carolina.[134] As a result of the proposed spectrum exchange, Triton PCS will assign 20 MHz of PCS spectrum in the Augusta, GA BTA to AT&T Wireless PCS, and AT&T Wireless PCS will assign 10 MHz of PCS spectrum in the Asheville, NC, Jacksonville, NC, and Wilmington, NC BTAs to Triton PCS. In the Savannah, GA BTA, AT&T Wireless PCS will assign its 10 MHz A-block PCS license to Triton PCS. In return, Triton PCS will assign its 15 MHz C-block license, which covers nine of the nineteen counties in the Savannah, GA BTA, to AT&T Wireless PCS. Triton PCS will also acquire a 15 MHz C-block license from Lafayette Communications Company L.L.C. ("Lafayette") that covers the remaining ten counties in the Savannah, GA BTA and assign it to AT&T Wireless PCS. Thus, AT&T Wireless PCS will have a net gain of 5 MHz of spectrum throughout the Savannah, GA BTA. Additionally, pursuant to a separate agreement between AT&T Wireless and Triton PCS, AT&T Wireless "will relinquish all of its equity in Triton [PCS]" and will no longer have the right to appoint a director to Triton PCS's board of directors.[135] Consummation of the proposed spectrum exchange and AT&T Wireless's relinquishment of Triton PCS

[127] T-Mobile-Cingular Application, Exhibit 1, at 2.

[128] *Id.*

[129] *Id.* at 1.

[130] *Id.* at 1-3. This spectrum will be partitioned and disaggregated from PacTel's 20 MHz B-Block PCS license for the San Francisco-San Jose-Oakland MTA and its 20 MHz B-Block PCS license for the Los Angeles-San Diego MTA. *See id.* at 1. Additionally, T-Mobile has a future option to purchase 10 MHz of spectrum in the Los Angeles and San Diego BTAs from PacTel, *see id.* at 2, 3, and the parties plan to exchange certain additional spectrum licenses pursuant to a separate Exchange Agreement. *See id.* at 3.

[131] *Id.* at 2.

[132] *Id.*

[133] *Id.* at 3.

[134] Application, File No. 0001810683, Exhibit 1, at 1 (filed July, 21, 2004) ("Triton-AT&T Wireless Application").

[135] *Id.*

equity is contingent upon the closing of the proposed transfer of control of AT&T Wireless to Cingular.[136]

C. Applications and Review Process

1. Commission Review

34. *Cingular – AT&T Wireless.* On March 18, 2004, pursuant to section 310(d) of the Communications Act of 1934, as amended ("Communications Act"),[137] Cingular and AT&T Wireless filed 92 applications seeking consent to the proposed transfer of control of licenses held by AT&T Wireless and its subsidiaries to Cingular,[138] and 21 applications seeking consent to the *pro forma* transfer of control of minority interests held by AT&T Wireless to Cingular.[139] Cingular and AT&T Wireless also filed an application seeking Commission approval to transfer to Cingular control of an international section 214 authorization held by AT&T Wireless,[140] pursuant to section 214 of the Communications

[136] *See id.*

[137] 47 U.S.C § 310(d).

[138] *See* AT&T Wireless Services, Inc. and Cingular Wireless Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, *Public Notice*, 19 FCC Rcd. 6185, 6186-6188 (2004) ("Comment Public Notice"). Two applications seeking consent to the transfer of control of licenses held by Longview Cellular, Inc. ("Longview") (file no. 0001656377) and Medford Cellular Telephone Co., Inc. ("Medford") (file no. 0001656384) from AT&T Wireless to Cingular were dismissed on April 6, 2004 for procedural reasons. *See* Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications Action, *Public Notice*, Report No. 1804 (rel. Apr. 14, 2004). New applications were filed on behalf of Longview (file no. 0001689252) and Medford (file no. 0001689338) on April 8, 2004. *See* Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and De Facto Transfer Lease Applications Accepted for Filing, *Public Notice*, Report No. 1803 (rel. Apr. 14, 2004). Further, during the pendency on this transaction, AT&T Wireless submitted notifications, pursuant to the Commission's *pro forma* forbearance procedures, reporting an internal tax reorganization. *See* File No. 0001845233, Exhibit 1, at 2 (filed Aug. 18, 2004); *see also* File No. 0001845158 (filed Aug. 18, 2004); File No. 0001845426 (filed Aug. 18, 2004). As part of this tax reorganization, AT&T Wireless converted Vanguard Cellular Pennsylvania, LLC to a limited partnership. *See* File No. 0001845233. The Applicants amended the application transferring control of Vanguard Cellular Pennsylvania, LLC from AT&T Wireless to Cingular to reflect that the entity is now Vanguard Cellular Pennsylvania, L.P. *See* File No. 0001656573 (amended Sept. 3, 2004). AT&T Wireless also assigned the license held by Eclipse PCS of Indianapolis, LLC, WPQP644, to AT&T Wireless PCS. *See* File No. 0001845158. The Applicants amended the application transferring control of AT&T Wireless PCS, LLC from AT&T Wireless to Cingular to include WPQP644, *see* File No. 0001656065 (amended Sept. 3, 2004), and withdrew the Eclipse PCS of Indianapolis, LLC application. *See* File No. 0001656356 (withdrawn Sept. 22, 2004). Lastly, AT&T Wireless reported the transfer of control of AT&T Wireless PCS of Philadelphia, LLC from Vanguard Cellular Pennsylvania, LLC to Vanguard Cellular Pennsylvania, L.P. *See* File No. 0001845426.

[139] Comment Public Notice, 19 FCC Rcd. at 6189 (listing, in Part III.B of the Comment Public Notice, the applications seeking consent to the "*pro forma* transfer of control of non-controlling interests held by AT&T Wireless to Cingular"). As control of these licensees is unaffected by the proposed transaction, it is unnecessary to reevaluate the qualifications of these licensees at this time. We do consider these interests, to the extent that they are relevant, in the competitive analysis of the proposed transaction.

[140] AT&T Wireless Services, Inc., Transferor, and Cingular Wireless Corporation, Transferee, Application for Transfer of Control of Section 214-Authorized International Carrier, File No. ITC-T/C-20040318-00126, at 1 (filed Mar. 18, 2004). The Applicants seek Commission consent to transfer control of AT&T Wireless's international Section 214 authorization "only as to (1) [AT&T Wireless's] global resale service authority and (2) limited global facilities-based authority, excluding the U.S.-South Africa route. . . . [AT&T Wireless] will relinquish the residual authority (*i.e.*, facilities-based authority not transferred to Cingular) as of consummation of the transaction." AT&T Wireless Services, Inc., Transferor, and Cingular Wireless Corporation, Transferee, Application for Transfer of

(continued....)

Act.[141] Additionally, the Applicants filed three applications seeking consent to the proposed transfer of control to Cingular of experimental authorizations held by AT&T Wireless and its subsidiaries.[142]

35. Prior to the filing of the applications, the Wireless Telecommunications Bureau ("Bureau") adopted a protective order, dated March 17, 2004, under which third parties would be allowed to review confidential or proprietary documents submitted by the Applicants.[143] On April 2, 2004, the Commission released a Public Notice seeking public comment on the proposed transaction.[144] In response to the Comment Public Notice, twenty petitions to deny the applications or comments supporting or opposing grant of the applications during the pleading cycle.[145] On June 30, 2004, Bureau staff requested additional information from the Applicants ("Information Request").[146] The Applicants' responses to the Information Request, along with their responses to additional Commission requests, are included in the record.[147] On July 16, 2004, Commission staff requested information ("Third-Party Information Requests") from ALLTEL Corporation, Nextel Communications Inc. ("Nextel"), Sprint Corporation ("Sprint"), T-Mobile, United States Cellular Corporation, and Verizon Wireless (collectively, "Third Parties").[148] The responses to the Third-Party Information Requests, along with their responses to

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Control of Section 214-Authorized International Carrier, File No. ITC-T/C-20040318-00126, at 1 (amended Sept. 8, 2004) at 1-2.

[141] 47 C.F.R. § 214.

[142] Comment Public Notice, 19 FCC Rcd. at 6189.

[143] Applications for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services, Inc. and Its Subsidiaries to Cingular Wireless Corporation; Order Adopting Protective Order, WT Docket No. 04-70, *Order*, 19 FCC Rcd. 4793 (2004).

[144] *See* Comment Public Notice, 19 FCC Rcd. at 6185. The Comment Public Notice set due dates of May 3, 2004 for Petitions to Deny, May 13, 2004 for Oppositions, and May 20, 2004 for Replies. *See id.* at 6185, 6190.

[145] The parties that filed formal pleadings in this proceeding are noted in Appendix A. In addition to those formal pleadings, we have received informal comments through *ex parte* submissions. *See* Appendix A. All pleadings and comments are available on the Commission's Electronic Comment Filing System ("ECFS") website at www.fcc.gov/cgb/ecfs/.

[146] *See* Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to David C. Jatlow, AT&T Wireless Services, Inc., and David G. Richards, Cingular Wireless Corporation (June 30, 2004).

[147] *See* list of AT&T Wireless and Cingular responses in Appendix B.

[148] *See* Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, and Martin K. Perry, Chief Economist, Federal Communications Commission, to William P. Barr, Executive Vice-President and General Counsel, Verizon Corporation (July 16, 2004); Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, and Martin K. Perry, Chief Economist, Federal Communications Commission, to Francis X. Frantz, Executive Vice President – External Affairs, General Counsel and Secretary, ALLTEL Corporation (July 16, 2004); Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, and Martin K. Perry, Chief Economist, Federal Communications Commission, to Tom Gerke, Executive Vice-President and General Counsel, Sprint Corp. (July 16, 2004); Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, and Martin K. Perry, Chief Economist, Federal Communications Commission, to James R. Jenkins, Vice President – Legal and External Affairs, U.S. Cellular Corporation (July 16, 2004); Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, and Martin K. Perry, Chief Economist, Federal Communications Commission, to Leonard Kennedy, Senior Vice President and General Counsel, Nextel Corp., Inc. (July 16, 2004); Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, and Martin K. Perry, Chief Economist, Federal
(continued....)

additional Commission inquiries, are included in the record.[149]

36. Additionally, on September 21, 2004, the Applicants filed a series of applications seeking consent to the *pro forma* assignment and transfer of control of licenses to effectuate a reorganization of the merged company.[150] The Applicants will file additional notifications under the Commission's *pro forma* forbearance procedures for all other licenses affected by this reorganization.[151]

37. *T-Mobile – Cingular.* On June 16, 2004, T-Mobile and Cingular filed applications seeking Commission consent, pursuant to section 310(d) of the Communications Act,[152] to assign partitioned and disaggregated portions of three broadband PCS licenses from a subsidiary of Cingular to a subsidiary of T-Mobile.[153] Additionally, T-Mobile and Cingular filed applications seeking approval of a proposed long-term *de facto* transfer leasing arrangement between various subsidiaries of Cingular and a subsidiary of T-Mobile.[154] The Commission released a Public Notice, dated July 13, 2004, seeking public comment on this proposed transaction.[155] No pleadings were filed regarding this transaction, and we find it to be in the public interest.[156]

38. *Triton PCS – AT&T Wireless.* On July 21, 2004, pursuant to section 310(d) of the Communications Act,[157] AT&T Wireless PCS, LLC, a wholly-owned subsidiary of AT&T Wireless, Triton PCS License Company L.L.C., a wholly-owned subsidiary of Triton PCS, and Lafayette filed four applications seeking consent to the proposed full and partial assignment of certain A- and C-Block PCS

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Communications Commission, to Dave Miller, Senior Vice President and General Counsel, T-Mobile U.S.A., Inc. (July 16, 2004).

[149] *See also* list of ALLTEL Corporation, Nextel, Sprint, T-Mobile, United States Cellular Corporation, and Verizon Wireless responses in Appendix B.

[150] *See* File Nos. 0001876500, 0001876485, 0001874675, 0001874690, 0001874724, 0001874736, 0001874757, 0001874780, 0001874800, 0001874828, 0001876511, 0001876519, 0001876540, 0001876544, 0001876550, 0001876556, 0001876560, 0001874920, 0001874868, 0001876568, 0001876573, 0001876580, 0001876584, 0001876589, 0001876604, 0001876609, 0001876616, 0037-EX-TU-2004, 0038-EX-TU-2004, 0039-EX-TU-2004, 0040-EX-TU-2004.

[151] *See, e.g.,* Application, File No. 0001874675, Exhibit 1, at 1 n.2.

[152] 47 U.S.C § 310(d).

[153] *See* Cingular Wireless Corporation and T-Mobile USA, Inc. Seek FCC Consent to Assignment of Licenses and Approval of Long-Term *De Facto* Leasing Arrangements, WT Docket No. 04-254, *Public Notice*, DA 04-2119, at 2 (rel. July 13, 2004) ("T-Mobile-Cingular Public Notice") (listing T-Mobile-Cingular Application, File No. 0001771442).

[154] *See id.* (listing T-Mobile-Cingular Lease Applications, File Nos. 0001757186 and 0001757204).

[155] *See id.* at 1. The Comment Public Notice set due dates of August 12, 2004 for Petitions to Deny, August 23, 2004 for Oppositions, and August 30, 2004 for Replies. *See id.* at 1, 4.

[156] We have reviewed these assignment and lease applications, and we find that they are in the public interest and will not result in competitive harm. No competitor will leave the market as a result of this transaction; to the contrary, T-Mobile will be greatly strengthened as a vigorous new competitor in these markets. Post-transaction, T-Mobile will hold from 20 MHz to 25 MHz of spectrum in the applicable counties as a result of the assignment applications. As a result of the leasing arrangement with Cingular, T-Mobile will have an interest between 30 MHz and 45 MHz in the applicable counties. Although we do not find that these transactions will have any adverse competitive impact, we have taken them into consideration, to the extent that they are relevant, in the competitive analysis of the proposed AT&T Wireless-Cingular transaction.

[157] 47 U.S.C § 310(d).

licenses.[158] The Commission released a Public Notice, dated August 20, 2004, seeking public comment on the proposed transaction.[159] No pleadings were filed regarding this transaction, and we find it to be in the public interest.[160]

2. Department of Justice Review

39. The Antitrust Division of the U.S. Department of Justice ("DOJ") reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.[161] The Antitrust Division's review is limited solely to an examination of the competitive effects of the acquisition, without reference to national security, law enforcement, or other public interest considerations. The Antitrust Division reviewed the merger between Cingular and AT&T Wireless and entered into a consent decree with the Applicants on October 25, 2004, approving the merger subject to the Applicants' divesting business units in certain markets, divesting bare spectrum in other markets, and either selling or making passive certain of their minority investments in other wireless telecommunications carriers.

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

40. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed transfer of control of AT&T Wireless's licenses and authorizations to Cingular will serve the public interest, convenience, and necessity.[162] In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,[163] other applicable statutes, the Commission's

[158] *See* AT&T Wireless PCS, LLC, Triton PCS License Company, L.L.C., and Lafayette Communications Company L.L.C. Seek FCC Consent to Assignment of Licenses, WT Docket No. 04-323, *Public Notice*, DA 04-2599 (rel. Aug. 20, 2004) ("Triton PCS Public Notice").

[159] *See* Triton PCS Public Notice, DA 04-2599, at 1 (listing Triton-AT&T Wireless Applications, File Nos. 0001810683, 0001808915, 0001810164, and 50013CWAA04). The Comment Public Notice set due dates of September 20, 2004 for Petitions to Deny, September 30, 2004 for Oppositions, and October 7, 2004 for Replies. *See id.* at 1, 3.

[160] We have reviewed these assignment applications, and we find that they are in the public interest and will not result in competitive harm. No competitor will leave the market as a result of this transaction; to the contrary, these spectrum swaps will strengthen both carriers' ability to compete in this region. Post-transaction, Triton will hold either 10 MHz or 30 MHz of spectrum in the applicable counties. We have taken AT&T Wireless's post-transaction spectrum holdings in the affected markets into account in our analysis of the Cingular-AT&T Wireless transaction. Although we do not find that the assignment of spectrum to Triton will have any adverse competitive impact, we have taken these applications into consideration, to the extent that they are relevant, in the competitive analysis of the proposed AT&T Wireless-Cingular transaction.

[161] 15 U.S.C. § 18.

[162] 47 U.S.C. §§ 214(a), 310(d).

[163] Section 310(d), 47 U.S.C. § 310(d), requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See* Applications of VoiceStream Wireless Corporation or Omnipoint Corporation, Transferors, and VoiceStream Wireless Holding Company, Cook Inlet/VS GSM II PCS, LLC, or Cook Inlet/VS GSM III PCS, LLC, Transferees, *Memorandum Opinion and Order*, 15 FCC Rcd. 3341, 3345-46 ¶ 10 (2000) ("*VoiceStream-Omnipoint Order*"); Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 FCC Rcd. 18,025, 18,030 ¶ 8 (1998) ("*WorldCom-MCI Order*"); *SBC-BellSouth Order*, 15 FCC Rcd. at 25,464 ¶ 12; Vodafone AirTouch, PLC, and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd. 16,507, 16,511-12 ¶ 12 (WTB, IB 2000) (continued....)

rules, and federal communications policy.[164] The public interest standards of sections 214(a) and 310(d) involve a balancing process that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits.[165] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[166] If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we

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("*Bell Atlantic-Vodafone Order*"). Thus, we must examine the Applicants' qualifications to hold licenses. *See* 47 U.S.C. § 308; *see also* discussion *infra* Part IV.

[164] *See, e.g.,* 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, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd. 2570, 2580-81 ¶ 24 (2004) ("*Cingular-NextWave Order*"); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 484 ¶ 16 (2004) ("*GM-News Corp. Order*"); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd. 20,559, 20,574 ¶ 25 (2002) ("*EchoStar-DirecTV HDO*"); AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C, Violet License Co. LLC, and TNV [Bahamas] Limited Applications, IB Docket No. 98-212, Memorandum Opinion and Order, 14 FCC Rcd. 19,140, 19,150 ¶ 20 (1999) ("*AT&T Corp.-British Telecom. Order*"); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., WT Docket No. 03-203, Memorandum Opinion and Order, 19 FCC Rcd. 6232, 6241 ¶ 23 (WTB, MB 2004) ("*Nextel-WorldCom Order*"); Application of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. and TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C, Polycell Communications, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC, WT Docket No. 00-130, *Memorandum Opinion and Order*, 16 FCC Rcd. 3716, 3721-22 ¶ 12 (WTB 2000); GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd. 14,032, 14,045, 14,046 ¶¶ 20, 22 (2002) ("*Bell Atlantic-GTE Order*").

[165] *See, e.g., Cingular-NextWave Order*, 19 FCC Rcd. at 2580-81 ¶ 24 (2004); *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 15; WorldCom, Inc. and Its Subsidiaries (Debtors-in-Possession), Transferor, and MCI, Inc., Transferee, WC Docket No. 02-215, *Memorandum Opinion and Order*, 18 FCC Rcd. 26,484, 26,492 ¶ 12 (2003) ("*WorldCom Order*"); Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, MB Docket No.02-70, *Memorandum Opinion and Order*, 17 FCC Rcd. 23,246, 23,255 ¶ 26 (2002) ("*AT&T-Comcast Order*"); *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,574 ¶ 25; VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779, 9789 ¶ 17 (2001) ("*Deutsche Telekom-VoiceStream Order*"); *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,045, 14,046 ¶¶ 20, 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3347 ¶ 12; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 20; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031 ¶ 10; *Nextel-WorldCom Order*, 19 FCC Rcd. at 6241-42 ¶ 23; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,464, 25,467 ¶¶ 13, 18; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16,512, 16,517 ¶¶ 13, 25.

[166] *See, e.g., Cingular-NextWave Order*, 15 FCC Rcd. at 2581 ¶ 24; *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 26; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3347 ¶ 11; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,464 ¶ 13; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16,512 ¶ 13; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 98-178, *Memorandun Opinion and Order*, 14 FCC Rcd. 3160, 3169 ¶ 15 (1999) ("*AT&T-TCI Order*"); *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031-32 ¶ 10.

designate the application for hearing.[167]

41. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[168] which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest.[169] Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.[170] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.[171]

42. In determining the competitive effects of the merger, our analysis is not limited by traditional antitrust principles.[172] The Commission and the DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission's review differ from those of DOJ.[173] DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers

[167] 47 U.S.C. § 309(e). *See also GM-News Corp. Order*, 19 FCC Rcd. at 483 n.49; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 26; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,574 ¶ 25; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,231 ¶ 435; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,139-40 ¶ 202. Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, *see ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

[168] *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 16; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,575 ¶ 26; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd. 9816, 9821 ¶ 11 (2000) ("*AT&T-MediaOne Order*"); *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3346-47 ¶ 11; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,146 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,030 ¶ 9.

[169] *See* 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; *Cingular-NextWave Order*, 19 FCC Rcd. at 2583 ¶ 29; *GM-News Corp. Order*, 19 FCC Rcd. at 483-84 ¶ 16; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,575 ¶¶ 26; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,030-31 ¶ 9; *Nextel-WorldCom Order*, 19 FCC Rcd. at 6244 ¶ 29; *see also* 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd. 22,668, 22,696 ¶ 55 (2001) (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); *cf.* 47 U.S.C. §§ 521(4), 532(a).

[170] *See AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031 ¶ 9.

[171] *See AT&T-Comcast Order*, 17 FCC Rcd. at 23,255 ¶ 27; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821-22 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,031 ¶ 9.

[172] *See, e.g., GM-News Corp. Order*, 19 FCC Rcd. at 484 ¶ 17; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd. at 23256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd. at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,033 ¶ 13. *See also Satellite Business Systems*, 62 F.C.C.2d 997, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[173] *See, e.g., GM-News Corp. Order*, 19 FCC Rcd. at 484 ¶ 17; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,575 ¶ 26; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,046 ¶ 23; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,256 ¶ 28; *AT&T-TCI Order*, 14 FCC Rcd. at 3169 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,033 ¶ 12.

that are likely to lessen competition substantially in any line of commerce.[174] The Commission, on the other hand, as stated above, is charged with determining whether the transfer of licenses serves the broader public interest. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.[175] In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition.[176] We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[177]

43. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.[178] These conditions may include the divestiture of certain licenses along with associated facilities and customers, for example. Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[179] Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[180] Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the merger will yield overall public interest benefits.[181] Despite our broad authority, we have held that we will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-

[174] 15 U.S.C. § 18.

[175] *AT&T-Comcast Order*, 17 FCC Rcd at 23,256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821 ¶ 10.

[176] *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,256 ¶ 28.

[177] *See, e.g.,* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Inc. Transferors, to AOL Time Warner Inc., Transferee, CS Docket No. 00-30, *Memorandum Opinion and Order*, 16 FCC Rcd. 6547, 6550, 6553 ¶¶ 5, 15 (2001) ("*AOL-Time Warner Order*").

[178] *See, e.g., Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15. *See also WorldCom-MCI Order*, 13 FCC Rcd. at 18,032 ¶ 10 (conditioning approval on the divesture of MCI's Internet assets); *Deutsche Telekom-VoiceStream Wireless Order*, 16 FCC Rcd. 9779 (2001) (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

[179] 47 U.S.C. § 303(r). *See Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,032 ¶ 10 (*citing FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

[180] *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19,150 ¶ 15.

[181] *See, e.g., GM-News Corp. Order*, 19 FCC Rcd. at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,047-48 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd. at 18034-35 ¶ 14. *See also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

specific harms)[182] and that are fairly related to the Commission's responsibilities under the Communications Act and related statutes.[183] Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.[184]

IV. QUALIFICATIONS OF APPLICANTS

44. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."[185] Therefore, as a threshold matter, the Commission must determine whether the parties meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission's rules.[186] In making this determination, the Commission does not, as a general rule, re-evaluate the qualifications of transferors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing.[187] In this proceeding, no issues have been raised with respect to the basic qualifications of AT&T Wireless, and we thus find that AT&T Wireless has the requisite qualifications. Conversely, section 310(d) requires the Commission to consider whether the proposed transferee is qualified to hold a Commission license.[188]

A. The Record

45. Six parties, each of which at one time acted as an independent dealer for Cingular in Illinois, offering its wireless services and products for sale to the public, have filed a collective petition opposing the transfer of control, alleging that Cingular has engaged in a pattern of misconduct that demonstrates that it lacks the requisite character to hold Commission licenses.[189] Each of the parties (collectively, the "Dealers") asserts that, after it entered into an independent dealership contract with Cingular and obtained customers for Cingular's service, Cingular took a series of actions designed to deprive it of business and to obtain a direct commercial relationship with its customers.[190] Five of the six parties have brought suit against Cingular, alleging claims that include, *inter alia*, breach of contract, fraud and false representation, tortious interference with a business relationship, violations of RICO,

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[182] *See GM-News Corp. Order*, 19 FCC Rcd. at 534 ¶ 131; *AT&T-Comcast Order*, 17 FCC Rcd. at 23,302 ¶ 140; *AOL-Time Warner Order*, 16 FCC Rcd. at 6550 ¶ 5-6.

[183] *See AOL-Time Warner Order*, 16 FCC Rcd. at 6610 ¶¶ 146-47.

[184] *GM-News Corp. Order*, 19 FCC Rcd. at 534 ¶ 131 ("An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. These issues are best left to broader industry-wide proceedings.").

[185] *See* 47 U.S.C. §§ 308, 310(d); *GM-News Corp. Order*, 19 FCC Rcd. at 485 ¶ 18.

[186] *See* 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; *see, e.g., GM-News Corp. Order*, 19 FCC Rcd. at 485 ¶ 18; *WorldCom Order*, 18 FCC Rcd. at 26,493 ¶ 13; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9,790 ¶ 19.

[187] *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9790 ¶ 19; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,465 ¶ 14.

[188] *SBC-BellSouth Order*, 15 FCC Rcd. at 25,465 ¶ 14.

[189] AT&T Wireless Services, Inc, Transferor, and Cingular Wireless Corporation, Transferee, WT Docket No. 04-70, Petition to Dismiss or Deny by AW Acquisition Corp. *et al.*, filed May 3, 2004 (Dealers Petition to Deny). The parties are: AW Acquisition Corp., Pace Communications Services Corp., Edward Garcia dba Comm One Systex of Ohio and Comm One Wireless of Chicago, Ed Wicks dba Mercedes Wireless, Inc., Kempner Mobile Electronics, Inc., and Airborne Beepers and Video, Inc.

[190] Dealers Petition to Deny at 1-12.

defamation, unjust enrichment, and conversion.[191] Only one of these actions, the lawsuit brought by Kempner Mobile Electronics, Inc. ("Kempner"), has been adjudicated, with Kempner prevailing on two counts of breach of contract and claims for tortious interference and fraud.[192] Based on these claims as well as those claims that are still pending, the Dealers argue that Cingular has engaged in a pattern of anticompetitive conduct and that transfer of control to Cingular would therefore be inconsistent with the public interest. In the alternative to denial of the transfer, they suggest that a grant be made conditional on the outcome of the pending cases.[193] Finally, they argue that the applications are defective for not mentioning any of their lawsuits. In response, Cingular argues that none of the claims brought by the Dealers are relevant to the Commission's character analysis under its existing policies and precedents, and that Cingular was not required to list any of them in its applications.[194]

46. In a separate petition, Thrifty Call, Inc. ("Thrifty Call") asserts that one of Cingular's parent companies, SBC, has demonstrated a propensity to act anti-competitively and to violate Commission rules, and argues that the transfer of control should be denied for that reason.[195] In response, Cingular argues that the Commission has found that both Cingular and SBC are well qualified to hold Commission licenses and that no new allegations or actions since those findings warrant a change in the determination.[196]

[191] *Id.* at Attachments 1-B, 2-B, 4-B, 5-B, and 6-B.

[192] *See Kempner Mobile Electronics, Inc. v. Southwestern Bell Mobile Systems, LLC*, No. 02 C 5403, 2004 WL 434213 (N.D. Ill. March 4, 2004); Letter from Richard S. Myers, Counsel, Kempner Mobile Electronics, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 04-70 (September 28, 2004). A number of other claims brought by Kempner were rejected by summary judgment or withdrawn. *Id.*, 2004 WL 434213, at n.2, *1.

[193] AT&T Wireless Services, Inc, Transferor, and Cingular Wireless Corporation, Transferee, WT Docket No. 04-70, Reply to Opposition to Petition to Dismiss or Deny by AW Acquisition Corp. *et al.*, filed May 20, 2004 ("Dealers' Reply").

[194] Applicants Joint Opposition to Petitions to Deny and Comments at 51.

[195] Thrifty Call Petition to Deny at 25.

[196] Applicants Joint Opposition to Petitions to Deny and Comments at 53-57. Cingular also argues that the Dealers and Thrifty Call, as well as the other parties that have filed petitions to deny such as Consumer Federation of America ("CFA")/Consumer's Union ("CU"), all lack standing to challenge the applications for transfer. Applicants Joint Opposition to Petitions to Deny and Comments at 58-60. Cingular argues that none of the Petitioners has demonstrated that it is a "party in interest" as required by section 309(d)(1). Having reviewed these arguments, we have doubts regarding whether all of the Petitioners have adequately demonstrated that they have standing. For example, the declaration submitted by CFA in support of its standing likely falls short because the declarant failed to make any specific claims regarding his current ownership or use of a wireless phone that would demonstrate that he would be directly affected by the order. *Compare Consumer Federation of America v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) (upholding CFA's standing to challenge the merger of Comcast and another cable company where affidavit from one of CFA's members established that the member was also a customer of Comcast and that he had suffered a direct injury from the merger). However, we need not decide the standing issue for any of the Petitioners because we do not, in any case, find the Petitioners' arguments for denial of the applications to be persuasive. In addition, even were we to conclude that some or all of the Petitioners lack standing, we would still have discretion to consider their pleadings as informal objections. *See* Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 18 FCC Rcd. 22,761, n. 47 (2003); *see also* Application of Tabback Broadcasting Company for Renewal of License of Station KAZM (AM), Sedona, Arizona, *Memorandum Opinion and Order*, 15 FCC Rcd 11899 (2000) (treating petition to deny transfer of control as informal objection); Applications of MLGAL Partners, L.P., (Transferor) and Evergreen Media Corporation (Transferee), *Memorandum Opinion and Order*, 10 FCC Rcd. 5,653 (1995) (treating petition to deny transfer of control into informal objection where party lacked standing); *see also*

(continued....)

B. Discussion of Character

47. We turn first to the Dealers' allegations that Cingular has engaged in misconduct that demonstrates that it lacks the requisite character qualifications. In determining whether Cingular has the requisite character to be a Commission licensee, we look to the Commission's character policy initially developed in the broadcast area as guidance in resolving similar questions in common carrier license transfer proceedings.[197] Under this policy, the Commission will review allegations of misconduct directly before it, as well as conduct that takes place outside the Commission.[198] The Commission has long held that the character qualifications of an applicant or licensee are relevant to the Commission's public interest analysis and that an applicant's or licensee's willingness to violate other laws, and in particular to commit felonies, also bears on our confidence that an applicant or licensee will conform to Commission rules and policies.[199] Thus, while the central focus of our review of an applicant's character qualifications is conduct that bears on the proclivity of an applicant to deal truthfully *with the Commission* and to comply with *our* rules and orders,[200] we have determined that, in deciding character issues, we will consider a limited subset of adjudicated, non-Commission-related misconduct as relevant in deciding this issue. Specifically, the Commission has stated that it will consider: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.[201] With respect to Commission-related conduct, the Commission has stated that all violations of provisions of the Act, or of the Commission's rules or polices, are predictive of an applicant's future truthfulness and reliability and, thus, have a bearing on an applicant's character qualifications.[202]

48. After reviewing the record and the Dealers' assertions and arguments, we find that Cingular has the requisite character qualifications to hold a Commission license. First, we note that the Commission has already found Cingular to be qualified to acquire licenses numerous times previously, most recently in February of this year.[203] Second, we find no evidence in the record that Cingular has made any misrepresentations or acted with a lack of candor in any of its proceedings before the Commission, or that it has a pattern of willful violations of the Communications Act or the Commission's rules.

49. The Dealers assert that Cingular has engaged in misconduct in connection with them. However, we do not agree with the Dealers that the alleged misconduct warrants the disqualification of Cingular. With one exception, those civil cases brought by the Dealers are unadjudicated matters still pending in trial court. "[T]he Commission's long-held position [is] that there 'must be an ultimate

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Nextel License Holdings 4, Inc., 17 FCC Rcd. 7,028, 7,033 ¶ 16 (2002) (noting that there is no standing requirement to file an informal objection).

[197] *WorldCom Order*, 18 FCC Rcd. at 26,493 ¶ 13.

[198] *See, e.g., GM-News Corp. Order*, 19 FCC Rcd. at 486 ¶ 23; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,576 ¶ 28; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,227-28 ¶ 429 (2000).

[199] *GM-News Corp. Order*, 19 FCC Rcd. at 486 ¶ 23.

[200] Application of TRW Inc., Transferor, and Northrop Grumman Corp., Transferee, *Order and Authorization*, 17 FCC Rcd. 24,625, 24,629 ¶ 10 (2002) ("*Northrop Grumman Order*").

[201] *Id.*; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14,227-28 ¶ 429. We note that the Commission may exercise its discretion to consider an egregious problem on a case-by-case basis.

[202] *WorldCom Order*, 18 FCC Rcd. at 26,494 n.56.

[203] *Cingular-NextWave Order*, 19 FCC Rcd. at 2570 & n.112.

adjudication before an appropriate trier of fact, either by a government agency or court, before we will consider the activity in our character determinations.'"[204] We reject the Dealers' argument that the conduct at issue is excepted from this rule. The courts adjudicating these claims are empowered to provide redress to the Dealers if a finding of liability is made.

50. Further, none of the claims brought by the Dealers fall under the categories of relevant non-Commission related misconduct described above and so we would not consider these claims even if they were adjudicated. We also find that the breach of contract, tortious interference, and fraud claims of Kempner, which have been adjudicated in state court, are not relevant to our consideration. Relevant conduct does include fraudulent misrepresentations made to government units.[205] Kempner's claim, however, involves only statements between private parties. Further, although the Dealers assert that Cingular's actions constituted anticompetitive conduct intended to "steal" customers from one of its authorized dealers,[206] the actual claims, such as common law breach of contract and fraud, do not constitute violations of antitrust or other laws protecting competition for purposes of our consideration.[207]

51. The Dealers argue, correctly, that the Commission has retained discretion to consider non-Commission misconduct outside of the three specified categories on a case-by-case basis.[208] However, we have found that the public interest would not be served by expenditure of Commission and applicant resources on routine consideration of misconduct less relevant than these three categories,[209] and we do not find any circumstances in this case justifying a departure from our long standing general policy. The Dealers suggest that, where the Commission does not find it appropriate to deny an application for transfer of licenses on the basis of pending litigation, it has the discretion to make the

[204] *GM-News Corp. Order*, 19 FCC Rcd. at 487 ¶ 24; Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1205 n.60 (1986) ("*1986 Character Qualifications Policy Statement*") ("We will not take cognizance of [relevant] non-FCC misconduct . . . unless it is adjudicated."), *modified*, 5 FCC Rcd 3252 (1990) ("*1990 Character Qualifications Policy Statement*"), *recon. granted in part*, 6 FCC Rcd. 3448 (1991) ("*Character Qualifications Recon. Order*"), *modified in part*, 7 FCC Rcd. 6564 (1992). We note that, although there must be an ultimate adjudication by an appropriate trier of fact, whose factual conclusions will not be reviewed by a higher authority on a *de novo* basis, once such an adjudication has occurred, we will consider the conduct even though an appeal of the adjudication may be pending. *1986 Character Qualifications Policy Statement*, 102 FCC 2d at 1205 ¶ 48, n.62.

[205] *GM-News Corp. Order*, 19 FCC Rcd. at 486 ¶ 23. *See also Character Qualifications Recon. Order*, 6 FCC Rcd. at 3448 ¶ 6.

[206] Dealers Petition to Deny at 13; Letter from Kempner Mobile Electronics, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 04-70, filed July 12, 2004 ("Kempner Letter"), at 1-2.

[207] *1986 Character Qualifications Policy Statement*, 102 FCC 2d at 1195 ¶ 34 (describing third category of relevant adjudicated non-FCC misconduct as "violations of broadcast related anti-competitive and antitrust statutes"), 1201 ¶ 43 ("Generally, where alleged anticompetitive activity does not constitute a violation of state or federal antitrust or anticompetitive laws we will not pursue the matter."), 1202-03 n.55 ("In this regard, we note that our consideration will include violations of the Sherman Antitrust Act, Clayton Antitrust Act, Robinson-Patman Act, [and] Federal Trade Commission Act as well as similar state antitrust and anticompetitive statutes."); *see also 1990 Character Qualifications Statement*, 5 FCC Rcd. at 3252 ¶ 6 (relevant conduct includes "adjudicated violations of antitrust or anticompetitive laws. . . .").

[208] Dealers Reply at 2; *Character Qualifications Recon. Order*, 6 FCC Rcd. at 3448 ¶ 6; *1990 Character Qualifications Policy Statement*, 5 FCC Rcd. at 3252 ¶ 2 ("while we intend to continue to be guided by the policies set forth in the *Character Policy Statement*, as modified herein, we remain 'free to exercise . . . discretion in situations that arise.'" (modifications in original) (citation omitted)).

[209] *Character Qualifications Recon. Order*, 6 FCC Rcd. at 3448 ¶ 5.

grant conditional on the outcome of the litigation.[210] To the extent that the Dealers request such relief, we reject the request. Given that, as discussed above, the unadjudicated claims do not constitute relevant misconduct, there is no reason to condition a grant on their outcome.[211]

52. We turn now to Thrifty Call's assertion that the applications should be denied because of an alleged pattern of misconduct by one of Cingular's parent companies, SBC. The Commission will consider non-Commission related misconduct of the transferee's parent where there is a sufficient nexus between the transferee and the parent corporation.[212] Specifically, if a close ongoing relationship between the parent and subsidiary can be found, if the two have common principals, and if the common principals are actively involved in the day-to-day operations of the subsidiary, we will then consider the significance of the relationship of the non-Commission misconduct to the operation of the subsidiary, focusing on the actual involvement of the common principals in both the misconduct and the day-to-day activities of the subsidiary.[213] In addition, if the corporate parent is involved in Commission-related misconduct, whether or not such misconduct involves the subsidiary, the bearing of that misconduct on the subsidiary's qualifications would be considered.[214]

53. Although Thrifty Call has made no attempt to demonstrate any nexus of the sort specified above between SBC and Cingular, the vast majority of government actions and adjudications cited by Thrifty Call were Commission-related, for which a demonstration of a nexus is not a prerequisite to consideration. Looking at these Commission-related actions, however, we find that they do not provide a basis for denying the applications. Initially, we find that many of the Commission actions cited by Thrifty Call are not relevant to a character qualifications analysis. For example, some of the Commission actions cited are consent decrees. The Commission does not consider matters resolved in consent decrees adjudicated misconduct for the purposes of assessing an applicant's character qualifications.[215] Thrifty Call also cites to a website listing, *inter alia*, a number of payments made by SBC to the federal government.[216] However, most of these were voluntary payments that, under the terms of the SBC/Ameritech merger plan, SBC makes to the U.S. Treasury if it fails to meet the performance standards established in that plan.[217]

54. In addition, a number of the Commission actions cited by Thrifty Call had been taken and

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[210] Dealers Petition to Deny at 12; Dealers Reply at 2.

[211] We also disagree with the Dealers' contention that the applications are defective for failure to mention these lawsuits in response to Items 76 and 77 of FCC Form 603. Item 76 requires an applicant to list all final adjudications in which a court has found the applicant guilty of unlawfully monopolizing or attempting unlawfully to monopolize radio communications. Item 77 requires an applicant to list any pending claims of such a nature. We do not agree that the fraud, breach of contract, and other claims brought by the Dealers in their lawsuits are covered by either question.

[212] *Northrop Grumman Order*, 17 FCC Rcd. at 24,628 ¶ 8.

[213] *1986 Character Qualifications Policy Statement*, 102 FCC 2d at 1219 ¶ 79.

[214] *Id.*

[215] *Id.*, 102 FCC 2d at 1,205 n.64.

[216] Thrifty Call Petition to Deny at 29 n. 97 (citing RBOC Fines and Penalties 1996-Present, *at* http:/www.voicesforchoices.com/voices/media/sbc.pdf).

[217] *Id.*; *see* SBC Communications Inc., 18 FCC Rcd. 4997, 4999 ¶ 3 (EB 2003) ("Such payments are voluntary performance measurements payments and are not fines, penalties, or forfeitures."). We also note that these website list entries have a number of other problems, including fines that are listed more than once, and entries that are factually inaccurate, including an erroneous reference to a $2.5 million fine in March of 2003. *See* RBOC Fines and Penalties 1996-Present, *at* http:/www.voicesforchoices.com/voices/media/sbc.pdf.

were part of the public record when the Commission upheld SBC's qualifications to hold Commission licenses in September 29, 2000.[218] In all of the cases cited, the Commission has investigated the infractions and taken appropriate enforcement actions against SBC including the imposition of monetary penalties.[219] In no case did the Commission think that license revocation was an appropriate penalty. Cingular, which is one step removed, should not be treated more harshly than the carrier that was investigated.

55. Furthermore, as noted above, we found Cingular itself qualified to hold licenses earlier this year. Virtually all of the Commission actions to which Thrifty Call refers occurred prior to that assessment, and were a matter of public record at the time of our assessment of Cingular. Moreover, Thrifty Call has not offered a single example of how the alleged inclination of SBC to ignore Commission rules and orders has translated into similar conduct by Cingular in the past.[220] Indeed, Thrifty Call has not cited any example in which Cingular has violated our rules or orders, much less done so willfully.[221] Nor has any other party challenged Cingular's qualifications with such evidence. For all these reasons, we conclude that SBC's conduct does not justify a change in our conclusion earlier this year that Cingular has the requisite character to hold Commission licenses.

56. In sum, after reviewing the record and all objections to the contrary, we find that Cingular has the requisite qualifications to hold Commission licenses. Therefore, we reject the petitioners' request that transfer of control be denied on the grounds of disqualification.[222]

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[218] *See SBC-Bell South Order*, 15 FCC Rcd. at 25,459; *see also* Thrifty Call Petition to Deny at 25-26.

[219] *See, e.g.*, SBC Communications, Inc., Forfeiture Order, 17 FCC Rcd. 19,923 (2002) (imposing monetary penalty for violation of obligation to provide transport arising from merger agreement), *rev. denied*, SBC Communications Inc. v. FCC, 373 F.3d 140 (D.C. Cir. 2004).

[220] We note that SBC does not have sole control over Cingular. Rather, both SBC and BellSouth have negative control of Cingular and exercise *de facto* control. *See* discussion *supra* ¶ 26.

[221] *See Cingular-NextWave Order*, 19 FCC Rcd. at 2,583 ¶ 23 (finding "no evidence that Cingular has made any misrepresentations or acted with a lack of candor in any of its proceedings before the Commission, or has a pattern of willful violations of the Communications Act or the Commission's rules.").

[222] We note that two parties that have minority partnership interests in specific radio licenses have submitted pleadings objecting to the proposed transfer of control over those licenses. *See* Letter from Robert H. Jackson, Reed Smith LLP, to Marlene H. Dortch, Federal Communications Commission, WT Docket No. 04-70, filed September 30, 2004 ("O'Krepki Letter"); Letter from Richard Giandomenico, Cobra Investigative Agency, Inc., WT Docket 04-70, filed March 1, 2004 ("Giandomenico Letter"). The parties allege that transfer would violate or threaten their minority partnership rights. *See* O'Krepki Letter (alleging that transfer would violate their minority partnership rights to have their interests bought out by any future controlling owners); Giandomenico Letter (alleging that transfer may cause interruption in owner's receipt of distribution checks). We find, however, that these are private contractual disputes that are not relevant to our public interest analysis and are best resolved in courts of competent jurisdiction. *See Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16,515; *Applications of Centel Corp. and Sprint Corp.*, 8 FCC Rcd. 1,829, 1,831, ¶ 10 (CCB 1993) (rejecting argument that transfer should be denied on grounds that it violated partnership agreements; "The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes. . . ."), *rev. denied*, 8 FCC Rcd. 6,162 (2003). In the O'Krepki Letter, the parties assert that approval of a transfer that violates minority partnership rights would send a signal that the public interest does not require compliance with contractual obligations. *See* O'Krepki Letter at 1. We disagree, however, that approval of the transfer is intended to decide or has the effect of deciding the merits of their dispute. *See Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16,515, ¶ 21. "Our consent to the transfer . . . does not predetermine the resolution of contractual disputes under the . . . partnership agreement." *Id.* We decide only that we are not the appropriate forum to resolve the dispute, and we leave the parties free to raise such allegations before the courts in a private cause of action and to seek appropriate remedies.

V. COMPETITIVE ANALYSIS

57. In this section, as an essential part of our public interest analysis, we analyze the potential competitive harms of the proposed transaction in an evaluation informed by (though not limited to) modern antitrust principles.[223] In general, competition depends on consumers having choices among products or services that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the "competitive" level because consumers will switch to a substitute. The level of competition depends on what products or services are substitutes for each other (product market), where those substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). The relevant product market may be marked by substitutes that are closer fits than others from the viewpoint of consumers (differentiated product market). To evaluate the impact of a merger on competition, we examine the characteristics of competition in the markets of the merging firms and determine the impact of the merger on these characteristics. Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions, such as raising prices or reducing output, either by itself or in coordination with other firms (market power).

58. We undertake this assessment of the competitive effects of the transaction in two parts, first considering impacts within the mobile telephony sector and second considering intermodal impacts across the mobile wireless and wireline sectors. In the case of the mobile sector, we begin with an analysis of the relevant product and geographic markets. In making these determinations, we focus primarily on output markets – the markets for telecommunication services that businesses and individuals purchase and consume. Secondarily, however, we also consider input markets, since this transaction affects a key input – the spectrum licenses – and this effect may also influence the overall competitive harms and benefits resulting from the transaction. We next identify market participants, examine market concentration, and analyze how concentration will change as a result of the merger. We examine whether the changes in concentration would be harmful to market performance. Our primary focus is on possible effects from losing an independent service provider in relevant markets, *i.e.*, markets in which this transaction is in effect a horizontal merger increasing seller concentration.[224] We also consider the non-horizontal issues of possible effects on roaming and special access. As explained further below, we find that, without conditions, in certain local markets competitive harms are likely to be significant.

59. In the case of the intermodal evaluation, we focus primarily on the potential impact of the transaction on the extent of, and further development of, competition between wireless and wireline service providers for mass market customers. We do so in light of the fact that Cingular is a joint venture between two regional wireline incumbent local exchange carriers ("LECs"), and AT&T Wireless is the largest wireless provider that is not affiliated with an incumbent LEC. We examine the limited, but growing trend of substitution of wireless services for traditional wireline services, and consider the incentives and abilities of wireless carriers in a post-merger environment to engage in competition against wireline carriers. We conclude that this particular transaction will not result in significant public interest

[223] The Commission employs the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission as the starting point for its analysis. *See* Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*DOJ/FTC Merger Guidelines*"); *see EchoStar-Direct TV Order*, 17 FCC Rcd. at 20559.

[224] Consistent with the *DOJ/FTC Guidelines* and Commission precedent, we first perform a structural analysis of the transaction to examine if it would create conditions conducive to anticompetitive behavior. Structural analysis considers the structural characteristics of the relevant markets in which the acquiring and acquired firms participate (*e.g.*, number of sellers, ease of entry) in order to make predictions about the likely competitive effects of a proposed transaction.

harms related to existing or future competition between wireless and wireline carriers for telecommunications services provided to mass market customers.[225]

A. Mobile Telephony Competition

1. Introduction

a. The Mobile Telephony Sector

60. The wireless industry in the United States has evolved through several successive phases, each marked and shaped by certain regulatory choices and marketplace responses. Initially, two 25 MHz cellular licenses in the 800 MHz band were offered in each local market, one of which was assigned to the incumbent wireline carrier.[226] This introductory phase was designed to encourage the deployment and testing of a new technology and consumer product and provided some competition. Subsequently, 120 megahertz of spectrum in the 1900 MHz band was allocated for broadband PCS, including three blocks of 30 megahertz each and three blocks of 10 megahertz each in every geographic area of the country.[227] These broadband PCS licenses have been assigned through auction, beginning in 1995. Apart from cellular and broadband PCS, approximately 26 megahertz of spectrum in the 800 and 900 MHz bands that has been licensed for Specialized Mobile Radio ("SMR") also can be used to provide mobile telephony services.[228]

61. The Commission's first broadband PCS auction in 1995 marked the beginning of the transition from a cellular duopoly to a far more competitive market in mobile telephony services. In the wake of this and subsequent auctions, the mobile telephony sector has seen dramatic changes in market structure, carrier conduct, consumer behavior, and market performance that continue to the present day. To date, almost 97 percent of the total U.S. population have three or more different operators offering mobile telephony service in the counties in which they live, up from 88 percent in 2000.[229] The percentage of the U.S. population living in counties with five or more operators competing to offer service increased from almost 69 percent to nearly 88 percent during this period, and the percentage of the U.S. population living in counties with 7 or more competing operators increased from approximately 4 percent to nearly 30 percent.[230] The development of significant regional variation in the number of operators reflects a shift from the restrictive cellular licensing rules to a more flexible licensing policy that reduces entry barriers associated with government control of spectrum availability and allows market forces to play a greater role in determining the number of competitors in a given geographic area.

62. Another significant structural trend during the transition has been the continued efforts of carriers to build nationwide or large regional footprints. In addition to aggregating geographic area licenses acquired through the Commission's spectrum auctions or earlier licensing procedures, since the end of 1999 carriers have been expanding their geographic coverage through various types of

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[225] Our conclusion is based on compliance with any conditions necessary to address horizontal concentration in individual wireless markets, as discussed elsewhere in this Order.

[226] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 04-111, *Ninth Report*, FCC 04-216, at 37 ¶ 87 (rel. Sept. 29, 2004) ("*Ninth Report*").

[227] *Ninth Report*, FCC 04-216, at 37 ¶ 88.

[228] *Id.* at 38-39 ¶ 89.

[229] *Id.*, Appendix A, Table 10, at A-11.

[230] *Id.*, Appendix A, Table 10, at A-11.

transactions, including mergers and acquisitions, joint ventures, contractual affiliations with smaller carriers, and spectrum sales and swaps.[231] For example, Verizon Wireless's national system was based on a combination of wireline-owned systems (Bell Atlantic, NYNEX, GTE) with those accumulated and consolidated by Vodafone (including AirTouch).[232] Cingular was formed by merging SBC's (including former SNET, PacBell, and Ameritech) and BellSouth's systems.[233] T-Mobile acquired the systems constructed and combined by VoiceStream and Omnipoint.[234] Currently, there are six mobile telephony operators that analysts typically characterize as nationwide: AT&T Wireless, Cingular Wireless, Nextel, T-Mobile, Sprint, and Verizon Wireless.[235]

63. By fostering continuing experimentation with a variety of different pricing options, service packages, and policies on handset subsidies, competition to attract and retain customers has resulted in complicated and ever-changing pricing and feature structures. Today all of the nationwide operators offer some version of a national rate pricing plan in which customers can purchase variously sized buckets of minutes to use on a nationwide or nearly nationwide network without incurring roaming or long-distance charges.[236] Other significant trends in mobile telephony pricing have been the offering of free night and weekend minutes, and the expansion of free calling among a particular company's customers, known as "in-network" or "mobile-to-mobile" calling.[237] Moreover, although most U.S. mobile telephony subscribers pay their mobile phone bills after they have incurred charges (known as postpaid service), all the nationwide operators offer some version of a prepaid service either directly to their retail customers or through third-party resellers.[238]

64. Fueled by the entry of all-digital broadband PCS operators and the migration of incumbent cellular operators from analog to digital networks, digital has rapidly displaced analog as the dominant technology in the mobile telephony sector, with the share of digital subscribers in the total subscriber base rising from 30 percent at the end of 1998 to over 90 percent today.[239] Under the Commission's policy of affording carriers flexibility with regard to the choice of technological standards (unlike the policy in Europe and other areas), the deployment of competing second-generation ("2G") and next-generation network technologies has emerged as an important dimension of non-price rivalry among U.S. mobile telephony providers.[240] Of the six nationwide mobile telephony operators, Cingular and AT&T Wireless use TDMA and GSM as their 2G digital technology, T-Mobile uses only GSM, Sprint and Verizon Wireless use CDMA, and Nextel uses iDEN.[241] Beyond the 2G technologies, the

[231] *Id.* at 27 ¶ 64.

[232] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Fifth Report*, 15 FCC Rcd. 17,660, 17,670 (2000) ("*Fifth Report*").

[233] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Sixth Report*, 16 FCC Rcd. 13,350, 13,363-13,364 (2001) ("*Sixth Report*").

[234] *Sixth Report*, 16 FCC Rcd. at 13,364; *Fifth Report*, 15 FCC Rcd. at 17,670.

[235] *Ninth Report*, FCC 04-216, at 18 ¶ 36.

[236] *Id.* at 49 ¶ 113.

[237] *Id.* at 49 ¶ 114.

[238] *Id.* at 50 ¶¶ 115-16.

[239] *Id.* at 74 ¶ 176; *Fifth Report*, 15 FCC Rcd. at 17,665, 17,672-73.

[240] *Ninth Report*, FCC 04-216, at 53 ¶ 124.

[241] *Id.* at 55 ¶ 130.

TDMA/GSM carriers are deploying or planning to deploy the next-generation technologies on the GSM migration path, including General Packet Radio Services ("GPRS"), Enhanced Data Rates for GSM Evolution ("EDGE"), and eventually Wideband CDMA ("WCDMA").[242] Similarly, many CDMA carriers have been upgrading their networks to CDMA2000 1xRTT, and both Verizon Wireless and Sprint have begun deploying a high-speed wireless data network using CDMA2000 1X EV-DO (evolution-data only, "EV-DO"), the next step in the CDMA migration path after 1xRTT.[243]

65. In addition to investing in network deployment and upgrades, certain carriers have pursued marketing strategies designed to differentiate their brands from rival offerings with regard to various aspects of network performance such as geographic coverage, voice quality, and wireless data speeds.[244] Some carriers also have attempted to differentiate their brands with regard to other terms and conditions of service, such as the provision of ancillary services. For example, push-to-talk ("PTT") services have been a signature of Nextel's product offering since it launched its wireless service in 1993.[245] Beginning in 2003, however, several carriers have introduced rival PTT services in an attempt to compete for customers attracted to Nextel's PTT feature.[246]

66. Consumers have contributed to pressures for carriers to compete on price and other terms and conditions of service by freely switching providers in response to perceived differences in the cost and quality of service. Average churn rates for mobile telephone service have remained roughly constant at about 2.4 to 2.7 percent per month for the past several years.[247] The implementation of wireless LNP beginning in November 2003 has lowered consumer switching costs by enabling wireless subscribers to keep their phone numbers when changing wireless providers. While to date the advent of wireless LNP does not appear to have resulted in an increase in churn, there is evidence to suggest that competitive pressure to retain existing customers has increased as a result of wireless LNP.[248]

67. After stabilizing at a plateau in the final years of the cellular duopoly, the price per minute of mobile telephony service started to decline shortly before the first commercial launches of PCS service and subsequently dropped sharply and steadily.[249] Average revenue per minute, a proxy for mobile telephony pricing, declined from 47 cents in 1994 to 10 cents in 2003.[250] By all indications, lower prices have stimulated rapid growth in the demand for mobile telephony services. The number of mobile telephony subscribers has grown nearly fivefold from almost 34 million at the end of 1995 to approximately 160 million at the end of 2003, and annual service revenues have more than quadrupled from $19 billion to $87 billion in the same period.[251] Mobile penetration reached and then surpassed 50

[242] *Id.* at 55-57 ¶¶ 128, 131-32.

[243] *Id.* at 55, 57-58 ¶¶ 129, 133-34.

[244] *Id.* at 61-63 ¶¶ 146-49.

[245] *Id.* at 63 ¶ 152.

[246] *Id.* at 63 ¶ 152.

[247] Michel Morin & Linda Mutschler, *Global Wireless Matrix 4Q03*, Merrill Lynch, Global Fundamental Equity Research Department, at 96 (Mar. 19, 2004).

[248] *Ninth Report*, FCC 04-216, at 69 ¶¶ 165-66.

[249] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Third Report*, 13 FCC Rcd. 19,746, 19,769-70 (1998) ("*Third Report*").

[250] *Ninth Report*, FCC 04-216, Appendix A, Table 9, at A-11.

[251] CTIA, *Semi-Annual Wireless Industry Survey*, *at* http://www.wow-com/industry/stats/surveys/.

percent of the population in 2003, up from just 25 percent at the end of 1998,[252] and is forecast to continue rising significantly over the next five years.[253] On average, U.S. mobile telephony subscribers talk on their mobile phones in excess of 500 minutes per month, more than three times as much as mobile subscribers in Western Europe and Japan.[254] Mobile data applications introduced by carriers in recent years are also gaining in popularity. It is estimated that nearly 25 percent of mobile subscribers are casual data users, most of whom use their handsets to send text messages and some of whom also use handset-based entertainment and leisure applications such as picture messages, games, and ring tones.[255]

b. Introduction to the Analysis

68. In our analysis of this transaction's effects on mobile telephony, we consider, first, horizontal issues (those related to increased concentration within a market) and, second, vertical issues (those related to impacts across related markets). Our primary focus is on horizontal effects. Horizontal mergers lead to a loss of a competitor, and such loss can lead to a diminution in competition. Mergers raise competitive concerns when they reduce the availability of substitute choices to the point that the merged firm has the incentive and ability, either by itself or in coordination with other firms, to raise prices.[256] The ability to raise prices above competitive levels is generally referred to as "market power." Market power may also enable sellers to reduce competition on dimensions other than price, including innovation and service quality.[257] A fundamental tenet of the Commission's public interest review is that, absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest.

69. A horizontal transaction is unlikely to create or enhance market power or facilitate its exercise unless it significantly increases concentration and results in a concentrated market, properly defined and measured.[258] Transactions that do not significantly increase concentration or do not result in a concentrated market ordinarily require no further competitive analysis (although we separately consider the spectrum holdings that would occur post-merger). Market concentration is generally measured by the Herfindahl-Hirschman Index ("HHI") and changes in concentration are measured by the change in HHI.

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[252] Morin & Mutschler, *supra* note 247, at 96.

[253] Frank J. Governali, Robert Barry, & Marje Soova, *Raising Long-Term Wireless Penetration Ests; Tweaking Near-Term Ests,* Goldman Sachs, Global Investment Research, at 1 (June 1, 2004) (raising wireless penetration forecast from 65 percent to 69 percent for voice-only services, and to 80 percent including 11 percent for data devices); Rick Prentiss, *"S-Curve" Ahead: Wireless Voice Plateaus in 2004 When Data Kicks-In*, Raymond James, Industry Report, at 4 (Sept. 5, 2001) (forecasting U.S. wireless penetration to surpass 60 percent and possibly approach 70 percent of the population by 2010).

[254] Morin & Mutschler, *supra* note 247, at 2.

[255] Frank J. Governali, Robert D. Barry, & Marje Soova, *Wireless Data Prospects Brightening*, Goldman Sachs, Global Investment Research, at 10 (Apr. 16, 2004).

[256] *See, e.g., DOJ/FTC Merger Guidelines* § 0.1; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61,* 12 FCC Rcd. 15756, 15802-03 ¶ 83 (1997) ("*LEC Classification Order*"); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Fourth Report and Order,* 95 FCC 2d 554, 558 ¶ 7-8 (1983) ("*Competitive Carrier Fourth Report and Order*"), *vacated on other grounds,* AT&T v. FCC, F.2d 727 (D.C. Cir. 1992), *cert. denied,* MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993).

[257] *DOJ/FTC Merger Guidelines* § 0.1, n.6.

[258] *Id.* § 1.0.

However, HHI data provide only the beginning of the analysis. The Commission then examines other market factors that pertain to competitive effects, including the incentive and ability of other firms to react and of new firms to enter the market. Ultimately, the Commission must assess whether it is likely that the merged firm could exercise market power in any particular market.

70. We begin by determining the appropriate market definitions to employ for the analysis, as well as identifying relevant market participants. We then measure the degree of market concentration. Next we consider the possible competitive harms that could occur due to a significant increase in market concentration or market power. Mergers can diminish competition and firms can exercise market power in a number of ways. A merger may create market power in a single firm and allow that firm to act on its own in raising prices, lowering quality, reducing innovation, or restricting deployment of new technologies or services. For example, the other firms in the market may not have the capacity to serve all of the customers who would otherwise leave the merged firm due to a price increase, thereby allowing the merged firm to raise prices profitably. And in differentiated product markets, a merger – by eliminating a competitor with a similar product – may allow the merged firm to raise prices or lower quality profitably, because it will no longer lose customers to its merged partner, and therefore will lose fewer customers than if it took the same actions before the merger. A merger may also diminish competition by enabling the firms selling in the market more likely, more successfully, or more completely to engage in coordinated interaction that harms consumers. This behavior includes tacit or express collusion and *may or may not* be lawful in and of itself. The effects of such coordinated behavior may include increased prices, reduced number of minutes in a given price plan, degraded output quality, or some combination of these effects. Perhaps more importantly, it may also include dynamic effects such as reduced innovation and restricted deployment of new technologies and services.

2. Market Definition

a. Product Market Definition

71. A relevant product market is the smallest group of competing products or services for which a hypothetical monopolist in a geographic area could profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products (the "hypothetical monopolist test").[259] In other words, when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant market. Thus, the relevant market includes "all products 'reasonably interchangeable by consumers for the same purposes.'"[260]

72. Using the hypothetical monopolist test, the Applicants argue that there are two relevant product markets that should be used to evaluate this transaction: interconnected mobile voice services and stand-alone mobile wireless data services.[261] According to the Applicants, the markets for interconnected mobile voice services and stand-alone wireless data services are separate product markets because consumers are unlikely to substitute wireless voice services for wireless data services in response

[259] *DOJ/FTC Merger Guidelines* §§ 1.11, 1.12. *See also* Gregory Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 ANTITRUST L.J. 253 (2003).

[260] *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also United States v. Microsoft*, 253 F.3d 34, 52 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001) (in determining what is a reasonable substitute, the court excluded "middleware" software from the definition of the relevant product market because of its present non-interchangeability with Windows, despite its future long-term potential); *In re Wireless Telephone Services Antitrust Litigation*, 2003 WL 21012603 at 9 (S.D.N.Y. 2003) (relevant product market "consists of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered").

[261] Application, Exhibit 1, Attachment 1 – Gilbert Declaration at ¶ 37 ("Gilbert Declaration").

to a small but significant and non-transitory price increase for stand-alone wireless data services.[262] The Applicants further argue that, in contrast to stand-alone wireless data services, data services that are sold in conjunction with mobile wireless voice services need not be analyzed as a separate product market.[263] By way of justification for limiting the product market for voice services to interconnected mobile voice services, the Applicants find that few customers would substitute other telecommunications services, such as wireline voice services, for mobile voice services.[264] Finally, the Applicants argue that there are not separate relevant product markets for enterprise (business) and residential customers, given that there is a continuum of possible service plans.[265] Apart from the Applicants, the only other party that provided comments on the issue of product market definition argues that there is a wireless phone service product market.[266]

73. Like the Applicants, we use the hypothetical monopolist test to determine the relevant product markets for the purposes of evaluating this transaction. To conduct this test, first we assume that a hypothetical monopolist within a geographic area offers one of the differentiated mobile telephony products such as stand-alone data services or a regional rate plan. Then we assume that this monopolist imposes a small but significant and non-transitory price increase for this mobile telephony service, and finally we evaluate the likely response of consumers to this price increase. If the extent of demand substitution is such that the monopolist could profitably impose a small, but significant and non-transitory, increase in price ("SSNIP") for a particular product, then this product may be defined as a relevant product market.

74. Using this test, we find that there are separate markets for interconnected mobile voice[267] and mobile data services,[268] and also for residential and enterprise services. For the reasons explained below, however, we will not distinguish mobile data subscribers from mobile voice subscribers, or enterprise subscribers from residential subscribers. Instead of a separate analysis of each of these services, we will analyze all of them under the combined market for mobile telephony services.[269]

75. It is probable that most mobile data services are currently sold as add-ons to mobile voice services rather than as separate data-only service offerings. Nearly all mobile data subscribers are also mobile voice subscribers using the same phone number. Based on available evidence, however, we

[262] *Id.* at ¶ 46.

[263] *Id.* at ¶ 48.

[264] *Id.* at ¶ 43-44.

[265] *Id.* at ¶ 45.

[266] *See* Petition to Deny of Thrifty Call, Attachment A, at 16.

[267] Therefore, we agree with the Applicants that few customers would substitute other telecommunication services, such as wireline services, for mobile telephony services. Customers of mobile telephony services are unlikely to find wireline services to be close substitutes because wireline services lack the mobility dimension of wireless services. However, some consumers may find wireless services to be a good substitute for wireline service. For a discussion of wireline/wireless substitution, see *Ninth Report*, FCC 04-216, at 87-91 ¶¶ 211-217.

[268] Interconnected mobile voice consists of all commercially available two-way mobile voice services, providing access to the public switched telephone network via mobile communications devices employing radiowave technology to transmit calls. *See Ninth Report*, FCC 04-216, at 16 ¶ 32.

[269] Mobile data service is considered to be the delivery of non-voice information to a mobile device. Two-way mobile data services include the ability not only to receive non-voice information on an end-user device, but also to send it from an end-user device to another mobile or landline device using wireless technology. Data services available today include, but are not limited to, short messaging service, email, and access to the internet. *See Ninth Report*, FCC 04-216, at 16 ¶ 33; Gilbert Declaration at ¶ 46.

suspect that individual carrier's shares of the mobile data market may deviate significantly from their respective shares of the mobile voice market. For example, the carriers vary in terms of their degree of emphasis on implementing and promoting mobile data services. One analyst report characterizes both Sprint and Verizon Wireless as being very focused on mobile data, while other carriers such as Cingular and Nextel are described in the same report as having had less mass market data focus so far.[270] One measure of a wireless carrier's data performance is the percentage of revenues from data services. By this measure, Sprint has taken an early lead in consumer wireless data,[271] with five percent of its revenues from data in the fourth quarter of 2003.[272] With respect to the remaining nationwide carriers, T-Mobile ranked second with 3.5 percent, Verizon Wireless was third with 3 percent, and AT&T Wireless, Cingular, and Nextel shared last place with 2 percent of their revenues from data services during the same period.[273]

76. Estimates of the percentage of U.S. mobile subscribers who are also mobile data users vary widely. One analyst report estimates that almost 25 percent of U.S. mobile subscribers can be considered casual data users, most of whom use short messaging services ("SMS") and some of whom use other handset-based leisure and entertainment applications.[274] Another report estimates that 17 million cellular/PCS subscribers, or 11 percent of the total, were mobile data users at the end of 2003, mostly SMS only.[275] Using this range of estimates and the number of data subscribers Sprint reported for the fourth quarter of 2003 (5.5 million),[276] we estimate that Sprint's share of the total number of mobile data subscribers at the end of 2003 ranged from a low of 14 percent to a high of 32 percent, whereas Sprint's share of the total number of mobile telephony subscribers during the same period is estimated to be only 10 percent.[277] A ranking of five of the six nationwide carriers in terms of the number of data subscribers from a source in the record indicates that, as of the third quarter of 2003, Verizon Wireless was the market leader with 10 million data subscribers, followed by Cingular (5.8 million), Sprint (5.1 million), Nextel (3.082), and AT&T Wireless (2.152 million).[278] This latter estimate, while differing from the estimates cited above in terms of the total number of U.S. mobile data users, nonetheless confirms that Sprint's share of the data market likely exceeds its share of the voice market, as well as indicating that AT&T Wireless is far from being a market leader in mobile data.

77. The foregoing evidence, while fragmentary, strongly suggests that Cingular's and AT&T Wireless's subscriber shares of the data market are no greater than, and more likely less than, their shares of the voice market. The evidence also suggests that Sprint's share of the voice market likely understates its share of the data market, and that it has gained a larger share of the data market at least partly at the

[270] Governali, Barry & Soova, *supra* note 255, at 24.

[271] *Id.* at 28.

[272] Morin & Mutschler, *supra* note 247, at 87.

[273] *Id.*

[274] Governali, Barry, & Soova, *supra* note 255, at 10.

[275] Mike McCormack and Phil Cusick, *U.S. Wireline/Wireless Services*, Bear Stearns, Equity Research, June 2004, at 47.

[276] *Fourth Quarter and Full Year 2003 Investor Update*, Sprint Group, at 11, *available at* http://www.sprint.com/sprint/ir/fn/qe/pcs4q03.pdf (visited Sept. 14, 2004).

[277] Morin & Mutschler, *supra* note 247, at 86. Verizon Wireless had the largest share of the total number of mobile telephony subscribers at 24 percent, followed by Cingular (15 percent), AT&T Wireless (14 percent), and then Sprint.

[278] Legg Mason Wood Walker, *3Q 2003 Wireless Industry Scorecard*, at Bates Number AWSFCC00001259. No ranking or data are reported for T-Mobile.

expense of Cingular and AT&T Wireless. Based on these considerations, we believe that an analysis based on combined mobile telephony services is very unlikely to understate potential competitive harm to the market for mobile data services as a result of the transaction. Therefore, by employing an analysis that does not distinguish mobile data subscribers from mobile voice subscribers, we are unlikely to overlook adverse competitive effects in the mobile data market using this approach.

78. We decline to support the Applicants' position that stand-alone mobile data services need to be analyzed separately from mobile data services that are sold in conjunction with mobile voice services. We recognize that there are two distinct segments of the mobile data market. One segment generally consists of handset-based applications marketed to consumers primarily as an add-on to mobile voice service, including text messages and other leisure and entertainment applications such as picture messages, games, and ring tones. The second segment consists of monthly mobile Internet access service packages for customers who wish to connect to wireless networks primarily for data, rather than voice, use, and who typically access the Internet through laptops or Personal Digital Assistants ("PDAs") rather than mobile handsets.[279] While the estimates cited above suggest that handset-based data applications are rapidly gaining popularity among U.S. mobile subscribers, the stand-alone data market is relatively nascent. By one estimate, as of early 2004 there were only about one million wireless data devices in service, with a data device defined as a PDA such as a Blackberry or a laptop card.[280] Among the factors that currently limit demand for mobile Internet access service are the limited coverage to date of high-speed wireless data networks, and the slow speeds, relative to fixed broadband, of wireless network technologies that are widely available today.[281] Moreover, it remains unclear at this juncture whether, and to what extent, mobile broadband access service will face competition from portable broadband access service based on alternative wireless technologies such as Wi-Fi. In light of these considerations, we conclude that the market for stand-alone mobile data services is not sufficiently developed at this time to subject to a credible antitrust review.

79. Turning to the enterprise and residential product markets, we note that the majority of subscribers to mobile telephony services are residential customers rather than enterprise customers. Thus, an analysis based on subscriber shares for a combined market for mobile telephony services will tend to provide more accurate insight into the residential market than the enterprise market. However, since enterprise customers tend to be high-volume users of mobile voice services, competition among carriers to attract and retain enterprise customers is likely to be relatively intense. Therefore, we believe that an analysis based on combined mobile telephony services is unlikely to understate potential competitive harm to the market for enterprise services.

80. Another possible product distinction is between plans providing nationwide service (without expensive added charges) and plans providing local/regional service.[282] We do not, however, define separate nationwide and local/regional product markets. Rather, in our analysis below we take account of the fact that local/regional plans are differentiated from nationwide plans, and thus that firms that can only provide local/regional plans may not play the same competitive role as firms offering nationwide service plans.

81. Finally, we find it appropriate also to consider directly the input market of spectrum that is suitable for provision of mobile telephony services. Suitability is determined by the physical properties

[279] Governali, Barry, & Soova, *supra* note 255, at 31, 34. *See also Ninth Report*, FCC 04-216, at 50 ¶ 117.

[280] Governali, Barry, & Soova, *supra* note 255, at 1, 9.

[281] *Id.* at 34.

[282] Yet another possible product would be local service with no roaming service at all, a business model that a small number of mobile wireless firms have adopted.

of the spectrum, the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony. The spectrum that meets the above suitability criteria includes cellular, PCS, and SMR spectrum and currently totals approximately 200 MHz of spectrum.[283]

b. Geographic Market Definition

82. The Supreme Court has defined a relevant geographic market as the area of effective competition to which purchasers can practicably turn for services.[284] It is commonly defined in the economic literature as the region in which a hypothetical monopolist that is the only producer of the relevant product or service in the region could profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.[285] The relevant geographic market selected for analysis must reflect "the commercial realities of the industry."[286]

83. The Applicants claim that a nationwide geographic market, rather than a set of local markets, is appropriate for assessing the effects of this transaction. They argue that the pricing of wireless plans and equipment is national and that consumers prefer plans with larger geographic scope.[287] They note that, given consumer preferences for plans with larger geographic scope, the trend is to national plans, although some customers continue to subscribe to regional plans.[288] Further, they state that carriers find that pricing and advertising is more efficient on a national rather than local basis.[289] The Applicants also argue that the price of regional plans is driven by national plans, and the pricing of mobile plans is determined by national rather than local competitive factors.[290]

84. In order to support their conclusion that the relevant geographic market is national, the Applicants provide: (1) a survey of the lowest prices available in the largest 100 metropolitan areas for both national and regional plans that provide a minimum of 500 anytime minutes; (2) a survey of prices in 50 small rural markets; and (3) an examination of pricing of wireless handsets.[291] The survey finds little differentiation across geographic areas, and the Applicants conclude that the survey results support the use of a nationwide geographic market.[292]

85. Some commenters concur with the Applicants that the relevant geographic market is

[283] *Ninth Report*, FCC 04-216, at 36-39 ¶¶ 86-89. Note that Advanced Wireless Service ("AWS") and Multipoint Distribution Service ("MDS") spectrum does not currently meet our criteria because it is committed to non-mobile telephony uses currently and for the near-term future.

[284] *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *accord United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963).

[285] *DOJ/FTC Merger Guidelines* § 1.21.

[286] *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1421 (6th Cir. 1991) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962)); *RSR Corp. v. FTC*, 602 F.2d 1317, 1323 (9th Cir. 1979) (same).

[287] Gilbert Declaration at ¶ 53.

[288] *Id.* at ¶ 56.

[289] *Id.* at ¶ 53.

[290] *Id.* at ¶ 59.

[291] *Id.* at ¶ 60 and Appendix.

[292] *Id.* at ¶ 61 and Appendix.

national.[293] However, both Consumers Union/Consumers Federation and Thrifty Call argue that the relevant geographic markets are local areas. Consumers Union/Consumers Federation claim that the market is local because consumers expect a local number, because most calls made on wireless handsets are local calls, and because spectrum is a local input.[294] Thrifty Call argues that counties constitute the relevant geographic markets.[295]

86. As described above, to determine the proper geographic dimension of mobile markets we again use the hypothetical monopolist test, asking what is the smallest geographic area in which a hypothetical monopolist could profitably and permanently impose a small but significant price increase. In asking this question, we assume that buyers of wireless services would respond to a price increase by seeking to purchase wireless services in a different location (not by switching to other products). As discussed below, we find that the proper geographic market is a local one, not national.

87. To begin with, we reject the Applicants' suggestion of a national geographic market. First, we reject the Applicants' argument that the fact that customers prefer plans with a larger geographic scope indicates that the market is a national one. The scope of a plan is a feature of the product being offered, not an indication of where users may travel to purchase the service.[296] Second, we see no evidence for the proposition, and find it unlikely, that many users of wireless services will travel across the country to purchase their wireless service. Third, we agree with the suggestion of Consumers Union/Consumers Federation that many consumers want a local number. We believe that most users still prefer a telephone number for their wireless service which will result in a local call, not a toll or long-distance call, for the people who call them the most (*e.g.*, friends, family, and co-workers). Further supporting the conclusion that the geographic market is not national is the fact that, in addition to marketing on a national basis, the wireless carriers also market differently in different markets and offer regional specials and discounts.

88. The Applicants' pricing evidence does not undercut the finding of a local geographic market. While they find substantial similarity in prices nationwide, their data show significant variations. Moreover, we have conducted our own survey of both regional and national rate plans, gathered from the websites of AT&T Wireless, Cingular, Nextel, Sprint, T-Mobile, and Verizon Wireless. We collected information on regional and national rate plans in 197 large urban areas,[297] and examined these carriers' plan variations over geographic areas in the continental United States. Sprint and T-Mobile offered the same regional pricing plans in all the urban centers that were analyzed. We found, however, that regional rate plans for AT&T Wireless, Cingular, and Verizon Wireless exhibited variation in terms of plan choice and price. Turning to national plans, AT&T Wireless, Nextel, Sprint, and T-Mobile offer the same rate plans in all 197 areas surveyed. In contrast, Cingular's and Verizon Wireless's national rate plans showed some differentiation across the urban areas. We conclude that these facts regarding the six nationwide carriers do not establish the existence of a national market.

89. We therefore find that the proper geographic market is a local one. Because a geographic market is the smallest area for which a hypothetical monopolist would be able to impose a price increase

[293] RCC Reply Comments at 1; Small Business Survival Committee Comments at 2-3.

[294] Petition to Deny of Consumers Union and Consumers Federation at 4-5.

[295] Thrifty Call Petition to Deny, Attachment A, at 17. Thrifty Call Reply to Joint Opposition, Attachment A, at 15.

[296] For example, consumers wish to purchase automobiles that can travel throughout the country, but when seeking to purchase an automobile most do not look to dealers throughout the country to make their purchase.

[297] Verizon Wireless offered regional plans in 91 percent of the urban areas surveyed, Sprint 85 percent, AT&T Wireless 77 percent, Cingular 76 percent, and T-Mobile 76 percent.

successfully, it is generally the area within which the customer easily shops for mobile telephony service. For most individuals, we believe this will be a local area, as opposed to a larger regional area or a nationwide area. Such areas may encompass more than one county, and, depending on an individual's location, may even include parts of more than one state.

90. We recognize that all local geographic markets are unique to their particular circumstances, because they depend on where customers do and would travel to purchase wireless services. We cannot, of course, define separate geographic markets for every user of mobile service. But because people do tend to live in clusters – living and moving around in areas that largely overlap – we can without harm to our analysis treat together individuals who are geographically similar. For this reason, we also reject the proposition that, as a general matter, a useful approximation of the local market is as small as a single county. In most parts of the United States, we find that the areas within which consumers regularly shop for wireless services are larger than counties. Thus, if a hypothetical monopolist were to impose a small, non-transitory price increase for mobile telephony services within a single county, it would likely be unprofitable. Significant numbers of consumers would be able to circumvent the increased price easily and obtain the identical service at a lower price in a nearby county.[298] Documentary evidence submitted in response to our information request supports our finding that the appropriate definition of the relevant geographic market is neither national, on the one hand, nor as small as a county, on the other.[299]

c. Market Participants

91. The Applicants argue that mobile telephony services offered by cellular, PCS, and SMR licensees employing various technologies provide the same basic voice and data functionality and are indistinguishable to the consumer.[300] The Applicants' analysis focuses primarily on the ability of the other national carriers to discipline the merged firm, although regional carriers and resellers offer additional constraints.[301]

92. We agree with the Applicants that consumers do not distinguish mobile telephony service by license or technology type. Generally, we limit our analysis to only facilities-based carriers, either nationwide or regional, for example excluding mobile virtual network operators ("MVNOs") and resellers from consideration when computing initial concentration measures. We acknowledge, however, that non-facilities based service options have an impact in the marketplace and in some instances may provide additional constraints against anti-competitive behavior. We take account of the role of resellers in our

[298] We assume that, although the hypothetical monopolist is the only seller of service in the county, customers can still receive service in the county if they purchase their service elsewhere, because there are other carriers who serve the county but do not have stores there, or because other carriers have roaming agreements with the hypothetical monopolist at prices that are not passed on to the customer, or because the customer can purchase service from the hypothetical monopolist itself in a different county at a lower price. As to the last point, we note that wireless carriers do not charge their customers different prices for service on different portions of their own network.

[299] [REDACTED]. In this Order, "REDACTED" indicates confidential or proprietary information subject to the Protective Order in this proceeding. Applications for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services, Inc. and Its Subsidiaries to Cingular Wireless Corporation; Order Adopting Protective Order, WT Docket No. 04-70, *Order*, 19 FCC Rcd. 4793 (2004). The unredacted text is included in the confidential version of this Order, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgments of the protective order. Qualified persons who have not yet signed the required acknowledgment may do so in order to obtain the confidential version of this Order.

[300] Technologies include analog, TDMA, CDMA, GSM, and iDEN. *See* Gilbert Declaration at ¶¶ 39-40.

[301] The Applicants include ALLTEL, USCC, Metro PCS, and two AT&T Wireless affiliates in their analysis. *Id.* at ¶ 63; Gilbert Supplemental Declaration at ¶ 7.

discussion of likely competitive effects below.[302]

93. We consider that the participants in the provision of mobile telephony service include all the facilities-based carriers. However, because carriers generally do not market service in those geographic areas where they do not have their own facilities, for each local market we limit the participants to those carriers that are actually present in the market.

94. We consider that the firms able to offer nationwide service are the six nationwide carriers[303] (AT&T Wireless, Cingular, Nextel, Sprint, T-Mobile, and Verizon Wireless) plus three large regional firms: ALLTEL, USCC, and Western Wireless.[304] Other regional and small firms are typically unable to offer national mobile telephony services that can compete effectively with the various price and non-price components of the national services offered by the larger carriers.

3. Potential Competitive Harms

a. Market Concentration

95. In this analysis, we consider whether there is a substantial likelihood that the merger will result in anticompetitive effects, such as higher prices, reduced features in a given service plan, slower rollout of advanced network availability, or reduced incentives for innovation. Concentration in the relevant markets is one indicator of the likely competitive effects of a proposed merger. Therefore, following relevant precedent, we assess the current market concentration, the post-transaction market concentration, and the increase in concentration that is likely to result from the transaction.[305]

96. The degree of concentration in a market provides insight into the competitive effects that would result from a particular transaction. Market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power. A widely used and accepted measure of market concentration is the Herfindahl-Hirshman Index ("HHI").[306] HHIs may use either output measures (*e.g.*, subscribers, minutes, or revenues) or capacity measures (*e.g.*, spectrum).[307] Market share data are the beginning, not the end, of the competitive analysis.[308] Such data provide useful information

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[302] The resale sector accounts for approximately 5 percent of all mobile telephony subscribers. *See Ninth Report*, FCC 04-216, at 19 ¶ 38.

[303] When an operator is described as being "nationwide," it does not necessarily mean that the operator's license areas, service areas, or pricing plans cover the entire land area of the United States. The six mobile telephony carriers that analyst reports typically describe as nationwide all offer service in at least some portion of the western, midwestern, and eastern United States. *See id.* at 18 ¶ 36.

[304] *Id.*

[305] *See, e.g., DOJ/FTC Merger Guidelines* § 1.51 ("In evaluating horizontal mergers, the Agency will consider both the post-merger market concentration and the increase in concentration resulting from the merger."); FTC v. H.J. Heinz Co., 246 F.3d 708, 715-17, (D.C. Cir. 2001); *EchoStar-DirecTV Order*, 17 FCC Rcd. at 20,603-04 ¶¶ 97-98; *WorldCom-MCI Order*, 13 FCC Rcd. at 18,025.

[306] The HHI is the sum of the squares of the market shares of each firm participating in the market. The HHI can range from nearly zero in an atomistic market to 10,000 in the case of monopoly. Since the HHI is based on squared market shares, it gives proportionally greater weight to carrier with large market shares. *See DOJ/FTC Merger Guidelines* § 1.5.

[307] *See id.* § 1.41.

[308] *WorldCom-MCI Order*, 13 FCC Rcd. at 18100-01, 18050.

as to which markets need more in-depth, multidimensional analysis of potential anticompetitive effects.[309]

97. The Applicants calculate HHIs and the change in the HHIs for the national market using total revenues and flow share revenues.[310] We have already rejected the Applicants' argument for analyzing the competitive effects of the transaction at a national level and, as explained below, also decline to adopt the Applicants' flow share approach. A flow share is a carrier's percentage of the total number of customers or revenues gained by the various carriers in a certain time period, as opposed to its percentage of the total number of current customers or revenues.[311] The Applicants argue that flow market shares are a better indicator of the current state of competition than other measures because flow shares measure how consumers are currently choosing among various wireless providers,[312] the industry market structure is likely to be different than in the past,[313] and churn rates for mobile telephony services are high.[314] Although flow shares can be calculated from either subscriber or revenue data, the Applicants argue that revenues are the preferred metric to evaluate the competitive effects of the transaction because revenues reflect the utilization of the network while subscriber shares do not.[315] The Applicants' calculation of flow shares for the major wireless carriers purportedly shows that Cingular and AT&T Wireless are falling behind the other nationwide competitors in attracting customers.[316]

98. Some petitioners favor the use of subscriber shares, rather than revenue or flow shares, on the ground that subscriber shares better reflect post-transaction concentration levels in the market.[317] Thrifty Call cites two other objections to the use of flow shares. First, Thrifty Call notes that there is no language in the *DOJ/FTC Merger Guidelines* justifying the use of flow shares.[318] Second, Thrifty Call argues that flow shares can be misleading, because a small but growing company could have a large flow share but still have a small share of the overall customers and thus have little or no market power, while a dominant but stable company could produce a minimal flow market share (*i.e.*, attract few new customers) but still have a large stock share and significant market power.[319] Thrifty Call acknowledges

[309] We note that the mobile telephony market is a growing and dynamic industry, and therefore HHIs and changes in HHIs may be less predictive as to whether the merger could result in anticompetitive behavior in a particular geographic market than they would if the market were stable. As discussed in section V.A.3.d, below, we took this factor into account when we performed our more in-depth analysis of the markets we marked for further study.

[310] Gilbert Declaration at ¶¶ 64-67. For the revenue share calculation, each firm's service revenue, equipment sales, and other revenue were included. Revenues for the nationwide firms were obtained from company financial statements, and for the regional firms revenues were calculated as the difference between the number of total subscribers and the nationwide providers and multiplied by the average revenue per subscriber for the national carriers. *See id.* at ¶ 64.

[311] Flow shares are also known as gross adds. *See* Application, Exhibit 1, at 36. A "new customer" is not necessarily a customer that has not previously purchased wireless service, but may be a customer previously with another carrier.

[312] Gilbert Declaration at ¶ 65.

[313] *Id.* at ¶ 64; Gilbert Supplemental Declaration at ¶¶ 4-5, 32; Application, Exhibit 1, at 36; Joint Opposition at 21.

[314] Gilbert Supplemental Declaration at ¶ 6, 9; Application, Exhibit 1, at 36; Joint Opposition at 21.

[315] Gilbert Supplemental Declaration at ¶ 2.

[316] *Id.* at ¶ 6.

[317] Thrifty Call Petition to Deny at 9, 11; Consumers Union and Consumers Federation Petition to Deny at 8; Thrifty Call Petition Reply to Joint Opposition at 12 and Attachment A at 13; Consumers Union and Consumers Federation Reply at 3-4.

[318] Thrifty Call Reply to Joint Opposition, Attachment A at 12-13.

[319] *Id.* at 13.

that flow shares, though not a proper measure of market concentration, may accurately measure a firm's current success in the market, as reflected in consumers' ranking of AT&T Wireless and Cingular as fourth and fifth in a field of six nationwide carriers.[320] However, Thrifty Call uses subscriber shares to calculate HHIs and claims that these shares reflect a firm's relative advantage in serving different customers.[321]

99. We acknowledge that flow market shares may shed light on the relative competitive strengths of market participants in certain markets, provided that the correct methodology is used to calculate the flow market shares. However, the Applicants' flow share methodology does not appear to include all potential buyers in the relevant market. We find that, in order for a flow share methodology to be useful, it would have to include four types of subscribers: (1) all new subscribers who entered the market for the first time during a given period; (2) all subscribers who switched carriers during that period; (3) all subscribers who entered into new contracts with their current carrier; and (4) all subscribers whose original contract periods have expired (who therefore face no penalties for early termination) and choose to remain with their carrier on a month-to-month contract. Subscribers who face no termination penalty but nevertheless choose to continue with their existing carrier are potential buyers in the market analogous to subscribers who entered the market for the first time or switched from another carrier.

100. The Applicants' flow market share calculation, by contrast, appears to include only subscribers in categories (1) and (2) – new subscribers and existing subscribers who switched wireless carriers during a defined period – and fails to account for subscribers in categories (3) and (4) – subscribers who executed new contracts with their current carrier and subscribers who could have switched to another carrier without an early termination penalty. Thus, the Applicants' methodology for calculating flow shares is of limited utility for our purposes. Moreover, given the unavailability of accurate data about subscribers in the necessary categories, we note that it would be almost impossible to calculate flow market shares correctly. We therefore reject the flow market share calculation proposed by the Applicants in favor of performing a traditional market share analysis that calculates market share in terms of subscribers.

101. We also find that the Applicants' and some petitioners' HHI calculations are not helpful because their figures are based on a nationwide geographic market – a market definition we decline to adopt.[322] As discussed above, we find the relevant market to be a local one. Finally, although Thrifty Call calculates HHIs for a single county,[323] we have rejected the idea of generally using counties as the proper geographic market, and Thrifty Call has provided no evidence as to why the county is the correct market in that particular case.

102. In analyzing the competitive effects of this transaction, we use two sets of data. First, we use our Numbering Resource Utilization / Forecast (NRUF) database, which tracks phone number usage by all telecommunications carriers, including wireless carriers, in the United States. These data indicate the number of assigned phone numbers that a wireless carrier has in a particular wireline rate center. All mobile wireless carriers must report to the FCC the quantity of their phone numbers that have been assigned to end users, thereby permitting the Commission to calculate the total number of mobile

[320] Thrifty Call Petition to Deny at 14.

[321] *Id.*, Attachment A, at 18.

[322] See Gilbert Declaration at 34-37; Thrifty Call Petition to Deny at 9-10, Attachment A 17-19; and Consumers Union and Consumers Federation at 7-8; Thrifty Call Reply to Joint Opposition, Attachment A at 16-17, 19; Comments of Communications Workers of America at 7.

[323] Thrifty Call Petition at 9-10, Attachment A at 19-21; Thrifty Call Reply to Joint Opposition, Attachment A at 17, 20.

subscribers. In addition, because we collect NRUF data on a rate center area basis,[324] we can use this information to estimate mobile telephone subscribership levels and penetration rates on a regional basis in addition to a national basis. For purposes of geographical analysis, the rate center data can be associated with a geographic point, and all of those points that fall within a county boundary can be aggregated together and associated with much larger geographic areas based on counties. Using this data, we can determine market shares for carriers for various geographic market definitions.

103. Second, we use billing data submitted by the six nationwide carriers (AT&T Wireless, Cingular, Nextel, T-Mobile, Sprint, and Verizon Wireless) in response to a staff data request. These data include information on all service plans for which the carrier currently has subscribers, including the number of subscribers taking a particular plan, broken down by billing address zip code. From this data set, we calculate the number of subscribers per zip code for each carrier. This data set also can be aggregated up to larger geographic areas and can be used to calculate market shares for all mobile wireless carriers. Using two sets of data to cross-check against each other gives us confidence that any shortcomings in either data set will not lead to inappropriate analytical conclusions.

104. In calculating market shares and market concentration, we analyzed carrier data by two sets of geographic areas, Component Economic Areas ("CEAs") and Cellular Market Areas ("CMAs"). CEAs, which are defined by the Bureau of Economic Analysis, are composed of a single economic node and surrounding counties that are economically related to the node.[325] There are 348 CEAs in the 50 States and the District of Columbia. Of the 3,141 U.S. counties, 2,267 are non-nodal counties which are assigned to a CEA based first on county-to-county commuting flows from the 1990 Census and second on locations of the most widely read regional newspapers.[326] CMAs are the regions originally used by the Commission in issuing licenses for cellular service. There are 734 CMAs, made up of 305 Metropolitan Statistical Areas ("MSAs"), 428 Rural Service Areas ("RSAs"), and a market for the Gulf of Mexico.[327] RSAs are regions defined by the Commission for the purpose of issuing spectrum licenses.[328]

105. No one set of standard geographic areas can capture all the nuance in local markets across the country. We chose these two geographic areas for our data analysis because both are consistent in order of magnitude with the local market definition we have adopted and because each brings a different consideration to the analysis. CEAs are designed to represent consumers' patterns of normal travel for personal and employment reasons[329] and may therefore capture areas within which groups of consumers would be expected to shop for wireless service.[330] In addition, CEAs should be areas within which any service providers present would have an incentive to market – and actually provide – service

[324] Rate centers are geographic areas used by local exchange carriers for a variety of reasons, including the determination of toll rates. *See* Harry Newton, NEWTON'S TELECOM DICTIONARY: 16TH EXPANDED & UPDATED EDITION, CMP Books, July 2000, at 732.

[325] *See* Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURVEY OF CURRENT BUSINESS, February 1995, at 75-81.

[326] Three quarters of non-nodal counties were assigned based on commuting patterns. *See id.* at 78.

[327] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eighth Report*, 18 FCC Rcd. 14783, 14795 (2003).

[328] *See Ninth Report*, FCC 04-216, at n.188.

[329] *See* Johnson, *supra* note 326, at 75 ("The main factor used in determining the economic relationships among counties is commuting patterns, so each economic area includes, as far as possible, the place of work and the place of residence of its labor force.").

[330] *See id.* ("Economic nodes are metropolitan areas or similar areas that serve as centers of economic activity").

relatively ubiquitously. Conversely, CMAs are the areas in which the Commission initially granted licenses for the cellular service.[331] Although partitioning has altered this structure in many license areas, CMAs represent the fact that the Commission's licensing programs have to a certain degree shaped this market by defining the initial areas in which carriers had spectrum on which to base service offerings, and they may therefore serve as a proxy for where consumers face the same competitors. Because these two sets of geographic areas come from different sides of the equation – demand in one case, supply in the other – we believe that they are useful cross-checks on each other and together help ensure that our analysis did not overlook local areas that required more detailed analysis. In performing that analysis, we also examined smaller geographic areas in order to understand any competitive problems fully and to design targeted remedies, if necessary.

106. In order to determine which areas deserved further examination, we calculated the HHIs and the change in HHI that would result from this transaction for all CEAs and CMAs, and we also examined the concentration of spectrum holdings in each market. As explained below, we examined the market further if the post-transaction HHI would be greater than 2800 and the change in HHI would be 100 or greater; or if the change in HHI would be 250 or greater regardless of the level of the HHI; or if, post-transaction, the Applicants would hold 70 MHz or more.

107. This analysis follows the general structure of the DOJ/FTC Merger Guidelines, but we chose the concentration thresholds for this screen based on our observation of the current mobile telephony marketplace. To begin with, the Commission has found that there is generally effective competition in mobile telephony markets today,[332] and our analysis indicates that the current average HHI in markets across the country is slightly over 2900. We chose initial thresholds of 2800 for the HHI and 100 for the change in HHI because a mobile telephony market that does not exhibit at least this combined post-merger level of concentration will be no more concentrated than the average market today and therefore, in our judgment, needs no further review. In addition, we judged that a market in which the impact of the merger is so slight that it does not cause a change of at least 100 in the HHI need not be examined further because, even if the post-transaction HHI for such a market would be greater than 2800, the loss of a competitor with such a small market share is *de minimis* and would not likely cause significant, merger-related anticompetitive effects.[333]

108. Because this initial screen was intended to eliminate from further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace – rather than to identify conclusively markets in which there *is* competitive harm – we also adopted a conservative second criterion: regardless of the HHI, we examined a market further if the merger causes a change in HHI of at least 250. Although this threshold resulted in some "false positives" – *i.e.*, we gave further review to markets in which the concentration levels are below that of the average market today – we chose to apply this criterion in order to be confident that we gave further review to any market in which the merger may cause significant change in the competitive landscape.

109. Finally, because spectrum is a necessary resource for wireless carriers to compete effectively, we also further analyzed those markets in which, post-transaction, the Applicants would have 70 MHz or more in at least part of the market. By selecting 70 MHz as the threshold, we ensured that we subjected to further review any market in which the level of spectrum aggregation will exceed what is present in the marketplace today. As an initial matter, although 70 MHz represents a little more than one-

[331] *See* 47 C.F.R. § 22.909.

[332] *Ninth Report*, FCC 04-216, at 15 ¶ 27.

[333] For example, a change in HHI of 100 would represent the merger of companies with market shares of 25% and 2%, or 49% and 1%.

third of the total bandwidth available for mobile telephony today, we emphasize that a market may contain more than three viable competitors even where one entity controls this amount of spectrum, because many carriers are competing successfully with far lower amounts of bandwidth today. For example, Verizon Wireless has recently launched EV-DO service in five markets in which it holds 30 MHz of bandwidth – Austin, Texas; Milwaukee, Wisconsin; and Miami, Tampa, and West Palm Beach, Florida – and in most other locations where it has begun to offer EV-DO, it is doing so with 35 MHz of spectrum.[334] Similarly, Dobson Communications Corporation ("Dobson") has recently announced launch of EDGE service throughout its 16-state territory, where it holds no more than 30 MHz of bandwidth in over 90 percent of the applicable counties.[335] Nevertheless, in line with the conservative approach embodied in this initial screen, the function of which was simply to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction, we subjected to further review any market in which one entity controls more than one-third of this critical input.

110. Application of the initial screen described above to data aggregated by CEA identified 180 CEAs (out of the total of 348) for further, case-by-case analysis. (These CEAs are listed in Appendix C). Application of the screen to data aggregated by CMA identified 270 CMAs (out of the total of 734) for closer analysis. (These CMAs are listed in Appendix C). By comparing the results of these two applications of the initial screen and analyzing any local area caught in either application, we ensured that we did not overlook any local area which deserved closer scrutiny in our case-by-case analysis. Conversely, application of the initial screen eliminated from further review any market *not* identified by the screen. Although the structure of many of these eliminated markets will change as a result of the transaction, the fact that they were not caught by the screen indicated either that the market will be no more concentrated than the average market today, or that the structural change as a result of the merger is *de minimis*, or both, and we therefore find that these structural changes will not alter carrier conduct in such a way as to impair competition and hence market performance.

111. For the 180 CEAs caught by the initial screen, the average post-transaction HHI is 3,096. The minimum value is 1,675 and the maximum value is 7,755. The average increase in HHI is 524, and this statistic ranges from a minimum of zero to a maximum of 3,739. For the 270 CMAs caught by the initial screen, the average post-transaction HHI is 3,687. The minimum value is 1,927 and the maximum value is 7,399. The average increase in HHI is 540, and this statistic ranges from a minimum of zero to a maximum of 3,443. (Markets with a zero change in HHI were caught by the screen when they involved spectrum aggregation of 70 MHz or more in at least one county within the market).

112. We again emphasize that this initial evaluation of markets was only the beginning of the competitive analysis, because it was only meant to screen out those markets which are at least as competitive as the average market today and therefore needed no further examination. In particular, it was designed to ensure that we did not exclude from further scrutiny any geographic areas in which any potential for anti-competitive effects exist. We now turn to an examination of the various other factors we considered in our further, case-by-case analysis of whether there will be potential competitive harms if the transaction were to be approved without conditions.

b. Horizontal Issues

113. Because the structural analysis above suggests that the acquisition by Cingular of AT&T

[334] For Verizon Wireless's spectrum holdings, *see* the Commission's ULS database; for EV-DO launch information, *see* Verizon Wireless Expands BroadbandAccess 3G Network to Cover 14 Markets From Coast to Coast, *available at* http://news.vzw.com/news/2004/09/pr2004-09-22c.html (Sept. 22, 2004).

[335] For Dobson's spectrum holdings, *see* the Commission's ULS database; for EDGE launch information, *see* *Dobson launches EDGE services in 16-state service area*, RCR WIRELESS NEWS, October 18, 2004, at 22.

Wireless is likely to have adverse effects on competition in certain markets, this section examines in more detail how the transaction could affect competitive behavior in such markets. As the DOJ/FTC Guidelines state, competition may be harmed either through unilateral actions by the merged entity or through coordinated interaction among firms competing in the relevant market.[336]

114. Unilateral effects occur when the firm finds it profitable to alter its behavior following the merger.[337] Examples of unilateral effects include the ability of the merged firm to raise its price or reduce the features it includes in a given service plan it supplies. Coordinated effects occur when the remaining firms in the market, recognizing their interdependence, take actions "that are profitable for each of them only as a result of the accommodating reactions of others."[338] Examples of coordinated effects include explicit collusion, tacit collusion, and price leadership. Because coordinated effects may be more likely the fewer the number of firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms in the market.

(i) Unilateral Effects

(a) Introduction

115. Cingular's acquisition of AT&T Wireless will lead to significant changes in the structure of the local wireless markets identified above for further analysis, and thus it is necessary to examine in detail the possibility that the merger may lead to competitive harm through unilateral actions by the merged entity.[339] Unilateral effects arise when the merged firm finds it profitable to alter its behavior following the merger by "elevating price and suppressing output."[340] In the case of mobile telephony, this might take the form of delaying improvements in service quality or adversely adjusting plan features without changing plan price.[341] Incentives for such unilateral competitive actions vary with the nature of competition in the relevant markets.

116. As we explain below, the market for mobile telephony service in the United States appears to be differentiated. Wireless service carriers do not offer a completely homogeneous service. Rather, the carriers compete vigorously on the basis not only of price but also of other plan features, call quality and geographic coverage, and customer service. While carriers can change some of these attributes relatively quickly, others – particularly non-price attributes such as quality and coverage – require investments in spectrum and infrastructure and are not easily modified.

117. In a market characterized by product differentiation, a merger may lead to particularly strong increases in the merged firm's ability to affect market performance unilaterally when the merging firms' products are relatively close substitutes for one another. "A merger between firms in a market for

[336] *DOJ/FTC Merger Guidelines* § 2.

[337] *Id.* at § 2.2.

[338] *Id.* at § 2.1; *see also* VISCUSI, VERNON & HARRINGTON, ECONOMICS OF REGULATION AND ANTITRUST 107 (2000); DOUGLAS GREER, INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 269 (1992).

[339] *DOJ/FTC Merger Guidelines* § 2; *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,620 ¶ 153.

[340] *DOJ/FTC Merger Guidelines* § 2.2.

[341] The term "unilateral" refers to the method used by firms to determine strategy, not to the fact that the merged entity would be the only firm to change its strategy. The term unilateral is used to indicate that strategies are determined unilaterally by each of the firms in the market and not by explicit or tacit collusion. Other firms in the market may find it profitable to alter their behavior as a result of the merger-induced change in market structure by, for example, repositioning their products, changing capacity, or changing their own prices. These reactions can alter the total effect on the market and must be taken into account when evaluating potential unilateral effects.

differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level. The price rise will be greater the more the buyers of one product consider the other product to be their next choice."[342] Therefore, if the services offered by Cingular and AT&T Wireless are viewed as close substitutes by significant numbers of customers, the merger of the two firms can remove a strong constraint on Cingular's ability to raise prices for its pre-transaction customers, for AT&T Wireless's former customers, or for both.[343] Alternatively, if most customers consider Cingular and AT&T Wireless to be more distant substitutes for one another in the spectrum of differentiated choices available, or if there are multiple choices available to customers that they view as similarly close substitutes for one another, then anticompetitive unilateral effects may be less likely to occur or may be less significant.

118. Other market conditions conducive to anticompetitive unilateral effects in a differentiated markets setting are a large market share by the merged firm,[344] and conditions such that rival sellers are unlikely to replace competition lost through the acquisition by repositioning their product offerings.[345] In settings in which products are relatively undifferentiated, a large market share for the merged entity makes harm from unilateral behavior more likely, in particular in cases in which "a sufficiently large number of the merged firm's customers would not be able to find economical alternatives sources of supply" because other firms would not respond with output increases of their own, perhaps because of "binding capacity constraints."[346] In this sector, for example, spectrum suitable for use in mobile telephony is an input of finite supply. It is possible that rivals to the merged entity may be unable to add subscribers so as to function as a competitive check if there is an insufficient amount of spectrum available to them. This constraint may be most noticeable in those markets where advanced services are being introduced. In addition, the transaction may enhance the merged firm's ability to rely on "network effects" to retain subscribers despite increasing prices or decreasing plan features.[347]

(b) Discussion

119. The Applicants claim that there is some product differentiation among the mobile telephony providers, including differences in call quality, geographic coverage, and customer service, but that this product differentiation is not large relative to other industries.[348] The Applicants argue that unilateral effects are unlikely because customers do not regard Cingular and AT&T Wireless as their first and second choices. In addition, the Applicants argue that Cingular or AT&T Wireless customers who choose wireless carriers on the basis of price are likely to regard T-Mobile as the preferred alternative in the event of a price increase by Cingular or AT&T Wireless. They also argue that customers who choose wireless carriers on the basis of quality are likely to regard Verizon Wireless as the preferred alternative

[342] *DOJ/FTC Merger Guidelines* § 2.21.

[343] That is, Cingular's presence in a market may have been a constraint on AT&T Wireless's prices, and AT&T Wireless's presence in a market may have been a constraint on Cingular's prices. It is not necessary for the products to be the next best substitutes for there to be competitive harm arising from unilateral effects, although it makes the harm more likely. *See* Gregory Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 408 (1998).

[344] *DOJ/FTC Merger Guidelines* § 2.211.

[345] *Id.* § 2.212.

[346] *Id.* § 2.22.

[347] Certain services become more attractive to customers as more customers use them, a phenomenon known as a "network effect." Network effects tend to be strongest in businesses whose main output or product is access to other persons, as is the case with telephone service.

[348] Gilbert Declaration at ¶¶ 76, 82.