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DESCRIPTION OF TRANSACTION, PUBLIC INTEREST STATEMENT, AND WAIVER REQUEST

This application seeks approval by the Federal Communications Commission (“FCC” or the “Commission”) for the transfer of control of AT&T Wireless Services, Inc. (“AWS”) and its subsidiaries, along with its interests in affiliates and other entities in which AWS holds substantial interests, to Cingular Wireless Corporation (“Cingular”). The combination of Cingular and AWS will significantly improve the quality of existing voice services and allow the deployment of advanced services much more expeditiously than would be possible on a stand-alone basis.

SUMMARY

The public interest benefits of the transaction are straightforward and compelling. The combined company will be able to deliver the following benefits faster and more broadly than either company could on a stand alone basis:

- Significantly improve the quality of existing voice and basic data services;
- Acquire the spectrum necessary to deploy advanced, third generation (“3G”) services on a national scale and without customer disruption;
- Create more value for consumers and a more viable nationwide competitor by substantially expanding the coverage of each of the companies;
- Achieve economies of scope and scale that will enhance the ability of the combined company to compete more effectively in the nationwide mobile telephony market; and
- Improve homeland security by strengthening the resiliency and survivability of Cingular’s network.

Since the inception of cellular service in the early 1980s, the domestic market for mobile voice services has experienced a constant and dramatic evolution. The industry began on a purely local market basis characterized by high equipment prices, small local calling scopes (rarely exceeding a metropolitan area), high local per minute rates, separate long distance charges for calls terminated outside the small “home” calling areas, and prohibitive roaming rates often exceeding \$2.00 per minute.¹

The mobile telephony market initially consisted of two cellular carriers operating within distinct areas – either Metropolitan Statistical Areas (“MSAs”) or Rural Service Areas (“RSAs”). It was not unusual for adjacent markets to be served by completely different licensees.

¹ Consumers often had problems while roaming. If their home carrier did not have an automatic roaming agreement with one of the carriers serving the area, the caller had to establish an independent contractual relationship – manual roaming – with one of the carriers. Moreover, although customers could place calls while roaming outside of their home market, they were unable to receive calls.

Moreover, because the MSAs and RSAs often were operated independently, the coverage of the individual systems frequently did not abut, causing substantial gaps in coverage.

Cellular service during this early period was provided almost exclusively to bulky units permanently installed in cars. Although “handheld” units became available shortly thereafter, they were very large and bulky. These units were “affectionately” referred to as “bricks” and had a very short battery life.

Today’s wireless telephony market stands in stark contrast to the early days of the industry. Handsets today are so small that they can fit in a person’s pocket and often weigh less than 3 ounces. Advances in technology also have improved battery life significantly; many phones now have batteries that last ten days or more.

As advances in technology permitted greater mobility, consumers began demanding anytime, anywhere communication. They quickly became dissatisfied with costly roaming charges and confusion surrounding small “home” calling areas. Carriers thus began consolidating calling areas into larger home areas and roaming charges were greatly reduced. Calling areas now encompass the entire nation and, in most cases, the smallest calling area is statewide.

In addition, as local calling scopes expanded, the concept of long distance calling became less and less prevalent. First, as the calling scope expanded, by definition certain calls that before had originated in a home area and terminated outside that area, and therefore were subject to long distance charges on top of the per minute rate, now terminated within the local home area and no separate long distance charges were assessed. The long distance call was now local. Second, as indicated above and described in Section III.C. below, calling areas now encompass the entire nation and regional calling areas typically cover multiple states. With many of these national rate plans, customers do not incur separate long distance or roaming charges for calls to or from anywhere in the nation.

Wireless networks are no longer a patchwork of disjointed systems. Instead, as the Commission recognized in its *Eighth Annual CMRS Competition Report*, there are six national or near-national networks providing numerous voice and data services in an intensely competitive national market along with numerous other regional and niche competitors. Rate plans consist of low monthly rates that include hundreds, and often thousands, of minutes that can be used without additional charges. Additional minutes are available for a fraction of the price charged in the 1980s and 1990s.

One of the essential characteristics of a national rate plan is that it is offered at a single price for a given package. Carriers price their national plans uniformly across the nation. That is, a Cingular customer buying a 600-minute national plan will pay the same price whether she is located in Washington, D.C., San Francisco or a rural community. The same is true for virtually every competitor. Where products are offered nationwide at a uniform price, the market is necessarily national.

Just as customer demands triggered an evolution of handsets from bricks to 3 ounce phones and home calling areas from small areas to the entire nation, customers have spurred carriers to expand beyond voice services. Wireless phones are no longer used just for talking. Basic data services – such as short messaging services and slow, non-graphic intensive Internet

access – have been available for a few years and demand for faster, more complex applications is skyrocketing.

This data evolution, coupled with the voracious increase in the number of voice minutes, has had a profound impact on wireless networks. Usage, whether measured by voice minutes of use (“MOUs”) or data bits, has reached previously unforeseen levels. Capital expenditures by all wireless carriers have exceeded \$100 billion in an attempt to keep pace with demand. Cingular and AWS are particularly challenged due to technical limitations and the cellular analog capability requirement. Both companies provide service utilizing three distinct networks using three distinct technologies. Where the companies offer cellular service, they are required to operate an analog network. To meet consumer demands, however, the companies also offer digital service. TDMA was deployed initially, but ultimately GSM technology was required to allow the companies to transition to a third generation (“3G”) technology capable of meeting customer demands for high speed data. Thus, Cingular and AWS operate three networks in many areas: analog, TDMA, and GSM.

Although GSM bridges the gap between TDMA and 3G, the companies must deploy a 3G technology to offer new advanced, high-speed data services demanded by consumers – the same types of services that are currently available in Europe, Japan, and Korea. These new offerings will require the creation of yet a fourth network – UMTS – utilizing W-CDMA technology. Neither company has the spectrum necessary, however, to deploy a fourth network widely. By combining, the new company will have sufficient spectrum, scale, and scope to deploy the necessary fourth technology capable of supplying high-speed data services. The merger thus will allow the combined company to roll-out 3G services faster and more broadly than either company could alone. Moreover, by combining spectrum and network assets, the new company can offer higher quality service and achieve dramatic efficiencies not otherwise available to Cingular or AWS individually. These efficiencies will allow the company to offer service with better voice and data quality, fewer dropped calls, and lower blocking rates.

In addition to these pro-consumer benefits, this transaction will produce a number of homeland security and public safety benefits. It will improve homeland security by facilitating a faster, more widespread deployment of Wireless Priority Service (“WPS”). Instead of deploying a WPS solution on two networks, both with coverage gaps, WPS can be rolled out on a single network with greater coverage and capacity. The additional capacity will play a critical role in emergency situations when wireless networks experience extreme congestion. In areas where both companies hold licenses, additional capacity will be available to increase the ability for NS/EP personnel to complete a call. Similarly, the additional capacity will decrease the potential for calls initiated by the general public to be blocked during an emergency.

Because the merger involves the combination of existing networks, the likelihood for diversified routing, greater redundancy and increased reliability in both the signaling and data networks will increase dramatically. This will improve the ability of Cingular’s wireless network to function if certain assets are destroyed or damaged in an emergency. Approval of the transfer applications also will benefit public safety because the additional spectrum available to the combined company will allow it added flexibility in responding to interference issues.

These consumer benefits cannot be realized quickly by acquiring spectrum in a piecemeal fashion. In this fast-moving, ultra-competitive industry, time is of the essence in responding to consumer demands. Without network assets and infrastructure to put spectrum to immediate use,

improvements in coverage, capacity, and quality will be delayed substantially. Thus, Cingular must acquire both spectrum *and* infrastructure. In heavily populated urban areas with high demand, for example, it is becoming increasingly difficult to improve quality by splitting existing cells. To split cells, a company must find a tower location with the right coverage and then address zoning, environmental, and political issues concerning the tower. This is both time-consuming and costly.

Importantly, all of the aforementioned benefits will be achieved through the merger without any adverse impact on competition. The intense, fierce, and ultra-competitive state of the industry² will remain unchanged. If anything, the merger will spur Cingular and its many competitors to differentiate themselves in terms of service quality, new products, prices, coverage, and other characteristics.

In order to demonstrate that the proposed merger will have substantial public interest benefits, Cingular has included four declarations.³ Professor Richard Gilbert of the University of California, former Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S., analyzes the relevant geographic and product markets and evaluates the national scope of the wireless market. William Hogg, Cingular's Vice President, Network Strategic Planning, and Dr. Mark Austin, a Cingular radio technology and communications manager, analyze spectrum, capacity, and technical efficiency issues. Mark P. Lefar, Cingular's Chief Marketing Officer, describes the impact of the transaction from a consumer marketing perspective. Stephen A. McGaw, Cingular's Senior Vice President of Corporate Development, describes the pro-consumer and pro-competitive synergies that will result from the transaction.

In further support of the aforementioned public interest benefits, AWS has provided declarations from G. Michael Sievert, Chief Marketing Officer and Executive Vice President of AWS and Greg Slemons, Executive Vice President of Wireless Network Services of AWS.⁴ These declarations describe the technical and marketing benefits associated with the merger and how a combination of the two companies will benefit consumers.

Also included herein is a request for waiver of the cellular cross-ownership rule.⁵ Approval of the transaction would result in Cingular controlling or holding attributable interests

² 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, Eighth Report*, 18 F.C.C.R. 14783, 14826 (2003) ("*Eighth Annual CMRS Competition Report*").

³ See Declaration of Professor Richard Gilbert ("Gilbert Declaration") (Attachment 1); Declaration of William Hogg, Vice President, Network Strategic Planning, Cingular, and Dr. Mark Austin, radio technology and communications manager, Cingular ("Hogg/Austin Declaration") (Attachment 2); Declaration of Steve McGaw, Senior Vice President of Corporate Development, Cingular ("McGaw Declaration") (Attachment 3); and Declaration of Mark P. Lefar, Chief Marketing Officer of Cingular ("Lefar Declaration") (Attachment 4).

⁴ See Declaration of G. Michael Sievert, Chief Marketing Officer and Executive Vice President of AWS ("Sievert Declaration") (Attachment 5); Declaration of Greg Slemons, Executive Vice President of Wireless Network Services of AWS ("Slemons Declaration") (Attachment 6).

⁵ 47 C.F.R. § 22.942.

in both cellular licenses in portions of 11 RSAs. Grant of the waiver would not adversely affect competition because multiple competitors will remain in each area after the transaction is consummated. Moreover, a waiver grant would allow the combined company to substantially improve service to these rural areas. Thus, the public interest would be served.

I. BACKGROUND

A. Description of the Parties

1. Cingular

Cingular is eminently qualified to control the instant licenses. The company was formed in 2000 to provide consumers with another option for nationwide wireless service. Through various subsidiaries and affiliates, Cingular constructs, operates and holds interests in numerous wireless telecommunications systems throughout much of the United States. The company is led by a management team with decades of collective experience in the telecommunications industry. An FCC Form 602 providing the ownership information for Cingular as it would appear upon consummation is on file with the Commission.

The Commission recently reviewed the qualifications of Cingular's wholly-owned subsidiary, Cingular Wireless LLC, and determined that the company has all the requisite character and other qualifications to hold FCC licenses.⁶ The Commission specifically recognized that "Cingular has the requisite character qualifications to acquire the Designated Licenses" and it "has found Cingular to be qualified to acquire licenses numerous times. . . ."⁷ Cingular is legally, technically, and financially qualified with regard to the instant transfer of control applications.

2. AWS

AWS is equally qualified. AWS, through various subsidiaries and affiliates, constructs, operates and holds interests in numerous wireless telecommunications systems throughout much of the United States and in foreign countries. An FCC Form 602 providing current ownership information for AWS is currently on file with the Commission. The Wireless Telecommunications Bureau has observed that the qualifications of AWS to hold licenses have been "regularly reviewed and approved."⁸

⁶ See *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 No. 03-217, *Memorandum Opinion and Order*, FCC 04-26, at ¶ 28 (rel. Feb. 12, 2004) ("*Cingular/NextWave*").

⁷ *Id.* (citing numerous instances where Cingular has been found qualified to acquire licenses).

⁸ See *American Cellular Corporation and Joint Venture Between Dobson Communications Corporation and AT&T Wireless Services, Inc., Seek FCC Consent to Transfer Control of Wireless Licenses; Pleading Cycle Established, Public Notice*, 14 F.C.C.R. 19356, 19356 (WTB 1999).

B. Description of the Transaction

Cingular seeks Commission approval of transfer applications that would allow AWS to become an indirect wholly-owned subsidiary of Cingular. At the time of the merger, each share of stock of AWS will be converted into a right to receive cash (either pursuant to the merger or through the Delaware appraisal proceeding) and then cancelled.⁹

Given the structure of the transaction, there will be no adverse impact on AWS subscribers. These subscribers entered into contracts with AWS and that relationship will continue unchanged. AWS will continue in existence, but as an indirect wholly-owned subsidiary of Cingular. Thus, there is no need to “transition” customers to Cingular.

C. Standard of Review

Under Sections 310(d) and 214 of the Communications Act of 1934, as amended, the subject licenses may not be transferred unless the Commission finds “that the public interest, convenience and necessity will be served thereby.”¹⁰ The scope of review is as follows:

Any [transfer] application shall be disposed of as if the proposed transferee . . . were making an application under Section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer . . . of the permit or license to a person other than the proposed transferee.¹¹

As a threshold matter, in evaluating transfer applications under Section 310(d), the Commission normally reviews whether the transferor and transferee are qualified to hold Commission licenses. As noted above, the Commission repeatedly has affirmed the qualifications of each Applicant.

The public interest analysis involves a review of the benefits of the transaction. It incorporates an analysis of whether the proposed transaction presents any significant anticompetitive issues and, if so, whether there are countervailing pro-competitive effects or other public interest benefits.¹² This determination requires both an evaluation of competitive

⁹ As a result, DoCoMo’s ownership interest in AWS will be extinguished.

¹⁰ 47 U.S.C. § 310(d).

¹¹ *Id.*

¹² See, e.g., *Global Crossing Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, International and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, Order and Authorization*, 18 F.C.C.R. 20301, 20315-16 (IB, WTB, WCB 2003) (“*Global Crossing Order*”); *Applications of Voicestream Wireless Corporation, Powertel, Inc., Transferors, and Deutsche Telekom AG, Transferee, for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, 16 F.C.C.R. 9779, 9789 (2001) (“*VSTR/DT Order*”); *AT&T Corp., British Telecommunications, plc, VLT Co. LLC, Violet License Co. LLC, and TNV (Bahamas) Limited*,

(continued)

effects and a broader public policy analysis.¹³ The Commission also “must determine whether the transaction violates [FCC] rules, or would otherwise frustrate implementation or enforcement of the Communications Act and federal communications policy.”¹⁴

II. THE PROPOSED TRANSACTION WILL SERVE THE PUBLIC INTEREST

Commission approval of the transfer of control applications will promote the public interest. In the current wireless marketplace, consumers demand: (1) high quality voice transmission (few dropped calls and high grade audio); (2) advanced high-speed data applications; and (3) nationwide coverage (*i.e.*, few coverage gaps and no roaming charges).¹⁵ The merger would permit the combined company to satisfy these customer needs more quickly than either company alone.

- First, because the transaction increases network capacity and provides the spectrum and compatible network resources to fill in the coverage holes of both companies, consumers will enjoy significant near-term improvements in service quality.
- Second, the merger will alleviate spectrum capacity constraints that currently hinder the growth of Cingular and AWS, as well as their ability to provide 3G services. The combined company will be able to deploy 3G service in more areas, including rural areas, and with less disruption than either company could do on its own.
- Third, approval of the transaction will expand significantly the facilities-based footprint of Cingular to reach 97 of the top 100 metropolitan areas.
- Fourth, the merger will create economies of scale and scope that will make Cingular a more effective competitor.
- Finally, the transaction will improve homeland security and public safety.

Absent the merger, these benefits cannot be achieved without substantial delay, if at all.

(footnote continued)

Applications for Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc, Memorandum Opinion and Order, 14 F.C.C.R. 19140, 19147 (1999) (“AT&T/BT Order”); *Motient Services Inc. and TMI Communications and Company, LP, Assignors, and Mobile Satellite Ventures Subsidiary LLC, Assignee, Order and Authorization*, 16 F.C.C.R. 20469, 20473 (IB 2001).

¹³ *Global Crossing Order*, 18 F.C.C.R. at 20315; 47 U.S.C. § 157(a).

¹⁴ *General Motors Corporation and Hughes Electronics Corporation, Transferors and the News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03-124, *Memorandum Opinion and Order*, FCC 03-330 (rel. Jan. 14, 2004).

¹⁵ Lefar Declaration at 2.

A. The Transaction Will Result in Service Quality Improvements for Consumers

The ability of Cingular and AWS to improve quality, offer new services, and deploy new technologies has been hampered by the amount of spectrum each holds. Both Cingular and AWS operate cellular and PCS systems and, consistent with the Commission's rules, their cellular systems must provide analog service.¹⁶ As demand for wireless service increased, the original cellular carriers were forced to deploy next generation digital technologies that would increase capacity. The predecessors of Cingular and AWS were among the first to deploy second generation ("2G") digital technologies.¹⁷ At that time, TDMA was the most viable 2G option – GSM was not available in the U.S. on 850 MHz cellular frequencies and CDMA was unavailable for commercial deployment.¹⁸

In the 1990s, consumers began demanding new applications from cellular carriers. These applications – like text messaging and elementary (non-graphics intensive) web browsing – created bandwidth demands that could not be satisfied with TDMA technology without compromising the quality and capacity available for traditional voice services. To accommodate the anticipated demand for traditional wireless telephony and new data services, Cingular and AWS evaluated next generation technologies. Unfortunately, TDMA offered no realistic migration path to third generation ("3G") technology.¹⁹ Thus, carriers like Cingular and AWS had to develop a transition to a brand-new 3G technology. The transition required each company to deploy a third separate network as an overlay.²⁰

For a variety of reasons, both AWS and Cingular selected the GSM standard for this overlay. GSM has the benefit of being the global standard for interconnected mobile voice services and offers a simple migration path for meeting the demand for new services during the conversion to a true 3G network. This transition plan enabled Cingular and AWS to meet demand for new medium-speed data services by deploying the General Packet Radio Services ("GPRS") 2.5G technology, followed by the deployment of Enhanced Data Rates for GSM Evolution ("EDGE") as an initial 3G ("3G Light") technology.²¹ These technologies permit the transmission of data at rates up to 115 kbps for GPRS and up to 470 kbps for EDGE.²² Neither technology was a viable option for TDMA networks.²³

¹⁶ The Commission's rules require that analog service remain available on these systems until February 18, 2008. *See* 47 C.F.R. § 22.901(b).

¹⁷ Hogg/Austin Declaration at 3.

¹⁸ *Id.*

¹⁹ *See id.* at 4-5.

²⁰ *Id.* at 4-7.

²¹ *Id.* at 5-7.

²² *Id.* at 5; *see Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14804.

²³ As discussed in the Hogg/Austin Declaration: "EDGE was originally seen as the evolutionary path to 3G for TDMA networks, but EDGE was more closely related to GSM. Given the relatively low global penetration of TDMA compared to GSM and CDMA, vendors' concentrated their development efforts on GSM 3G migration as compared to TDMA 3G migration, and TDMA development efforts ultimately, faltered completely. Moreover, the

(continued)

By deploying a GSM overlay, however, Cingular and AWS have been forced to divide their spectrum in order to effectively run three separate networks in many areas – analog, TDMA, and GSM networks.²⁴ Both companies also use spectrum from two frequency bands – 850 MHz (cellular) and 1900 MHz (PCS) – which adds further complexity. Thus, only a portion of each carrier’s spectrum is available for calls made by phones utilizing each of these distinct technologies. Other national carriers such as Sprint and T-Mobile do not face this problem because they do not have to comply with an analog service requirement and they only have to support a single 2G technology.²⁵

In urban areas where Cingular provides cellular service, a typical system currently uses about 4 MHz (six voice channels per site in a 4-cell reuse pattern) to comply with analog service requirement and about 11 MHz (including a guardband between TDMA and GSM) to provide TDMA service, leaving about 10 MHz for Cingular’s provision of GSM service, including GPRS/EDGE.²⁶ Thus, Cingular only has a limited ability to improve quality without degrading some other aspect of its network operation.²⁷ AWS faces similar constraints.²⁸

Cingular already has taken a step forward in addressing its geographic and spectrum limitations by acquiring spectrum from NextWave. Even when the NextWave transaction closes,²⁹ however, Cingular will hold 25 MHz or less of spectrum in a majority of the top 50 MSAs, including some where it will have no spectrum at all.³⁰ In addition, even with the acquisition of NextWave spectrum in markets where Cingular does not operate a 1900 MHz system, Cingular would face an extended process of finding new sites and constructing a new

(footnote continued)

substantial delay before EDGE services would be available meant that there would be a considerable time before TDMA-based networks would be able to offer data communications at the necessary increased speed levels. Given the expected demand for increasingly fast data services, the vendors’ inability to deliver TDMA-based 3G services was one of the factors that led them to discontinue efforts to develop TDMA-based 3G services and capabilities.” Hogg/Austin Declaration at 5.

²⁴ Although Cingular expects to complete its roll-out of GSM services this summer, it still must maintain a TDMA network for its TDMA subscribers for the foreseeable future, and the Commission’s rules require Cingular to continue providing analog service until February 18, 2008. *See* 47 C.F.R. § 22.901(b).

²⁵ The analog service requirement contained in Section 22.901(b) of the Commission’s rules only applies to *cellular* systems (*i.e.*, those operating at 850 MHz), and neither T-Mobile nor Sprint holds such licenses. Although Verizon is subject to this requirement in some markets, it does not have to maintain multiple digital networks, because it uses only CDMA as its 2G technology. *See* Hogg/Austin Declaration at 3, 25-26.

²⁶ *Id.* at 7-8. The precise allocation of spectrum varies from area to area. *Id.*

²⁷ *Id.* at 7, 12-13. When designing or modifying a system, capacity, quality, and coverage are interdependent – if capacity is increased without adding spectrum, quality and coverage are detrimentally affected. *Id.* at 13.

²⁸ *See* Slemons Declaration at 1-3; *see also* Hogg/Austin Declaration at 12-13.

²⁹ *See generally* Cingular/NextWave.

³⁰ Hogg/Austin Declaration at 7.

network. This time to market will be substantially shortened by the combination of spectrum and network assets held by Cingular and AWS.

Cingular has struggled to keep up with the other nationwide and near national CMRS carriers. In addition to lagging behind Verizon and Nextel in terms of coverage footprint, Cingular ranked third in a J.D. Power survey regarding network quality.³¹ Consumer Reports noted that “Cingular and AT&T subscribers suffer from overloaded circuits in several major cities.”³² Without additional spectrum and infrastructure, both companies would find it challenging to provide customers with the quality and advanced services they desire. The merger will allow Cingular to address these issues far more expeditiously than it could on a stand-alone basis.

With the additional spectrum involved in this transaction, network capacity, quality, and coverage can all be improved.³³ Indeed, improvements often will be disproportionately advantageous in comparison to the spectrum added. For example, trunking communication channels together leads to a nonlinear increase in capacity and improvement in service quality. Two channels trunked together can provide 0.223 Erlangs³⁴ of capacity at 2% blocking, while four channels trunked together can provide 1.09 Erlangs of capacity at the same blocking rate, which is more than double the capacity of two two-channel blocks, an increase in efficiency (*i.e.*, Erlangs per channel) from 11% to 27%.³⁵ This is true because the caller is more likely to find a vacant channel when a larger number of channels are pooled together in a trunk group.

Trunking efficiencies also will produce a significant improvement in service quality. As noted in the Hogg/Austin Declaration:

a typical cell site in an urban area will have about 40 trunked channels per sector, with a capacity of 31 Erlangs at 2% blocking. If Cingular and AWS have sites that can be combined and operated as a single 80-channel trunk group instead of two 40-channel trunk groups, there would be an increase in total capacity from 62 Erlangs to 68.7 Erlangs at 2% blocking. As a result, if at a given

³¹ See Peter Valdes-Dapena, *How's Your Cell Service Rate?*, CNN/MONEY, July 31, 2003, at http://money.cnn.com/2003/07/31/technology/cellular_survey.

³² *Cingular Priority: Improving Customer Satisfaction*, ASSOCIATED PRESS, Feb. 19, 2004 (citing Feb. Consumer Reports survey).

³³ Hogg/Austin Declaration at 14-15.

³⁴ “Communications traffic is often measured in Erlangs, representing call-hours during a given period, typically the busiest hour of the day. A single call 60 minutes long, 20 three-minute calls, and assorted calls of varying length totaling 60 minutes, would each represent one Erlang of traffic.” *Id.* at 14 n.14.

³⁵ See *id.* at 14. The illustrative computations above use the Erlang B formula for calculating the effects of trunking, premised on unsuccessful call attempts being blocked on the first try. Under this formula, an increase in number of channels produces a greater than proportional increase in capacity at the same blocking rate, or a greater than proportional decrease in blocking rate for the same number of call attempts, in both cases reflecting an increase in efficiency. *Id.* at 14 n.15.

site and sector AWS and Cingular each had 40 voice channels deployed at the site and serve the same number of subscribers at the same quality level, the combination of their 80 channels into a single trunk group will provide a 10.8% increase in capacity for serving new traffic at the same quality level as before. Until that traffic is added, the increased efficiency would serve the same level of traffic at an even higher quality level (lower rates of blocked and dropped calls). Alternatively, the efficiency gain could be used to reduce the number of channels needed to accommodate the combined traffic. In the example, the total number of voice channels could be reduced from 80 (in two separate trunk groups) to 73 (in a combined system) to serve the combined customer base with no reduction of the existing quality level, thereby recovering 7 channels for alternative uses, e.g., GSM.³⁶

As a result, consumers will quickly experience improved service quality, such as a reduction in blocking and dropped calls during peak call hours.³⁷ The combined networks of the two companies also will close dead spots within many cities and coverage gaps in many rural areas, which will provide more seamless calling with higher quality.³⁸ By combining the two networks, Cingular will be able to address quality concerns by improving capacity and enhancing coverage in problematic areas. “Significantly increased spectrum and more sites means clear calls, fewer dropped calls and broader availability of coverage.”³⁹

Dropped calls are an important factor in customers’ perception of service quality and the merger will give the combined company the capability to better serve customers through improvements in service quality.⁴⁰ If the systems being combined in a given area are equally loaded, dropped calls could be reduced by up to 20%, but if one system is more highly loaded than the other, customers of the system with higher usage would see an improvement of up to 40% in dropped calls without any decrease in service quality received by customers of the less congested system.⁴¹ The attached Hogg/Austin Declaration demonstrates the service improvements in detail.⁴² For example, they include graphs demonstrating⁴³ – based on actual market data – that when the two systems are combined, blocked and dropped call rates will improve, in some cases dramatically. As the graphs (reproduced below) show, combining

³⁶ *Id.* at 15 (footnotes omitted).

³⁷ *See id.* at 15-18; McGaw Declaration at 6.

³⁸ Hogg/Austin Declaration at 22-25; *see* McGaw Declaration at 5; Sievert Declaration at 3.

³⁹ Jane Spencer and Andrea Petersen, *AT&T-Cingular Merger to Affect One in Three Wireless Users; Sprint Counters With New Plan*, WALL ST. J., Feb. 18, 2004, at D1 (Quoting Marc Lefar, Cingular’s Chief Marketing Officer); *see* Hogg/Austin Declaration at 13-18.

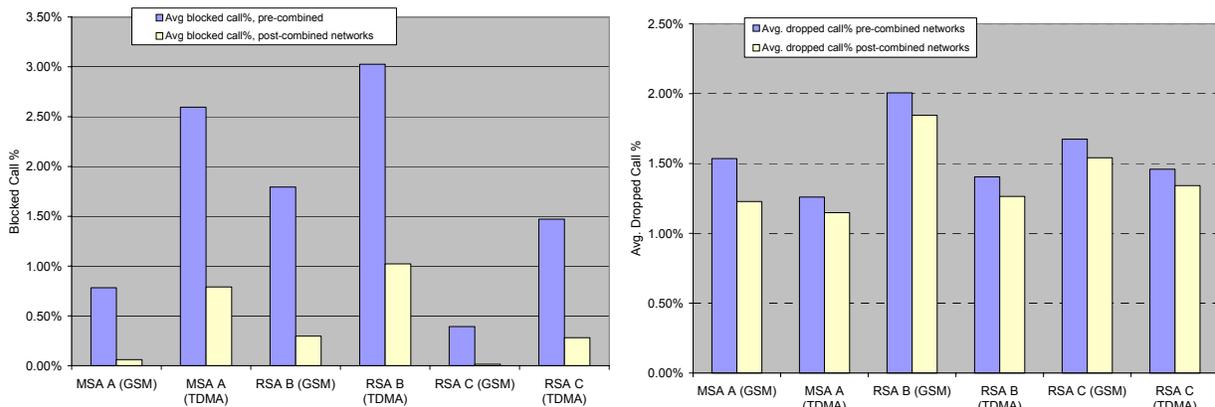
⁴⁰ Hogg/Austin Declaration at 16 & n.18.

⁴¹ *Id.* at 16 & Appendix 4.

⁴² *See id.* at 15-19.

⁴³ *Id.* at 17, Figures 4-5.

systems can reduce the percentage of blocked calls well below the pre-merger level. The percentage of dropped calls is reduced as well:



Mr. Hogg and Dr. Austin demonstrate that in one of the metropolitan areas currently served by both companies, the trunking efficiencies resulting from combining two identical systems could result in a reduction in blocked calls by more than 180,000 calls per day or, put another way, about 66,000,000 calls annually.⁴⁴ The improvements in blocking also would be felt in rural areas. In one RSA evaluated, the TDMA blocking rate was reduced from 3% to 1% which, in turn, eliminated blocking for some 10,000 calls per day — over 3,000,000 calls in the space of a year.⁴⁵ While these figures are based on certain assumptions, they indicate the order of magnitude of the consumer benefits of the merger, which will occur not just in a few special cases but will generally occur wherever Cingular and AWS networks are combined.⁴⁶ “Nationwide, hundreds of millions of calls would be favorably affected per year.”⁴⁷

Absent the merger, the ability of either Cingular or AWS to improve quality and roll out new services is limited. In both urban and rural areas, for example, it is becoming increasingly difficult to improve quality by splitting existing cells, because there are limits on how many towers can be built.⁴⁸ To split cells, a company must find a tower location with the right coverage and then address zoning, environmental, and political issues merely to have the right to build the tower.⁴⁹ This is both time-consuming and costly; as a result cell-splitting has only limited utility in improving coverage, quality, and capacity in mature networks.⁵⁰

⁴⁴ *Id.* at 18.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 21 n.25, 23 n.28; *see* McGaw Declaration at 7.

⁴⁹ *See* Hogg/Austin Declaration at 21 n.25, 23 n.28; McGaw Declaration at 7.

⁵⁰ *See* Hogg/Austin Declaration at 21 n.25, 23 n.28. In addition to minimizing the need for cell splitting and new towers due where AWS networks have complementary sites, the merger invariably will result in an elimination of redundant sites where additional capacity is not necessary. Thus, the combined company will retain the sites that provide the best and most efficient coverage and free up space on the other towers for third party collocation. *See id.* at 24-25.

In addition to the benefits derived from the availability of more spectrum, the merger will expand the size of Cingular's footprint and reduce its reliance on roaming networks which has prevented the company from exploiting fully the technological enhancements available over its new GSM networks.⁵¹ New features and services – such as mobile-to-mobile calling and push-to-talk capabilities – are not as attractive to consumers based on Cingular's current footprint as they would be if available more broadly.⁵² The combination of AWS and Cingular will allow the availability of these services on a seamless, nationwide basis far more promptly than can otherwise be achieved, if they could be achieved at all, by the companies individually.

In many rural areas where one company provides cellular service and the other provides PCS, customers will experience improvements in service quality. Cellular signals at 850 MHz typically have coverage that extends further from population centers and highways than 1900 MHz PCS systems.⁵³ Thus, 1900 MHz subscribers with dual-band phones will be able to place calls on their "home" network in areas where they previously would have roamed.⁵⁴ Consequently, these subscribers will be able to receive all of the features associated with a home system rather than the more limited menu of features available while roaming.⁵⁵

B. The Proposed Merger Will Further the Public Interest by Alleviating Spectrum Constraints Currently Precluding the Rapid Deployment of Advanced Services

Consumer demand for new, high speed/bandwidth, advanced services is growing tremendously. Growth rates for data services dwarf the growth of wireless voice services.⁵⁶ Cell phones are no longer used just for talking. The growth rate of 2G and 2.5G data services offered on Cingular's networks, such as interactive messaging and multimedia messaging, confirms this trend. As an illustration, the number of multimedia messages per day has increased by over 700 percent in the last six months, as shown in the following graph:

⁵¹ Lefar Declaration at 9; *see* Dan Meyer, *Cingular Continues to Hunt for Nationwide Presence*, RCR WIRELESS NEWS, Apr. 7, 2003 ("*Cingular Continues to Hunt for Nationwide Presence*").

⁵² *See* Lefar Declaration at 10.

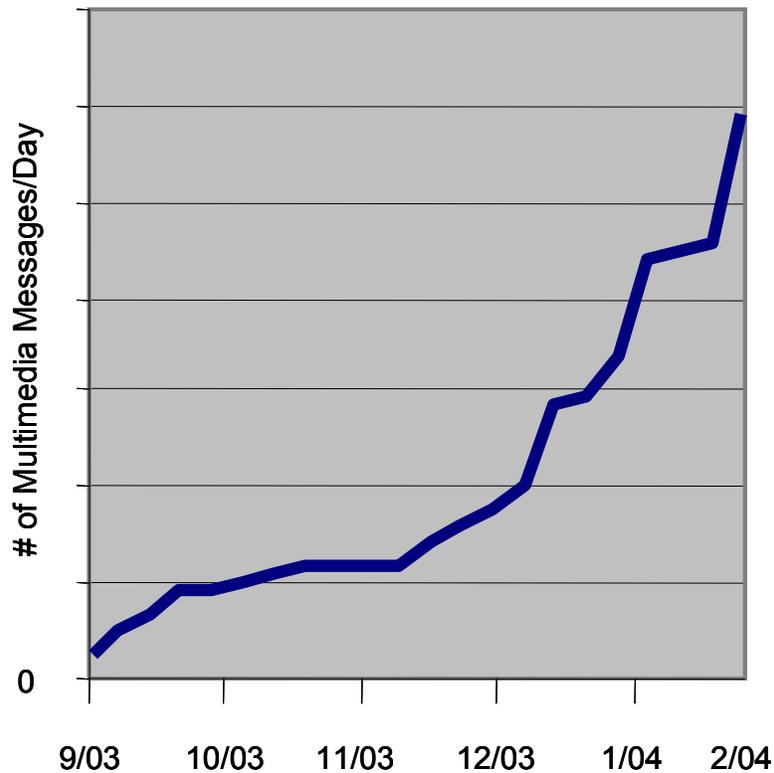
⁵³ *See* Hogg/Austin Declaration at 23-24. The complementary nature of the two systems is depicted in the attached coverage maps. *See* Attachment 7.

⁵⁴ *See* Hogg/Austin Declaration at 24; Slemons Declaration at 2; *see* Sievert Declaration at 4.

⁵⁵ Hogg/Austin Declaration at 24; *see* Lefar Declaration at 9.

⁵⁶ Lefar Declaration at 2-3; *see* Sievert at 1-2. As discussed below, Cingular's data traffic is increasing exponentially. Other countries where advanced services have been deployed show similar growth. In South Korea, for example, data accounts for 14 percent of cell phone company revenue. *See also* Yuki Noguchi and Griff Witte, *Wireless Firms Look at Phones as Limitless*, THE WASHINGTON POST, Feb. 19, 2004, at E1 ("*Wireless Firms Look at Phones as Limitless*").

MMS Messages/Day



These trends presage the growth rates expected when higher-speed 3G services are offered.

As one analyst noted:

The market has moved from a regulatory driven phase where availability, pricing and services were largely defined by regulatory decisions. The next period was a marketing phase driven by price plans, acquisition and retention programs, channel activities and advertising. Finally, the market now is entering a technology driven phase where the availability of mobile data (e-mail, Internet access), base stations and mobile computing will shape the market. The move to 3G service will further continue this trend.⁵⁷

In Europe, cell phones are used to transact business, much like an ATM card.⁵⁸ In Japan, cell phones are used as portable televisions.⁵⁹ U.S. consumers are now demanding capabilities that require large amounts of bandwidth at high speeds to work properly, such as:⁶⁰

⁵⁷ Paul Budde Communication Pty Ltd, *USA – Wireless Communications Market Overview*, 2004, at 7 available for purchase at <http://www.budde.com.au/Reports/Contents/USA-Wireless-Communications-Market-Overview-1838.html>.

⁵⁸ See *Wireless Firms Look at Phones as Limitless*, *supra* note 56.

- streaming video;⁶¹
- high-speed Internet transmission;⁶²
- multimedia messaging capabilities;⁶³
- the delivery of pictures over cell phones;⁶⁴
- high-end gaming (such as real-time multiplayer games);⁶⁵
- music offerings;⁶⁶ and
- location-based services.⁶⁷

Cingular and AWS currently use data transmission technologies such as GPRS and EDGE that are unable to accommodate all of these demands. Competitors have begun deploying other 3G technologies that are capable of satisfying them. For example, Verizon Wireless currently offers the CDMA-based 1xEV-DO “BroadbandAccess” data service in the Washington, D.C. and San Diego, California areas, with a maximum speed of 2.4 Mbps and average end-user speeds of 300-500 kbps, and has announced plans to introduce this service nationally, starting in “many major U.S. cities” this summer.⁶⁸ Sprint is moving forward with deployment of an even more advanced service – 1xEV-DV – that also will offer consumers much faster data transmission (3.09 Mbps maximum, 400 kbps to 1 Mbps average) than currently available over either the Cingular or AWS networks.⁶⁹ To illustrate the differences in the capabilities of the technologies, a 1 megabyte file would take almost seven minutes to

(footnote continued)

⁵⁹ *Id.*

⁶⁰ Lefar Declaration at 3; *see* Hogg/Austin Declaration at 4, 25; McGaw Declaration at 7. Cingular currently offers camera phones (such as the Motorola V400) and phones integrated with mp3 players (such as the Nokia 3300 Music Phone).

⁶¹ Hogg/Austin Declaration at 4, 25; McGaw Declaration at 7.

⁶² *See* Yuki Noguchi and Griff Witte, *Cingular Wins the Bidding*, THE WASHINGTON POST, Feb. 18, 2004, at E1 (“*Cingular Wins the Bidding*”).

⁶³ *See* Hogg/Austin Declaration at 4, 25; McGaw Declaration at 7.

⁶⁴ *See Cingular Wins the Bidding*, *supra* note 62.

⁶⁵ *See* Hogg/Austin Declaration at 4.

⁶⁶ *See* McGaw Declaration at 7.

⁶⁷ *See* McGaw Declaration at 7.

⁶⁸ *See* News Release, Verizon Wireless, *Verizon Wireless Announces Roll Out of National 3G Network*, Jan. 8, 2004, at <http://news.vzw.com/news/2004/01/pr2004-01-07.html>.

⁶⁹ *See Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14804; Bob Brewin, *Sprint PCS Signs \$1B Cell Network Upgrade Deal with Lucent*, COMPUTERWORLD, July 22, 2003, available at <http://www.computerworld.com/mobiletopics/mobile/story/0,10801,83320,00.html?f=x68>.

download utilizing GPRS versus 1.5 minutes utilizing EDGE and only 20 seconds utilizing 1xEV-DO.⁷⁰

To compete with the new Verizon and Sprint offerings, Cingular and AWS must deploy a technology that permits data transmission at comparable speeds.⁷¹ From a technology standpoint, the logical transition from EDGE is to the Universal Mobile Telecommunications System (“UMTS”) which will initially permit data transmission at speeds of up to about 2 Mbps and eventually, when upgraded with High Speed Downlink Packet Access (“HSDPA”), at speeds of up to 10 Mbps.⁷²

To deploy UMTS, a carrier must set aside a *minimum* of 10 MHz of dedicated spectrum (5 MHz uplink paired with 5 MHz downlink).⁷³ Because UMTS requires all customers in a sector to share the download bandwidth, a UMTS base station (prior to the introduction of HSDPA) that is capable of providing 384 kbps download speed to users at the outer boundary of service (up to 2 Mbps to close-in users) will only provide 38.4 kbps to 10 simultaneous users per sector.⁷⁴ Thus, additional UMTS channels will be needed to maintain adequate download speed as more subscribers demand access to 3G services.⁷⁵

Because Cingular must continue serving subscribers using two different legacy technologies in addition to GSM/GPRS/EDGE, it will be unable to clear the minimum 10 MHz of spectrum necessary for the initial deployment of UMTS in most of its service area much less the substantially greater spectrum requirements necessary to serve anticipated demand for the high-speed services UMTS supports.⁷⁶ Even in the limited areas where Cingular has both a 25 MHz cellular system and a 10 MHz PCS system, there is no room for UMTS because the PCS system is already being used to serve GSM (and in some cases TDMA) subscribers. Thus, the

⁷⁰ See Dave Conabree, *Verizon to Unveil Ultra-Fast Wireless*, MOBILEMAG.COM, Mar. 17, 2003, available at <http://www.mobilemag.com/content/100/104/C1549/>; News Release, Verizon Communications, *Verizon Wireless to Offer High-Speed Wireless Broadband Services for Business Customers*, Mar. 17, 2003, at http://investor.verizon.com/news/VZ/2003-03-17_X835726.html.

⁷¹ Verizon currently has no competition for data applications at these very high speeds. According to analyst Jane Zweig, Chief Executive of Shosteck Group, Verizon charges a premium for its advanced data service which would be unavailable if there was more competition. See Rob Pegoraro, *Verizon Wireless Lets You Get Online and Get Out – Quickly*, THE WASHINGTON POST, Mar. 14, 2004, at F7.

⁷² See Hogg/Austin Declaration at 5; UMTS World, WCDMA(UMTS), at <http://www.umtsworld.com/technology/wcdma.htm> (visited Mar. 16, 2004); UMTS World, HSPDA in W-CDMA, at <http://www.umtsworld.com/technology/hsdpa.htm> (visited Mar. 16, 2004).

⁷³ Hogg/Austin Declaration at 10.

⁷⁴ *Id.* Of course, the speed will increase if the 10 users are not continuously using their full share of the bandwidth. For example, 10 users browsing web pages will not all be downloading data or graphics at the same time, so a much larger number of users would be able to browse at high speeds than could download simultaneously.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 7, 11-12.

company has no clear 10 MHz of spectrum. Similarly, in the limited areas where Cingular only operates PCS systems, these systems utilize 20-30 MHz of spectrum to provide GSM/GPRS/EDGE service and do not have 10 MHz of clear spectrum within which to offer UMTS.⁷⁷ As a result of these constraints, Cingular alone would be able to introduce UMTS in only 38 metropolitan areas when the acquisition of additional NextWave spectrum is considered and with optimistic assumptions regarding the transition of analog and TDMA subscribers to GSM.⁷⁸ AWS suffers from similar constraints.⁷⁹

As demonstrated in detail in the Hogg/Austin Declaration, where both companies have an existing customer base, the combined network will require 80 MHz to provide a full menu of competitive voice and data services. The post-merger company would require approximately 50 MHz of spectrum (assuming both carriers are currently using 25 MHz or more to serve their separate customer bases) to simultaneously serve the combined customer base with analog, TDMA, and GSM/GPRS/EDGE services and allow for anticipated growth in demand for existing services.⁸⁰ When the two companies' networks are fully combined and spectrum beyond this 50 MHz can be cleared, Cingular will be able to deploy UMTS in 10 MHz building blocks. Cingular anticipates that three 10 MHz UMTS blocks – for a total of 30 MHz – will be necessary to meet anticipated demand for 3G services.⁸¹ Thus, the combined company will need up to 80 MHz of spectrum to meet the demand for existing voice and data services and meet the anticipated demand for advanced services.⁸²

By combining the spectrum assets of both companies, Cingular will have sufficient spectrum to offer at least some UMTS in 75-80 of the top metropolitan areas and in many rural areas.⁸³ By allowing Cingular to obtain this spectrum, the Commission will create an additional provider of data service with a transmission rate of 2 Mbps or more and pave the way for the deployment of 3G services expeditiously and over a wider footprint.⁸⁴ This will increase competition in the provision of 3G services to a level that would not be possible without the merger and will provide consumers with additional choices for high speed connectivity.

⁷⁷ *Id.* at 12.

⁷⁸ *Id.*

⁷⁹ *See* Slemons Declaration at 2-4.

⁸⁰ Hogg/Austin Declaration at 20. As discussed in the previous section, Cingular currently needs about 4 MHz to comply with the analog service requirement, about 11 MHz to provide TDMA service, and 10 MHz for Cingular's provision of GSM service, including GPRS/EDGE, to meet the demands of existing customers served via a 25 MHz system in urban areas. *Id.* at 7-8. The precise allocation of spectrum varies from area to area. *Id.*

⁸¹ *Id.* at 21.

⁸² In areas where the combined company would hold an attributable interest in more than 80 MHz throughout a BTA, it will reduce its holdings to no more than 80 MHz. The combined spectrum holdings of AWS and Cingular are provided in Attachment 8.

⁸³ Hogg/Austin Declaration at 22.

⁸⁴ *See* Press Release, Cingular Wireless, *Cingular To Acquire AT&T Wireless, Create Nation's Premier Carrier*, Feb. 17, 2004, at http://www.cingular.com/about/latest_news/04_02_17.

C. The Merger Will Benefit Consumers by Making Cingular a Source for Truly Nationwide Coverage

The Commission has determined that the public interest is served by authorizing transactions that enable national CMRS carriers “to expand into new markets, and provide new services to subscribers and increase subscribership in markets in which [they] currently provide[] service.”⁸⁵ The importance of achieving a nationwide footprint has been stressed by Thomas J. Hazlett, the former FCC Chief Economist:

Gaining national geographic scope has allowed competing wireless networks to better pursue technological upgrades and to roll out a richer mix of services. The result is that the quality of wireless service has improved markedly with the emergence of wide area networks. . . . The integration of local systems into nationwide networks allowed for economies of scale in developing advanced applications and in deploying new technologies.⁸⁶

Others have recognized that the expansion of Cingular’s footprint is essential to its ability to provide nationwide service and to remain competitive with the other nationwide CMRS carriers:

Analysts note this lack of coverage for Cingular . . . is preventing the carrier from presenting a true nationwide footprint and is hurting the carrier’s attempt to compete.

“When a customer walks into a store and sees on a map all the areas Cingular does not provide service, it creates doubt,” said Eddie Hold, vice president of telecom services at Current Analysis. “Even if the customer will never travel out of their [sic] home calling area, the lack of a nationwide footprint could drive them away.”⁸⁷

Cingular was created in an attempt to provide consumers with another option for nationwide wireless service.⁸⁸ Although the company currently provides cellular and PCS service in 43 states⁸⁹ and has attributable interests in cellular/PCS licenses in 87 of the top 100

⁸⁵ *Applications of Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless For Consent to Assignment of Licenses, Memorandum Opinion and Order*, 18 F.C.C.R. 6490, 6494 (2003) (“Northcoast-VZW Order”); see, e.g., *Cingular/NextWave* at ¶ 32.

⁸⁶ See Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, 56 FED. COMM. L.J. 155, 202 (Dec. 2003).

⁸⁷ *Cingular Continues Hunt for Nationwide Presence*, *supra* note 51.

⁸⁸ See McGaw Declaration at 1-2.

⁸⁹ See Cingular Wireless LLC, SEC Form 10-K, 2003 Annual Report at 2, Feb. 25, 2004, available at <http://www.sec.gov/Archives/edgar/data/1130452/000095014404001647/0000950144-04-001647-index.htm>.

metropolitan areas,⁹⁰ its competitors have a more expansive footprint. Verizon Wireless already provides service in 97 of the top 100 metropolitan areas,⁹¹ Nextel provides service in all of the top 100 metropolitan areas,⁹² and Sprint's footprint encompasses all 50 states.⁹³ After the transaction is consummated, Cingular's footprint will extend into 6 new states and Cingular will be able to offer service in 97 of the top 100 metropolitan areas.⁹⁴ It concurrently will expand its coverage from approximately 220 million licensed POPs to approximately 264 million.⁹⁵

Cingular has entered into 114 roaming agreements to permit its subscribers to utilize their phones in areas unserved by Cingular. Similarly, AWS has entered into nearly 140 roaming agreements. By combining the networks and other infrastructure assets of Cingular and AWS, roaming charges – whether levied on subscribers or absorbed by the companies as part of certain pricing plans – will be eliminated in many areas. For example, AWS subscribers that currently roam in Portland, Oregon, Salt Lake City, Utah, and Tulsa, Oklahoma– three top 100 metropolitan areas – would no longer roam in those areas once the companies are combined. Similarly, Cingular does not provide facilities-based service in several major cities served by AWS, such as Denver, Colorado, Pittsburgh, Pennsylvania, Phoenix, Arizona, and Minneapolis, Minnesota.⁹⁶ After the merger, Cingular subscribers would not roam in these areas.

To eliminate coverage gaps quickly and extend its nationwide coverage, Cingular must acquire both spectrum *and* infrastructure.⁹⁷ Spectrum alone does not solve the coverage problem.⁹⁸ Without network assets and infrastructure to put spectrum to immediate use, improvements in coverage – as well as capacity and quality – will be delayed substantially.⁹⁹ By the time infrastructure is deployed, competitors will have expanded their coverage into other

⁹⁰ See Dan Meyer, *Cingular Banks on AWS with \$41B Buy*, RCR WIRELESS NEWS, Feb. 23, 2004; Denise Pappalardo and Jim Duffy, *Cingular, AT&T Face Hurdles*, NETWORK WORLD, Feb. 23, 2004.

⁹¹ See Verizon Wireless Overview, at <http://www.verizonwireless.com/b2c/aboutUs/index.jsp>.

⁹² See Nextel History: December 2001, Nextel Communications, at http://www.nextel.com/about/corporateinfo/company_history.shtml (noting that Nextel, with Nextel Partners Inc., serves the top 100 MSAs).

⁹³ See Corporate Fact Sheet, Sprint Corporation, at <http://www.sprint.com/sprint/ir/sd/cfs.html>.

⁹⁴ Lefar Declaration at 9. The three metropolitan areas remaining unserved will be Norfolk, Richmond and Newport News.

⁹⁵ McGaw Declaration at 5.

⁹⁶ See Lefar Declaration at 9. The merger should have little impact on the availability of roaming agreements to other carriers. Permitting the customers of other carriers to roam on the Cingular network produces valuable revenue for Cingular. Thus, with the exception of home roaming – which discourages competitors from building and expanding networks – Cingular will continue to enter into roaming agreements with other carriers.

⁹⁷ McGaw Declaration at 3-4.

⁹⁸ *Id.*

⁹⁹ *Id.* at 3-4, 5, 8, 12-13.

areas and Cingular will remain behind its competition. By acquiring both spectrum and infrastructure, the company can provide expanded coverage to consumers in the near term.¹⁰⁰

D. The Transaction Will Result in Substantial Economies of Scale and Scope

In addition to improvements in network coverage and service quality, and greater availability of enhanced service offerings, the transaction will result in a number of synergies which will benefit consumers and make the new Cingular a more effective competitor. As a result of the merger, Cingular expects to generate operating and capital expense synergies of more than \$1 billion in 2006 and more than \$2 billion in subsequent years due to new economies of scale and scope created by the acquisition of AWS.¹⁰¹ These economies of scale and scope include greater purchasing and billing system efficiencies and reductions in common expenses – such as network expansion expenses and maintenance and administrative costs.¹⁰²

1. Technical and Operational Efficiencies

By combining, the two companies will be able to achieve significant operating synergies by sharing best practices and consolidating networks, distribution, procurement, advertising, and other functions.¹⁰³ In areas where the two companies both provide service, they currently operate six networks (and each would require one more for UMTS, for a total of eight) and divide their spectrum accordingly. The combined company would be able to eliminate some redundancy in spectrum usage by consolidating the six current networks into three (analog, TDMA, and GSM/GPRS/EDGE) in any given area and by combining the spectrum into larger trunk groups. This would increase trunking efficiency, dramatically in many instances.¹⁰⁴ The new trunking efficiency will allow Cingular to offer service that is superior in quality to the service available from either company pre-merger, while also accommodating the growth of existing voice and data services for several years.

¹⁰⁰ Cingular and T-Mobile have entered into a limited infrastructure agreement. *See Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14808. The merger has no impact on this agreement with T-Mobile. If either party eventually decides to terminate the relationship, there is a substantial transition period imposed by contract to afford the parties time to build infrastructure where they previously did not have such.

¹⁰¹ McGaw Declaration at 9; Andrew Ross Sorkin and Matt Richtel, *\$41 Billion Offer by Cingular Wins AT&T Wireless*, N.Y. TIMES, Feb. 18, 2004, at A1. The Commission has recognized that “operators with larger footprints can achieve certain economies of scale and increased efficiencies compared to operators with smaller footprints.” *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805.

¹⁰² *See* McGaw Declaration at 9-11; *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805.

¹⁰³ *See generally* McGaw Declaration at 9-11.

¹⁰⁴ For a more detailed explanation of the trunking efficiencies, *see* Hogg/Austin Declaration at 13-19; *see also* McGaw Declaration at 6; Slemons Declaration at 3-4.

2. Greater Scope and Scale for Customer Handset Functionality

Another benefit of the merger is that the combined company will be able to work with device manufacturers to customize device interfaces to Cingular's service offerings. Potential examples could include a button on a phone that allows one-touch access to a customer's current minute or account balance.¹⁰⁵ This approach has proven very popular internationally and has been used to differentiate products in the marketplace.¹⁰⁶ Absent the merger, neither Cingular nor AWS sells a sufficient number of handsets to warrant this type of arrangement with device manufacturers.¹⁰⁷

Further, because both companies utilize the same wireless technologies, the networks can be integrated rapidly, thereby allowing the combined company to implement new features quickly. The merger also would increase the size of the customer base, thereby permitting the combined company to more quickly justify the development and deployment of new products and services such as multimedia messaging, digital music, interactive gaming, graphics-intensive web surfing, longer downloadable video clips (*e.g.*, news, music, and sports clips), the ability to stream full-motion video content on demand, and integrated cameras with higher resolution picture images.¹⁰⁸ Absent the merger, the customer base of each company may not justify the rapid deployment of such new products. The combined company's larger customer base and enhanced purchasing power will also enhance its ability to acquire and provide to consumers a broader selection of equipment at more competitive prices.¹⁰⁹

3. Synergies from Combined "Best Practices"

Both Cingular and AWS have developed a series of practices designed to meet customer needs and to comply with regulatory mandates. The merger will allow the combined company to take advantage of the best practices each has developed. For example, in the course of forming Cingular, nearly a dozen separate billing operations were consolidated into two scalable systems which significantly reduced billing costs per subscriber. Cingular also merged sixty separate customer service call centers into twenty more responsive mega-centers, making it more qualified to address customer service issues. Cingular's wireless local number portability ("WLNP") practices have resulted in some of the lowest transition complaints in the industry, and Cingular is also a leader in addressing wireless disability issues. AWS has developed marketing practices and expertise in serving an extensive business customer base that will benefit the combined company.¹¹⁰

E. The Transaction Will Enhance Homeland Security and Public Safety

Both AWS and Cingular intend to provide WPS to key national security and emergency preparedness ("NS/EP") personnel during disaster and emergency situations. The subject

¹⁰⁵ Lefar Declaration at 11.

¹⁰⁶ *Id.* at 11-12.

¹⁰⁷ *Id.* at 12.

¹⁰⁸ *See* McGaw Declaration at 7.

¹⁰⁹ *Id.* at 9.

¹¹⁰ *See generally id.* at 8-9.

transaction will improve homeland security by facilitating a faster, more widespread deployment of WPS. Moreover, instead of deploying a WPS solution on two networks, both with coverage gaps, WPS can be rolled out on a single network with greater depth and breadth of coverage and substantially higher capacity.

In emergency situations, wireless networks experience extreme congestion. The additional capacity that will result from the subject transaction in areas where both companies currently hold licenses will alleviate congestion on the Cingular network during such situations and provide increased WPS capacity. This will allow Cingular to implement WPS in the manner in which it was intended: “serv[ing] national security and emergency preparedness needs while minimizing the impact on consumer access to the same infrastructure.”¹¹¹

Because the transaction involves the combination of existing networks, it also increases the likelihood for diversified routing, greater redundancy and increased reliability in both the signaling and data networks. This will improve the ability of Cingular’s wireless network to function if certain assets are destroyed or damaged in an emergency; the diversified routing will provide a measure of redundancy that will increase the potential for call completion. In addition, by improving coverage, the battery life of public safety handsets utilizing the network during a crisis will be extended because the handset is likely to be closer to a tower.¹¹² Network survivability and restoration capabilities also will be increased by the proposed transaction. The additional spectrum available in areas where the two companies overlap – when combined with the frequency hopping capabilities inherent in GSM – will make the network more resilient against interference and jamming.¹¹³

Approval of Cingular’s acquisition of AWS also will benefit public safety.¹¹⁴ As the Commission is well aware, the “expansion of the CMRS systems, particularly SMR systems and cellular networks, using digital technology and employing more intensive frequency reuse has apparently caused interference on the public safety channels.”¹¹⁵ By granting the subject applications, the Commission will alleviate spectrum constraints faced by Cingular in many

¹¹¹ Dept. of Homeland Security, National Communications System, Wireless Priority Service Fact Sheet, *at* wps.ncs.gov/documents/WPS%20Fact%20Sheet%2025Mar03.pdf.

¹¹² The closer a handset is to a tower, the lower the transmit power necessary to reach the tower and transmit power is the biggest consumer of battery power.

¹¹³ This transaction will have no impact on the combined company’s CALEA responsibilities. Cingular has worked diligently with law enforcement to implement CALEA capabilities throughout its network and has consistently kept the FBI’s Electronic Surveillance Technology Section apprised of its progress. The merger will in no way undermine these efforts, nor the efforts that AWS has expended to date. Once the merger is effectuated, Cingular will be able to evaluate AWS CALEA capabilities and the networks of both companies can be brought under a unified approach for CALEA compliance.

¹¹⁴ The transaction will have no impact on the Enhanced 911 consent decrees held by both companies. Under these decrees, Cingular and AWS will face identical requirements by the time the transaction is consummated or shortly thereafter.

¹¹⁵ *Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc.; For Consent to Assignment of Licenses, Memorandum Opinion and Order*, 16 F.C.C.R. 21105, 21110 (WTB 2001) (“Chadmoore”).

areas. This will positively affect public safety because the additional frequencies will allow Cingular “to react in a more flexible manner if its operation did affect public safety licensees.”¹¹⁶ The Commission has previously concluded that this “constitute[s] [a] transaction-specific public interest benefit[.]”¹¹⁷

III. THE PROPOSED TRANSACTION WILL NOT HARM COMPETITION

When the Commission eliminated the spectrum cap, it emphasized that its case-by-case review would seek to achieve the same objective as the former rule – namely, “to ‘discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency.’”¹¹⁸ As discussed above, this merger will unquestionably promote efficiency and innovation and will not have anticompetitive effects. To the contrary, the proposed transaction will promote more effective competition.

A. Wireless Telephony Markets Are and Will Remain Robustly Competitive

The wireless industry in the United States is a model of vigorous and dynamic competition. As the Commission found just last year in its *Eighth Annual CMRS Competition Report*:

Continued downward price trends, the continued expansion of mobile networks into new and existing markets, high rates of investment, and churn rates of about 30%, when considered together with the other metrics, demonstrate a high level of competition for mobile telephone consumers.¹¹⁹

The “other metrics” referred to in the *Eighth Report* included steadily declining prices and greatly expanded output and usage of mobile telephone services.

This transaction will do nothing to diminish the vigor of this competition which has benefited consumers throughout the country. To the contrary, by allowing Cingular and AWS to overcome some of the limitations that each faces as an independent carrier, it will strengthen competition and provide more and better service and faster provision of advanced services than would otherwise be possible. One of the key observations made by the Commission in the *Eighth Annual CMRS Competition Report* was that “while there are several large, established carriers in the CMRS industry, they have no guarantee of maintaining their market share, and they are faced with consumers that would readily leave carriers that attempted to raise prices or diminish service quality.”¹²⁰ There is abundant evidence to support this conclusion.

¹¹⁶ *Id.* at 21112.

¹¹⁷ *Id.*; see *Keller Communications, Inc. v. FCC*, 130 F.3d 1073, 1076-77 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 954 (1998).

¹¹⁸ *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, Report and Order*, 16 F.C.C.R. 22668, 22695 (2001) (“*2000 Biennial Regulatory Review*”).

¹¹⁹ *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14812.

¹²⁰ *Id.* at 14786.

The history of the wireless industry demonstrates that, as new carriers have entered and built-out their networks, they have rapidly gained customers and market share. T-Mobile doubled its share between 2000 and 2003¹²¹ while Metro PCS announced last month that its 2003 revenue almost quadrupled versus 2002.¹²² Whatever “advantage” the legacy cellular carriers may once have had has long since disappeared as a result of the successful entry and expansion of PCS carriers. Today, consumers perceive no difference among cellular, PCS or SMR service provided by such carriers as Nextel and Southern LINC.

Net subscriber additions also demonstrate the highly competitive nature of the industry. Professor Gilbert analyzed data for each of the national carriers between 2000-2004 and concluded that new entrants are taking substantial market share from original providers such as Cingular and AWS.¹²³ As Professor Gilbert notes, “[t]he aggregate positions of both Cingular and AWS have been eroding over the past few years and the pace of this erosion has accelerated.”¹²⁴ Market penetration emphasizes the importance of this metric – over the next ten years, wireless penetration is expected to grow from 53% to 75% domestically.¹²⁵

In addition, the high rate of customer switching, or “churn,” in this industry indicates that carriers have no particular ability to retain their customers if they are not providing competitive pricing, service, and features. Indeed, U.S. wireless carriers lose approximately one-third of their customers each year.¹²⁶ And that was before the introduction of WLNP in November 2004. Prior to WLNP, approximately 40% of customers cited “don’t want to change my current phone

¹²¹ Gilbert Declaration at 5.

¹²² See MetroPCS, SEC Form 8-K, Feb. 25, 2004, available at <http://www.metropcs.com/investor/200304.pdf>.

¹²³ Gilbert Declaration at 5-8.

¹²⁴ *Id.* at 8. Some analysts predict that the combined company could lose the top ranking in terms of subscribers within a short time. See Chris Nolter, *You Call This Consolidation?*, DAILY DEAL, Feb. 19, 2004, at M&A Section (noting that Verizon’s “organic growth is so darn good that they’re going to pass Cingular eventually”); Yankee Group, *Cingular Acquires AT&T Wireless, Devours the Competition* (predicting that “[e]ven if Cingular/AT&T Wireless does not falter in adding subscribers, Verizon Wireless will surpass them in less than 3 years), at http://www.yankeegroup.com/public/home/daily_viewpoint.jsp?ID=11299; Shawn Young, *Cingular’s Next Challenge: Rivals Could Take Advantage of Any Disruptions in Merger With AT&T Wireless Services*, WALL ST. J. Feb. 18, 2004, at B1 (citing Roger Entner, Analyst, Yankee Group).

One expert even predicted that the market share of the combined company might not rank first by the time the deal is approved. Jennifer Davies, *Cingular Wins Bidding for AT&T Wireless*, SAN DIEGO UNION-TRIBUNE, Feb. 18, 2004, at A-1 (quoting Michael King, Wireless Industry Analyst, Gartner Group). Although Cingular does not endorse these views, they indicate the intensely competitive nature of the industry.

¹²⁵ See Cingular Wireless and AT&T Wireless, *New Leadership for the U.S. Wireless Industry*, at 6, at http://www.cingular.com/about/new_leadership.pdf.

¹²⁶ *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14801; Gilbert Declaration at 3.

number” as one of their reasons for not changing carriers.¹²⁷ With the advent of WLNP, this impediment to a customer leaving its existing carrier in pursuit of better pricing or better service is gone. Thousands of customers are taking advantage of this opportunity, and Cingular and AWS have some of the highest churn rates in the industry.

<u>Carrier</u>	<u>Churn Fourth Quarter 2003</u>
Nextel	1.5 percent ¹²⁸
Verizon Wireless	1.7 percent ¹²⁹
Sprint PCS	2.7 percent ¹³⁰
Cingular	2.8 percent ¹³¹
T-Mobile USA	3.2 percent ¹³²
AT&T Wireless	3.3 percent ¹³³

The market is comprised of six well-established nationwide carriers – AWS, Cingular, Nextel, Sprint, T-Mobile, and Verizon Wireless – and a number of large regional players, including ALLTEL Corp., Western Wireless Corp., United States Cellular Corp., and Dobson Communications Corporation (“Dobson”).¹³⁴ There are also numerous smaller competitors who play important roles in the competitive environment. For example, in the Miami area, Metro PCS has been a particularly successful recent entrant whose low-priced offerings have proved very attractive to a significant segment of the population.

After the transaction, there will still be five national competitors as well as a substantial number of regional and local competitors.¹³⁵ In an industry in which customers can and do switch carriers frequently and easily, and in which new entrants have experienced little difficulty in rapidly expanding, there is no question that vigorous competition will continue after this merger. The merger will not result in higher prices; indeed, one analyst noted that “[g]oing from six to five competitors will have no impact on calming the pricing war in the long term” and in the short term may actually lead to steeper price cuts.¹³⁶ As Verizon Communications’ Senior

¹²⁷ See Ex Parte of Telephia in WT Docket No. 01-184 (Jan. 22, 2002) at 1.

¹²⁸ *Nextel Report Higher 4th-Quarter Revenue, As Profit Drops*, WASHINGTON TELECOM NEWSWIRE, Feb. 19, 2004.

¹²⁹ *Churn, Churn, Churn*, WIRELESS WEEK, Feb. 1, 2004, available at <http://www.wirelessweek.com/article/CA478478?ticker+NXTL&type=stockwatch>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805.

¹³⁵ A list of competitors in each BTA involved in this transaction is set forth at Attachment 9.

¹³⁶ Matt Richtel, *A \$41 Billion Telephone Deal, but What’s in It for Consumers*, N.Y. TIMES, Feb. 18, 2004, at C1 (quoting Eddie Hold, Telecommunications Industry Analyst, Current Analysis).

Vice President for Public Policy and External Affairs stated, “[c]onsolidation won’t stop the price wars, but it will give carriers an opportunity to . . . deliver better service at lower costs.”¹³⁷

As discussed below, competition to provide mobile voice and data services will be strengthened, not lessened, as a result of the transaction. The merger will have no adverse impact on competition, whether or not voice and data services are viewed separately or as a single market, nor will there be any harm to competition in other potential alternative product markets. The same forces that govern competition in the market for mobile telephony services are at work in these alternative potential markets. Finally, the transaction will have no adverse effect on competition between wireless and wireline telecommunications services.

B. Relevant Product Market

In defining the relevant product market, the Commission includes all services that are a reasonable substitute for each other in the eyes of consumers – even if the products are not identical.¹³⁸ The relevant market clearly includes cellular, PCS and SMR carriers such as Nextel and Southern LINC who provide service that is substantially identical to other CMRS carriers because neither consumers nor carriers distinguish wireless services based on the type of technology utilized.¹³⁹ As the Commission has noted, “from a customer’s perspective, digital services in the cellular or SMR band is virtually identical to digital service in the PCS band.”¹⁴⁰

In analyzing transfers and assignments involving cellular and PCS licenses, the Commission has concluded that the relevant market is “all commercially available two-way, mobile voice and data services providing access to the public switched telephone network via terrestrial systems.”¹⁴¹ The Commission similarly recognized that “mobile voice and mobile data services are no longer clearly delineated in the marketplace.”¹⁴² In the recent *NextWave*

¹³⁷ Anne Marie Squeo, *Regulators Are Likely to Clear Cellphone Deal*, WALL STREET JOURNAL, Feb. 18, 2004, at A11 (quoting Thomas Tauke, Senior Vice President – Public Policy and External Affairs, Verizon Communications).

¹³⁸ See *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. (Transferors) and EchoStar Communications Corp. (Transferee)*, Hearing Designation Order, 17 F.C.C.R. 20559, 20606 (2002) (“*EchoStar/Hughes*”); accord Gilbert Declaration at 14.

¹³⁹ Gilbert Declaration at 15. In addition, the relevant market may include other interconnected mobile voice services, such as those provided by mobile satellite services. As the Commission noted, providers of cellular, PCS, and MSS “offer mobile telephone services that are *essentially interchangeable from the perspective of most consumers. . . .*” *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14804. Inclusion of MSS services in the relevant market does not, however, result in meaningful changes in the level of market concentration, and we thus do not discuss them further.

¹⁴⁰ *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, Seventh Report*, 17 F.C.C.R. 12985, 12993 (2002) (emphasis added) (“*Seventh Annual CMRS Competition Report*”).

¹⁴¹ *Cingular/NextWave* at ¶ 29.

¹⁴² *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14792.

order, the Commission defined a market for mobile telephony that included both voice and data services.¹⁴³

Professor Gilbert believes that the market for wireless voice services may be distinct from the market for wireless data services, but believes that the same analysis applies and the same conclusions are reached regardless of whether voice and data are part of the same market because largely the same competitive forces are at work with regard to both voice and data.¹⁴⁴

All of the national wireless carriers offer or have announced that they intend to offer mobile data services.

- By the end of 2002, Nextel had overlaid its iDEN network with a packet network in order to offer data services.¹⁴⁵ Nextel's "Packetstream Gold service" reportedly uses advanced compression technology to increase transmission speeds up to 56 Kbps.¹⁴⁶ In November 2003, Nextel announced that it plans to adopt "Motorola's WiDEN higher speed data technology, which is designed to quadruple data speeds."¹⁴⁷ Nextel expects to deploy the network infrastructure equipment and software necessary to operate the WiDEN technology in the second half of 2004.¹⁴⁸ Following a smaller test last year, Nextel reportedly continued to test Flarion Technologies' FLASH-OFDM, which supports data rates up to 2 Mbps.¹⁴⁹
- Sprint PCS began offering 2.5G data service in August 2002 using 1xRTT technology, which the carrier deployed across its entire network. Sprint plans to roll out 3G services using 1xEV-DV in 2005 or 2006.¹⁵⁰

¹⁴³ *Cingular/NextWave* at ¶ 29.

¹⁴⁴ Gilbert Declaration at 17-19.

¹⁴⁵ See *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14819-20 & n.258.

¹⁴⁶ Lee Gimpel, *Defining 2.5G and 3G Networks: Has Wi-Fi Stolen the 3G Show?*, WIRELESS BUS. & TECH., Dec. 1, 2003, at <http://www.sys-con.com/wireless/article.cfm?id=708> ("Defining 2.5G and 3G Networks").

¹⁴⁷ Nextel History: November 2003, Nextel Communications, at http://www.nextel.com/about/corporateinfo/company_history.shtml.

¹⁴⁸ News Release, Nextel Communications, *Nextel to Deploy Higher Speed Data Technology; WiDEN Designed to Quadruple Packet Data Speeds*, Nov. 14, 2003, at <http://phx.corporate-ir.net/phoenix.zhtml?c=63347&p=irol-ewsArticle&t=Regular&id=470345> (noting that Nextel Executive Vice President and Chief Operating Officer Tom Kelly added that Nextel continues to evaluate capabilities, customer demand and cost efficiencies of broadband technologies); *Nextel Plans to Upgrade to WiDEN*, RCR WIRELESS NEWS, Nov. 17, 2003, available at <http://www.rcrnews.com/cgi-bin/news.pl?newsId=15944>.

¹⁴⁹ See *Nextel Gets Flashier With Flarion*, UNSTRUNG, Dec. 10, 2003 at http://www.unstrung.com/document.asp?doc_id=44729.

¹⁵⁰ *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14820-21; see also Sam Omatseye, *Verizon to Extend EV-DO's Reach*, RCR WIRELESS NEWS, Jan. 12, 2004 ("EV-DO

(continued)

- T-Mobile claims to be the first U.S. carrier to launch a 2.5G wireless data services across its entire network.¹⁵¹ T-Mobile currently offers GSM/GPRS, and plans to roll out EDGE.
- Verizon Wireless has completed 1xRTT upgrades in a total of 900 towns and cities.¹⁵² On October 1, 2003, Verizon Wireless launched service over 1xEV-DO networks (with data rates of approximately 300 Kbps to 500 Kbps) in Washington, D.C. and San Diego.¹⁵³ Verizon Wireless plans to spend \$1 billion to launch EV-DO service in other major cities in 2004, and expects service to be available by the summer of 2004.¹⁵⁴

In addition, many of the same data services are offered by the regional and local carriers. There are also data-only providers who offer additional competition in this market and whose competitive incentives and strategies are very different from carriers who also provide voice services.¹⁵⁵ The same conditions that make unilateral or coordinated anticompetitive effects unlikely in mobile voice services apply equally in a market for mobile data services. Indeed, there is greater heterogeneity in the various carriers' offering and pricing of mobile data service than there is in mobile voice services, further reducing the prospect of anticompetitive coordination. Accordingly, the impact of the merger should not be evaluated in terms of a separate mobile data market.

C. Relevant Geographic Market

The relevant geographic market is “the area in which buyers practically can turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers.”¹⁵⁶ In the context of mobile services, “the geographic scope of competition in the provision of wireless calling plans should be analyzed as national.”¹⁵⁷

(footnote continued)

Reach”); *Defining 2.5G and 3G Networks*, *supra* note 146 (reporting that peak EV-DV speeds are expected to be near 3 Mbps).

¹⁵¹ See T-Mobile USA, SEC Form 10-K, 2002 Annual Report at 7, Mar., 11, 2003.

¹⁵² *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14820.

¹⁵³ Press Release, Verizon Wireless, *Wireless Broadband Data Service Introduced in Major Metro Areas*, Sept. 29, 2003 at <http://investor.verizon.com/news/VZ/2003-09-29X335914.html>.

¹⁵⁴ See *EV-DO Reach*, *supra* note 150.

¹⁵⁵ *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14867. For example, Cingular's wholly-owned subsidiary, Cingular Interactive, offers information services over a high speed data network utilizing dedicated SMR spectrum. AWS does not offer stand-alone information services and expressed no desire to enter the “data-only” market (to the extent one exists). Thus, the transaction has no impact on competition in a hypothetical market for data-only services. See *VSTR/DT Order*, 16 F.C.C.R. at 9825 n.236. Moreover, if viewed as a separate market, the transaction will increase competition in mobile data services by making it possible for the merged firm to introduce advanced 3G services to more consumers more quickly than either could do independently. See *supra* Section II.B.

¹⁵⁶ *BellAtlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company Application For Transfer of Control of Eighty-two Cellular Radio Licenses to Cellco*

(continued)

Historically, the Commission has regarded wireless telecommunication markets as local in nature. In large part, that was due to the fact that cellular licenses were originally awarded on a localized basis – MSAs and RSAs.¹⁵⁸ Service plans allowed subscribers to make calls within a relatively small geographic area for one price. When a subscriber attempted to place a call from beyond this “home” area, the subscriber would pay higher “roaming” fees.¹⁵⁹

By the early 1990s, however, the Commission recognized that the cellular licensing areas no longer represented the appropriate geographic boundaries for mobile voice services and adopted larger service areas – Metropolitan Trading Areas (“MTAs”) and Basic Trading Areas (“BTAs”). The Commission noted that cellular MSAs and RSAs had been consolidated by licensees to form larger “home” calling areas and thus concluded that use of these license areas for market definition would result in the “*unnecessary fragmentation of natural markets.*”¹⁶⁰

(footnote continued)

Partnership, Order, 10 F.C.C.R. 13368 (WTB 1995) (citing *U.S. v. Phila. Nat. Bank*, 374 U.S. 321, 359 (1963)) (“*BellAtlantic/NYNEX*”), *aff’d* 12 F.C.C.R. 22280 (1997); *accord* 2002 *Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C.R. 13620, 13716 (2003) (noting the “Supreme Court’s definition of the relevant geographic market as the region ‘in which the seller operates, and to which the purchaser can practicably turn for supplies.’ *United States v. Grinnell Corp.*, 348 U.S. 563, 588-89 (1966)”).

¹⁵⁷ Gilbert Declaration at 19. The Supreme Court has stated that “the relevant market . . . is not the several local areas which the individual stations serve, but the broader national market that reflects the reality of the way in which they build and conduct their business.” *Grinnell Corp.*, 384 U.S. at 576. This decision has been used to establish a framework for evaluating whether there is a national market for mobile telephony:

[E]vidence [of a nationwide market] might consist of a large portion of the sales of the relevant product being made to regional or nationwide customers; providers adopting nationally centralized management or operations, or setting rates on a nationwide basis; a large percentage of current sales of portable units as opposed to car-bound units; a major proportion of traffic being roamer traffic . . .; or widespread subscription to regional or national service options.

BellAtlantic/NYNEX, 10 F.C.C.R. at 13375 n.28 (citing *Grinnell Corp.*, 384 U.S. at 575-76).

¹⁵⁸ 47 C.F.R. § 22.909.

¹⁵⁹ See Gilbert Declaration at 20.

¹⁶⁰ *Amendment to the Commission’s Rules To Establish New Personal Communications Services, Report and Order*, 8 F.C.C.R. 7700, 7732 (1993) (emphasis added); see *Policy and Rules Concerning the Interstate, Interexchange Marketplace, First Memorandum Opinion and Order on Reconsideration*, 12 F.C.C.R. 11812 (1997) (“*Rate Integration Recon.*”) (emphasis added); *Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance, Memorandum Opinion and Order*, 14 F.C.C.R. 391, 401 (1998).

By the mid-1990s, alterations in cell phone design and marketing further expanded the areas in which consumers expected to make “home” calls. Wireless phones initially were very bulky and most were designed for permanent in-vehicle installation.¹⁶¹ These phones evolved into streamlined handsets that could be taken anywhere. In-vehicle mobility was replaced with “anytime, anywhere” mobility.¹⁶² This handset evolution accelerated the need for carriers to expand home calling areas.

This new “anytime, anywhere” demand for mobility moved the regional MTA-wide focus into nationwide competition. In May 1998, AWS began offering “one rate” pricing plans.¹⁶³ Thereafter, virtually every major carrier began offering similar national pricing plans and began building nationwide networks.¹⁶⁴ Since the introduction of the Digital One-Rate plan, there has been a steady shift of consumers away from buying local wireless service and paying often steep long distance and roaming charges. Instead, customers increasingly buy national rate plans that charge a single rate for every minute of use, whether for a call across the street or across the country, whether at home or on the road.

Every wireless carrier now offers and heavily promotes various national rate plans, and customers have flocked to such plans.¹⁶⁵ Nationwide rate plans outsell all other rate plans, a trend that is expected to accelerate.¹⁶⁶ Cingular believes that more than 70% of Verizon’s new customers are on national plans,¹⁶⁷ and it is Cingular’s goal to have a substantial majority of its new customers on national plans by the end of the year.¹⁶⁸

One of the essential characteristics of a national rate plan is that it is offered at a single price for a given package. Carriers price their national plans uniformly across the nation.¹⁶⁹ That is, a Cingular customer buying a 600 minute national plan will pay the same price whether

¹⁶¹ *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, First Report*, 10 F.C.C.R. 8844, 8851 (1995) (“*First Annual CMRS Competition Report*”); Lefar Declaration at 6.

¹⁶² *First Annual CMRS Competition Report*, 10 F.C.C.R. at 8851; *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, Second Report*, 12 F.C.C.R. 11266, 11281 & n.50 (1997); see Gilbert Declaration at 20-21.

¹⁶³ See *Seventh Annual CMRS Competition Report*, 17 F.C.C.R. at 13014. In 2001, the Commission sunset the 55 MHz spectrum but retained the cellular cross-ownership rule in RSAs because cellular licenses had been granted much earlier than PCS, not because RSAs represented the relevant market for mobile services. *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22695-96.

¹⁶⁴ See *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14805-06; *USA – Wireless Overview*, *supra* note 57, at 7-8.

¹⁶⁵ Lefar Declaration at 6; McGaw Declaration at 2; Sievert Declaration at 1-3.

¹⁶⁶ Lefar Declaration at 6; see Sievert Declaration at 3.

¹⁶⁷ Gilbert Declaration at 22.

¹⁶⁸ *Id.*; see also Lefar Declaration at 6.

¹⁶⁹ A few minor variations are discussed in the Gilbert Declaration at 34-35.

she is located in Washington, D.C., San Francisco or a rural community.¹⁷⁰ The same is true for every competitor.¹⁷¹ Where the same competitive forces are at play nationwide, products are offered nationwide at a uniform price and the market is necessarily national.¹⁷²

Although a dwindling number of wireless customers are on rate plans that do not provide national coverage, the trend is clearly towards national rate plans. In Cingular's case, truly "local" plans are no longer offered.¹⁷³ Cingular's "Regional" plans generally offer calling scopes of at least an entire state, and usually several states, encompassing multiple MTAs and BTAs. For example, a customer in Washington, D.C. would pay a single rate for calls made anywhere in D.C., nine states, and part of West Virginia – an area ranging from the Canadian border to Hampton Roads, Virginia.

Even though these regional rate plans do not offer nationwide calling scopes, the way they are priced and sold is consistent with the national character of the market. T-Mobile, Nextel, Sprint, and Metro PCS offer the same "regional" plans nationwide, offering the same number of minutes for the same price regardless of the area in which the plan is sold.¹⁷⁴ Although the regional offerings of other carriers, including Cingular, vary somewhat by region, this variation is not indicative of the existence of a local geographic market.

First, even those carriers that do not charge a uniform nationwide price for regional service do not vary the pricing of their regional plans significantly. For example, Cingular offers a \$39.99 regional plan virtually everywhere it provides service, except in a few areas where, due to the incomplete build-out of its nationwide GSM network, it must offer dual-mode GAIT phones. Of the top 100 MSAs, the \$39.99 plan is offered in all but 4.¹⁷⁵ The number of minutes varies only slightly under this \$39.99 plan, from 600 minutes in 59 of the MSAs, to 550 minutes in 17 MSAs, and 500 minutes in 3 MSAs.¹⁷⁶ In all cases, the pricing is on a regional basis – customers in any MSA or RSA within the region receive the same price irrespective of local competitive conditions.

More importantly, the limited variation in pricing of regional calling plans is not driven by local competitive conditions. If Cingular offered more minutes on its \$39.99 plan in areas where it faced more competitors, that practice could suggest that the relevant geographic markets were local. In fact, however, there is no correlation between the number of minutes offered on regional plans and the number of competitors serving the MSA. As Professor Gilbert concludes:

The evidence supports that conclusion that price competition does not decline significantly in regions with only 1 or 2 major carriers

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See, e.g., Grinnell Corp.*, 384 U.S. at 575 (market for central station security services was nationwide where defendants had a "national schedule of prices, rates and terms."); *see also Bell Atlantic/NYNEX*, 10 F.C.C.R. at 13375 n.28 (citing *Grinnell Corp.*).

¹⁷³ There are some customers on older local plans, but these are not sold to new customers.

¹⁷⁴ Gilbert Declaration at 37 and Tables A-1 and A-2.

¹⁷⁵ Cingular serves three of these MSAs (Tampa, FL, Birmingham, AL, and Lakeland, FL) with a \$49.99 GAIT plan and provides no regional plan in Mobile, AL.

¹⁷⁶ Gilbert Declaration at 37.

rather than 5 to 7 major carriers. My Internet price survey found that major carriers charge the same prices in 50 small RSAs as they do in the top 100 CMAs, with very few exceptions that do not appear to be related to measures of concentration. This is powerful evidence that the merger of AWS and Cingular is in the public interest and not likely to diminish competition.¹⁷⁷

This lack of correlation between local “market” structure and pricing is key. No matter how the market is defined, whether local or national, Professor Gilbert’s study demonstrates that pricing is not driven by local competitive structure. The forces of national competition, driven by vigorous competitors at the national level, plus a significant fringe of regional providers, dictate pricing throughout the country, across all cities and regions and in rural areas as well. As Professor Gilbert concludes:

The pricing of mobile wireless plans is determined by national rather than local competitive factors. This is illustrated by the fact that the prices for most mobile wireless plans do not vary according to where they are purchased. . . . My analysis of national and regional prices for calling plans and handset prices shows little to no variation that is correlated with industry structure at a local level. This supports the conclusion that the pricing of mobile wireless service is national and that the competitive effects from the proposed merger should be analyzed in a national geographic market.¹⁷⁸

The Commission took a similar approach in *EchoStar*. There, the Commission found it appropriate to apply a common analysis to different local areas that exhibited similar competitive conditions.¹⁷⁹ Likewise, there is no reason here to analyze separately different local areas because all are characterized by numerous competitors, pricing that is uniform over broad areas, and vigorous competition across many dimensions. Accordingly, the Commission should evaluate the impact of the merger on the provision of mobile service nationwide.

D. The Merger Will Not Lead to Reduced Competition in Mobile Telephony Services

1. Concentration Levels

After the merger, five strong competitors will remain offering wireless service on a nationwide basis, and these five competitors will face additional competition from strong

¹⁷⁷ Gilbert Declaration at 32. Professor Gilbert also notes that “[w]hile there is variation in the handset subsidy across CMAs, there is no apparent relationship to subscriber market shares or spectrum share at the CMA level.” *Id.* at 40.

¹⁷⁸ Gilbert Declaration at 22-23.

¹⁷⁹ *EchoStar/Hughes*, 17 F.C.C.R. at 20610. Of course, the Commission’s conclusion in that case (local markets) is distinguishable. In the mobile services market, unlike *EchoStar/Hughes*, customers are mobile and can buy wireless services away from their home, and the demand for national coverage drives national pricing.

regional and local players. This is more than sufficient to offer consumers all the benefits of a thoroughly competitive marketplace.

Concentration levels, measured by Herfindahl-Hirschman Index (HHI), provide a starting point for the analysis of competitive effects of mergers. The Commission's precedent indicates that the level of market concentration as measured by the HHI after the transaction is unlikely to give rise to anticompetitive effects.

When it adopted the CMRS spectrum cap, the Commission concluded that an HHI of 1900 would be acceptable in the market for interconnected mobile voice services.¹⁸⁰ The Commission recognized that this would be considered a highly concentrated market under the guidelines promulgated by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), but concluded that "the risk that significant competitive harm will occur is probably low in most cases."¹⁸¹

In December 2001, the Commission announced the repeal of the spectrum cap effective January 1, 2003 and reiterated its conclusion that "moderate to high concentration is not necessarily a threat to competition."¹⁸² The Commission concluded that "competition is now robust enough in CMRS markets that it is no longer appropriate to impose overbroad, *a priori* limits on spectrum aggregation that may prevent transactions that are in the public interest."¹⁸³ For the interim period between December 2001 and January 2003, the Commission observed that the new 55 MHz cap could result in four carriers holding all of the covered spectrum. The Commission also concluded that:

Raising the cap to 55 MHz increases the maximum possible input-based HHI by only 350 points, from 2,500 to 2,850. While not insignificant, this increase appears unlikely to foster unilateral pricing power in the current marketplace. [M]obile telephony operators typically experience high fixed costs and low marginal costs of production. Low marginal costs mean that producers can potentially achieve high profits by reducing their prices, and therefore can render tacit agreements to charge high prices difficult to sustain.¹⁸⁴

Thus, the Commission has determined that concentration levels between 1900 and 2850 are acceptable given the competitive state of the industry.¹⁸⁵ This transaction would thus

¹⁸⁰ *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order*, 11 F.C.C.R. 7824, 7873 (1996) ("Spectrum Cap Order").

¹⁸¹ *Id.* at 7872.

¹⁸² *See 2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22668 (the effective date for spectrum cap elimination was January 1, 2003).

¹⁸³ *Id.* at 22694.

¹⁸⁴ *Id.* at 22703.

¹⁸⁵ *See id.*; *Spectrum Cap Order*, 11 F.C.C.R. at 7873.

produce an HHI well below the range where the Commission has concluded that anticompetitive effects are likely.

Professor Gilbert has calculated market shares and HHIs on a number of different bases. Market shares are typically calculated based upon each competitor’s revenue.¹⁸⁶ Using a conservative approach to HHI calculation (one that treats all regional competitors as if they were a single firm), the transaction would result in a post-merger HHI of 2023, well below the range in which the Commission has concluded that anticompetitive effects are likely.

HHIs Based on National Revenue Share ¹⁸⁷			
Carrier	Revenue Share		Post-Merger
	2002	2003	
Verizon Wireless	20.1%	21.0%	21.0%
Cingular Wireless	15.3%	14.4%	30.0%
AT&T Wireless	16.3%	15.6%	
Sprint PCS	12.6%	11.8%	11.8%
T-Mobile	5.2%	7.5%	7.5%
Nextel	9.1%	10.1%	10.1%
Regional Carriers	21.4%	19.6%	19.6%
Total	100.0%	100.0%	100.0%
Revenue HHI	1,630	1,573	2,023
Revenue HHI Change		(57)	450

Calculating shares based upon revenue can be misleading in a vibrant industry such as this one, however, because revenue shares reflect in large measure the firm’s *past* success in winning customers, rather than its current and future competitive significance. As Professor Gilbert notes, “flow share [also called share of gross adds] is in many respects a better indication of competition in the market for mobile than total revenue share because it measures how consumers are currently choosing between the different providers of wireless services.”¹⁸⁸

Using the flow share measure, Cingular and AWS would have a combined share of only 16.3%. The current HHI would be 2,081 and would increase by a mere 128 points to 2,210.

¹⁸⁶ “[T]he principal judicial device for measuring actual or potential market power remains market share, typically measured in terms of a percentage of total market sales.” *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 994 (11th Cir. 1993); *cf. U.S. v. SBC Communications, Inc.*, 1999 WL 1211458, at *15 (D.D.C. Aug. 2, 1999) (noting that “[t]he United States has used subscriber data here to estimate market shares because those data are more readily available. In some contexts, however, other measures of market share may provide a more precise indication of market concentration or a firm’s competitive significance.”)

¹⁸⁷ See Gilbert Declaration at 25, Table 3.

¹⁸⁸ Gilbert Declaration at 25.

This HHI is again well below the level at which the Commission believes anticompetitive effects are likely.

HHI Based on National Revenue Flow Share¹⁸⁹

Carrier	Flow Share 2003	Post- Merger
Verizon Wireless	28.8%	28.8%
Cingular Wireless	6.8%	16.3%
AT&T Wireless	9.5%	
Sprint PCS	5.5%	5.5%
T-Mobile	26.8%	26.8%
Nextel	18.7%	18.7%
Regional Carriers	3.9%	3.9%
Total	100.0%	100.0%
Flow Revenue HHI	2,081	2,210
Flow Revenue HHI Change		128

Market concentration is, however, “only the starting point for analyzing the competitive impact of a merger.”¹⁹⁰ The Commission must thus consider “whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants.”¹⁹¹ A thorough analysis demonstrates that neither unilateral anticompetitive conduct nor coordinated effects are likely after the merger.

2. Unilateral Effects

The merger of two companies will create unilateral effects only when a combined company can raise prices without triggering the ability of competitors to alter their prices.¹⁹² Unilateral effects are unlikely where there are other firms with similar cost characteristics that sell products that consumers regard as close substitutes for the products sold by the merging firms.¹⁹³

Professor Gilbert notes that although there is some product differentiation in the mobile wireless service industry as a result of differences in call quality, dropped and blocked calls, geographic coverage, and administrative service, the fact that prices for mobile wireless service plans are very similar across the major national wireless service providers suggests that product

¹⁸⁹ *Id.* at 26, Table 4.

¹⁹⁰ United States Department of Justice/Federal Trade Commission, Horizontal Merger Guidelines, Apr. 1992, at ¶ 2.0 available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (“Merger Guidelines”).

¹⁹¹ *E.g., In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., Memorandum Opinion and Order*, 13 F.C.C.R. 18025, 18047 (1998).

¹⁹² *See* Gilbert Declaration at 28.

¹⁹³ *Id.*

differentiation is not a primary determinant of competition in this industry.¹⁹⁴ To the extent that there is differentiation along these quality axes, “the merger would not significantly alter the choices available to mobile wireless consumers.”¹⁹⁵

Anticompetitive unilateral effects are also unlikely given the merging firms’ low combined share. The DOJ/FTC Merger Guidelines recognize that unilateral effects are unlikely in markets (like the market for wireless services) where the post-merger market share of the merged firm is less than 35 percent.¹⁹⁶ Here, however, the merger will result in a combined market share of AWS and Cingular of only 16.3% based on the more accurate national flow share measure. (Looking at national revenue share would still leave the combined share, 30%, below the Merger Guidelines threshold.)

Moreover, the prospect of new entrants and competition from other sources also undermines the likelihood of unilateral effects. In addition to resellers, regional and smaller CMRS carriers, and the four remaining nationwide CMRS providers, the combined company will face competition from satellite providers of interconnected mobile voice services (including at least four 2 GHz MSS providers), Virtual Network Operators (such as Virgin Mobile), and wireless Voice over Internet Protocol (“VoIP”) offerings.¹⁹⁷ These services will exert competitive pressure on the combined company and eliminate the potential for unilateral effects.

¹⁹⁴ *Id.* at 29.

¹⁹⁵ *Id.*

¹⁹⁶ “Where the merging firms have a combined market share of at least thirty-five percent, merged firms may find it profitable to raise price and reduce joint output below the sum of their premerger outputs because the lost markups on the foregone sales may be outweighed by the resulting price increase on the merged base of sales.” *Merger Guidelines, supra* note 190 at § 2.22.

¹⁹⁷ The Commission has recognized that Wi-Fi “has the potential to act as both a substitute and a complement to data services offered over mobile telephone networks.” *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14862. More and more companies are announcing the availability of products that support the transmission of wireless VoIP. For example, Nokia and Cisco announced that Nokia’s 9500 Communicator handsets will be able to use Cisco’s wireless LAN infrastructure, so that mobile phones equipped with Wi-Fi chips and the appropriate software can use a Wi-Fi access point to make phone calls via the Internet, using VoIP capabilities. By making use of unlicensed spectrum for Wi-Fi and an Internet Protocol backbone, “Nokia’s Communicator 9500 will be able to bypass conventional mobile-phone networks ...” David Pringle, *Nokia Takes Leap Into Wi-Fi Arena with New Phone*, WALL ST. J., Feb. 23, 2004 at B4.

Nokia is not the only company producing such handsets. Motorola is developing handsets with built-in Wi-Fi capabilities. Toshiba has bundled its e800/805 Series Pocket PC handhelds with Gphone wireless VoIP software, allowing Toshiba users to use wireless LANs to make VoIP calls. *Toshiba bundles VLI Gphone wireless VoIP software with PDAs*, FEDERAL COMPUTER MARKET REPORT, Nov. 10, 2003; Peter Bell, *SIP goes mobile: when IP goes wireless, SIP will be at its heart*, TELECOMMUNICATIONS AMERICAS, Mar. 1, 2003 (“Several companies have already launched products that bring VoIP and other IP-based features, such as conferencing and call forwarding to W-LAN-enabled laptop and PDA users.”). Additionally,

(continued)

Unilateral effects in the context of mobile voice services also are unlikely because of the ease of potential entry.¹⁹⁸ The FCC has announced that the availability of additional spectrum for interconnected mobile voice and 3G services. In 2002, the Commission allocated 90 MHz of spectrum for the provision of 3G and other mobile services.¹⁹⁹ The Commission has also sought comment on the possible uses of an additional 30 MHz reallocated from MSS, including for 3G services, and Verizon Wireless has recently advocated that a portion of this spectrum in the 1.9 GHz band be licensed through auction.²⁰⁰ Additional spectrum, such as the upper 700 MHz band, likely will be available for mobile voice services in the near future.

Given these facts, any concerns regarding unilateral effects are implausible.

(footnote continued)

several major chipmakers, including Texas Instruments, Broadcom, Royal Phillips Electronics and Atheros Communications, are making Wi-Fi chips small enough to fit into cellphones. Ben Charny, *TI debuts Wi-Fi chip for phones, PDAs*, CNET NEWS.COM, Sept. 16, 2003 at <http://news.com.com/2100-73513-5077695.html>.

In addition to the increase in the technology available to provide wireless VoIP, there has been a marked increase in the number of hot-spots for wireless LAN access. Gartner, Inc., a research and advisory firm, stated that wireless LAN hot-spots have risen from 1,200 in 2001 to over 71,000 in 2003. *Analysts Project More Than 71,000 Public Wireless LAN Hot Spots in 2003*, GARTNER.COM, June 30, 2003, available at http://www3.gartner.com/5_about/press_releases/pr30june2003a.jsp. Additionally, hot-spot locations are continuing to increase. See, e.g., Richard Shim, *McDonald's Wi-Fi Recipe Could Define Industry*, CNET NEWS.COM, March 12, 2004, at http://news.com.com/2100-7351_3-5172630.html (McDonald's, Barnes & Noble and Starbucks installing Wi-Fi hot spots). The increase in hot-spot locations coupled with the increase in the technology capable of completing Wi-Fi/VoIP calls translates to greater demand and use of wireless VoIP. The FCC must consider wireless VoIP accomplished via wireless LANs as a real and viable competitor to traditional mobile telephony. See Brad Smith, *Nokia, IBM Talk Enterprise Strategy*, WIRELESS WEEK, Feb. 23, 2004 (discussing the new Nokia 9500 Handset), available at <http://www.wirelessweek.com/index.asp?layout=newsat2direct&Pubdate=02%2F23%2F04>.

¹⁹⁸ In markets where Cingular holds an attributable interest in more than 80 MHz throughout a BTA, it will reduce its holdings to no more than 80 MHz. Thus, access to additional spectrum will be available in each of these markets.

¹⁹⁹ See *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Second Report and Order*, 17 F.C.C.R. 23193 (2002) ("AWS Allocation Order"), recon. pending.

²⁰⁰ See *Allocation of Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 F.C.C.R. 2223 (2003); Letter to Marlene H. Dortch, Secretary, FCC from John T. Scott, III, Verizon Wireless in WT Docket No. 02-55, (Feb. 26, 2004) at 3.

3. Coordinated Effects

The transaction also will not increase the likelihood of anticompetitive coordination among wireless carriers. In the first place, the characteristics and behavior of this industry belie any potential for collusion. The post-merger industry structure, with five robust national competitors and significant competitive pressure from regional and local players, is not compatible with coordinated behavior.

In addition, as Professor Gilbert discusses, a coordinated effort to raise prices could be successful, in theory, only if each of the following conditions is satisfied:

- The costs of restraining output or elevating price are comparable to the benefits for all of the coordinating firms;
- Non-coordinating firms (sometimes called “mavericks”) face limits on their ability to expand capacity;
- Firms are able to monitor the coordination in price or output by other firms;
- The coordinating firms can punish firms that fail to coordinate their price or output; and
- Firms do not have opportunities for product or other service innovations that would allow them to achieve discrete competitive advantages while escaping punishment by other firms.²⁰¹

Professor Gilbert’s declaration enumerates the reasons why “[c]oordinated effects are unlikely in the market for mobile wireless services.”²⁰²

- “After the merger, there would be at least 5 major national carriers and more than a dozen regional players serving numerous areas across the country.”²⁰³
- “Newer entrants such as T-Mobile and regional competitors such as MetroPCS are eager to take business from the more established firms and have the capacity to do so. It is unlikely that relationships among the wireless suppliers will become less complex and varied after the merger.”²⁰⁴
- “The industry has a history of price and quality competition and rapid innovation. Prices have declined rapidly, particularly after the licensing of new PCS spectrum in 1995. Wireless companies provided new services

²⁰¹ Gilbert Declaration at 27.

²⁰² *Id.*

²⁰³ *Id.* at 28.

²⁰⁴ *Id.*

such as voicemail, caller ID, SMS, and mobile Internet offerings, and developed innovative pricing plans.”²⁰⁵

- “The history of price declines and the large mix of services and price offerings is inconsistent with a stable relationship required to maintain collusive outcomes.”²⁰⁶
- “Wireless providers compete in different dimensions, including equipment subsidies as well as monthly price, number of free minutes and how they break down by off-peak and on-peak, roaming charges, and other services, such as on-net free calling. Wireless providers also differ in the quality of service and the amount of excess capacity. The latter, in particular, creates different incentives for price-cutting by different firms in the industry.”²⁰⁷

There is thus no basis for concern that the transaction will facilitate anticompetitive coordinated effects.

E. The Merger Will Have No Impact on Bundled Services

In past merger decisions, the Commission has examined the potential impacts of mergers in possible markets for bundles of telecommunications services. This transaction will not have any adverse impact on the bundling of wireless services with other telecommunications services.

The Department of Justice has recognized that “efficient, voluntary bundling through discounts or otherwise . . . benefits customers by offering them the improved products, lower prices and lower transaction costs they desire.”²⁰⁸ Such bundles generally involve a package of complementary goods, often at a discount from the prices of the items if purchased separately.²⁰⁹ These combinations can be created simply for consumer convenience (*i.e.*, “one stop shopping”), or can offer prices lower than the sum of the *a la carte* prices.

SBC and BellSouth are sales agents for Cingular and sell Cingular service on either a stand-alone basis or at the same time the customer is purchasing wireline services. Numerous other providers offer various packages of telecommunication services, many of which include

²⁰⁵ *Id.* at 27-28 (footnote omitted).

²⁰⁶ *Id.* at 28.

²⁰⁷ *Id.*

²⁰⁸ See United States Department of Justice, *Antitrust Division Submission for OECD Roundtable on Portfolio Effects in Conglomerate Mergers – Range Effects: The United States Perspective*, Oct. 2001, at 3 available at <http://www.usdoj.gov/atr/public/international/9550.pdf>.

²⁰⁹ *Id.* at 15, n.41. The FCC has addressed bundling in a telecommunications context, and found that “the benefits of bundling come from allowing consumers to purchase an all-inclusive bundle at a single price that consists of interstate, domestic, interexchange transmission services combined with their choice of enhanced service and CPE.” *Policy and Rules Concerning the Interstate, Interexchange Marketplace; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment And Enhanced Services Unbundling Rules, Report and Order*, 16 F.C.C.R. 7418, 7433 (2001).

wireless service as well. Qwest today offers packages with a monthly discount on selected Qwest Choice™ Wireless calling plans when combined with other Qwest services – including wireline service – on one bill.²¹⁰ MCI offered packages that included both wireless and wireline service prior to bankruptcy.²¹¹ And Sprint, which has been promoting its “Complete Sense unlimited” wireless/wireline bundles since August 2003,²¹² recently announced that it would combine its wireless and wireline tracking stocks in part to continue the offering of “a full suite of integrated products and services.”²¹³

AT&T Corp., which divested AWS and now has no wireless affiliate, recently announced that it intends to offer bundles that include wireless service, combining the AT&T brand (which AWS cannot use six months after being acquired by Cingular) with wholesale service provided by another wireless carrier. As its Chairman and CEO David Dorman told Wall Street analysts on February 25, 2004 under the heading “Wireless Re-entry:”

The fact remains that, while AT&T Wireless and their network goes to Cingular, there will be six large wireless providers in the U.S. ... [I]t’s an abundance, and ... we like the idea of being able to go to the marketplace and say, hey, if we buy billions of minutes what can we buy them for?”²¹⁴

Moreover, there are numerous other types of combinations of telecommunications and related services, such as those offered by cable companies that include video and broadband.²¹⁵ One example is the Wi-Fi agreement between Comcast and T-Mobile entered into last month pursuant to which T-Mobile will offer its Wi-Fi services at a discount to Comcast customers.²¹⁶ Time Warner also has indicated it is considering adding wireless to its bundles.²¹⁷

²¹⁰ See Press Release, Qwest Communications, *Qwest Communications Introduces Nationwide Wireless Calling*, Mar. 1, 2004, at www.qwest.com/about/media/pressroom/1%2C1720%2C1457_current%2C00.html (March 1, 2004).

²¹¹ See *Sprint Unveils Bundled Phone Services*, TECHWEB NEWS, Aug. 27, 2003 at <http://www.techweb.com/wire/story/TWB20030827S0009>.

²¹² *Id.*

²¹³ News Release, Sprint Corporation, *Sprint to Recombine Tracking Stocks and Return to Single Common Stock*, Feb. 29, 2004, at http://www3.sprint.com/PR/CDA/PR_CDA_Press_Releases_Detail/0,3681,1111970,00.html.

²¹⁴ AT&T Analyst Meeting, Feb. 25, 2004, available at http://www.att.com/ir/redirect/2004_analyst_webcast.html.

²¹⁵ See, e.g., Press Release, Qwest Communications, *Qwest Communications Introduces Nationwide Wireless Calling New Plans Offer Customers Greater Flexibility and Choice with Wireless Calling Across the United States*, Mar. 1, 2004, at http://www.qwest.com/about/media/pressroom/%2C1720%2C1457_current%2C00.html.

²¹⁶ See Press Release, T-Mobile USA, *T-Mobile and Comcast Announce Strategic Marketing Alliance*, Feb. 02, 2004, at <http://www.t-mobile.com/company/pressroom/pressrelease87.asp>.

²¹⁷ See *Time Warner Cable CEO: Wireless should be in bundle*, SAN JOSE MERCURY NEWS, Mar. 10, 2004, available at www.siliconvalley.com/mld/siliconvalley/8154346.htm?template=contentModules/printstory.jsp.

In light of these facts, this transaction will not have any adverse effect on the offering of competitive telecommunications bundles. The transaction will create no barriers to the offering of existing and new service bundles by all types of providers.

F. The Merger Will Not Harm Intermodal Competition

The FCC has consistently viewed wireless and wireline services as different product markets, although it has recently recognized a greater degree of intermodal competition.²¹⁸ Indeed, the intense competition and rapid growth in wireless voice services has led to a degree of substitution of wireless minutes for wireline minutes. This transaction will not retard the trend towards convergence between wireless and wireline communications.

Cingular's parents are major wireline carriers. Yet, Cingular has competed vigorously for wireless business (including being the first company to market features such as rollover minutes) throughout its service territory, which overlaps almost completely with the ILEC territories of its parents. The merger with AWS will add only insubstantially to Cingular's presence within SBC and BellSouth's wireline territories. Thus, there is no reason to believe that the merger will reduce the degree of intermodal competition faced by SBC and BellSouth. Wireline customers seeking to switch to an all wireless service still will have Cingular and four other carriers to choose from at a national level, in addition to numerous smaller carriers. These carriers will compete vigorously with Cingular for each such consumer. Indeed, as Professor Gilbert observes, the merger is unlikely to change this competitive environment:

Because mobile wireless competition is national in scope, the merged company is unlikely to raise wireless prices only in its' parents' wireline service territories. If it attempted to do so, given the competitive wireless market, it could not stop or slow wireline to wireless substitution. It would simply lose share, as other wireless carriers would be eager to take the business. Given that the combined company would lack the ability to control such a dynamic, it would have no incentive not to aggressively compete to win such customers.²¹⁹

IV. REQUEST FOR WAIVER OF THE CELLULAR RSA CROSS INTEREST RULE

As a result of the proposed merger, Cingular will be acquiring cellular A Band spectrum from AWS in eleven RSAs where Cingular presently holds spectrum on the cellular B Band, as identified below and discussed in Section IV.C.1 (the "overlap area(s)"). Section 22.942 of the Commission's rules, also known as the cellular cross-interest rule, generally limits the ability of a party to have interests in cellular licenses on different channel blocks in the same RSA. The Commission, however, has provided that waivers will be considered where doing so would not

²¹⁸ See, e.g., *Telephone Number Portability*, CC Docket No. 95-116, *Order*, FCC 04-12 (rel. Jan. 16, 2004).

²¹⁹ See Gilbert Declaration at 32.

create a significant likelihood of substantial competitive harm in the relevant area and would otherwise serve the public interest. As shown below, these grounds are satisfied here.²²⁰

The AWS calls signs for which a waiver of Section 22.942 is requested are as follows:²²¹

RSA	RSA Name	AT&T Call Sign	AT&T Licensee
CMA357	Connecticut 1 - Litchfield	KNKN833	Litchfield Acquisition Corporation
CMA360	Florida 1 – Collier	KNKN555	AT&T Wireless Services of Florida, Inc.
CMA361	Florida 2 – Glades	KNKQ386 KNKQ421	AT&T Wireless Services of Florida, Inc.
CMA363	Florida 4 – Citrus	KNKN738	AT&T Wireless Services of Florida, Inc.
CMA364	Florida 5 – Putnam	KNKN550 KNKQ422	AT&T Wireless PCS, LLC AT&T Wireless Services of Florida, Inc.
CMA598	Oklahoma 3 – Grant	KNKN627	OK-3 Cellular, Inc.
CMA657	Texas 6 – Jack	KNKN472	McCaw Communications of Gainesville, TX, LLC
CMA662	Texas 11 – Cherokee	KNKN428	Northeast Texas Cellular Telephone Company
CMA669	Texas 18 – Edwards	KNKN456	Texas Cellular Telephone Company, L.P.
CMA670	Texas 19 – Atascosa	KNKN525	Texas Cellular Telephone Company, L.P.
CMA671	Texas 20 – Wilson	KNKN452	Texas Cellular Telephone Company, L.P.

A. Background

Section 22.942 states, in pertinent part:

A licensee, an individual or entity that owns a controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for one channel block in a CGSA may not have a direct or indirect ownership interest of more than 5 percent in the licensee, an individual or entity that owns a

²²⁰ Cingular is seeking all relief necessary from DOJ to hold the spectrum and licenses that are the subject of this transaction.

²²¹ On March 12, 2004, AWACS, Inc. (“AWACS”), a wholly owned, indirect subsidiary of SBC Communications Inc., entered into a contract with Celco Partnership d/b/a Verizon Wireless and another party. Under that contract, subject to various conditions (including the receipt of any required regulatory consents), AWACS is to acquire Verizon Wireless’s 50 percent, non-managing interest in Bristol Bay Cellular Partnership (“Bristol Bay”). Bristol Bay holds KNKQ331, a Phase 2 B-Band cellular license for Alaska RSA 2. AWS holds a 49 percent, noncontrolling interest in Cordova Wireless, which holds WPOL372, a Phase 2 A-Band cellular license for Alaska RSA 2. Cingular plans to acquire that interest along with the rest of AWS. Despite involving both cellular bands in the same RSA, those acquisitions would not violate the cellular cross-ownership rule when both deals are consummated because the cellular geographic service areas (“CGSAs”) for the two licenses do not overlap. *See* 47 C.F.R. § 22.942(a).

controlling or otherwise attributable interest in a licensee, or an individual or entity that actually controls a licensee for the other channel block in an overlapping CGSA, if the overlap is located in whole or in part in a Rural Service Area (RSA).²²²

Absent a waiver, the rule provides for divestiture of spectrum that causes a conflict with the rule's provisions prior to the consummation of a transaction which would otherwise create the conflict.²²³

The cellular cross-interest rule was adopted in 1991 when cellular licensees were the predominant providers of mobile voice services and originally applied to both MSAs and RSAs.²²⁴ In adopting the cross-interest rule, the Commission stated that "in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block in the same market."²²⁵ Therefore, "[i]n order to guarantee the competitive nature of the cellular industry and to foster the development of competing systems," the Commission restricted a party's ability to hold ownership interests in both cellular licensees in the same area.²²⁶

In 1999, the Commission reexamined the need for the rule as a part of its Biennial Review process. It found that the market shares for cellular carriers had eroded with the emergence of competition from PCS and digital SMR, but that the two cellular carriers still had the majority of subscribers and were the only providers in many markets.²²⁷ It did, however, find that the increased competition warranted relaxation of attribution benchmarks used in the rule.²²⁸

By the next Biennial Review in 2001, the Commission found that competitive conditions had changed and cellular carriers no longer possessed market power in MSAs. It specifically found that 86% of MSA counties had 4 or more CMRS competitors.²²⁹ As a result, it concluded that in MSAs "the cellular duopoly conditions that prompted the rule's adoption no longer

²²² 47 C.F.R. § 22.942(a).

²²³ See 47 C.F.R. § 22.942(c). The rule states that parties needing to divest "will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting interest . . . or other request for Commission approval by which, if granted, such parties no longer would have an attributable interest in the conflicting interest." 47 C.F.R. § 22.942(c)(1).

²²⁴ *Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, 6 F.C.C.R. 6185, 6628-29 (1991) ("Cellular First Report and Order"). The rule initially was codified at 47 C.F.R. § 22.902(b)(5) but subsequently was moved to 47 C.F.R. § 22.942. *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services*, 9 F.C.C.R. 6513, 6574 (1994).

²²⁵ *Cellular First Report and Order*, 6 F.C.C.R. at 6628.

²²⁶ *Id.*

²²⁷ *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, Report and Order*, 15 F.C.C.R. 9219, 9251-52 (1999).

²²⁸ *Id.* at 9252-53.

²²⁹ *2000 Biennial Regulatory Review*, 16 F.C.C.R. 22668, 22707-08 (2001).

exist.”²³⁰ Given “the presence of numerous competitive choices for consumers in such markets,” the Commission “repeal[ed] the rule in MSAs in order to provide relief from capacity constraints.”²³¹ The Commission also found that competition warranted allowing the separate cap on the aggregation of CMRS spectrum to sunset.²³² The cellular cross-interest rule was retained in RSAs, however, because at that time only 24% of RSA counties had 4 or more competitors and there was little competition from PCS providers in rural areas.²³³

Most recently, in October 2003, the Commission sought comment on whether the rule was a barrier to investment and should be eliminated in favor of case-by-case review, or whether market conditions warranted its continued retention.²³⁴ The Commission tentatively concluded that the rule should be eliminated in RSAs with 4 or more CMRS competitors.²³⁵ The majority of commenters supported elimination of the rule in its entirety.²³⁶

B. Waiver Standard

In general, Commission rules may be waived upon a showing that there is “good cause” to do so.²³⁷ Waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than would strict adherence to the general rule.²³⁸ Circumstances that would justify a waiver include “considerations of hardship, equity, or more effective implementation of overall policy.”²³⁹ Waiver is also appropriate if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.²⁴⁰ The courts require that the Commission give a “hard look”

²³⁰ See *id.* at 22671, 22707-08.

²³¹ *Id.* at 22707.

²³² *Id.* at 22670-71.

²³³ See *id.* at 22684, 22708-09.

²³⁴ *Facilitating the Provision of Spectrum-Based Services to Rural Areas, Notice of Proposed Rulemaking*, 18 F.C.C.R. 20802, 20884-85, 20849 (2003) (“*Rural NPRM*”).

²³⁵ See *id.* at 20847.

²³⁶ See Comments of AT&T Wireless, Cingular, CTIA, Dobson and OPASTCO/RTG in WT Docket No. 02-381 (filed Dec. 29, 2003); Reply Comments of Western Wireless in WT Docket No. 02-381, Reply Comments of Arctic Slope Tel. Assoc. Coop. in WT Docket No. 02-381 (filed Jan. 26, 2004); compare Comments of RCA in WT Docket No. 02-381 (filed Dec. 29, 2003) (apply rule only in RSAs with three or fewer competitors). *But see* Comments of U.S. Cellular in WT Docket No. 02-381 (filed Dec. 29, 2003) (opposing the rule’s elimination by favoring increased attribution thresholds).

²³⁷ See 47 C.F.R. § 1.3; see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (“*WAIT Radio*”); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

²³⁸ *Northeast Cellular*, 897 F.2d at 1166.

²³⁹ *WAIT Radio*, 418 F.2d at 1159.

²⁴⁰ See *id.* at 1157.

at waiver requests to ensure that applying a rule in a particular case would serve the public interest.²⁴¹

In its 2001 decision to retain the cellular cross-interest rule in RSAs, the Commission provided for a specific waiver standard. That standard is as follows: “[t]o the extent that it can be shown that an RSA exhibits market conditions under which a specific cellular cross-interest would not create a *significant* likelihood of *substantial* competitive harm, such a situation can be addressed through waiver of the cross-interest prohibition.”²⁴²

In January 2003, the Wireless Telecommunications Bureau (“Bureau”) applied this specific waiver standard for the first time.²⁴³ In determining whether cellular cross-interests may be permissible “without significant likelihood of substantial competitive harm,” and therefore whether a waiver is in the public interest, the Bureau considered “the competitive effects of the transaction.”²⁴⁴ It first considered the relevant product market, and found it to be interconnected mobile voice services.²⁴⁵ It next considered the relevant geographic market. Noting that no party argued for a geographic market narrower than the BTA in which the RSA overlap occurred, the Bureau agreed that the market was “broader” than just the RSA overlap area.²⁴⁶ It chose an area of similar size, though not entirely coterminous with, the larger BTA as representative of the area in which customers face similar choices in terms of competitors, pricing and service options.²⁴⁷

Within the relevant market, the Bureau examined a number of factors to assess whether there was a significant likelihood of substantial competitive harm, including: (i) the number of competitors remaining in the relevant market; (ii) the ability of the acquiring party to increase prices or reduce service quality in the overlap area, and (iii) the size of the overlap in comparison to the relevant market.²⁴⁸ In making these assessments, the Commission noted that the presence of multiple other competitors in the relevant market, the small size of the overlap, and relative pricing parity among the competitors, acted to constrain the entity acquiring the overlapping cellular interests from having the ability or incentive to charge discriminatory prices.²⁴⁹

²⁴¹ See *id.* For cellular and other wireless providers, Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, codifies these general principles.

²⁴² 2000 Biennial Regulatory Review, 16 F.C.C.R. at 22709 (emphasis added).

²⁴³ *CenturyTel Wireless, Inc. and CenturyTel, Inc.; Request for a Waiver of Cellular Cross-Interest Rule, Section 22.942 of the Commission’s Rules, Memorandum Opinion and Order*, 18 F.C.C.R. 1260 (WTB 2003) (“*CenturyTel*”).

²⁴⁴ *Id.* at 1263.

²⁴⁵ *Id.*

²⁴⁶ See *id.* at 1263-64.

²⁴⁷ Specifically, the Bureau selected an undefined area it termed the “Broader Baton Rouge Area.” That area encompassed 5 of the 9 parishes of the Baton Rouge BTA plus 2 additional parishes outside, but adjacent to, the BTA. See *id.*

²⁴⁸ See *id.* at 1264-66.

²⁴⁹ See *id.* at 1265-66. In *CenturyTel*, the number of competitors did not change. ALLTEL held an indirect 100% interest in the A Band licensee and a non-controlling partnership interest in the B Band carrier. The controlling partner in the B Band licensee was Cingular. Thus, the

(continued)

As demonstrated below, application of these factors to the cellular cross-interests at issue here would not create a “significant likelihood of substantial competitive harm.” Therefore, under the circumstances presented here, waiver of Section 22.942 is in the public interest.²⁵⁰

C. The Standard for Waiving the Cellular Cross-Interest Rule Is Satisfied in the Circumstances Presented Here

1. The Cellular Cross-Interests Do Not Create a Significant Likelihood of Substantial Competitive Harm

Consistent with the *CenturyTel* decision, the relevant product market for evaluating this waiver request is mobile telephony.²⁵¹ The relevant geographic market is nationwide or, for purposes of evaluating this waiver, the community of interest – defined as the BTA(s) in which the applicable overlap area is located. Irrespective of which geographic market is used, the result is the same. The market is fully competitive with at least 4 other authorized competitors and no ability to unilaterally set pricing.²⁵² As discussed in more detail below, even in a smaller area limited to the discrete RSA overlap counties only – which the Bureau in *CenturyTel* properly recognized as being too small to be the relevant market – there are at least 4 authorized competitors. Under these circumstances, there is no likelihood that the cellular cross-interests will create a significant likelihood of competitive harm.

a. Competition in the Nationwide Market Is Robust and Justifies a Waiver

As previously discussed, the relevant geographic market is nationwide – the market in which national, regional and local carriers compete today.²⁵³ This is due largely to the fact that nationwide price plans establish pricing trends not only at the national level but also at the

(footnote continued)

two blocks remained controlled by different competitors. The greater concern in *CenturyTel* was whether the two parties could collude or ALLTEL would be inclined to compete less aggressively because it earns a share of Cingular’s profits as a limited partner in the partnership. The Bureau found this was not a concern given the small size of the overlap area, the presence of 4 other competitors, and the existence of pricing parity among the competitors. *See id.* at 1266.

²⁵⁰ *See id.* at 1266.

²⁵¹ *See id.* at 1263.

²⁵² The Commission should properly consider both licensed new entrants and licensed operational carriers in assessing competition in the relevant market. *See Establishment of Rules and Policies for LMDS, Third Report and Order and Memorandum Opinion and Order*, 15 F.C.C.R. 11857, 11860-61 (2000) (determination of whether there is a “significant likelihood of substantial competitive harm” entails examining a number of factors, including “entry barriers[] and potential competition”), *cited in 2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22709 n.257. The barrier to entry has been lowered now that the FCC has permitted spectrum leasing and is supportive of infrastructure sharing. Both existing competition and the threat of ease of entry of potential competition impose discipline on the marketplace.

²⁵³ *See supra* Section III.C.

regional and local levels.²⁵⁴ Regional and local carriers are subject to the same competitive pressures of nationwide carriers due to national advertising and the Internet, which have served to educate consumers about pricing and service offerings on a national scale.²⁵⁵ Because wireless providers do not price plans differently across regions, Professor Gilbert has concluded that “the geographic scope of competition in the provision of mobile wireless calling plans should be analyzed as national.”²⁵⁶

Using a nationwide relevant market, there is no question that the retention of overlapping cellular cross-interests in select counties nationwide simply cannot cause significant competitive harm in the national market. The overlaps occur in parts of eleven cellular RSAs, each of which is comprised of between 1-12 counties spread out over five states.²⁵⁷ The total number of counties at issue with cellular RSA overlaps is 53, which represents barely 1.7% of the 3141 counties or county equivalents nationwide. These counties include as little as 414 POPs (Kenedy County, TX) to as much as 210,528 POPs (Lake County, FL) for a total of 1,795,833 POPs across all 53 counties, which equates to barely more than 0.6% of the 281,421,906 POPs nationwide.²⁵⁸

In a national market comprised of a minimum of 5 nationwide mobile telephone operators, as well as MSS providers, resellers, and a number of large regional players,²⁵⁹ Cingular’s acquisition of overlapping cellular interests in these discrete areas does not give it either the ability or the incentive to charge discriminatory prices nationwide. Cingular does not even offer service plans limited to each of these discrete overlap areas; its smallest rate plan covers at least an entire state, and in most cases multiple states.²⁶⁰ Because pricing trends are established at the national level, Cingular cannot leverage these limited overages of the RSA cross-interest rule to affect pricing nationwide.²⁶¹

²⁵⁴ See *id.*

²⁵⁵ See *id.*; *Eighth Annual CMRS Competition Report*, 18 F.C.C.R. at 14792 n.45 (citing Dobson Comments).

²⁵⁶ Gilbert Declaration at 19.

²⁵⁷ The specific RSAs and counties within those RSAs where the overlaps occur is set forth in Section IV.C.1 below.

²⁵⁸ This estimate is based upon actual population in the counties with overlap areas. Comparing only POPs in the overlap counties that are actually served to overall POPs nationwide may result in an even lower percentage. This also applies to all BTA/overlap area size comparisons below, which are based upon population. All population figures are based on the 2000 Census.

²⁵⁹ See *supra* Section IV.C.

²⁶⁰ Lefar Declaration at 7.

²⁶¹ See Gilbert Declaration at 23-33.

b. Even at the BTA Level, Significant Competition Precludes the Possibility of Substantial Competitive Harm and Justifies a Waiver

Even assuming *arguendo* that the relevant market for evaluating the waiver is not nationwide, there still is no risk of competitive harm in an area such as that utilized in the *CenturyTel* decision. As noted above, in *CenturyTel* the Bureau chose an area in which customers faced “similar” market conditions with respect to price and service options. That area approximated, though was not entirely coterminous with, the BTA. The Commission in the past has explained that BTAs comprise areas “within which consumers have a community of interest.”²⁶² BTAs are therefore an appropriate, and ascertainable, area within which to assess whether the cellular cross-interests would create a significant likelihood of substantial competitive harm.²⁶³

As depicted in Attachment 9 and discussed in more detail below, the BTAs within which the RSA cellular overlaps occur are intensely competitive, with at least 4 other licensed competitors and more than 6 licensed competitors in many BTAs. Indeed, even in a smaller area limited to the RSA overlap counties only (which, as noted below, the Commission has previously indicated do not comport to natural service areas and are too small to be a relevant market for purposes of evaluating the waiver request), there are at least 4 licensed competitors in 51 of the 53 counties, and at least 3 licensed competitors in the remaining 2 counties. These 2 counties are part of a multi-county overlap area in which there are at least 4 competitors in some part of the overlap.²⁶⁴ This level of competition meets or exceeds the level of competition that justified elimination of the cellular cross-interest rule in MSAs – the presence of 4 or more competitors in most (but not all) MSA counties, which demonstrated that “cellular carriers no longer possessed market power” in these service areas.²⁶⁵ In fact, the Commission recently proposed to eliminate the rule in RSAs having 4 or more competitors, tentatively concluding that this level of competition would protect against potential competitive harms.²⁶⁶

²⁶² See *Establishment of Rules and Policies for Local Multipoint Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration*, 8 F.C.C.R. 557, 562 (1993).

²⁶³ The specific “Broader Baton Rouge Area” chosen in *CenturyTel* does not comport with FCC mobile voice service license areas (*e.g.*, cellular MSAs or RSAs or PCS MTAs or BTAs), making it of little utility outside of the specific area in question. BTAs best comport with the Bureau decision’s to examine competition in a community with “similar market conditions.” See *CenturyTel*, 18 F.C.C.R. at 1265.

²⁶⁴ Specifically, in the Texas 11 – Cherokee RSA, the overlap area comprises of 5 out of 8 counties; there are at least 4 competitors in Angelina, Nacogdoches and San Augustine Counties, and 3 competitors in Sabine and Shelby Counties. Compare *CenturyTel* Petition for Waiver in WT Docket No. 02-325 (Oct. 4, 2002) at 2 (noting that multiple carriers serve “portions” of the county and “all or part of” the overlap area).

²⁶⁵ See *2000 Biennial Regulatory Review*, 16 F.C.C.R. at 22707-08 (eliminating the rule in MSAs where 86% of counties had four or more facilities based providers (meaning 14% had less than four)).

²⁶⁶ *Rural NPRM*, 18 F.C.C.R. at 20847.

The level of competition in the relevant market (and indeed, even in the smaller overlap areas) demonstrates that the cellular duopoly conditions that prompted the rule's adoption no longer exist in these areas.²⁶⁷ Competition from PCS and wide-area SMR is now widespread, leading the FCC to recognize that “there is effective competition in the CMRS marketplace as a whole, including rural areas”²⁶⁸ and “CMRS providers are competing effectively in rural areas.”²⁶⁹ This competition ensures that neither cellular nor other CMRS carriers have a lock on market share, as consumers can readily take their business elsewhere if a particular carrier were to raise prices above market levels or diminish quality.²⁷⁰ Indeed, high churn rates demonstrate that customers will readily switch providers if they are dissatisfied, a trend that will only increase with the advent of WLNP.²⁷¹

These conditions demonstrate that the RSA rule is no longer warranted²⁷² and, at a minimum, strict adherence to the rule here cannot be justified. As is the case in the nationwide market, Cingular cannot leverage its overlapping cellular interests to sustain discriminatory pricing in the BTAs or even the overlap areas. As Professor Gilbert notes:

[I]n each of the 11 RSAs where Cingular and AWS have overlapping licenses, the monthly plan prices and allotted anytime minutes for the wireless carriers show no variation between RSAs. All are priced the same as at the most common package for the top 100 CMAs for each carrier, with the exceptions of US Cellular, which offers the 500 minute regional plans for the *lower* \$35 price and Verizon Wireless offering 600 minutes for \$39.99 [*i.e.*, the same price as Verizon charges in every top 100 CMA except for San Juan, Puerto Rico]. The variation of the 11 RSAs from the top 100 CMAs is no greater than the variation found within the top 100 CMAs, and all the monthly plan prices and allotted anytime minute combinations found [in the 11 RSAs] can be found in the top 100 CMAs.²⁷³

Thus, like in *CenturyTel*, “there is little price differentiation between providers” and “mobile telephony rates are set over a much broader area.”²⁷⁴ Accordingly, because the market is competitive with multiple providers offering services at similar prices, the transaction does not

²⁶⁷ See 2000 Biennial Regulatory Review, 16 F.C.C.R. at 22671, 22707-08.

²⁶⁸ Rural NRPM, 18 F.C.C.R. at 20807.

²⁶⁹ Eighth Annual CMRS Competition Report, 18 F.C.C.R. at 14838; *accord id.* at 14791.

²⁷⁰ *Id.* at 14889.

²⁷¹ McGaw Declaration at 3; Sievert Declaration at 2.

²⁷² See Comments of AT&T Wireless, Cingular, CTIA, and Dobson in WT Docket No. 02-381 (filed Dec. 29, 2003); Reply Comments of Western Wireless, WT Docket No. 02-381 (filed Jan. 26, 2004); Reply Comments of Arctic Slope Tel. Assoc. Coop., WT Docket No. 02-381 (filed Jan. 26, 2004).

²⁷³ Gilbert Declaration at 38 (emphasis added).

²⁷⁴ *CenturyTel*, 18 F.C.C.R. at 1265.

involve a significant likelihood of substantial competitive harm. The rule therefore should be waived.

Specific analyses of competitive conditions in the BTA(s) in which each of the overlaps occurs follow, as listed by overlap area:

- **CMA357 (Connecticut 1 – Litchfield)**

Southwestern Bell Mobile Systems, LLC, a Cingular subsidiary, is the licensee of RSA station KNKN589 in the Connecticut 1 – Litchfield RSA. Litchfield Acquisition Corporation, an AWS affiliate, is the licensee of RSA station KNKN833 in the Connecticut 1 – Litchfield RSA. The CGSAs of these two licenses overlap in Litchfield County, CT.²⁷⁵

Litchfield County falls within the New Haven-Waterbury-Meriden, CT BTA – the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with 5 authorized competitors other than Cingular. Using POPs to measure the size of the overlap area relative to the size of the overall BTA, Litchfield County contains 182,193 POPs, which equates to barely more than 18% of the 1,006,201 POPs BTA-wide. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁶ Even in Litchfield County itself – an area too small to evaluate the merits of the waiver – there are 5 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA360 (Florida 1 – Collier)**

Florida Cellular Service, LLC, a Cingular subsidiary, is the licensee of RSA station KNKQ360 in the Florida 1 – Collier RSA. AT&T Wireless Services of Florida, Inc., an AWS affiliate, is the licensee of RSA station KNKN555 in the Florida 1 – Collier RSA. The CGSAs of these two licenses overlap in the northeast corner of Hendry County, FL.

Hendry County falls within the Fort Meyers, FL BTA – the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 authorized competitors other than Cingular. Using POPs to measure the size of the overlap area relative to the size of the overall BTA, Hendry County contains 36,210 POPs, which equates to less than 6% of the 629,301 POPs BTA-wide. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁷ Even in Hendry County itself – an area too small to evaluate the merits of the waiver – there are 6 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

²⁷⁵ The specific CMRS spectrum holdings the combined company will be attributed with in any given county are set forth in Attachment 8.

²⁷⁶ See Gilbert Declaration at 37-38 & Table A-3.

²⁷⁷ See *id.*

- **CMA361 (Florida 2 – Glades)**

Florida Cellular Service, LLC and Florida RSA No. 2B (Indian River) Limited Partnership, both Cingular subsidiaries, are the licensees of RSA stations KNKQ361 and KNKN990, respectively, in the Florida 2 – Glades RSA. AT&T Wireless Services of Florida, Inc., an AWS affiliate, is the licensee of RSA stations KNKQ386 and KNKQ421 in the Florida 2 – Glades RSA. The CGSAs of these licenses overlap in Glades, Indian River and Okeechobee Counties, FL.

Glades County falls within the Fort Meyers, FL BTA; Indian River County falls within the Fort Pierce-Vero Beach-Stuart, FL BTA; and Okeechobee County falls within the West Palm Beach-Boca Raton, FL BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs, Glades, Indian River and Okeechobee Counties contain 159,433 POPs, which equates to slightly more than 7% of the combined 2,228,768 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁸ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 5-6 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA363 (Florida 4 – Citrus)**

Orlando SMSA Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN994 in the Florida 4 – Citrus RSA. AT&T Wireless Services of Florida, Inc., an AWS affiliate, is the licensee of RSA station KNKN738 in the Florida 4 – Citrus RSA. The CGSAs of these two licenses overlap in Lake County, FL.

Lake County falls within the Orlando, FL BTA – the smallest relevant area to evaluate the merits of the waiver. As Attachment 9 reflects, this BTA is fully competitive, with more than 6 authorized competitors other than Cingular. Using POPs to measure the size of the overlap area relative to the size of the overall BTA, Lake County contains 210,528 POPs, which equates to barely 12% of the 1,697,906 POPs BTA-wide. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁷⁹ Even in Lake County itself – an area too small to evaluate the merits of the waiver – there are 5 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA364 (Florida 5 – Putnam)**

Jacksonville MSA Limited Partnership and Orlando SMSA Limited Partnership, both Cingular subsidiaries, are the licensees of RSA stations KNKQ335 and KNKQ274, respectively, in the Florida 5 – Putnam RSA. AT&T Wireless PCS, LLC and AT&T Wireless Services of

²⁷⁸ See *id.*

²⁷⁹ See *id.*

Florida, Inc., both AWS affiliates, are the licensees of RSA stations KNKN550 and KNKQ422 in the Florida 5 – Putnam RSA. The CGSAs of these licenses overlap in Flagler and Putnam Counties, FL.

Flagler County falls within the Daytona Beach, FL BTA and Putnam County falls within the Jacksonville, FL BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the relevant BTAs, Flagler and Putnam Counties contain 120,255 POPs, which equates to less than 7% of the combined 1,852,000 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁰ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are 6 or more other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA598 (Oklahoma 3 – Grant)**

Oklahoma RSA 3 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN821 in the Oklahoma 3 - Grant RSA. OK-3 Cellular, Inc., an AWS affiliate, is the licensee of RSA station KNKN627 in the Oklahoma 3 - Grant RSA. The CGSAs of these two licenses overlap in Kay, Lincoln, Logan, Noble, Pawnee and Payne Counties, OK.

Kay County falls within the Ponca City, OK BTA; Lincoln and Logan Counties fall within the Oklahoma City, OK BTA; Noble and Payne Counties fall within the Stillwater, OK BTA; and Pawnee County falls within the Tulsa, OK BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 4 and in many cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Kay, Lincoln, Logan, Noble, Pawnee and Payne Counties contain 210,297 POPs, which equates to slightly more than 8% of the combined 2,512,436 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸¹ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-5 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA657 (Texas 6 – Jack)**

Texas RSA 6 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN369 in the Texas 6 – Jack RSA. McCaw Communications of Gainesville, TX, LLC, an AWS affiliate, is the licensee of RSA station KNKN472 in the Texas 6 – Jack RSA. The CGSAs of these licenses overlap in Cooke, Jack, Montague and Palo Pinto Counties, TX.

²⁸⁰ *See id.*

²⁸¹ *See id.*

Cooke and Palo Pinto Counties fall within the Dallas-Fort Worth, TX BTA, and Jack and Montague Counties fall within the Wichita Falls, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Cooke, Jack, Montague and Palo Pinto Counties contain 91,269 POPs, which equates to less than 2% of the combined 5,794,290 POPs across both of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸² Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4 other licensed competitors. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA662 (Texas 11 – Cherokee)**

Cingular Wireless of Texas RSA #11 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN538 in the Texas 11 – Cherokee RSA. Northeast Texas Cellular Telephone Company, an AWS affiliate, is the licensee of RSA station KNKN428 in the Texas 11 – Cherokee RSA. The CGSAs of these licenses overlap in Angelina, Nacogdoches, San Augustine, Sabine and Shelby Counties, TX.

Sabine County, TX falls within the Beaumont-Port Arthur, TX BTA; Angelina, Nacogdoches and San Augustine Counties fall within the Lufkin-Nacogdoches, TX BTA; and Shelby County, TX falls within the Shreveport, LA BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 5 and in some cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Angelina, Nacogdoches, San Augustine, Sabine and Shelby Counties contain 183,972 POPs, which equates to less than 15% of the combined 1,234,854 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸³ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are 5 other licensed competitors in Nacogdoches County, 4 in Angelina and San Augustine Counties, and 3 in Sabine and Shelby Counties. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA669 (Texas 18 - Edwards)**

Texas RSA 18 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN696 in the Texas 18 – Edwards RSA. Texas Cellular Telephone Company, L.P., an AWS affiliate, is the licensee of RSA station KNKN456 in the Texas 18 – Edwards RSA. The CGSAs of these licenses overlap in Bandera, Dimmit, Edwards, Frio, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Val Verde and Zavala Counties, TX.

²⁸² *See id.*

²⁸³ *See id.*

Dimmit, Kinney, Maverick, Val Verde and Zavala Counties fall within the Eagle Pass-Del Rio, TX BTA; La Salle County falls within the Laredo, TX BTA; Edwards County falls within the San Angelo, TX BTA; and Bandera, Frio, Medina, Uvalde and Real Counties fall within the San Antonio, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 4 and in many cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Bandera, Dimmit, Edwards, Frio, Kinney, La Salle, Maverick, Medina, Real, Uvalde, Val Verde and Zavala Counties contain 227,582 POPs, which equates to less than 10% of the combined 2,352,015 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁴ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-5 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

- **CMA670 (Texas 19 – Atascosa)**

Texas RSA 19 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN576 in the Texas 19 – Atascosa RSA. Texas Cellular Telephone Company, L.P., an AWS affiliate, is the licensee of RSA station KNKN525 in the Texas 19 – Atascosa RSA. The CGSAs of these licenses overlap in Atascosa, Brooks, Duval, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy and Zapata Counties, TX.

Willacy County falls within the Brownsville-Harlingen, TX BTA; Brooks, Duval, Jim Wells, Kenedy, Kleberg and Live Oaks Counties fall within the Corpus Christi, TX BTA; Jim Hogg and Zapata Counties fall within the Laredo, TX BTA; Starr County falls within the McAllen, TX BTA; and Atascosa and McMullen Counties fall within the San Antonio, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 5 and in some cases more than 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Atascosa, Brooks, Duval, Jim Hogg, Jim Wells, Kenedy, Kleberg, Live Oak, McMullen, Starr, Willacy and Zapata Counties contain 235,315 POPs, which equates to less than 7% of the combined 3,599,296 POPs across each of the BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁵ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-5 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

²⁸⁴ *See id.*

²⁸⁵ *See id.*

- **CMA671 (Texas 20 – Wilson)**

Texas RSA 20B1 Limited Partnership, a Cingular subsidiary, is the licensee of RSA station KNKN945 in the Texas 20 – Wilson RSA. Texas Cellular Telephone Company, L.P., an AWS affiliate, is the licensee of RSA station KNKN452 in the Texas 20 – Wilson RSA. The CGSAs of these licenses overlap in Aransas, Bee, Karnes, Refugio, and Wilson Counties, TX.

Aransas, Bee and Refugio Counties fall within the Corpus Christi, TX BTA, and Karnes and Wilson Counties fall within the San Antonio, TX BTA. These BTAs comprise the smallest relevant area for evaluating the waiver request. As Attachment 9 reflects, this area is fully competitive, with at least 6 competitors other than Cingular authorized to provide service. Using POPs to measure the size of the overlap area relative to the size of the BTAs used for the waiver analysis, Aransas, Bee, Karnes, Refugio, and Wilson Counties contain 110,538 POPs, which equates to less than 5% of the combined 2,404,481 POPs across both of the relevant BTAs. Moreover, there is little price differentiation in the RSA containing the overlap (an area even smaller than the BTA) and rates are set over a much broader area.²⁸⁶ Even in the RSA overlap counties only – an area too small to evaluate the merits of the waiver – there are between 4-6 other licensed competitors depending on the county. As a result, the merged company will have little incentive or ability to charge discriminatory prices in the overlap area.

2. Waiver Will Serve the Public Interest

There are several public interest reasons why it is important for the merged company to be able to continue to operate on both cellular blocks in the eleven RSA overlap areas, and therefore why waiver would better serve the public interest than strict adherence to the rule. Most importantly, the merged company can achieve significant trunking efficiency gains in rural areas where more spectrum must be dedicated to maintaining less efficient legacy networks than in urban areas.²⁸⁷ As the Hogg/Austin Declaration explains, trunking channels together leads to increases in capacity, improvements in service and less blocked calls. By combining the 850 MHz systems of the two carriers, trunking efficiencies can result in *millions* fewer blocked calls in the RSAs where overlaps occur each year.²⁸⁸

The net positive result is twofold. First, there will be better service for legacy customers of the two companies. Second, the more efficient spectrum use will free up spectrum to use for UMTS directly or to gradually shift legacy TDMA subscribers off of the 1.9 GHz bands to free up spectrum in those bands for UMTS.²⁸⁹ Strict invocation of the rule to require divestiture of one of the 850 MHz channel blocks to a third party, however, would eliminate these efficiency gains. Maintaining separate systems (one held by Cingular and one divested to a third party)

²⁸⁶ *See id.*

²⁸⁷ Hogg/Austin Declaration at 18, 22. The need to support these legacy subscribers is especially pronounced in rural areas, where analog subscribership is higher due to use of longer range 3-watt phones, and TDMA subscribership is higher because rural systems were converted to digital later than urban systems. *See id.* at 8 n.8.

²⁸⁸ *Id.* at 18; *see also id.* at 22-24.

²⁸⁹ Mr. Hogg and Dr. Austin explain that while cell splitting can add capacity, it cannot generally free up sufficient spectrum for UMTS, and, in any event, adding cells involves numerous challenges. *See id.* at 21 n.25, 23 n.28.

would perpetuate the inefficient use of spectrum to support the legacy networks, providing no change in dropped call rates for subscribers of either party. Nor would divestiture free up additional spectrum at 850 MHz needed by Cingular and AWS to begin the evolution towards UMTS. Use of the PCS bands that the merged entity may also acquire may be encumbered by TDMA subscribers depending upon the RSA, making PCS bands alone only a partial solution to clearing adequate spectrum needed for UMTS.

Combining the two companies' overlapping 850 MHz service areas also provides unique benefits to the legacy subscribers of both carriers that would not be the case if one of the spectrum blocks (and accompanying network assets) were divested. While the two carriers have roughly overlapping service areas, the locations of each carrier's facilities varies in a given area. As a result, where one carrier has a weak signal, the other's signal may be strong. Likewise, where one system has facilities and the other does not, it may be possible to dedicate additional spectrum from the other frequency block to improve service and increase capacity. The complementary nature of the overlapping service areas will thus bring more consistently reliable service to the legacy 850 MHz customers of both networks. This is a particular benefit in rural areas where coverage tends to be more differentiated than in urban areas.²⁹⁰ By contrast, requiring divestiture means that legacy customers of both companies would be denied this benefit. Moreover, Cingular customers would be identified as roamers on the divested system to the extent it covers certain areas that the retained system does not, and vice versa.

These benefits – better service quality and coverage and better spectrum utilization to support UMTS – are uniquely available by merging the two 850 MHz systems and would not be achievable if one of the 850 MHz blocks were divested. As the Hogg/Austin Declaration notes, “the merger will make it possible for rural areas — including those where the two companies are both present at 850 MHz — to receive UMTS more quickly and in a broader geographic area than would have occurred without the merger.”²⁹¹ Moreover, they are achievable without a significant likelihood of substantial competitive harm, as discussed above, making waiver manifestly in the public interest.

For all the foregoing reasons, Cingular respectfully requests that, as part of its approval of the instant transaction, the Commission waive Section 22.942 of its rules to permit the holding of the cellular RSA cross-interests described herein by the merged company post consummation.

V. OTHER ISSUES

A. International

The instant transaction also involves the transfer of control of Section 214 authorized international carrier AWS, which holds a single authorization to provide global facilities-based and resold international services.²⁹² Approving this transfer will promote and preserve

²⁹⁰ *Id.* at 22.

²⁹¹ *Id.* at 23.

²⁹² The parties are filing concurrently a separate transfer of control application with respect to the international Section 214 authorization held by AWS in accordance with the Commission's Part 63 rules. There also will be a *pro forma* transfer of control of GSM Corridor, LLC, an international Section 214 authorization holder in which AWS and Cingular each have

(continued)

competition in the international telecommunications marketplace. Consummation of the proposed transaction will enable Cingular to offer more innovative and competitive domestic and international service offerings, thereby enabling Cingular to become a more effective competitor in the U.S. international telecommunications marketplace. In addition, grant of the instant application will ensure that Cingular has the necessary authority to continue to offer seamless international services to existing AWS customers.

The proposed transaction poses no risk of anticompetitive impact on the U.S. international telecommunications marketplace. Applicants together hold only a miniscule share of the international telecommunications market. For this reason alone, Cingular would have little ability to adversely affect competition, even if it so desired. In addition, the Commission's principal concern for "the exercise of foreign market power in the U.S. market" is that such market power "could harm U.S. consumers through increases in prices, decreases in quality, or reductions in alternatives in end user markets."²⁹³ As the Commission explained further, "generally, this risk occurs when a U.S. carrier is affiliated with a foreign carrier that has sufficient market power on the foreign end of a route to affect competition adversely in the U.S. market."²⁹⁴ As discussed in more detail in the related application to transfer control of authorized international carrier AWS, Cingular will acquire no affiliations with foreign carriers presumed to have market power. Moreover, on all but a few select non-dominant routes Cingular will remain authorized only to resell the services of unaffiliated facilities-based carriers, thus further mitigating the risk of anticompetitive conduct.²⁹⁵ Finally, for all international routes on which Cingular is regulated as dominant, Cingular has *already* agreed to abide by any applicable dominant carrier regulation, and Cingular does not seek any change to such dominant status in the instant application. Therefore, the transaction will have no adverse impact on competition in the international telecommunications marketplace.

B. Related Governmental Filings

The DOJ will conduct its own review of the competitive aspects of this transaction pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18(a), and the rules promulgated under that Act. Cingular and AWS have submitted a pre-merger notification form and an associated documentary appendix to the DOJ and the FTC. Filings also may be required with telecommunications and competition regulators in certain foreign countries.

(footnote continued)

negative control. Cingular will file a post-consummation notification of this transfer pursuant to 47 C.F.R. § 63.24(f).

²⁹³ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities, Report and Order and Order on Reconsideration*, 12 F.C.C.R. 23891, 23951-54 (1997).

²⁹⁴ *See id.*

²⁹⁵ *See* 47 C.F.R. § 63.10(a).

C. Additional Authorizations

In addition to seeking the Commission's approval of the transfers of control of the FCC authorizations covered in these applications, the parties also request the additional authorizations described below.

1. After-Acquired Authorizations

While the list of call signs referenced in each application is intended to be complete and to include all of the licenses and authorizations held by the respective licensees that are subject to the transaction, AWS licensees may now have on file, and may hereafter file, additional requests for authorizations for new or modified facilities which may be granted before the Commission takes action on the instant applications. Accordingly, the parties request that any Commission approval of the applications filed for this transaction include authority for Cingular to acquire control of: (1) any authorization issued to the respective licensees/transferees during the pendency of the transaction and the period required for consummation of the transaction; (2) any construction permits held by the respective licensees/transferees that mature into licenses after closing; and (3) any applications that are pending at the time of consummation. Such action would be consistent with prior decisions of the Commission.²⁹⁶ Moreover, because Cingular is acquiring AWS and all of its FCC authorizations, Cingular requests that Commission approval include any facilities that may have been inadvertently omitted.

In addition, the parties hereby request a blanket exemption from Sections 1.927(h) and 1.933(b) of the FCC's rules, 47 C.F.R. §§ 1.927(h), 1.933(b), in cases where the licensee files amendments to pending applications to reflect consummation of this application. The exemption is requested so that such amendments reporting the change in ownership will not be treated as major amendments requiring a second public notice for the still-pending applications. Since any ownership changes that result with respect to any particular pending application are part of a larger transaction undertaken for a legitimate business purpose, grant of such an exemption would be consistent with previous Commission decisions.²⁹⁷

²⁹⁶ *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, Memorandum Opinion and Order*, 12 F.C.C.R. 19985, 20097 (1997); *Applications of Craig O. McCaw, Transferor, and AT&T, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries, Memorandum Opinion and Order*, 9 F.C.C.R. 5836, 5909 n.300 (1994) ("McCaw").

²⁹⁷ *See, e.g., Applications of PacifiCorp Holdings, Inc. Transferor, and Century Telephone Enterprises, Inc. Transferee, For Consent to Transfer Control of Pacific Telecom, Inc. a Subsidiary of PacifiCorp Holdings, Inc., Memorandum Opinion and Order*, 13 F.C.C.R. 8891, 8915; *McCaw*, 9 F.C.C.R. at 5909 n.300 (1994); *Applications of Centel Corporation, Transferor, and Sprint Corporation, and F W Sub Inc., Transferees, For Consent to the Transfer of Control of Authorizations in the Domestic Public Cellular Radio Telecommunications Service and Other Common Carrier Services, Memorandum Opinion and Order*, 8 F.C.C.R. 1829, 1833 (1993).

2. Trafficking

To the extent any authorizations for unconstructed systems are covered by this transaction, these authorizations are merely incidental, with no separate payment being made for any individual authorization or facility. Accordingly, there is no reason to review the transaction from a trafficking perspective.²⁹⁸

3. Miscellaneous *Pro Forma* Issues

AWS and Cingular currently each have negative control over the licensees that are part of their “Roadrunner” joint venture. Roadrunner Cingular License Sub, LLC; Cingular New England License Sub LLC; and AT&T Wireless Roadrunner License Sub, LLC all hold CMRS licenses while GSM Corridor, LLC holds an international Section 214 authorization. With respect to these licensees, Cingular will be moving from negative to positive control, which is a *pro forma* transfer of control.²⁹⁹ The PCS and international Section 214 authorizations held by these licensees are all subject to forbearance from advance consent.³⁰⁰ Therefore, Cingular will file post-consummation notifications of these *pro forma* transfers of control.

In addition to the applications being filed by the Applicants, Cordova Wireless, Muskegon Cellular Partnership, Pittsfield Cellular Telephone Company, and St. Joseph CellTelCo will be filing *pro forma* transfers of control of AWS’ minority interests in those general partnerships. Under the relevant partnership agreements, AWS is precluded from exercising control over these partnerships, and the relevant state partnership laws permit parties to contract around the default presumption that each general partner has a right to participate in management and governance. In a similar instance, the staff approved post-consummation notifications.³⁰¹ Therefore, Applicants believe that the transfer of these interests is a *pro forma*

²⁹⁸ 47 C.F.R. § 1.948(i) (noting that the Commission *may* request additional information regarding trafficking if it appears that a transaction involves unconstructed authorizations that were obtained for the principal purpose of speculation); *id.* § 101.55(c)-(d) (permitting transfers of unconstructed microwave facilities that are “incidental to the sale [of] other facilities or merger of interests”).

²⁹⁹ *Applications of Vodafone AirTouch, Plc, and Bell Atlantic Corporation; For Consent to Transfer of Control or Assignment of Licenses and Authorizations, Memorandum Opinion and Order*, 15 F.C.C.R. 16507, 1608 n.4 (2000); Stephen F. Sewell, *Assignments & Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277, 321 & n.169 (1991).

³⁰⁰ See 47 C.F.R. §§ 1.948(c)(1), 63.24(f).

³⁰¹ See *Assignment of License Authorization Applications, Transfer of Control of License Applications, De Facto Transfer Lease Applications & Spectrum Manager Lease Notifications Action, Public Notice*, Rep. No. 1756, at 14 (WTB rel. Feb. 25, 2004) (approving ULS File No. 0001529630); *Assignment of Authorization & Transfer of Control Applications Action, Public Notice*, Rep. No. 1695, at 25 (WTB rel. Dec. 17, 2003) (approving ULS File No. 0001534079); see also *Review of Proposed Investment by Teléfonos de México, S.A. de C.V. in Parent of Cellular Communications of Puerto Rico, Public Notice*, 15 F.C.C.R. 1227, 1227-28 (WTB/IB 1999) (concluding that a transfer of an interest that is defined under the Commission’s rules as a

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transfer of control subject to forbearance under Section 1.948(c)(1) of the Commission's rules.³⁰² Nevertheless, applicants have requested the four partnerships to waive forbearance and file transfer applications in advance out of an abundance of caution.

AWS also holds interests of 50 percent or more in the following designated entities: ABC Wireless, L.L.C.; Arnage Wireless, L.L.C.; Cascade Wireless, LLC; Indiana Acquisition, L.L.C.; Lone Star Wireless, L.L.C.; Panther Wireless, L.L.C.; Royal Wireless, L.L.C.; Sabre Wireless, L.L.C.; Southwest Wireless, L.L.C.; THC of Houston, Inc.; THC of Melbourne, Inc.; THC of Orlando, Inc.; THC of San Diego, Inc.; THC of Tampa, Inc.; Wireless Acquisition LLC; Zuma/Lubbock, Inc.; and Zuma/Odessa, Inc. By definition, those interests are non-controlling; otherwise, the companies in question would not qualify as designated entities.³⁰³ Consequently, a transfer of such an interest – even though of 50 percent or more – is a *pro forma* transaction.³⁰⁴ Because the interests are being transferred from one non-designated entity to another, unjust enrichment concerns are not implicated by this transaction. Therefore, the Applicants believe that advance consent is not required.³⁰⁵ Nevertheless, the staff has requested that the designated entities file applications for advance consent for the transfer of these interests, and the Applicants understand that the designated entities are doing so.

CONCLUSION

For the foregoing reasons, Cingular and AWS respectfully request that the Commission find that the subject transaction serves the public interest, convenience, and necessity, and thus expeditiously grant the instant transfer of control applications, as well as the accompanying waiver request.

(footnote continued)

controlling interest only requires a *pro forma* notification if the interest holder, by contract, cannot exercise control) (“*Cellular Communications of Puerto Rico*”).

³⁰² 47 C.F.R. § 1.948(c)(1).

³⁰³ See 47 C.F.R. § 1.2110; *In re Amendment of Part 1 of the Comm'n's Rules – Competitive Bidding Procedures, Fifth Report and Order*, 15 F.C.C.R. 15293, 15323-28 (2000) (“We will adopt as our general attribution rule a ‘controlling interest’ standard for determining which applicants qualify as small businesses.”) (subsequent history omitted).

³⁰⁴ *Cellular Communications of Puerto Rico*, 15 F.C.C.R. at 1227-28 (generally concluding that a transfer of an interest that is defined under the Commission's rules to be a controlling interest in licensees but that, by contract, cannot exercise control of the licensees is a *pro forma* transfer of control of the licensees).

³⁰⁵ See 47 C.F.R. § 1.948(c)(1).