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

In the Matter of	)	
	)	
Applications of Western Wireless Corporation and ALLTEL Corporation	)	
	)	WT Docket No. 05-50
For Consent to Transfer Control of Licenses and Authorizations	)	
	)	
File Nos. 0002016468, *et al.*	)	

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 2005 **Released: July 19, 2005**

By the Commission: Commissioners Abernathy, Copps, and Adelstein issuing separate statements.

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I. INTRODUCTION

1. In this Order, we consider applications filed by Western Wireless Corporation ("WWC") and ALLTEL Corporation ("ALLTEL") (collectively, the "Applicants") for consent to transfer control of all licenses and authorizations held by WWC and its subsidiaries to ALLTEL. The Applicants generally seek Commission approval of the transfer of control of WWC's licensee subsidiaries to ALLTEL. This transfer of control would take place as a result of the proposed merger of WWC into Wigeon Acquisition LLC ("Wigeon"), a limited liability company wholly owned by ALLTEL. The applications pertain to licenses for the Part 22 Cellular Radiotelephone Service ("Cellular"), the Part 22 Paging and Radiotelephone Service, the Part 24 Personal Communications Service ("PCS"), the Part 90 Industrial/Business Pool Service, the Part 90 Private Carrier Paging Service, the Part 90 Specialized Mobile Radio Service, the Part 101 Common Carrier Fixed Point-to-Point Microwave Service, and the Part 101 Local Multipoint Distribution Service. Additionally, the Applicants are seeking consent to the assignment and transfer of control of two international section 214 authorizations from WWC to Wigeon.

2. Pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act"),[1] we must determine whether the Applicants have demonstrated that the proposed acquisition of WWC would serve the public interest, convenience, and necessity. Based on the record before us, we find that the Applicants have generally met that burden. Competitive harm is unlikely in most mobile telephony markets, primarily because of the complementary footprints of ALLTEL and WWC. Our case-by-case analysis did, however, indicate that in sixteen markets likely competitive harms exceed the likely benefits of the transaction. In these areas, we impose narrowly-tailored conditions that will effectively remedy the potential for these particular harms.

[1] 47 U.S.C. §§ 214(a), 310(d).

II. BACKGROUND

A. Description of the Applicants

1. ALLTEL Corporation

3. ALLTEL is a publicly-traded Delaware corporation, headquartered in Little Rock, Arkansas.[2] Through its subsidiaries, ALLTEL primarily provides wireless and wireline telephone services to more than 13 million customers in mid-sized cities and rural areas in 26 states throughout much of the Southeast and portions of the Northeast, Southwest, and upper Midwest United States.[3] For fiscal year 2004, ALLTEL reported approximately $8.2 billion in revenues.[4]

4. Specifically, ALLTEL provides wireless communications services to more than 8.6 million customers in 24 states.[5] ALLTEL provides analog and digital wireless telecommunications services to its customers on 850 MHz band Cellular licenses and 1900 MHz band PCS licenses using Code Division Multiple Access ("CDMA") technology.[6] Furthermore, ALLTEL is deploying 1xRTT and EV-DO to provide enhanced wireless data services.[7] Currently, ALLTEL owns a majority interest in Cellular and PCS wireless operations covering a total aggregate population ("POPs") of approximately 62.5 million.[8] As of December 31, 2004, ALLTEL had a penetration rate, which is the number of customers as a percentage of the total population in ALLTEL's service area, of 13.8 percent.[9] ALLTEL supplements its wireless service coverage area through roaming agreements with other wireless providers expanding its coverage area to approximately 95 percent of the United States population.[10]

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[2] *See* ALLTEL Corporation, Form 10-K, at 1 (filed Feb. 10, 2005) ("ALLTEL 10-K").

[3] *See id.* at 1, 4; *see also* ALLTEL Corporation, Form 8-K, Exhibit 99(a), at 2 (filed Jan. 10, 2005) ("ALLTEL 8-K"). ALLTEL also provides cable television services in select markets. *See* ALLTEL 10-K at 4.

[4] ALLTEL 10-K at 4; ALLTEL Corporation, 2004 Annual Review, at 11 (Jan. 24, 2005).

[5] ALLTEL 10-K at 4. ALLTEL states that it holds a 10 percent or greater ownership interest in Cellular and PCS licenses in portions of the following 28 states – Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin. Additionally, ALLTEL will soon begin providing service in a portion of Connecticut as well. *See* Letter from Doane F. Kiechel, Morrison & Foerster, LLP, Counsel for Western Wireless Corporation, and Kathryn A. Zachem, Wilkinson Barker Knauer, LLP, Counsel for ALLTEL Corporation, to Susan Singer, Assistant Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, at 3 (Mar. 15, 2005) ("March 15, 2005 Response to Information Request").

[6] ALLTEL 10-K at 8. ALLTEL is also authorized to operate paging licenses and ancillary private radio and microwave licenses. ALLTEL provides paging services in select markets to approximately 22,000 customers on a resale basis. *Id.* at 5.

[7] *See id.* at 5, 6, 8. ALLTEL provides high-speed wireless data in Arkansas, Arizona, Florida, Georgia, Louisiana, Michigan, North Carolina, New Mexico, Ohio, South Carolina, and Virginia. *See* March 15, 2005 Response to Information Request at 4.

[8] *See* ALLTEL 10-K at 4.

[9] *Id.* at 4.

[10] *Id.* at 5.

5. Additionally, ALLTEL provides local telephone, high-speed data, and Internet services to approximately 3 million customers in 15 states.[11] ALLTEL also offers long-distance services,[12] and network access and interconnection services,[13] and provides cable television services in select markets.[14]

2. Western Wireless Corporation

6. WWC is a publicly-traded Washington corporation, headquartered in Bellevue, Washington.[15] Through various subsidiaries and affiliates, WWC owns and operates wireless phone systems in predominantly rural areas in the Central and Western portions of the United States.[16] Additionally, a WWC subsidiary, Western Wireless International Holding Corporation ("WWI"), provides service to approximately 1.8 million international mobile subscribers and is licensed to provide wireless communications to approximately 56 million people in seven foreign countries.[17] For fiscal year 2004, WWC reported $1.9 billion in revenues.[18]

7. Specifically, WWC provides wireless services to approximately 1.4 million subscribers in 19 states,[19] and has a license and service area of 11.5 million POPs.[20] Using its 850 MHz band Cellular licenses and 1900 MHz band PCS licenses,[21] WWC provides basic voice services, short messaging, multimedia messaging, and wireless internet, and has deployed 1xRTT to provide high-speed data in 18

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[11] *See id.* at 1, 4, 12. ALLTEL provides wireline services as an incumbent local exchange carrier (ILEC) or competitive local exchange carrier (CLEC) in parts of Alabama, Arkansas, Florida, Georgia, Kentucky, Mississippi, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, and Texas. March 15, 2005 Response to Information Request at 4; ALLTEL 10-K at 12.

[12] ALLTEL 10-K at 20. ALLTEL states that it provides long-distance telecommunications services on a facilities-based and resale basis in all states in which it provides local exchange services. As of December 2004, ALLTEL provided service to approximately 1.8 million customers. *See id.* Further, ALLTEL states that it provides long-distance services to its wireline and wireless customers in Alabama, Arkansas, Arizona, Colorado, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and West Virginia. March 15, 2005 Response to Information Request at 3.

[13] *See* ALLTEL 10-K at 12, 17-19, 20.

[14] *See id.* at 12 (stating that ALLTEL provides cable television services to approximately 36,000 customers in Georgia and Missouri).

[15] *See* Western Wireless Corporation, Form 10-K, at 1 (filed Mar. 16, 2005) ("WWC 10-K").

[16] *See id.* at 5, 10.

[17] *Id.* at 5, 17-18. These countries include: Austria, Bolivia, Georgia, Ghana, Haiti, Ireland, and Slovenia. Applicants had operations in the Ivory Coast but note that, due to political instability, operations in have been temporarily suspended. *See id.* at 5, 18; March 15, 2005 Response to Information Request at 4. In Austria, Bolivia, Ghana, Haiti, Ireland, and Slovenia, WWI holds controlling interests in the operating company. It also holds a non-controlling interest in the operating company in Georgia. *See* Western Wireless Corporation, Form 10-Q, at 6 (filed May 6, 2005) ("WWC 10-Q"). In certain markets, WWI subsidiaries also provide other telecommunications services, such as wireline services and international long distance. *See* WWC 10-K at 5.

[18] ALLTEL 10-K at 4; ALLTEL Corporation, 2004 Annual Report, at 11 (Jan. 24, 2005), *available at* http://media.corporate-ir.net/media_files/irol/74/74159/2004/2004_Annual.pdf (last visited June 8, 2005).

[19] WWC 10-K at 5, 10; Western Wireless Corporation, Form 8-K, Exhibit 99.1 at 4 (filed Jan. 10, 2005) ("WWC 8-K").

[20] WWC 10-K at 5, 10.

[21] *See id.* at 5, 6, 10.

states.[22] Unlike many wireless providers, WWC's network supports four technology platforms, CDMA, Time Division Multiple Access ("TDMA"), Global System for Mobile Communications ("GSM"), and analog.[23] WWC uses its network not only to provide service to its subscribers but also to other companies' subscribers who roam in WWC's service area.[24]

8. WWC provides wireless services under two different brand names – Western Wireless and Cellular One.[25] Although WWC wholly owns the Cellular One brand name,[26] it licenses the Cellular One brand name to the other wireless service carriers comprising the Cellular One Group, pursuant to a licensing agreement.[27] The Cellular One Group is a national coalition of over twenty wireless service carriers that owns, manages, and promotes the registered Cellular One brand.[28] In the aggregate, the Cellular One Group of independent carriers offers wireless communications to more than 32 million customers in 42 states, as well as Puerto Rico, Bermuda, and the Caribbean.[29]

9. WWC is one of the two largest service providers branding their services as Cellular One; the other is Dobson Communications Corporation ("Dobson").[30] WWC's properties cover 41 percent of Cellular One's total POPs.[31] Under the Cellular One brand name, WWC serves more than one million customers in nineteen states using WWC properties with a service area of more than 10 million POPs and covering more than 30 percent of the continental United States.[32] Dobson provides wireless services,[33] under the Cellular One and Dobson Cellular Systems brand names,[34] to approximately 1.6 million

[22] *See id.* at 7-8.

[23] *See id.* at 5, 7.

[24] *Id.* at 5, 6.

[25] *Id.* at 5, 10; WWC 8-K, Exhibit 99.1 at 4. WWC provides service in Arizona, Arkansas, California, Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, and Wyoming. *See* WWC 10-K at 10.

[26] *See* WWC 8-K, Exhibit 99.1 at 4; *see also* Cellular One Company Overview at 1, *at* http://www.cellularone.com/AboutCellularOne. asp (last visited June 6, 2005) ("Cellular One Overview").

[27] *See* WWC 10-K at 12; *see also* WWC 8-K, Exhibit 99.1 at 4 (stating that WWC "licenses the Cellular One name in 16 additional states and the Caribbean").

[28] Cellular One Overview at 1.

[29] *Id.*

[30] *See* Petition to Deny of Dobson Cellular Systems, Inc. and American Cellular Corporation, filed Mar. 9, 2005, at 2 ("Dobson Petition").

[31] *Id.*

[32] *See* Cellular One Frequently Asked Questions at 1, *at* http://www.cellularonewest.com/CelloneFAQs.asp (last visited June 6, 2005).

[33] Dobson, through its subsidiaries Dobson Cellular Systems, Inc. and American Cellular Corporation, offers digital voice and high-speed data services, such as wireless e-mail, internet access, and multi-media message. *See* Dobson Petition at 1 n.1; *see also* Dobson Communications Corp, Form 10-K, at 3, 8 (filed May 10, 2005) ("Dobson 10-K"); Dobson Profile at 2, *at* http://www.dobson.net/dp_profile.html (last visited June 3, 2005); Dobson Network Excellence at 1, *at* http://www.dobson.net/ dp_network_excellence.html (last visited June 3, 2005). Dobson operates on 850 MHz and 1900 MHz bands, using multiple technologies including TDMA, GSM, General Packet Radio Service ("GPRS"), and Enhanced Date for GSM Evolution ("EDGE") technologies. *See* Dobson 10-K at 4; *see also* Dobson Profile at 1.

[34] Dobson Brands at 1, *at* http://www.dobson.net/dp_brands.html (last visited June 5, 2005) ("Dobson Brands"); Dobson Profile at 1.

subscribers in mostly rural and suburban markets in sixteen states.[35] Specifically, D markets service under the Cellular One brand name in all of its markets, except for parts of Texa lahoma where it markets its service under Dobson Cellular Systems.[36] The markets in which markets under the Cellular One brand name cover 45 percent of the total Cellular One POPs.[37]

B. Description of Transaction

10. On January 9, 2005, ALLTEL and WWC entered into a merger agreement ("Merger Agre nt") whereby ALLTEL would purchase WWC in a stock-and-cash transaction valued at app tely $6 billion.[38] According to the terms and conditions of the Merger Agreement, WWC would be merged into Wigeon Acquisition LLC, a newly formed limited liability company wholly owned by ALLTEL. Pursuant to the Merger Agreement, each share of WWC Class A Common stock and Class B Common Stock would be exchanged for $9.25 in cash and 0.535 shares of ALLTEL common stock. WWC shareholders would have the right to make an all-cash or all-stock election, subject to proration depending on the number of shareholders making either such election.[39] Specifically, WWC shareholders may elect to receive either 0.7 shares of ALLTEL common stock or $40.00 in cash for each share of WWC Common Stock; however, both of those elections would be subject to proration to preserve an overall mix of $9.25 in cash and approximately, but not less than, 0.535 shares of ALLTEL common stock for all of the outstanding shares of WWC Common Stock taken together.[40] In the aggregate, ALLTEL would issue approximately 60 million shares of stock and pay approximately $1.0 billion in cash. Through Wigeon, ALLTEL would assume debt of approximately $2.2 billion, including $1.2 billion of term notes issued under WWC's credit facility that, as a result of the proposed merger, would become due immediately upon closing.[41] The Merger Agreement also provides that licensee entities in which ALLTEL currently holds interests would remain directly and indirectly held by ALLTEL Communications, Inc., a wholly-owned subsidiary of ALLTEL that would become a sister corporation of Wigeon.[42] ALLTEL's existing licensee entities, therefore, would not be affected by the proposed transaction.

11. As a result of the proposed merger, ALLTEL would add approximately 1.3 million domestic wireless customers in nineteen midwestern and western states that are contiguous to the its existing wireless properties, increasing the number of wireless customers served by ALLTEL to more than 10 million in 33 states.[43] Furthermore, post-transaction, the combined service area of the A ants would cover 72 million POPs, which is 25 percent of the United States population, in an are covers 56

[35] *See* Dobson 10-K at 3, 4; *see also* Dobson Communications Corporation at 1, *at* http://www.dobson.net/ (last visited June 3, 2005) ("Dobson Website"); Dobson Profile at 1. Dobson provides service in portions of Alaska, Arizona, Illinois, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Pennsylvania, Texas, West Virginia and Wisconsin. *See* Dobson 10-K at 5-7.

[36] *See* Dobson 10-K at 8; *see also* Dobson Website at 1; Dobson Brands at 1.

[37] Dobson Petition at 2.

[38] *See* ALLTEL 10-K at 2, F-3; ALLTEL 8-K at 3, Exhibit 99(a) at 1; WWC 8-K, Exhibit 99.1 at 1.

[39] *See* ALLTEL 10-K at 2; ALLTEL 8-K at 3; WWC 10-K at 5-6.

[40] WWC 10-K at 6.

[41] ALLTEL 10-K at 2.

[42] Application Transferring Control of Licenses Held by WWC Holding Co., Inc. to Widgeon Acquisition LLC, No. 0002016468, Exhibit 1 at 2 n.5 (filed Jan. 24, 2005) ("Application").

[43] *See* ALLTEL 10-K at 2; ALLTEL 8-K, Exhibit 99(a) at 1.

percent of the contiguous United States.[44] ALLTEL and WWC assert that they serve mostly complementary geographic regions.[45] Specifically, the Applicants state that, collectively, they are authorized to provide service in 411 Cellular Market Areas ("CMAs") and 242 Component Economic Areas ("CEAs").[46] The proposed transaction, however, would result in spectrum and service overlaps in only 27 CMAs and 39 CEAs, which represent less than 3 million of the 72 million POPs that would be covered by the combined company.[47]

12. The Applicants assert that approval of the proposed transaction is in the public interest, stating that it would strengthen ALLTEL as a competitor by expanding its wireless footprint.[48] Specifically, the merger would allow ALLTEL to expand its existing wireless footprint into nine additional states – California, Idaho, Minnesota, Montana, Nevada, North Dakota, South Dakota, Utah, and Wyoming – and expand its existing wireless operations in Arizona, Colorado, New Mexico, and Texas.[49] The Applicants also assert that this transaction would create economies of scale and scope that would improve its ability to compete against the nationwide carriers.[50] The Applicants further claim that the combined company would have greater resources to enable it to deploy advanced wireless services in rural areas more quickly than either Applicant could do on a stand-alone basis.[51] This commitment to deploying such services in rural areas, the Applicants argue, distinguishes the company from its nationwide competitors.[52] Finally, the Applicants claim that the acquisition of WWC would provide a business base broad enough for ALLTEL to consider the deployment of additional technologies (*e.g.*, GSM) that would expand the availability of automatic roaming agreements in rural areas in the United States.[53]

C. Applications and Review Process

1. Commission Review

13. On January 24, 2005, pursuant to section 310(d) of the Communications Act,[54] ALLTEL and WWC filed five applications seeking consent to the proposed transfer of control of licenses held by WWC and its subsidiaries to Widgeon,[55] a wholly-owned subsidiary of ALLTEL,[56] and one application

[44] *See* Application, Exhibit 1 at 10 n.31; *see also* ALLTEL 8-K, Exhibit 99(a) at 1; WWC 8-K, Exhibit 99.1 at 2.

[45] Application, Exhibit 1 at 10. *See also* ALLTEL 8-K, Exhibit 99b at 5.

[46] Application, Exhibit 1 at 10. For a discussion of CEAs and CMAs, see *infra* paras. 44-45.

[47] Application, Exhibit 1 at 10.

[48] *See id.* at 3-5 (stating, however, that "the transaction will not transform ALLTEL into a nationwide competitor").

[49] *Id.* at 4.

[50] *See id.* at 4, 5-6.

[51] *See id.* at 4, 6-7.

[52] *See id.*

[53] *See id.* at 4, 8.

[54] 47 U.S.C. § 310(d).

[55] Application Transferring Control of Licenses Held by WWC Holding Co., Inc. to Widgeon Acquisition LLC, File No. 0002016468 (filed Jan. 24, 2005); Application Transferring Control of Licenses Held by WWC License L.L.C. to Widgeon Acquisition LLC, File No. 0002016892 (filed Jan. 24, 2005); Application Transferring Control of Licenses Held by WWC Paging Corporation to Widgeon Acquisition LLC, File No. 0002016459 (filed Jan. 24, 2005); Application Transferring Control of Licenses Held by WWC Texas RSA Limited Partnership to Widgeon Acquisition LLC, File No. 0002016476 (filed Jan. 24, 2005); Application Transferring Control of Licenses Held by (continued....)

seeking consent to the transfer of control of a *de facto* transfer lease authorization.[57] Pursuant to section 214 of the Communications Act,[58] ALLTEL and WWC also filed two international section 214 applications – an application seeking Commission approval to assign an international section 214 authorization from WWC to Widgeon and an application seeking consent to the transfer of control of an international section 214 authorization from Western Wireless International Enterprise, Inc., a subsidiary of WWC, to Widgeon.[59] On February 7, 2005, the Commission released a Public Notice seeking public comment on the proposed transaction.[60] In response to the Comment Public Notice, the Commission received three petitions to deny the applications and thirty-six comments in overall support of the grant of the applications.[61]

14. The Wireless Telecommunications Bureau ("Bureau") adopted a protective order, dated February 11, 2005, under which third parties would be allowed to review confidential or proprietary documents submitted by the Applicants.[62] On March 1, 2005, Bureau staff requested additional information from the Applicants ("Information Request").[63] The Applicants' responses to the

(Continued from previous page)
Western CLEC Corporation to Widgeon Acquisition LLC, File No. 0002016889 (filed Jan. 24, 2005). File No. 0002016468 has been designated the lead Application. The other applications each contain an exhibit referring to the exhibits attached to file no. 0002016468. Thus, for convenience, we only cite to the lead Application.

[56] Application, Exhibit 1 at 2.

[57] Application Transferring Control of *De Facto* Transfer Lease Authorization Held by WWC Holding Co., Inc. to Widgeon Acquisition LLC, File No. 0002018539 (filed Jan. 24, 2005). In evaluating the competitive effects of the proposed transaction, we will treat the spectrum under the *de facto* transfer lease authorization in the same manner as the licenses to be assigned from WWC to ALLTEL.

[58] 47 C.F.R. § 214.

[59] Application to Transfer Control of International Section 214 Authorization Held by Western Wireless Corporation to Widgeon Acquisition LLC, File No. ITC-T/C-20050126-00030, at 1 (filed Jan. 24, 2005); Application to Assign International Section 214 Authorization Held by Western Wireless Corporation to Widgeon Acquisition LLC, File No. ITC-ASG-20050126-00031, at 1 (filed Jan. 24, 2005). The Applicants are both authorized to provide global facilities-based and resale international services. Application, Exhibit 1, at 18.

[60] Western Wireless Corporation and ALLTEL Corporation Seek FCC Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 05-50, *Public Notice*, 20 FCC Rcd. 2337 (2005) ("Comment Public Notice"). The Comment Public Notice set due dates of March 9, 2005 for Petitions to Deny, March 21, 2005 for Oppositions, and March 28, 2005 for Replies. *See id.* at 2337, 2339.

[61] The entities that filed pleadings in this proceeding are listed in Appendix A. In addition, 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/.

[62] Applications for the Transfer of Control of Licenses and Authorizations from Western Wireless Corporation and Its Subsidiaries to ALLTEL Corporation; Order Adopting Protective Order, WT Docket No. 05-50, *Order*, 20 FCC Rcd. 2484 (2005).

[63] Letter from William W. Kunze, Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Doane F. Kiechel, Morrison & Foerster, LLP, and Kathryn A. Zachem, Wilkinson Barker Knauer, LLP (Mar. 1, 2005).

Information Request, filed on March 15, 2005 and March 29, 2005,[64] along with additional information supplied by the Applicants,[65] are included in the record.

15. Prior to the filing of the applications, the Bureau released a public notice announcing the Commission's intent to provide the United States Department of Justice ("DOJ") access to information contained in the Numbering Resource Utilization and Forecast ("NRUF") reports filed by wireless telecommunications carriers as well as disaggregated, carrier-specific local number portability ("LNP") data related to wireless telecommunications carriers.[66] The Bureau also announced by public notice that the NRUF and LNP reports would be placed into the record,[67] subject to a separate protective order ("NRUF Protective Order").[68] On March 11, 2005, ALLTEL requested access to the NRUF reports for the purpose of granting employees of ALLTEL's outside counsel and economic consulting firm access to the data.[69] The Commission placed the NRUF and LNP reports into the record, pursuant to the NRUF Protective Order, and provided the NRUF report to the Applicants on March 22, 2005.

2. Department of Justice Review

16. The Antitrust Division of DOJ reviews telecommunications mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition.[70] 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 ALLTEL and WWC. As a result of its analysis, DOJ concluded that the proposed merger was likely to result in competitive harm in certain markets.[71] Thus, it entered into an agreement with the Applicants that was submitted to the District

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[64] March 15, 2005 Response to Information Request at 1; Letter from Doane F. Kiechel, Morrison & Foerster, LLP, Counsel for Western Wireless Corporation, and Kathryn A. Zachem, Wilkinson Barker Knauer, LLP, Counsel for ALLTEL Corporation, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Mar. 29, 2005) ("March 29, 2005 Response to Information Request").

[65] *See, e.g.*, Letter from Kathryn A. Zachem and Kenneth D. Patrich, Wilkinson Barker Knauer, LLP, Counsel for ALLTEL Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 6, 2005); Letter from Kathryn A. Zachem and Kenneth D. Patrich, Wilkinson Barker Knauer, LLP, Counsel for ALLTEL Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 6, 2005).

[66] Notice of Request for Access to Data to Carriers Who File Numbering Resource Utilization and Forecast Reports (NRUF), *Public Notice*, 20 FCC Rcd. 1602 (2005).

[67] Western Wireless Corporation and ALLTEL Corporation Applications for Transfer of Control of Licenses and Authorizations; Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports Placed into the Record, Subject to Protective Order, WT Docket No. 05-50, *Public Notice*, 20 FCC Rcd. 4211 (2005).

[68] Applications for the Transfer of Control of Licenses and Authorizations from Western Wireless Corporation and ALLTEL Corporation; Protective Order, *Order*, WT Docket No. 05-50, *Protective Order*, 20 FCC Rcd. 4214 (2005).

[69] *See* Letter from Kenneth D. Patrich, Wilkinson Barker Knauer, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (Mar. 11, 2005).

[70] 15 U.S.C. § 18.

[71] *See* United States v. ALLTEL Corporation and Western Wireless Corporation, Complaint, No. 1:05CV01345 (filed 7/6/05); *see also* United States v. ALLTEL Corporation and Western Wireless Corporation, Competitive Impact Statement, No. 1:05CV01345 (filed 7/6/05) ("DOJ Competitive Impact Statement"). All DOJ filings regarding *United States v. ALLTEL Corporation and Western Wireless Corporation*, No. 1:05CV01345, are available at <http://www.usdoj.gov/atr/cases/alltel.htm>.

Court as a proposed final judgment on July 6, 2005.[72] In addition, DOJ and the Applicants agreed to a preservation of assets stipulation and order with the Applicants, which was entered by the District Court on the same day.[73] DOJ will allow the merger to proceed subject to the Applicants' divestiture of business units in sixteen markets and the Cellular One brand, including intellectual property, license agreements, and certain other assets relating to the Cellular One brand.[74]

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

17. 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 WWC's licenses and authorizations to ALLTEL would serve the public interest, convenience, and necessity.[75] In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Communications Act,[76] other applicable statutes, the Commission's rules, and federal communications policy.[77] The public interest standards of sections 214(a) and 310(d) involve a

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[72] United States v. ALLTEL Corporation and Western Wireless Corporation, Proposed Final Judgment, No. 1:05CV01345 (filed 7/6/05) ("DOJ Proposed Final Judgment").

[73] United States v. ALLTEL Corporation and Western Wireless Corporation, Preservation of Assets Stipulation and Order, No. 1:05CV01345 (filed 7/6/05) ("DOJ Stipulation").

[74] *See* DOJ Proposed Final Judgment at 1-2, 3, 6; *see also* DOJ Competitive Impact Statement at 8, 11-14. For additional discussion of DOJ's required divestiture of the Cellular One brand name, see *infra* para. 98.

[75] 47 U.S.C. §§ 214(a), 310(d).

[76] 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 AT&T Wireless Services, Inc. and Cingular Wireless Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd. 21522, 21542 ¶ 40 (2004) ("*Cingular-AT&T Wireless Order*"); 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. 18025, 18030 ¶ 8 (1998) ("*WorldCom-MCI Order*"); Applications of SBC Communications Inc. and BellSouth Corporation, WT Docket No. 00-81, *Memorandum Opinion and Order*, 15 FCC Rcd. at 25459, 25464 ¶ 12 (2000) ("*SBC-BellSouth Order*"); Vodafone AirTouch, PLC, and Bell Atlantic Corporation, *Memorandum Opinion and Order*, 15 FCC Rcd. 16507, 16511-12 ¶ 12 (WTB, IB 2000) ("*Bell Atlantic-Vodafone Order*").

[77] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21542-43 ¶ 40; 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*"); 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. 19140, 19150 ¶ 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) ("*TeleCorp-Tritel Order*"); GTE (continued....)

balancing process that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits.[78] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[79] 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 designate the application for hearing.[80]

18. 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."[81] Therefore, as a threshold matter, the Commission must determine whether the Applicants meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission's rules.[82] 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

(Continued from previous page)
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*").

[78] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21543 ¶ 40; *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. 26484, 26492 ¶ 12 (2003) ("*WorldCom Order*"); 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 14045, 14046 ¶¶ 20, 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3347 ¶ 12; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19150 ¶ 20; *WorldCom-MCI Order*, 13 FCC Rcd. at 18031 ¶ 10; *Nextel-WorldCom Order*, 19 FCC Rcd. at 6241-42 ¶ 23; *SBC-BellSouth Order*, 15 FCC Rcd. at 25464, 25467 ¶¶ 13, 18; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16512, 16517 ¶¶ 13, 25.

[79] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21543 ¶ 40; *Cingular-NextWave Order*, 15 FCC Rcd. at 2581 ¶ 24; *GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 15; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14046 ¶ 22; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3347 ¶ 11; *SBC-BellSouth Order*, 15 FCC Rcd. at 25464 ¶ 13; *Bell Atlantic-Vodafone Order*, 15 FCC Rcd. at 16512 ¶ 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, *Memorandum Opinion and Order*, 14 FCC Rcd. 3160, 3169 ¶ 15 (1999) ("*AT&T-TCI Order*"); *WorldCom-MCI Order*, 13 FCC Rcd. at 18031-32 ¶ 10.

[80] 47 U.S.C. § 309(e). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21542-43 ¶ 40; *GM-News Corp. Order*, 19 FCC Rcd. at 483 n.49; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14231 ¶ 435; *WorldCom-MCI Order*, 13 FCC Rcd. at 18139-40 ¶ 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.

[81] *See* 47 U.S.C. §§ 308, 310(d); *see also Cingular-AT&T Wireless Order*, 19 FCC Rcd. 21546 ¶ 44; *GM-News Corp. Order*, 19 FCC Rcd. at 485 ¶ 18.

[82] *See* 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; *see also Cingular-AT&T Wireless Order*, 19 FCC Rcd. 21546 ¶ 44; *Cingular-NextWave Order*, 19 FCC Rcd. at 2581 ¶ 25; *GM-News Corp. Order*, 19 FCC Rcd. at 485 ¶ 18; *WorldCom Order*, 18 FCC Rcd. at 26493 ¶ 13; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9790 ¶ 19; *Nextel-WorldCom Order*, 19 FCC Rcd at 6242 ¶ 24; *Global Crossing Order*, 18 FCC Rcd. at 20316 ¶ 18; Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless, WT Docket No. 03-19, *Memorandum Opinion and Order*, 18 FCC Rcd. 6490, 6492 ¶ 5 (CWD 2003) ("*Verizon-Northcoast Order*").

designation of a hearing.[83] As a required part of our public interest analysis, however, section 310(d) requires the Commission to consider whether the proposed transferee is qualified to hold a Commission license.[84] When evaluating the qualifications of a potential licensee, the Commission previously has stated that it will review allegations of misconduct directly before it,[85] as well as conduct that takes place outside of the Commission.[86] In this proceeding, no issues have been raised with respect to the basic qualifications of ALLTEL and WWC. Thus, we find that, at this time, there is no reason to reevaluate the qualifications of ALLTEL and WWC.

19. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[87] 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.[88] Our public interest analysis may also entail assessing whether the merger will affect the

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[83] *See, e.g., Cingular-AT&T Wireless Order,* 19 FCC Rcd. at 21546 ¶ 44; *Cingular-NextWave Order,* 19 FCC Rcd. at 2581-82 ¶ 25; *GM-News Corp. Order*, 19 FCC Rcd. at 485 ¶ 18; *WorldCom Order*, 18 FCC Rcd. at 26493-94 ¶ 13; *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9790 ¶ 19; *SBC-BellSouth Order*, 15 FCC Rcd. at 25459, 25465 ¶ 14 (2000); *Nextel-WorldCom Order,* 19 FCC Rcd. at 6242 ¶ 24; *Global Crossing Order*, 18 FCC Rcd. at 20316 ¶ 18; *Verizon-Northcoast Order*, 18 FCC Rcd. at 6492 ¶ 5; *TeleCorp-Tritel Order*, 16 FCC Rcd. at 3722 ¶ 5. *See also* Stephen F. Sewell, Assignment and Transfers of Control of FCC Authorizations under Section 310 (d) of the Communications Act of 1934, 43 FED. COMM. L. J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee's basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. *See id.*

[84] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21546 ¶ 44; *Cingular-NextWave Order*, 19 FCC Rcd. at 2582 ¶ 25; *GM-News Corp. Order*, 19 FCC Rcd. at 485 ¶ 18; *WorldCom Order*, 18 FCC Rcd. at 26494 ¶ 13; *SBC-BellSouth Order*, 15 FCC Rcd. at 25465 ¶ 14; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14227 ¶ 429; *Nextel-WorldCom Order*, 19 FCC Rcd. at 6242 ¶ 24.

[85] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21548 ¶ 47; *WorldCom Order*, 18 FCC Rcd. at 26494 ¶ 13. The Commission will consider any violation of any provision of the Act, or of the Commission's rules or policies, as predicative of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications. *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14227-28 ¶ 429; Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees, Gen. Docket No. 81-500, *Report and Order and Policy Statement*, 100 F.C.C. 2d 1179, 1209-10 ¶ 57 (1986), *modified,* 5 FCC Rcd. 3252 (1990), *recon. granted in part*, 6 FCC Rcd. 3448 (1991), *modified in part*, 7 FCC Rcd. 6564 (1992).

[86] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21548 ¶ 47; *WorldCom Order*, 18 FCC Rcd. at 26494 ¶13. The Commission previously has determined that in its review of character issues, it will consider forms of adjudicated, non-Commission related misconduct that include: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. *See, e.g., Bell Atlantic-GTE Merger Order,* 15 FCC Rcd. at 14227-28 ¶ 429.

[87] *E.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21544 ¶ 41; *see also GM-News Corp. Order*, 19 FCC Rcd. at 483 ¶ 16; *VoiceStream-Omnipoint Order*, 15 FCC Rcd. at 3346-47 ¶ 11; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19146 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18030 ¶ 9.

[88] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21544 ¶ 41; 47 U.S.C. §§ 157 nt, 254, 332(c)(7), Telecommunications Act of 1996, Preamble; *see also Cingular-NextWave Order*, 19 FCC Rcd. at 2583 ¶ 29; *GM-News Corp. Order*, 19 FCC Rcd. at 483-84 ¶ 16; *WorldCom-MCI Order*, 13 FCC Rcd. at 18030-31 ¶ 9; *Nextel-WorldCom Order*, 19 FCC Rcd. at 6244 ¶ 29; 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd. 22668, 22696 ¶ 55 (2001) ("*Spectrum Aggregation R&O*") (citing 47 U.S.C. §§ 301, 303, 309(j), 310(d)); *cf.* 47 U.S.C. §§ 521(4), 532(a).

quality of communications services or will result in the provision of new or additional services to consumers.[89] 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.[90]

20. In determining the competitive effects of the merger, our analysis is not limited by traditional antitrust principles.[91] The Commission and DOJ each have independent authority to examine telecommunications mergers, but the standards governing the Commission's review differ from those of DOJ.[92] DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce.[93] The Commission, on the other hand, 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.[94] 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.[95] 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.[96]

21. 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.[97] These

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[89] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21544 ¶ 41; *WorldCom-MCI Order*, 13 FCC Rcd. at 18031 ¶ 9.

[90] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21544 ¶ 41; *WorldCom-MCI Order*, 13 FCC Rcd. at 18031 ¶ 9.

[91] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21544 ¶ 42; *GM-News Corp. Order*, 19 FCC Rcd. at 484 ¶ 17; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14046 ¶ 23; *AT&T-TCI Order*, 14 FCC Rcd. at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18033 ¶ 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").

[92] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21544 ¶ 42; *GM-News Corp. Order*, 19 FCC Rcd. at 484 ¶ 17; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14046 ¶ 23; *AT&T-TCI Order*, 14 FCC Rcd. at 3169 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd. at 18033 ¶ 12.

[93] 15 U.S.C. § 18.

[94] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21545 ¶ 42.

[95] *See id.*; *see also Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14047 ¶ 23; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19150 ¶ 15.

[96] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21545 ¶ 42.

[97] *See, e.g., id.* at 21545 ¶ 43 (conditioning approval on the divestiture of operating units in select markets); *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19150 ¶ 15. *See also WorldCom-MCI Order*, 13 FCC Rcd. at 18032 ¶ 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).

conditions may include the divestiture of certain licenses along with associated facilities and customer, 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.[98] 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."[99] 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.[100] Despite our broad authority, we have held that we will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms)[101] and that are fairly related to the Commission's responsibilities under the Communications Act and related statutes.[102] Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.[103]

IV. COMPETITIVE ANALYSIS

22. 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 the ability, either by itself or in coordination with other firms, to raise prices.[104] The ability to raise prices above competitive levels is generally referred to as "market power."

[98] 47 U.S.C. § 303(r). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd. at 18032 ¶ 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)); United States 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).

[99] 47 U.S.C. § 214(c). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd. at 19150 ¶ 15.

[100] *See, e.g., Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21545 ¶ 43; *GM-News Corp. Order*, 19 FCC Rcd. at 477 ¶ 5; *Bell Atlantic-GTE Order*, 15 FCC Rcd. at 14047-48 ¶ 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).

[101] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21545-46 ¶ 43; *GM-News Corp. Order*, 19 FCC Rcd. at 534 ¶ 131.

[102] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21546 ¶ 43.

[103] *See id.*; *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.").

[104] *See, e.g.*, Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, at § 0.1 (Apr. 2, 1992, revised Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*"); 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); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, *Fourth Report and Order*, 95 F.C.C.2d 554, 558 ¶ 7-8 (1983), *vacated on other grounds*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, MCI Telecommunications Corp. v. AT&T, 113 S. Ct. 3020 (1993).

Market power may also enable sellers to reduce competition on dimensions other than price, including innovation and service quality.[105] 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.

23. A horizontal transaction is unlikely to create or enhance market power or facilitate its exercise unless the transaction significantly increases concentration and results in a concentrated market, properly defined and measured.[106] 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. 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.

24. 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. A merger may also diminish competition if it makes the firms selling in the market more likely 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.

A. Market Definition

1. Product Market Definition

25. When one product is considered by consumers to be a reasonable substitute for another product, it is included in the relevant market. Thus, the relevant market includes "all products 'that consumers consider reasonably interchangeable for the same purposes.'"[107] A relevant product market is the smallest group of competing products or services for which a hypothetical monopolist in a geographic

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

[106] *Id.* § 1.0.

[107] 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); Wireless Telephone Services Antitrust Litigation, No. 02 Civ. 2637(DLC), 2003 WL 21912603, at 9 (S.D.N.Y. Aug. 12, 2003) (relevant product market "consists of products that have reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered.").

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").[108]

26. In their Application, ALLTEL and WWC assert that the Commission should adopt in this proceeding the product market definition used in the *Cingular-AT&T Wireless Order*.[109] In that order, the Commission found that separate markets exist for interconnected mobile voice and mobile data services, and also for residential and enterprise services.[110] However, in performing its analysis, the Commission decided that analyzing the Cingular-AT&T Wireless transaction using a combined market for mobile telephony services was unlikely to understate potential competitive harm.[111] None of the petitioners or commenters commented on product market definition.

27. For the purposes of evaluating this transaction, we use the "hypothetical monopolist" test to determine the relevant product markets. 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.

28. Using this test, we find that there are separate markets for interconnected mobile voice services[112] and mobile data services,[113] and also for residential services and enterprise services. As we explain herein, however, we do not find it necessary to conduct our analysis in this transaction by distinguishing mobile data subscribers from mobile voice subscribers, or enterprise subscribers from residential subscribers.

29. Instead of a separate analysis of the mobile voice and mobile data markets, however, we will analyze both of them under the combined market for mobile telephony services. We do this because we conclude from our analysis that the market for stand-alone mobile data services is not sufficiently developed at this time to subject to a credible antitrust review. Accordingly, we determine that an analysis based on combined mobile telephony services will provide a reasonable assessment of any potential competitive harm to the markets for mobile voice or data services as a result of the proposed transaction.

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[108] *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).

[109] *See* Application, Exhibit 1 at 8-9.

[110] *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21558 ¶ 74.

[111] *See id.* at 21588, 21560 ¶¶ 74, 77, 79.

[112] 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* 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*, 19 FCC Rcd. 20597, 20611-12 ¶ 32 (2004) ("*Ninth Competition Report*").

[113] 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 id.* at 20613 ¶ 33.

30. Turning to the enterprise and residential product markets, we note that most mobile telephony service subscribers are residential customers. Thus, an analysis based on subscriber shares for a combined mobile telephony services market will tend to provide more accurate insights into the residential market than the enterprise market. However, analyzing a combined residential and enterprise product market should provide a fair assessment of the potential competitive harm to the enterprise service market. This is because competition among carriers to attract and retain enterprise customers, who are more likely to be high-volume users of mobile voice services than residential customers, is likely to be more intense than competition for residential customers.[114]

31. The mobile telephony services product market also may be characterized by a geographic dimension. Carriers offer plans providing nationwide service (without expensive added charges) and plans providing local/regional service. For purposes of this transaction, we do not define separate nationwide and local/regional product markets, but our analysis does take into account that local/regional plans are differentiated from nationwide plans.

2. Geographic Market Definition

32. The Supreme Court defined a relevant geographic market as the area in which consumers can reasonably search for competing services.[115] It is commonly defined in the economic literature as the geographic area in which a hypothetical monopolist 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.[116]

33. In their Application, the Applicants request that the Commission adopt the geographic market definition used in the *Cingular-AT&T Wireless Order*.[117] In that order, we held that the proper geographic market was a local one,[118] rejecting the parties claim of a national market.[119] None of petitioners or commenters raised the geographic market definition in their submissions.

34. For the purposes of evaluating this transaction, we use the hypothetical monopolist test to determine the relevant market by 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 switching to wireless services purchased in a different location rather than, by switching to different wireless services. As discussed below, we find that the proper geographic market is local, not national.

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[114] *See, e.g.*, Holly Wade, *Telecommunications*, 8 NAT'L SMALL BUS. POLL, Issue 8, at 4-6 (2004). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21560 ¶ 79.

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

[116] The relevant geographic market selected for analysis must also reflect "the commercial realities of the industry." *See* 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).

[117] *See* Application, Exhibit 1 at 9; Declaration of Robert D. Willig, Jonathan M. Orszag, and Yair Eilat at 5-6 ¶¶ 8-9 (Mar. 29, 2005) ("Declaration of Willig *et al.*"), *available at* March 29, 2005 Response to Information Request at Attachment 2; *see also Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21561-63 ¶¶ 82-90.

[118] *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21562-63 ¶ 89.

[119] *See id.* at 21562 ¶ 87.

35. For the proposed transaction, the geographic market is generally the area within which a consumer is most likely to shop for mobile telephony service. For most individuals, we believe this will be a local area, as opposed to a larger regional or nationwide area. In most parts of the United States, we find that the areas within which consumers regularly shop for wireless services are larger than counties, may encompass multiple counties, and, depending on an individual's location, may even include parts of more than one state.[120]

36. We recognize that local geographic markets are unique because they depend on where consumers travel to purchase wireless services. 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 because significant numbers of consumers would be able to circumvent the higher price by obtaining a reasonably comparable service at a lower price in a nearby county.[121]

3. Market Participants

37. The Applicants argue that they compete not only with facilities-based Cellular, PCS, and Specialized Mobile Radio ("SMR") providers but with other market participants as well. These other market participants include resellers, satellite providers of interconnected mobile voice services, mobile virtual network operators ("MVNOs"), and wireless Voice over Internet Protocol ("VOIP") providers.[122]

38. We find that mobile telephony services offered by Cellular, PCS, and SMR licensees, despite employing varying technologies, provide the same basic voice and data functionality and are indistinguishable to the consumer. Generally, we limit our analysis to Cellular, PCS, and SMR facilities-based carriers and exclude satellite carriers, wireless VOIP providers, MVNOs, and resellers[123] from consideration when computing initial measures of market concentration. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is significantly higher than for services offered by Cellular, PCS, or SMR carriers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony services.[124] We also do not consider wireless VOIP carriers as providing the same functionality as mobile telephony providers because in general the service they provide is nomadic rather than mobile. We acknowledge, however, that non-facilities based service

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[120] *See Ninth Competition Report*, 19 FCC Rcd. at 20606 n.24, 20672 ¶ 185 (indicating that average person shops for mobile telephony services in markets that include place of work, place of residence, and surrounding areas that are economically related; such areas generally are larger than counties); discussion *infra* paras. 44-45 (discussing size of economically-related areas in which consumers would be expected to shop for wireless services, *citing* Kenneth P. Johnson & John R. Kort, *2004 Redefinition of the BEA Economic Areas*, SURV. OF CURRENT BUS., Nov. 2004, at 68-71). *See also Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21562-63 ¶¶ 89-90.

[121] 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.

[122] *See* Application, Exhibit 1 at 14-15; *see also* Declaration of Willig *et al.* at 14, 15 ¶¶ 27, 29.

[123] Today, resellers are often referred to as MVNOs. MVNOs are distinguished from "traditional" resellers by a variety of factors including brand appeal, distribution channels, bundling of wireless and non-wireless products, and value-added services. *See Ninth Competition Report*, 19 FCC Rcd. at 20613 ¶ 38 n.71.

[124] *See* GlobalCom, Iridium Satellite Phone Service Plans, *at* http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html (last viewed May 20, 2005); GlobalStar, Airtime Pricing, Voice Pricing, *at* http://www.globalstarusa.com/en/airtime/voicepricing/ (last viewed May 20, 2005).

options such as MVNOs and resellers have an impact in the marketplace and in some instances may provide additional constraints against anticompetitive behavior. We take account of the role of MVNOs and resellers in our discussion of likely competitive effects, below.[125]

39. We conclude that all the facilities-based Cellular, PCS, and SMR carriers that provide service in a geographic area are the relevant market participants for purposes of analyzing the mobile telephony service market for that area.

B. Potential Competitive Harms

1. Market Concentration

40. 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 capabilities, or reduced incentives to innovate. Concentration in the relevant markets is one indicator of the likely competitive effects of a proposed merger. Market concentration affects the likelihood that one firm, or a small group of firms, could successfully exercise market power.

41. Also, we find it appropriate to consider directly the input market of spectrum that is suitable for provision of mobile telephony services. Suitability is determined by the physical properties 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.[126] The spectrum that meets the above suitability criteria includes Cellular, PCS, and SMR spectrum and currently totals approximately 200 megahertz of spectrum.[127]

42. Therefore, in the following discussion, we assess the current market concentration, the post-transaction market concentration, and the increase in concentration that is likely to result from the transaction.[128] Further, spectrum is an essential input for the provision of facilities-based service, and therefore we will assess the effects of spectrum aggregation on the provision of mobile telephony services.

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[125] The resale sector accounts for approximately 5 percent of all mobile telephony subscribers. *See Ninth Competition Report*, 19 FCC Rcd. at 20613 ¶ 38.

[126] *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21560-61 ¶ 80.

[127] *Id.* at 21561 ¶ 81. In the *Cingular-AT&T Wireless Order*, we noted that Advanced Wireless Service ("AWS") and Broadband Radio Service ("BRS") spectrum does not currently meet our criteria because it is committed to non-mobile telephony uses currently and for the near-term future. *Id.* at n.283. Subsequent to the adoption of the *Cingular-AT&T Wireless Order*, Congress adopted the Commercial Spectrum Enhancement Act, Public Law No. 108-494 (2004), enabling the Commission to announce its intent to auction AWS licenses as early as June 2006. FCC to Commence Spectrum Auction that Will Provide American Consumers New Wireless Broadband Services, *News Release* (rel. Dec. 29, 2004). Accordingly, some portion of this spectrum may well be licensed in the near-term future. Nevertheless, given the federal and non-federal encumbrance of 1710-1755 MHz and 2110-2155 MHz in many markets, we conclude that it is still premature to classify the AWS spectrum as suitable for the provision of mobile telephony services for purposes of our analysis here. The Commission will revisit the suitability of the AWS spectrum, and other spectrum potentially suitable for mobile telephony services, as events require.

[128] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21564 ¶ 95; *EchoStar-DirecTV Order*, 17 FCC Rcd. at 20603-04 ¶¶ 97-98; *WorldCom-MCI Order*, 13 FCC Rcd. at 18047-48 ¶¶ 36-37; *see also 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).

43. For this transaction, we use our Numbering Resource Utilization and Forecast (NRUF) database, which tracks phone number usage by all telecommunications carriers, including wireless carriers, in the United States.[129] We can use the information from this database to estimate mobile telephone subscribership levels, market shares, and penetration rates for various geographic market definitions.[130] In the Cingular-AT&T Wireless transaction, we also used billing data submitted by the nationwide carriers.[131] Although we may decide to collect such billing data as part of our review of future transactions, we found that the competitive situation was such that a collection of third-party billing data was unnecessary.

44. In calculating market shares and market concentration, we analyzed carrier data by two sets of geographic areas, CEAs and 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.[132] CMAs are the regions originally used by the Commission for issuing Cellular licenses. There are 734 CMAs, made up of 305 Metropolitan Statistical Areas ("MSAs"), 428 Rural Service Areas ("RSAs"),[133] and a market for the Gulf of Mexico.[134]

45. We chose the CEA and CMA geographic areas for our data analysis. Both are consistent with the local market definition we have adopted and each brings a different perspective to the analysis. CEAs were designed to represent consumers' patterns of normal travel for personal and employment reasons[135] and should replicate areas within which groups of consumers would be expected to shop for wireless service.[136] In addition, CEAs generally constitute areas within which any service providers present would have an incentive to provide relatively ubiquitous service. CMAs, in turn, are the areas in

[129] These data indicate the number of assigned phone numbers that a wireless carrier has in a particular wireline rate center. 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: 19TH EXPANDED & UPDATED EDITION 660 (July 2003). 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 subscribers.

[130] 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.

[131] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21567 ¶ 103 (stating that, in response to a staff data request, data was received from AT&T Wireless, Cingular, Nextel, T-Mobile, Sprint, and Verizon).

[132] 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 that 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. Three quarters of non-nodal counties were assigned based on commuting patterns. *See* Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURV. OF CURRENT BUS., Feb. 1995, at 75-81. In November 2004, the Bureau of Economic Analysis updated definitions for CEAs. The total number of CEAs decreased from 348 to 344. Non-nodal county assignment continued to be based on county-to-county commuting flows and locations of the most widely read regional newspapers. *See* Johnson & Kort, *supra* note 120, at 68-71. For purposes of this transaction, we did not adopt the new CEA definitions.

[133] RSAs are regions defined by the Commission for the purpose of issuing spectrum licenses. *See Ninth Competition Report*, 19 FCC Rcd. at 20632 n.188.

[134] *See id.* at 20632 ¶ 87.

[135] *See* Johnson, *supra* note 132, 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.").

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

which the Commission initially granted licenses for the Cellular service.[137] Although license partitioning has altered this initial licensing structure in many areas, CMAs continue to serve as reasonable areas for determining the number of competitors from which consumers may choose, because the Commission's licensing programs, to a large extent, have shaped the mobile telephony services market by defining the initial areas where carriers were able to provide facilities-based service. As CEAs are derived from factors related to consumer demand for mobile telephony services and CMAs reflect to some extent the initial supply of mobile telephony services, we believe that they are useful cross-checks on each other and together help ensure that our analysis identified all 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.

46. The degree of concentration 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 HHI.[138] Market share data are the beginning, not the end, of the competitive analysis.[139] Such data provide useful information as to which markets need more in-depth, multidimensional analysis of potential competitive harms. In order to determine which areas required further examination, we calculated the HHI and the change in HHI that would result from this transaction for all CEAs and CMAs. We also examined the impact on the concentration of spectrum holdings in each market of the proposed transaction. As explained below, we examined a 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 megahertz or more of spectrum.

47. This analysis follows the general structure of the *DOJ/FTC Merger Guidelines*,[140] but we chose the concentration thresholds based on our observation and evaluation of the current mobile telephony marketplace.[141] 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 at the time of the Commission's last congressionally mandated review, which concluded the market was effectively competitive.[142] In addition, we judged that a market in which the merger causes a change of less than 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 not likely to cause significant, merger-related anticompetitive effects.

48. Our initial analysis based on these thresholds was intended to eliminate from further review those markets in which there is clearly no competitive harm relative to today's generally competitive

[137] *See* 47 C.F.R. § 22.909.

[138] *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21564 ¶ 96, n.306.

[139] *See id.* at 21564 ¶ 96; *WorldCom-MCI Order*, 13 FCC Rcd. at 18050, 18100-01 ¶¶ 39, 135.

[140] *See generally DOJ/FTC Merger Guidelines*.

[141] *See generally Ninth Competition Report*, 19 FCC Rcd. at 20597.

[142] *See id.* at 20600 ¶ 2. Our analysis indicates that the current average HHI in markets across the country has increased to slightly over 3100 as a result of the Cingular-AT&T Wireless merger. Nevertheless, we have maintained an HHI score of 2800 as the trigger for the initial screen. A slightly more rigorous review is consistent with the analytical purpose of the initial screen – to eliminate from review markets where there is no competitive harm rather than identifying markets where competitive harm may exist.

marketplace. To ensure that we identified all markets where there was the potential for competitive harm, we also adopted a conservative second criterion. If the merger caused a change in HHI of at least 250 for a given market, regardless of the HHI, we examined that market further. Although applying this criterion resulted in the review of markets in which the concentration levels are below that of the average market today, we chose to apply this criterion to be confident that we fully evaluated any market in which the merger may adversely affect competition.

49. Finally, because spectrum is a necessary resource for wireless carriers to compete effectively, we also analyzed those markets in which the Applicants would have 70 megahertz or more in at least part of the market post-transaction. 70 megahertz represents a little more than one-third of the total bandwidth available for mobile telephony today, leaving approximately 130 megahertz of capacity available for a competitive response by other carriers in a local market. Our market by market analysis in this proceeding, as well as evidence from mobile telephony markets across the country, indicates that 130 megahertz of capacity is sufficient to support at least three viable competitors.[143] Nevertheless, consistent with the conservative approach embodied in our analysis, we subjected to further review any market in which one entity controls 70 megahertz or more of the available spectrum to further review.

50. Application of the initial HHI threshold described above to data aggregated by CEA identified only 11 CEAs (out of the total of 348) for further, case-by-case analysis.[144] In addition, application of the same HHI threshold to data aggregated by CMA identified only 19 CMAs (out of the total of 734) for closer analysis.[145] We also note that the combined entity would hold 70 megahertz or more in three of these CEAs and CMAs.[146] For the 11 CEAs identified by the initial HHI threshold, the average post-transaction HHI is 5,719. The minimum value is 1,932 and the maximum value is 9,719. The average increase in HHI is 1,328, ranging from a minimum increase of 2 to a maximum of 4,791.[147] For the 19 CMAs identified by the initial HHI threshold, the average post-transaction HHI is 7,798. The minimum value is 3,144 and the maximum value is 10,000. The average increase in HHI is 2,435, ranging from a minimum change of 405 to a maximum of 4,852. By comparing these results and analyzing each of the markets identified above, we ensured that we did not overlook any local area that required a closer case-by-case analysis. Although the structure[148] of some markets not identified for additional analysis will change as a result of the transaction, the fact that they were not identified 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 negligible, or both. Therefore, we find that these structural changes will not alter carrier conduct in such a way as to impair competition and increase market performance.

51. As noted above, this initial identification of markets was only the beginning of our competitive analysis. The initial screen was designed to ensure that we did not exclude from further

[143] With 130 megahertz of spectrum capacity available to other carriers, there could for instance be as many as four carriers with at least 30 megahertz of spectrum for the provision of mobile telephony services. Many carriers today are competing successfully with even less bandwidth.

[144] These CEAs are listed in Appendix B.

[145] These CMAs are listed in Appendix B.

[146] These CEAs and CMAs are noted in Appendix B.

[147] Markets with a change in the HHI of less than 100 were caught by the screen when they involved spectrum aggregation of 70 megahertz or more in at least one county within the market.

[148] Structure is defined as factors that determine the competitiveness of a market. These factors include market concentration statistics and the level of entry barriers. *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 247-51 (3rd ed. 1999).

scrutiny any geographic areas in which any potential for anticompetitive effects exist. As stated above, HHI and market share metrics provide useful information as to which markets need additional multidimensional analysis; however, these metrics are the beginning and not the end of the competitive analysis. Thus, we now turn to an examination of the other factors we consider in our case-by-case analysis when evaluating whether there would be potential competitive harms in certain geographic markets if the transaction were to be approved without conditions.

2. Horizontal Issues

52. Because the structural analysis above suggests that the acquisition by ALLTEL of WWC is likely to have adverse effects on competition in certain markets,[149] this section examines in more detail how the transaction could affect competitive behavior in such markets. As the *DOJ/FTC Merger 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.[150]

53. Unilateral effects occur when the merged firm finds that, as a result of the merger, it is now profitable to alter its behavior in an anticompetitive manner.[151] 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."[152] Examples of coordinated effects include explicit collusion, tacit collusion, and price leadership. Because coordinated effects may be more likely if there are fewer firms in a market, mergers may significantly increase the likelihood of coordinated effects by reducing the number of firms in the market.

a. Unilateral Effects

54. ALLTEL's acquisition of WWC would 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.[153] Unilateral effects arise when the merged firm finds it profitable to alter its behavior following the merger by "elevating price and suppressing output."[154] In the case of mobile telephony, this might take the form of delaying improvements in service quality or adversely adjusting plan features without

[149] *See* discussion *supra* para. 50.

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

[151] *Id.* § 2.2.

[152] *Id.* § 2.1. *See also* W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., ECONOMICS OF REGULATION AND ANTITRUST 107 (2000); DOUGLAS GREER, INDUSTRIAL ORGANIZATION AND PUBLIC POLICY 269 (1992).

[153] *See Cingular-AT&T Wireless*, 19 FCC Rcd. at 21570 ¶ 115; 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. 20559, 20620 ¶ 153 (2002) ("*EchoStar-DirecTV HDO*"); *see also DOJ/FTC Merger Guidelines* § 2.

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

changing plan price.[155] Incentives for such unilateral competitive actions vary with the nature of competition in the relevant markets.

55. The Applicants claim that unilateral effects are unlikely as a result of this transaction. They argue that actual competitors are not capacity constrained and would be able to attract and absorb new customers if, post-transaction, ALLTEL were to raise price.[156] Further, they argue that there is a high degree of substitutability between mobile telephony providers, and that any attempt by ALLTEL to raise price or suppress output would result in customers switching to a new provider.[157] Therefore, any such price increase would be transitory if it even occurred in the first place.[158]

56. Also, the Applicants argue that potential competitors have the ability and incentive to enter the market if, post-transaction, ALLTEL were to raise prices, and that other sources of mobile telephony services also would provide competitive pressures.[159] The Applicants argue that carriers in adjacent markets could offer service by entering into roaming agreements if ALLTEL were to raise prices.[160] They claim that there are relatively low barriers to entry by either facilities-based carriers or roaming agreements, especially by licensed carriers and carriers operating in adjacent areas.[161] ALLTEL estimates that a licensed carrier could provide significant facilities-based competition within seven months, assuming that zoning restrictions are minimal.[162] The Applicants discuss Viaero Wireless's entry into Nebraska as an example of low barriers to entry and the disciplining force of potential competition.[163]

57. Lamar challenges the Applicants' representation, arguing that this transaction would result in a lack of competition and this would be harmful to consumers. In particular, Lamar argues that the areas where ALLTEL and WWC licenses overlap would result in a loss of a competitor in a rural area, and that the elimination of a competitor would reduce pricing pressures to the detriment of consumers.[164]

58. In order to evaluate the likelihood of unilateral effects as a result of this transaction, we examine the issues of product differentiation and substitutability. Other market conditions conducive to

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[155] 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.

[156] Application, Exhibit 1 at 14; Declaration of Willig *et al.* at 14 ¶ 28.

[157] Application, Exhibit 1 at 15; Declaration of Willig *et al.* at 14-15 ¶ 28.

[158] Application, Exhibit 1 at 15; Declaration of Willig *et al.* at 14-15 ¶ 28.

[159] Application, Exhibit 1 at 14-15; Declaration of Willig *et al.* at 15, 18 ¶¶ 29, 35. *See also* discussion *supra* para. 37.

[160] Declaration of Willig *et al.* at 18-19 ¶¶ 36-37.

[161] *Id.* at 16-17, 18-19 ¶¶ 33, 36-37.

[162] A licensed carrier would need 30 days to plan its entry, 150 days to implement its entry plan, and 30 days to test its new facilities. *See id.* at 18-19 ¶ 37.

[163] In 2003, Viaero Wireless acquired Nebraska Wireless, and in 2004 it built out or converted over 60 cell sites in portions of eight Nebraska CMAs. Further, Viaero Wireless has indicated it will build out to communities that express a significant interest. *See id.* at 19-20 ¶¶ 38-39.

[164] Petition to Deny of Lamar County Cellular, filed Mar. 9, 2005, at 8 ("Lamar Petition").

anticompetitive unilateral effects in a differentiated market setting are a large market share by the merged firm,[165] and conditions such that rival sellers are unlikely to replace competition lost through the acquisition by repositioning their product offerings.[166] In some instances, rival sellers may be unable to reposition their product offerings because they face binding capacity constraints.[167] 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.[168] Therefore we also examine the competitive strength of rival carriers and rivals' ability to respond to potential anticompetitive unilateral actions on the part of the merged entity, spectrum availability, network effects, and the effects of an expected increase in market penetration. While we find that harm from unilateral action by a combined ALLTEL/WWC is unlikely in most local markets, there are specific markets for which we believe the acquisition poses a significant threat to competition.

59. *Product differentiation.* We agree with the Applicants that the market for mobile telephony service can be fairly characterized as differentiated. Wireless service carriers do not offer a completely homogeneous service. Rather, carriers compete vigorously on the basis not only of price but also on numerous non-price features, such as service quality, thoroughness of geographic coverage, and plan features.[169] While carriers can change some of these attributes relatively quickly, other attributes such as quality and coverage require investments in spectrum and infrastructure and are not easily modified. Further, product differentiation in this market may be characterized by ongoing dynamic rivalry, with firms competing based upon research and development, and by means of investment in new infrastructure and services.

60. *Substitutability.* 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 were relatively close substitutes for one another. We have previously found that there is a high degree of substitution between the nationwide carriers.[170] In analyzing this transaction for unilateral effects, however, the question before us is the substitutability between ALLTEL and WWC. Accordingly, if a significant number of customers view the services offered by ALLTEL and WWC as close substitutes, the merger of the two firms can remove a strong constraint on ALLTEL's

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

[166] *Id.* § 2.212.

[167] 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. *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21570 ¶ 118; *DOJ/FTC Merger Guidelines* § 2.22.

[168] 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.

[169] Quality includes the probability of blocked and dropped calls, and the quality of the connection. Also, customer support is a separate but important dimension of quality differentiation, and surveys indicate that customers consider this factor when they switch carriers. Coverage includes where the service is available either on the carrier's own network or on the network of one of its roaming partners. Plan features include various dimensions of subscriber usage. Usage means minutes of voice connection defined by the time at which a call is placed, the location from which it is placed, and the destination to which it is directed. *See Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21572-73 ¶¶ 123-126.

[170] *See id.* at 21574 ¶ 132.

ability to raise prices for its pre-transaction customers, for WWC's former customers, or for both.[171] Alternatively, if most customers consider WWC and ALLTEL to be more distant substitutes for one another when evaluating the 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.

61. The record contains neither empirical studies nor other information that resolve conclusively the question of the closeness of substitution of the services of ALLTEL and WWC relative to other mobile telephony operators. While both ALLTEL and WWC are regional carriers that offer facilities-based mobile voice and data services with local/regional and nationwide coverage,[172] these two carriers are differentiated in terms of prices, plans, and services offered.[173] Although there is product differentiation between ALLTEL and WWC, in certain markets consumers may consider these two firms to be close substitutes relative to other facilities-based carriers serving the market.

62. We also have analyzed data on wireless LNP[174] to gauge how consumers view the substitutability of ALLTEL and WWC. We analyzed data on porting from January 2004 through December 2004.[175] This information includes each instance of a customer porting a phone number from one mobile carrier to another, and indicates both the origin and destination carrier. Thus, we can determine the aggregate customer flows between ALLTEL and WWC for the markets identified by our initial screen. In our analysis of this LNP data, we have focused our review on the 11 CEAs and 19 CMAs identified by the initial screen. Since these particular markets constitute the majority of markets in which both ALLTEL and WWC provide facilities-based mobile telephony service, and are the markets

[171] That is, ALLTEL's presence in a market may have been a constraint on WWC's prices, and WWC's presence in a market may have been a constraint on ALLTEL'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).

[172] *See Ninth Competition Report*, 19 FCC Rcd. at 20613-14 ¶ 36; ALLTEL 10-K at 5-6; ALLTEL Wireless Plans, Compare Plans, *at* http://www.alltel.com/personal/wireless/plans/compare.html (last visited May 26, 2005); WWC 10-K at 7.

[173] For example, comparing national $40-per-month plans for Lincoln, Nebraska yields several differences. First, ALLTEL's National Freedom® plan is priced at $39.99 per month, and includes 450 anytime minutes, 1000 night and weekend minutes, and 1000 mobile-to-mobile minutes. WWC offers a $35 and a $45 per month national plan. The $45 plan includes 450 anytime minutes, and unlimited night and weekend and mobile-to-mobile minutes. ALLTEL, Wireless Plans, National Freedom, *at* http://www.alltel.com/personal/wireless/plans/ national_freedom. html (last visited May 26, 2005); Cellular One, Plans and Coverage, *at* http:www.cellularonewest.com/ rateplans.asp?national (last visited May 31, 2005). Next, there are differences in the regional plans as well. ALLTEL offers a regional plan priced at $39.99 per month, which includes 700 anytime minutes, 1000 night and weekend minutes, and 1000 mobile-to-mobile minutes. WWC offers a $44.99 per month regional plan. The $44.99 plan includes 1000 anytime minutes, and unlimited night and weekend and mobile-to-mobile minutes. ALLTEL Wireless Plans, Greater Freedom, *at* http://www.alltel.com/personal/wireless/plans/ greater_freedom.html (last visited May 31, 2005); Cellular One Plans and Coverage, *at* http:www.cellularonewest.com/rateplans.asp?regional (last visited May 31, 2005). Further, ALLTEL offers a push-to-talk feature called Touch2Talk, whereas WWC does not offer this feature.

[174] This LNP data was provided to the Commission by NeuStar.

[175] Wireless LNP was required in the 100 largest markets as of November 24, 2003, and required nationwide on May 24, 2004. *See* 47 C.F.R. § 52.31; *see also* Telephone Number Portability, CC Docket No. 95-116, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 7236, 7314 (1997); Verizon Wireless Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, WT Docket No. 01-184 and CC Docket No. 95-116, *Memorandum Opinion and Order*, 17 FCC Rcd. 14972, 14986 (2002).