

Dated 16 June 2017

## **ATTACHMENT D**

**Re:**

**Vodafone Hutchison Australia Pty Ltd submission to the Australian  
Competition and Consumer Commission**

# ERRORS IN MOBILE RETAIL MARKET DEFINITION

## 1 Summary

As the ACCC will appreciate, market definition is critical in the context of a Part XIC analysis. A market defined too broadly may result in a misdiagnosis of market power – and may dilute competitive effects to a level at which they are considered immaterial. A purposive approach is required that captures the effects of a wholesale declaration in such a way that competitive flow-through consequences for retail consumers can be carefully examined.

Unfortunately, the ACCC's approach to defining the relevant mobile retail markets in its Draft Decision<sup>1</sup> is inconsistent with the legal requirements for market definition in Australian law and in the ACCC's own Part XIC guidelines. The ACCC's approach is also inconsistent with international precedent. The law requires that the ACCC must adopt an approach based on substitution.

The failure of the ACCC to properly consider substitution is an error of law that fundamentally undermines the ACCC's analysis on market definition – and hence the ACCC's conclusions overall.

VHA has set out in this document its view as to how the ACCC should have applied an approach to market definition based on substitution. Such an approach leads to a fundamentally different market definition and outcome than the ACCC has proposed.

## 2 Purposive approach to market definition

Fundamentally, the approach to market definition is purposive. Market definition is intended as a means to identify the level of market power of market participants in the context of a particular proposal.

In the context of the present Part XIC declaration inquiry, the focus of the ACCC should be on the manner in which declaration of a wholesale roaming service in regional and remote areas of Australia will flow through into the downstream retail markets. Necessarily, this requires a focus on regional/remote areas of Australia.

The purposive approach to market definition is addressed by the ACCC in its 2008 Merger Guidelines as follows:

“Market definition is purposive, which means that the definition of a relevant market cannot be separated from the particular merger under investigation. Market definition always depends on the specific facts and circumstances of a merger, and current evidence from

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<sup>1</sup> ACCC, Domestic mobile roaming declaration inquiry, Draft Decision, May 2017 (**Draft Decision**).

market participants will often be critical. Decisions relating to market definition in previous, albeit similar, merger inquiries will provide only limited guidance.”

The ACCC also recognises this in the ACCC’s Part XIC Guidelines, which provide:

“As a result, market analysis under Part XIC should be seen in the context of shedding light on how declaration may promote competition rather than in the context of developing ‘all purpose’ market definitions.”

Consequently, the fact that the ACCC may have defined a ‘national mobiles market’ in previous proposals (such as mergers or previous declaration inquiries) does not mean that the ACCC should follow the same approach when it is considering competitive effects in regional Australia in the context of this current declaration proposal.

VHA is concerned that the ACCC’s current ‘retail national mobiles market’ has been driven more by previous ACCC analysis and precedent, than by an analysis of the particular circumstances of the current declaration inquiry. If so, the ACCC must take the opportunity to adopt a bespoke approach. A failure to do so will result in a conclusion in this declaration inquiry that misses the fundamental issue of concern, namely harm to Australian consumers caused by insufficient competitive choice.

### 3 Importance of substitutability

As the ACCC will be aware, a key legal requirement for market definition in Australia is to apply the concept of substitution. The concept of substitution has a statutory basis in section 4E of the CCA. It cannot be ignored, disregarded, or given lesser weight, as appears to have occurred in the Draft Decision. To do so would constitute a reviewable error of law, if such an approach were continued into any final decision. VHA hopes that this submission will assist the ACCC to fix its analysis to ensure it is consistent with the law.

The Australian approach to market definition is set out in the ACCC’s 2008 Merger Guidelines, in the ACCC’s Part XIC Guidelines and in Appendix A of the Draft Decision itself, as follows:

“Section 4E of the CCA provides that the term “market” means a market in Australia for the goods or services under consideration, as well as any other goods or services that are substitutable for, or otherwise competitive with, those goods or services. The ACCC’s approach to market definition is discussed in the ACCC’s 2008 merger guidelines.

Section 4E of the CCA provides that a market includes any goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, substitution is key to market definition. The ACCC’s approach to market definition in the 2008 merger guidelines focuses on two dimensions of substitution – the product dimension and the geographic dimension”. (emphasis added)

As there is no contrary intention expressed in Part XIC, this definition of a market from section 4E must also apply in section 152AB of the CCA.

The concept of “substitution” is well understood in Australian jurisprudence and has been the subject of extensive judicial consideration. For example, the High Court of Australia held in *Queensland Wire*.<sup>2</sup>

“A market is an area in which the exchange of goods and services between buyer and seller is negotiated. It is sometimes referred to as a sphere within which price is determined and that serves to focus attention upon the way in which the market facilitates exchange by employing price as a mechanism to reconcile competing demands for resources.”

VHA assumes, as a competition regulator, that the ACCC is highly familiar with the nuances of market definition and substitution, including historic case law.

Relevantly, on 14 June 2017, the High Court of Australia released its decision in *Air New Zealand Ltd v Australian Competition and Consumer Commission*, and *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2017] HCA 21. As the ACCC will be aware, this is the latest judicial determination of these issues and continues to emphasise the importance of substitution in market definition, but in the context of a particular statutory provision and commercial context.

For example, Keifel CJ, Bell J and Keane J commented:<sup>3</sup>

“The market spoken of in s 4E is a market in Australia. Section 4E treats substitutability as the principal driver of the rivalrous behaviour accommodated by a market.”

“Reconciling the abstract notion of a market with the concrete notion of location, so that they work coherently, presents something of a challenge. Particularly is this so because "competition" describes a process rather than a situation. But given that the TPA regulates the conduct of commerce, it is tolerably clear that the task of attributing to the abstract concept of a market a geographical location in Australia is to be approached as a practical matter of business. It is important that any analysis of the competitive processes involved in the supply of a service is not divorced from the commercial context of the conduct in question”

VHA is concerned that the Draft Decision does not currently reflect this – and the ACCC’s analysis does contain some fundamental errors of law.

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<sup>2</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6, per Dawson at 590.

<sup>3</sup> *Air New Zealand Ltd v Australian Competition and Consumer Commission and PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission*, [2017] HCA 21, as per Kiefel CJ, Bell and Keane JJ at [27] and [14].

A detailed description of the ACCC's approach to market definition is set out in the 2008 Merger Guidelines. Some fundamental points are as follows:

- Identifying relevant substitutes is key to defining a market. Substitution involves switching from one product to another in response to a change in the relative price, service or quality of two products (holding unchanged all other relevant factors, such as income, advertising or prices of third products).
- Market definition begins by selecting a product supplied in a particular geographic area and incrementally broadening the market to include the next closest substitute until all close substitutes for the initial product are included.
- There are two types of substitution: demand-side substitution, which involves customer-switching; and supply-side substitution, which involves supplier-switching.
- On the demand-side:
  - Whether or not a product or region is a close substitute for a product supplied, depends on likely switching behavior of consumers in response to an increase in the price, or decrease in the service or quality, of that product.
  - From a geographic market definition perspective, demand-side substitution depends on the willingness of customers to switch from a product supplied in one location to the same product supplied in another location in response to a price increase.
- On the supply side:
  - A product (or group of products) may be a supply-side substitute for a product parties if, in response to an increase in the price of the product, the production facilities and marketing efforts used for that product can be switched quickly and without significant investment to supply a demand-side substitute
  - From a geographic market definition perspective, supply-side substitution depends on the ability of suppliers, in response to a price increase, to modify a distribution network quickly without significant investment to deliver supply at a particular location or within a distance the customer would be willing to travel.

The apparent failure of the ACCC to define the retail mobiles market in this declaration inquiry with regard to these principles of demand-side and supply-side substitution constitutes, in VHA's view, a fundamental and reviewable error of law. This is a not a matter that the ACCC can disregard or ignore.

In *Boral Besser Masonry Ltd v ACCC* (2000) ATPR 41-915, the court commented: “*the inclusion of the terms ‘substitutable’ and ‘competitive with’ in section 4E also means that market definition must be determined in accordance with economic principles*”<sup>4</sup>. Contrary to the view apparently taken in the Draft Decision, the subjective discretion of the ACCC in defining a market is necessarily limited.

## 4 Risk of the ‘cellophane fallacy’ in non-merger analysis

The 2008 Merger Guidelines refer to the application of the hypothetical monopolist test (HMT), also known as the SSNIP test (Small but Significant Non-transitory Increase in Price), when determining product substitutability.

As the ACCC will be aware, the HMT determines the smallest area in product and geographic space within which a hypothetical current and future profit-maximising monopolist could effectively exercise market power. This is usually assessed by considering whether a hypothetical monopolist could profitably sustain a small but significant and non-transitory increase in price of at least 5% for the foreseeable future.

There is no evidence in the Draft Decision that the ACCC has undertaken this conceptual exercise to inform its views on market definition, although Vodafone assumes that this may have occurred as it is referred to in the ACCC’s Part XIC Guidelines. As the ACCC will be aware, the courts recognise the underlying principles of the SSNIP test without requiring econometric evidence. The ACCC itself acknowledges the utility of the SSNIP test as an appropriate analytical framework.

One issue of particular concern for VHA in the context of this current declaration inquiry is that the ACCC appears to have implicitly assumed that Telstra’s regional coverage (i.e., Telstra’s full metropolitan and regional coverage to 99.4% population coverage or ‘full national’ coverage) is fully substitutable for the lesser mobile coverage offered by Optus and VHA that is primarily metropolitan-oriented. Specifically, the ACCC is considering Telstra’s bundle of ‘regional’ and ‘metropolitan’ (i.e., full national) coverage product exists in the same product market as Vodafone’s or Optus’ ‘metropolitan’ (i.e., part national) coverage.

VHA considers that the ACCC’s conclusion in this regard may suffer (expressly or implicitly) from the ‘cellophane fallacy’. This is explained in CCH (Markets, competition and market power) in the following terms:

“However, in other cases of anti-competitive conduct, especially cases involving a misuse of market power under s46 of the CCA, the relevant price for applying the SSNIP test will be the competitive price rather than the prevailing price. The firm of firms whose conduct is at issue may already have considerable market power and be charging a price higher than the

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<sup>4</sup> *Boral Besser Masonry Ltd v ACCC* (2000) ATPR 41-915 .

competitive price. At these high prices, the firm with market power will face competition from other firms and to include the substitutes of those other firms will result in an overly broad market definition.”

“It is now widely accepted that the ‘cellophane fallacy’ limits the reliability of the SSNIP test in section 46 cases. If the prevailing price exceeds the competitive price, it will not be possible to apply the SSNIP test and reliance must be placed on a proxy for the competitive price, such as marginal cost. In such cases, it may be possible to dispense with market definition and conclude that the firm in question has substantial market power on the basis of other evidence of market structure”.

When applied to the current declaration inquiry, it is clear from all the available evidence (and as recognised by the ACCC) that Telstra’s pricing is materially higher in the market than Optus and VHA – and well beyond the level of a SSNIP. The ACCC comments, for example:

*“Telstra’s prices for its mobile services are generally higher than those of other MNOs and MVNOs”.*

*“Telstra generally charges considerably more for data” and “Telstra does not currently offer unlimited voice calls in its low or medium price plans”.*

*“there is no evidence that Telstra is under pressure to decrease its prices”.*

*“the average cost of data in Telstra’s low-priced plans is substantially higher than those of its competitors, while its voice call inclusions are much lower, presenting less value for money for consumers than services offered by other mobile service providers. As a result, consumers that strongly value coverage and perceive Telstra as the only viable mobile service provider may choose a higher-priced mobile service than they would otherwise purchase if alternative providers were available”.*

In this manner, there is evidence that Telstra’s pricing of its bundled ‘regional’ and ‘metropolitan’ (i.e., full national) coverage product is not closely substitutable with VHA’s or Optus’ ‘metropolitan’ (i.e., part national) coverage. The only reason that substitution might occur is because Telstra has already exercised its market power to set pricing up to a level at which consumers are at risk of switching – namely that ‘part coverage’ is sufficiently discounted relative to ‘full coverage’ that consumers are indifferent. Telstra’s ability to supply a service without a close substitute explains Telstra’s premium pricing – as Telstra has market power.

VHA has not identified any evidence in the Draft Decision that the ACCC has considered these issues of product market definition; yet they are fundamental to the particular issues of coverage under consideration in this declaration inquiry.

Moreover, if Telstra’s coverage and VHA’s coverage are not substitutable, then it follows that the ‘chain of substitution’ is broken as between VHA/Optus’ coverage and Telstra’s coverage. Put simply, neither

VHA nor Optus provide any meaningful constraint on Telstra's market power, derived of full coverage, in the mobile retail market.

VHA notes that the issue of 'chain of substitution' and the apparent 'break' in the chain of substitution in relation to mobile coverage is considered in detail in the independent expert evidence provided by Richard Feasey, as shared with the ACCC in VHA's various submissions.

The upshot of this evidence and analysis is that there are likely at least two product markets that should be considered by the ACCC under this declaration inquiry under a proper analysis of substitutability:

- (a) The retail market for the supply of mobile services involving regional coverage (with bundled in metropolitan coverage to give full national coverage) achieving coverage to 99.3% of the population; and
- (b) The retail market for the supply of mobile services involving metropolitan (i.e., part national) coverage, comprising a partial coverage product achieving mobile coverage to a substantially lesser geographic area, hence more suited for metropolitan rather than regional use.

VHA has provided further evidence to support this conclusion later in this submission. VHA also refers to the extensive evidence provided by Richard Feasey and Derek Ritzmann, as independent expert economists, on these issues.

VHA also notes that most mobile network operators also consider 'pre-paid' and 'post-paid' services to be in separate product markets. Therefore, it would also be appropriate to consider whether this distinction affects the ACCC's market analysis.

## 5 VHA's original submissions emphasised substitutability

With the extensive work undertaken by VHA for this declaration inquiry over the last 6 months, VHA's thinking has matured on issues of substitutability. For the benefit of the ACCC, VHA has annotated its original submission below – using square brackets and capitals to indicate VHA's updated views.

In VHA's original submission, VHA applied this approach to substitutability in the following terms:

"The geographic dimension of a market identifies the area within which substitution in demand or supply is sufficient for the product(s)/service(s) traded at different locations to be in the same market. Such demand and supply substitution, in conjunction with the salient features of competition and the resulting differences in market share and concentration, may lead to a conclusion that the retail markets are geographically segmented. As VHA identifies below, this is the case in retail mobiles."

*[Update: VHA still maintains this is the case.]*

"Moreover, the tendency in mobile markets globally to set a uniform national price does not necessarily imply that competition is uniform nationally or that regional competition does not occur. Such pricing is a global convention and not a competitive outcome. It is driven as

much, if not more, by the need to manage the complexity of pricing plans and IT /billing systems than other factors. Rather, regional competition occurs within the parameters of that price and influences the balancing of that price across markets”.

*[Update: uniform national pricing does not imply equivalence in value. For the same price, regional consumers receive significantly less quality than metro consumers, including 3G services rather than 4G in many locations.]*

“VHA considers that the regionally segmented nature of competition in retail mobiles is illustrated by the following factors, which evidence a lack of supply-side substitution between metropolitan and regional areas:

- **Supply-side substitution:** Supply-side substitutability is a relevant consideration. If a firm such as Telstra were to increase its prices for regional mobile telecommunications services, could a mobile operator that was confined to metropolitan Australia quickly shift its resources to supply mobile services in regional Australia? The answer to this question is obviously not. Such supply-side substitution could not occur without substantial investment in deploying a mobile network in regional Australia to provide competitive mobile services. A provider of regional mobile services could exercise market power in a regional market with little practical risk of supply-side substitution.”

*[Update: VHA maintains its view that supply side factors lead to a conclusion that retail mobile markets are inherently local, not national.]*

- **“Investment decisions are regional:** When deciding to invest in a locality, VHA analyses the market conditions in that locality. VHA undertakes a local analysis because the nature of demand and the likelihood of responses by VHA’s competitor are unique to the locality. VHA would therefore consider such matters as evidence of local demand, VHA retail shop coverage, geographic coverage characteristics, and the ability of VHA to provide proximate coverage in the area. VHA’s approach is more akin to the ACCC’s hospital or supermarket analysis, than treating the market as one national unit.”

*[Update: VHA has provided evidence to the ACCC that demonstrates that VHA’s investment decisions are inherently regional. VHA does not agree that wider ‘network effects’ from coverage provide any meaningful incremental revenue upside – such effects are likely trivial for VHA and most likely captured only by the largest network, so if they do exist they are likely captured purely by Telstra.]*

- **“Spectrum is differentiated by region:** As the ACCC will be aware, radiofrequency spectrum in Australia is segregated by the ACMA into different geographic zones. A phone travelling between different geographic zones may travel onto different radiofrequency ranges. There are different spectrum holdings by geography, which

impact the capacity, and hence quality, of mobile services the carriers can offer in different areas. Different prices may have been paid in relation to the underlying radiofrequency spectrum, altering the cost structure for the supply of services in the area. The greatest difference is between metropolitan and regional spectrum.'

*[Update: VHA maintains its view that spectrum holdings influence supply side considerations. Subsequent to VHA's original submission TPG has acquired sufficient spectrum to enter the market as 4<sup>th</sup> mobile operator, but it has indicated it will confine its deployment to metropolitan areas.]*

"VHA considers that the regionally segmented nature of competition in retail mobiles is illustrated by the following factors, which evidence a lack of demand-side substitution between metropolitan and regional areas:

- **Demand-side substitution:** If the hypothetical monopolist test is applied on a geographic basis to the supply of mobile services in Australia, it seems clear to VHA that consumers in regional Australia are captive to the supply of mobile services in regional areas. Regional consumers cannot realistically drive to metropolitan areas to make mobile phone calls or download mobile data. As such, a hypothetical monopolist supplying mobile services in regional Australia can profitably impose a small but significant and non-transitory increase in price (SSNIP). (The political unpalatability of a geographically de-averaged price is not a relevant consideration in the SSNIP analysis.)"

*[Update: please see VHA's earlier comments above regarding the application of an SSNIP test.]*

- **"Price differentiation:** While the ACCC has highlighted the existence of a uniform national price, the reality of retail mobile competition in Australia is that there are a myriad of different call plans and price points. These call plans and price points may be offered to different types of customers in different circumstances, including with selective offers and so-called 'below the line' discounting. In this market environment, it is very easy for a mobile operator such as Telstra to price discriminate on a practical basis, even though its pricing is ostensibly nationally uniform. Telstra could, for example, selectively target a discounted offer only at VHA customers, knowing that such customers are generally not located in regional Australia. VHA has provided evidence in Part B of [VHA's original] submission."

*[Update: VHA maintains its position that the proliferation of call plans and price points enables selective advertising and below-the-line discounting to occur. Moreover, Telstra may provide discounts by way of bundling of services, selective upgrades, subsidised content, and targeted promotions – all of which can be engineered in a way that results in price discrimination.]*

- **“Variations in market share:** The existence of significant variances in market share between different geographic locations in Australia provide clear evidence of the differences in competitive conditions in those locations. Those geographic differences have persisted over time. In turn, this leads to an inference that a firm can capture a greater proportion of consumers in one area and then retain those consumers over time. In turn, this also illustrates that there are very different patterns of market power within different regions of the Australian mobiles market, suggesting they form different markets. The starkest distinction is between metropolitan Australia and regional Australia.”

*[Updated: VHA has provided future evidence to the ACCC of market shares in different geographic areas which further confirms this submission that markets are local, not national]*

- **“Consumer preferences:** Market surveys indicate that metropolitan consumers of mobile services have different needs and demands than regional consumers. The primary focus of regional consumers is on coverage because regional consumers are far more exposed to differences in coverage and hence far more exposed to the inconvenience of call drop out or poor reception. In contrast, metropolitan consumers are less focused on coverage. A market definition that treats these different purchasing patterns as homogenous fails to recognise important differences in the way mobile services are perceived by these different groups of consumers.”

*[Update: VHA notes that metropolitan consumers may be less focused on coverage compared to regional consumers, but they are still heavily focused on coverage – as evidenced by the ANU Report referenced by the ACCC.]*

- **“Non-price competition:** Related to the point above, a focus on a uniform national price also overlooks the extent of non-price competition between the mobile networks. This non-price competition has many dimensions but has a different focus between metropolitan and regional consumers. From a metropolitan perspective, for example, the ‘best’ mobile network is viewed as the one with the least congestion, greatest depth and building penetration, highest call clarity, and highest data speeds. However, regional consumers are much more focused on coverage.”

*[Update: VHA maintains this submission, nothing the ANU Report]*

- **“Calls are inherently geographic:** A national approach to mobile services blurs the distinction between mobile calls and mobile plans. Mobile calls are subject to the geographic features of the location from which they are made. While mobile services in Australia are provided on a technology neutral basis, regional consumers receive later access to new technologies and hence lag metropolitan Australia in

speed and quality of service. The Telstra monopoly areas, for example, have had 3G and not 4G services to date. A mobile call (or data download) made in metropolitan Australia is therefore not necessarily of the same nature or quality as a mobile call (or data download) made in regional Australia.”

*[Update: VHA has included references to case law from the United States in this submission that clarifies how substitutability is considered in application to mobile services.]*

- **“Relevant focus is regional:** The concerns in relation to regional roaming are concerns that arise primarily in relation to insufficient competition in regional Australia. The various government inquiries and reports have focused on the supply of mobile telecommunications services in regional Australia. A purposive approach to market definition would suggest that the ACCC should focus its analysis on the effect on markets in regional Australia.”

*[Update: VHA maintains its position that the relevant focus is local. However, it is also true that Telstra’s coverage natural monopoly has spillover implications that extend throughout the market – as identified extensively in VHA’s various submissions.]*

As can be seen from the submission above, VHA applied the law relating to product substitutability and had close regard to the ACCC’s Merger Guidelines. The fact that the ACCC has largely disregarded VHA’s submissions on substitutability in its Draft Decision is a reviewable error of law.

## 6 International precedent identifies local mobile markets

As the ACCC will appreciate, the Australian approach to market definition is largely identical to the approach adopted to market definition in other comparable jurisdictions, such as the United States and the European Union (EU). While market circumstances may differ, the approach adopted in those countries is persuasive for Australian courts where the products and services are similar.

This is certainly case for the mobile services given mobile services are broadly similar in nature wherever they are supplied. The EU and US precedents on mobile market definition is therefore highly relevant.

While the ACCC has historically found the retail mobiles market in Australia to be a national market, this largely occurred because the ACCC did not need to consider competitive dynamics at a more detailed local level. As far as VHA is aware, this declaration inquiry is the first time that the ACCC has needed to carefully consider differences in competition and coverage between different geographic areas in Australia. Such an approach inherently requires the ACCC to consider the local, as well as national, implications of declaration.

In this regard, international courts and regulators have confirmed that retail telecommunications service markets can (and should where appropriate) be defined as local in scope.

By way of example, the Organisation for Economic Co-Operation and Development (OECD) has confirmed that mobile geographic coverage can lead to product differentiation and from a geographical perspective; the market for retail mobile services need not be national. In its paper *Defining the Relevant Markets in Telecommunications*,<sup>5</sup> the OECD confirmed that while traditionally the market for mobile telecommunications has been defined as a national one, mobile coverage is a major factor in redefining market boundaries because the mobile service being provided is no longer homogenous across the country. The OECD referenced the ACCC itself:<sup>6</sup>

“In Australia, for example, the ACCC acknowledged that *ex ante* regulations should reflect the fact that infrastructure-based competition is likely to develop in a heterogeneous manner across the country.”

In terms of identifying the geographic dimension for the retail markets for telecommunications services (including retail mobile services), the OECD has endorsed supply and demand substitution in defining geographic markets, stating:<sup>7</sup>

“When assessing whether or not competitive conditions in different areas are similar or sufficiently homogenous, i.e. when delineating the geographic boundaries of a relevant market, recourse should be made to the same principles as for the delineation of the relevant product market, in particular competitive constraints such as demand-side and supply-side substitution.”

Further, such analysis lends itself to a conclusion that the geographic boundaries of the market are not always national. The OECD states:

“Whilst, in the past, for historic reasons, geographic markets for electronic communications, usually corresponded to the territory of a particular Member State, the geographic scope of a defined market can in principle be local, regional, national or even covering territories across the borders of individual Member States.”<sup>8</sup>

In the United States, the Federal Communications Commission (FCC) has specifically considered geographic market definition and substitutability in the context of retail mobile markets. The FCC applies a substitution-based approach to the definition of geographic mobile markets in the United States, reflecting the approach to substitution that should be adopted by the ACCC in Australia.

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<sup>5</sup> *Defining the Relevant Markets in Telecommunications, Review of Selected OECD countries and Colombia 2014*,

<sup>6</sup> *Defining the Relevant Markets in Telecommunications, Review of Selected OECD countries and Colombia 2014*, page 33.

<sup>7</sup> OECD Commission Staff Working Document, *Explanatory Note, Commission Recommendation on relevant product and service markets in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications network and services*, page 10 [2.5].

<sup>8</sup> *Ibid*, page 10 [2.5].

In the first major case on this issue in October 2004, *AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, for example, the FCC commented:<sup>9</sup>

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

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

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

... Because a geographic market is the smallest area for which a hypothetical monopolist would be able to impose a price increase successfully, it is generally the area within which the customer easily shops for mobile telephony service. For most individuals, we believe this will be a local area, as opposed to a larger regional area or a nationwide area. Such areas

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<sup>9</sup> Federal Communication Commission, *Memorandum Opinion & Order, AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, (FCC 04-0255) , Released October 26, 2004, at [82], [83],[86], [89], [90] and [.104]-[105].

may encompass more than one county, and, depending on an individual's location, may even include parts of more than one state.

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

“In calculating market shares and market concentration, we analysed carrier data by two sets of geographic areas, Component Economic Areas (“CEAs”) and Cellular Market Areas (“CMAs”) ... No one set of standard geographic areas can capture all the nuance in local markets across the country. We chose these two geographic areas for our data analysis because both are consistent in order of magnitude with the local market definition we have adopted and because each brings a different consideration to the analysis... Because these two sets of geographic areas come from different sides of the equation – demand in one case, supply in the other – we believe that they are useful cross-checks on each other and together help ensure that our analysis did not overlook local areas that required more detailed analysis”.

This case has been followed and applied in numerous subsequent FCC decisions.

In this manner, the FCC has defined retail mobile markets that are local in nature. They are not regarded as national or State-based, but are rather defined based on the geographic area within which a consumer will travel in order to acquire a mobile service. The FCC uses a combination of the spectrum radiofrequency licence areas in the United States (being the ‘CMA’) and the bureau of statistics definitions of regional areas in the United States (being the ‘CEA’).

A map of the cellular mobile areas (CMA) may be found at the following URL, for example:

- <http://wireless.fcc.gov/auctions/data/maps/CMA.pdf>

A fundamental insight from the FCC in this analysis is that the ‘coverage feature’ of a mobile service supplied by an MNO is a feature of the **product** market, not necessarily the **geographic** market. The FCC reasoned:<sup>10</sup>

“First, we reject the Applicants’ argument that the fact that customers prefer plans with a larger geographic scope indicates that the market is a national one. The scope of a plan is a feature of the product being offered, not an indication of where users may travel to purchase the service. [Footnote 296: For example, consumers wish to purchase automobiles that can travel throughout the country, but when seeking to purchase an automobile most do not look to dealers throughout the country to make their purchase.]”

We also note that the FCC has continued to apply a local approach to retail mobile market definition in the United States in subsequent decisions, including those within the last few years. For example, in March 2014, in the application of *Cricket License Company, LLC, Leap Wireless International and AT&T Inc*, the FCC reasoned (at paras 27 to 31):<sup>11</sup>

“*Geographic Markets:* In prior transactions, the Commission has found that the relevant geographic markets for certain wireless transactions are “local” and has also evaluated a transaction’s competitive effects at the national level where a transaction exhibits certain national characteristics that provide cause for concern. As discussed below, for this proposed transaction, we continue to use CMAs as the local geographic markets, and in addition, analyse the nationwide competitive effects...”

“...Because most consumers use their mobile telephony/broadband services at or close to where they live, work, and shop, they purchase mobile telephony/broadband services from service providers that offer and market services locally. Service sold in distant locations is generally not a good substitute for service near a consumer’s home or work. In addition, service providers compete at the local level in terms of coverage and service quality...”

“...However, as the Commission has previously recognized, two key competitive variables – monthly prices and service plan offerings – do not vary for most providers across most geographic markets... In addition, certain key elements in the provision of mobile wireless services, such as the development of mobile broadband equipment and devices, are done largely on a national scale. For the purposes of evaluating the competitive effects of the proposed transaction, we use local geographic markets, but also analyze its potential national effects...”

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<sup>10</sup> Federal Communication Commission, *Memorandum Opinion & Order, AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, (FCC 04-0255) , Released October 26, 2004, at [87].

<sup>11</sup> Federal Communication Commission, *Memorandum Opinion & Order, Cricket License Company , LLC et al., Leap Wireless International, Inc., and AT&T Inc.*,(DA 14-349) Released March 13, 2014.

Based on VHA's analysis, this is the FCC's standard wording on geographic market definition and is repeated in a range of other recent FCC decisions.

The FCC's analysis therefore provides the following insights that should also apply in Australia given the methodology is the same in both Australia and the United States, based on a substitutability approach:

- Network coverage is irrelevant to geographic market definition, as network coverage is a feature of the product dimension, not the geographic dimension of a market.
- Geographic market definition is based on the distance that mobile consumers are willing to travel to acquire mobile services.
- In acquiring mobile services, consumers will consider perceived coverage and service quality in their immediate locality (i.e., they would check an MNO has coverage in their locality).
- Geographic markets are not national, as consumers are not willing to travel across the country. Geographic markets are similarly not State-based. Rather, geographic markets tend to be localised in nature.

VHA notes that this is precisely the approach that it has adopted to market definition in the local market shares it presented to the ACCC in its original submission, including a breakdown of market share by region.

As illustrated by the evidence presented to the ACCC, this is also the approach that VHA applies to its investment decisions. VHA considers local market shares in a particular regional area for the purposes of VHA's modelling of investment decisions into that locality. VHA does not consider wider 'network effects' as it regards such effects as trivial in its NPV analysis.

## **7 Australian advertising does have a local focus**

The ACCC has made comments in the Draft Decision that its view of the market as being a national market has been influenced by the ACCC's view that mobile operators advertise on a national basis.

VHA notes that the ACCC has not sought information from VHA on advertising issues and it does not appear from the Draft Decision that the ACCC had engaged on this issue with other service providers. It is unclear how the ACCC can form a view on this matter where it appears the ACCC has not relied on any relevant evidence to do so.

The ACCC's conclusion is not correct. The advertising for mobile services to Australian consumers is far more nuanced than the ACCC seems to appreciate.

While it is true that VHA (and other mobile operators) generally seek to apply nationally uniform pricing (subject to local below-the-line discounting and national differences in quality and value), this does not mean the mobile operators always have national marketing. In fact, marketing is localised.

[CIC]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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## 8 ACCC has made a fundamental error of law in its analysis

The ACCC did have some regard to substitutability in its Draft Decision. The ACCC comments as follows:

“There are some factors that indicate there are regional markets. For example, for consumers who live in some regional areas, a service offered by one MNO cannot be substituted with a service from another MNO unless that other MNO can offer the required coverage. On the supply side, a service provider cannot offer services in regional areas where it does not have network coverage”

However, the ACCC then proceeds onward in its analysis and makes some fundamental errors in doing so. VHA has set these out these errors in the following table for convenience:

ACCC comment	VHA response
<p>“Mobile services are provided on a national basis, with consumers able to use their services in any part of Australia where their service provider has coverage. The service that a consumer can acquire does not differ based on where they reside, and services are not advertised as being specifically metropolitan or regional.”</p>	<p>This is a feature of the <u>product</u> market, not a feature of the <u>geographic</u> market. See the FCC’s reasoning in <i>AT&amp;T Wireless Services, Inc. and Cingular Wireless Corporation</i> as noted above.</p> <p>The <u>product</u> being supplied is the ability to use a mobile service anywhere that the MNO provides network coverage.</p>
<p>“Service providers price mobile services on a nationally consistent basis. That is, service providers offer the same range of retail services in all areas where they have coverage, at the same price level.”</p>	<p>VHA has indicated that while prices are ostensibly nationally consistent, this betrays substantial geographic differences in value. Regional promotions do occur and the targeting of those promotions allow geographic differentiation by MNOs. Below-the-line discounting is more likely to occur in more competitive areas.</p> <p>Moreover, the fact that a product may be supplied at the same price in two different locations does not mean that they are in the same market. If the same widget is sold in the UK and Australia at the same price, this does not imply they are in the same market.</p>
<p>“Service providers also compete nationally for market share. Geographic coverage is one element on which they compete. Because a consumer can use their mobile service wherever their service provider has coverage, the extent of that coverage is a factor that consumers (in metropolitan and regional areas) will consider when choosing a service provider. As such, a service provider competing for customers nationally will rely on their network coverage in regional areas to compete against other service providers.”</p>	<p>Again, this is a feature of the <u>product</u> market, not a feature of the <u>geographic</u> market. See the FCC’s reasoning in <i>AT&amp;T Wireless Services, Inc. and Cingular Wireless Corporation</i> as noted above.</p> <p>The product being supplied is the ability to use a mobile service with a particular level of coverage functionality.</p>
<p>“For the network operator, this also means that when making decisions to invest to extend coverage, the additional revenues expected from attracting consumers in metropolitan areas who value or require regional coverage will be factored into those decisions. This is the indirect return from extending</p>	<p>VHA has provided clear evidence to the ACCC to indicate that investment decisions are made on a regional basis, not a national basis. When VHA makes a decision to invest, it looks at VHA’s market share in the immediate area – as this determines the revenue it will receive from the new base station.</p>

<p>coverage. The ACCC accepts the proposition that the business case for building out infrastructure into regional areas which would make a loss on a 'standalone basis', is made by considering the total increase in revenues generated across its entire customer base."</p>	<p>VHA cannot justify investments in new areas on the basis they "<i>increase revenues across the entire customer base</i>". This 'network effect' would only accrue to the largest provider and is so small in practice it is irrelevant to VHA's investment decision.</p>
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At page 19 of the ACCC's Draft Decision, the ACCC then proceeds:

"We have found that MNOs' coverage in regional Australia is relevant to competition in metropolitan areas. Further, we have found that competition in metropolitan areas impacts the services available to consumers in regional areas due to the nationally consistent nature of mobile retail offers. For these reasons, the ACCC does not consider that competition in metropolitan and regional areas can be considered in isolation. The ACCC has therefore concluded, for the purposes of this inquiry, that the geographic scope of the retail mobile services market is national, but as noted in section 5, we consider there are geographic variations within the national market, particularly in regional areas"

In VHA's view, there is a fundamental problem with this statement, namely that the ACCC has not applied the law correctly in relation to substitutability, but has instead focused on effects on competition.

In VHA's view, an assessment of the product dimension and the correct identification of the salient features of the product under examination is critical to identifying the correct retail markets relevant to this inquiry. A substitution analysis must be applied, as required by Australian law.

Similarly, an assessment of the geographic dimension and the correct identification of the salient features of the geographic areas under examination is critical to identifying the correct retail markets relevant to this inquiry. Again, a substitution analysis must be applied, as required by Australian law.

VHA also makes the following observations regarding the ACCC's analysis:

- The 'nationally consistent nature' that the ACCC has identified is a behavioral feature of the supply of mobile services, not a structural feature – or a feature driven by law or regulation. There is nothing to prevent any mobile market competitor in the Australian market from supplying metropolitan mobile service packages at a discount to regional services. Indeed, this already occurs in a hidden manner by way of 'below-the-line' discounts, strategic advertising of price plans, and targeted promotions. As the ACCC will appreciate, there is significant risk in defining a market based on a transient pricing feature that is based on observed behavior without regard to underlying substitutability or structural features of the market.

- Even within this quote from the Draft Decision, it is clear that the ACCC has reservations about its national market approach - commenting “*we consider there are geographic variations within the national market, particularly in regional areas*”. With respect, the reasons such geographic variations exist is because there are different geographic markets - supporting the legal conclusions based on substitutability.

The ACCC further recognises this with the following comment: <sup>12</sup>

“The ACCC accepts that there is a variance in competitive conditions between different regions, especially in regional, rural and remote areas. We also accept that for consumers in some remote and regional areas, there are few, if any, effective alternatives to Telstra’s mobile services.”

Again, the variance in competitive conditions in different regions is a clear indication that there are different geographic markets.

- Moreover, applying a purposive approach to market definition, the ACCC should be taking into account the variance in competitive conditions in its analysis. After all, it is this variance in competition conditions between metropolitan consumers and regional consumers that is at the heart of this declaration inquiry.

## 9 ACCC has diluted regional effects within a national whole

As VHA best understands it, the ACCC’s provisional view set out in its Draft Decision appears to be that there is a national retail market which contains a geographically smaller metropolitan ‘sub-market’ or ‘market segment’.

As VHA has indicated above, VHA considers that this view of the retail mobiles market is overly simplistic and does not give proper effect to the legal obligation on the ACCC to undertake product and geographic market definition by way of a methodology based on substitution. As VHA has indicated above, the evidence is that the retail market is bifurcated on the product dimension by issues of full national and metropolitan (i.e., part national) coverage. The evidence also suggests that the retail market is segmented on the geographic dimension by locality.

A key concern of VHA with the ACCC’s current analysis of the retail mobile services market is that the ACCC has diluted the competitive effects of Telstra bundling regional coverage with metropolitan

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<sup>12</sup> ACCC Draft Decision, page 17.

coverage by assuming competition in metropolitan areas equals competition in the national market as a whole. As VHA identified in its supplementary submission, this is a trap that Telstra and Optus appeared to set for the ACCC by conflating market outcomes in metropolitan areas with market outcomes in regional Australia..

Specifically:

- Based on VHA's calculations, the metropolitan component of retail mobile services is roughly equivalent to the 'Greater Capital City Statistical Area' as used by the Australian Bureau of Statistics. This area contains roughly 70% of the Australian population and comprises less than 5% of the total mobile coverage area in Australia. Collectively, VHA refers to these as the 'metropolitan areas', noting in practice each of the metropolitan areas is a distinct geographic market.
- The regional component of retail mobile services comprises the remainder of Australia with mobile coverage, comprising the remaining 30% of the Australian population and the remaining 95% of the total mobile coverage area. Collectively, VHA refers to these as the 'regional areas', noting in practice these comprise a range of different and distinct regional markets.

The bulk of the ACCC's justification for its provisional view to not declare a wholesale mobile roaming service (i.e., sections 5.2 and 6.2 of its Draft Decision) relies on an assessment of competition in the 'metropolitan areas' (comprising 5% of total mobile coverage area in Australia), rather than any consideration of the competitive processes in the 'regional areas' (comprising the remaining 95% of total mobile coverage area). The ACCC's analysis fails to recognise that a significant proportion of the 70% of Australians that live in metropolitan areas also require mobile coverage in regional areas.

In this manner, the ACCC has based most of its competition analysis on competitive conditions in only 5% of the national coverage area with respect to only a segment of consumers that live there. In other words, the ACCC did not consider the competitive dynamics in the *market* but merely a segment of a segment. This is a critical point and appears to have arisen because both Telstra and Optus chose to ignore the competitive conditions in regional Australia in their respective submissions, presumably for tactical reasons, to paint a rose-tainted picture of competition in the Australian mobile sector.

The ACCC's flawed assessment of market definition is carried into its provisional view about competitive outcomes in its view of the national market. The ACCC has stated: <sup>13</sup>

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<sup>13</sup> ACCC Draft Decision, page 23.

“The ACCC’s assessment of the national mobile services market suggests that the state of competition is mixed. Although the ACCC has found this is a national market, there is regional variation in the state of competition across the market. However, taking the views of submitters into account and assessing a number of factors, the ACCC has formed the view that the state of competition in the national retail market is generally showing signs of reasonably effective competition”.

In this manner, it is clear that the ACCC’s conclusion that the national market is “*generally showing signs of reasonably effective competition*” is actually an averaging across different metropolitan areas and regional areas that are showing very different (or ‘mixed’) levels of competition.

Metropolitan areas are exhibiting signs that competition is reasonably effective, although the ACCC has expressly recognised that “*each network has some degree of market power in the retail market*”.

However, regional areas are exhibiting signs that competition is not particularly effective at all. The ACCC separately comments, for example, “*there is often little choice of effective network operator for those consumers who value geographic coverage*” and that competition is “*less effective in parts of regional Australia*”. The ACCC also recognises the “*concerns of regional Australia regarding the lack of adequate and continuous mobile coverage and effective competition in regional areas*”.

In this manner, the difficulties that the ACCC is grappling with in its Draft Decision appear to have arisen from its unduly broad approach to market definition and its assessment of competition in a narrow part of that market. The ACCC is attempting to reconcile two very different sets of competitive market outcomes into a single averaged whole.

Moreover, in the ACCC’s mind, if the relevant retail market is an averaged ‘national market’ and if competition in that national market is effective, then it follows that there is no market failure deserving of regulatory attention by the ACCC.

However, the evidence identified by the ACCC in its Draft Decision does not reach an ‘effective competition’ conclusion in regional to regional areas. Under the ACCC’s approach, the ACCC seems unable to conceptually account for the lack of effective competition in regional areas – as manifested by Telstra’s extremely high market shares. This then causes a major flaw in the ACCC’s logic, resulting in some unusual assertions by the ACCC – including the ACCC’s suggestion that Boost provides a genuine competitive constraint to Telstra in regional Australia - and the ACCC’s apparent view that consumers have unshakable faith in Telstra’s network - neither of which are accurate on the evidence

Ultimately, the ACCC has sought to address these complications by concluding that there is no case for regulatory intervention based on a dilution of regional effects relative to the national whole. With respect, this is not the correct conclusion based on a proper application of the law – and this conclusion is not supported by the extensive evidence that VHA has already shared with the ACCC.

## 10 ACCC must consider structural issues in regional areas

VHA is particularly concerned by the ACCC's conclusion in the Draft Decision that there is “*no market failure*”, given that this conclusion appears to give no meaningful consideration to structural issues that arise in regional areas.

As a consequence of its omission to consider structural factors, the ACCC has failed to consider the key issues associated with mobile network economics in areas of sparse population density, which is the entire purpose for VHA seeking the declaration of mobile roaming in regional Australia.

In doing so, the ACCC appears to have avoided undertaking any meaningful structural analysis of markets in regional areas even though it has accepted that a ‘large extent’<sup>14</sup> of the Telstra-monopoly coverage area is a natural monopoly.

By way of historic context, for example, Graeme Samuel made the following comment in a key speech in October 2006 regarding declaring other services on mobile networks – suggesting that bottleneck characteristics in regional areas should be the key focus of any declaration inquiry into mobile services:

“Any such inquiry would need to determine whether any bottleneck characteristics exist in 3G services, for example, in regional and remote areas: In other words, a focus on whether there is a good case that there are economic impediments to competitors building their own network(s)”

The ACCC itself indicated in its original Discussion Paper that it would consider structural features of the market as a key component of the declaration inquiry. Indeed, the philosophical basis for the Part XIC regime is to address structural concerns. As recognised in the Vertigan Review, “*access regulation should control those features of the network that have natural monopoly elements, thereby creating scope for efficient competition at the retail level*”.

VHA maintains, as it has identified extensively in its submissions, that competition would be significantly promoted by overcoming a structural obstacle to market access, thereby enabling end-users to access multiple networks. The welfare benefits of doing so are significant and will reduce prices to both regional and metropolitan consumers.

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<sup>14</sup> ACCC, Draft Decision, see section 5.4.1.

## 11 ACCC must consider quality of competition in regional areas

The evidence before the ACCC shows that competition even within the metropolitan areas is tainted by Telstra's dominance in the regional areas, via Telstra's 2.4 million square kilometres of coverage monopoly. The ACCC's provisional finding that '*Telstra's prices are higher*' indicates this. However, the ACCC's qualification that Telstra's higher prices are '*subject to competitive constraint*'<sup>15</sup> is uninformative (and arguably self-contradictory) as to the *quality* of competition in the market.

In VHA's view consumers do not view Telstra's full coverage product and the partial coverage products supplied by Optus and VHA as close substitutes. This lack of substitutability means that Telstra is supplying a full coverage product in a separate product market, namely a 'market for the supply of full national coverage'; whereas Optus and VHA supply a part coverage product in a different product market, namely a 'market for the supply of part national coverage'.

The ACCC has apparently dismissed this view based on the fact that the differences in population coverage appear to be small – and in the nature of a few percentage points. However, as graphically illustrated by VHA below, these few percentage points lead to dramatic (if not exponential) differences in actual geographic coverage. The ACCC ought not to be drawn into reliance on population coverage without due consideration of the geographic coverage for the various geographic markets.

Bearing this in mind, VHA wishes to make some key points in relation to the quality of competition that the ACCC does not appear to have recognised in its Draft Decision:

- The ACCC has found evidence of demand side substitution which suggests that consumers view a full national coverage service and a part national coverage service as not close substitutes (see Annexure 1 below).
- VHA has submitted that any competitive constraint that VHA provides on Telstra cannot be based on coverage-based competition, given Telstra's coverage is so overwhelming that neither VHA nor Optus can compete against Telstra on coverage. When viewed in terms of product substitutability, this view is consistent with the conclusion that Telstra supplies its full coverage product in a different product market to VHA and Optus.
- Because of the absence of any meaningful competitive constraint provided, Telstra can charge a price premium to any consumer that values coverage; safe in the knowledge that such pricing is not subject to any effective restraint. Telstra's pricing for coverage is therefore capped at the

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<sup>15</sup> ACCC, Draft Decision, see page 39.

level where its pricing becomes so high that consumers that value coverage would ultimately substitute to a lesser coverage product from VHA or Optus. (This is a classic example of the 'cellophane fallacy' that VHA has identified earlier in this submission.)

- Accordingly, VHA again highlights that the ACCC should consider that Telstra's 'full coverage product' may well exist in a different product market from the 'part coverage products' offered by VHA and Optus. Ultimately, the issue arises because Telstra is a monopoly supplier to some 60% of the Australian geographic area - so, not surprisingly, its coverage advantage is so overwhelming in regional Australia that it causes a substitution discontinuity.

However, most concerning to VHA, the ACCC appears to be seriously under-estimating the number of consumers that are affected by differences in coverage between the networks.

## **12 Coverage differences affect >40% of the market, not 0.5%**

The ACCC appears to have in mind that there are only 200,000 Australians that do not have a choice and the rest of the Australian population have real choice. For example, the ACCC stated:

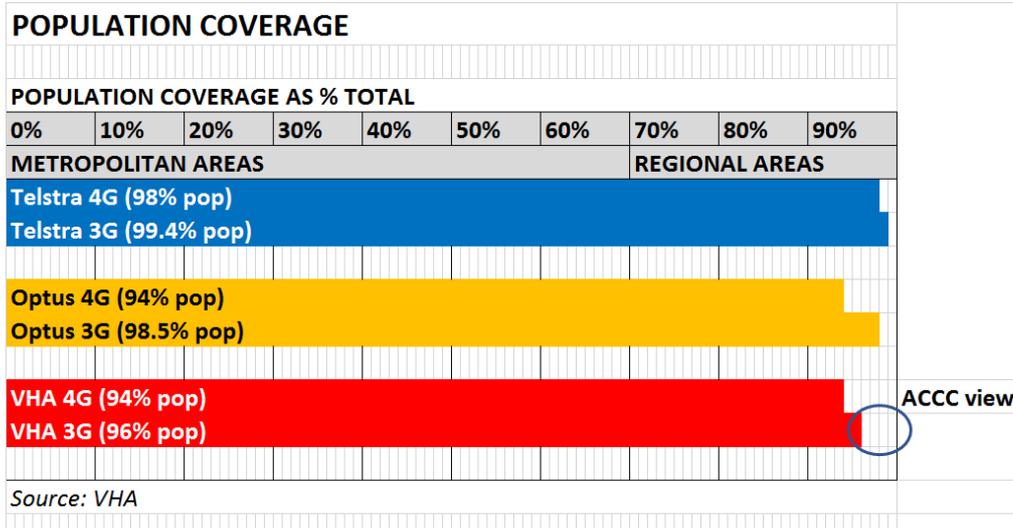
“This means that for the approximately 200,000 consumers who live in Telstra-only coverage areas and those who require coverage in these areas, Telstra, and potentially Boost which appears to have access to Telstra's entire coverage footprint, are the only choice of retail provider”.<sup>16</sup>

The ACCC's view of the competitive detriment therefore appears to be as indicated in the Figure 1 below, as indicated by the circle 'ACCC view'.

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<sup>16</sup> ACCC, Draft Decision, page 37.

**Figure 1. Population reach of each MNO – ACCC view on the market failure**

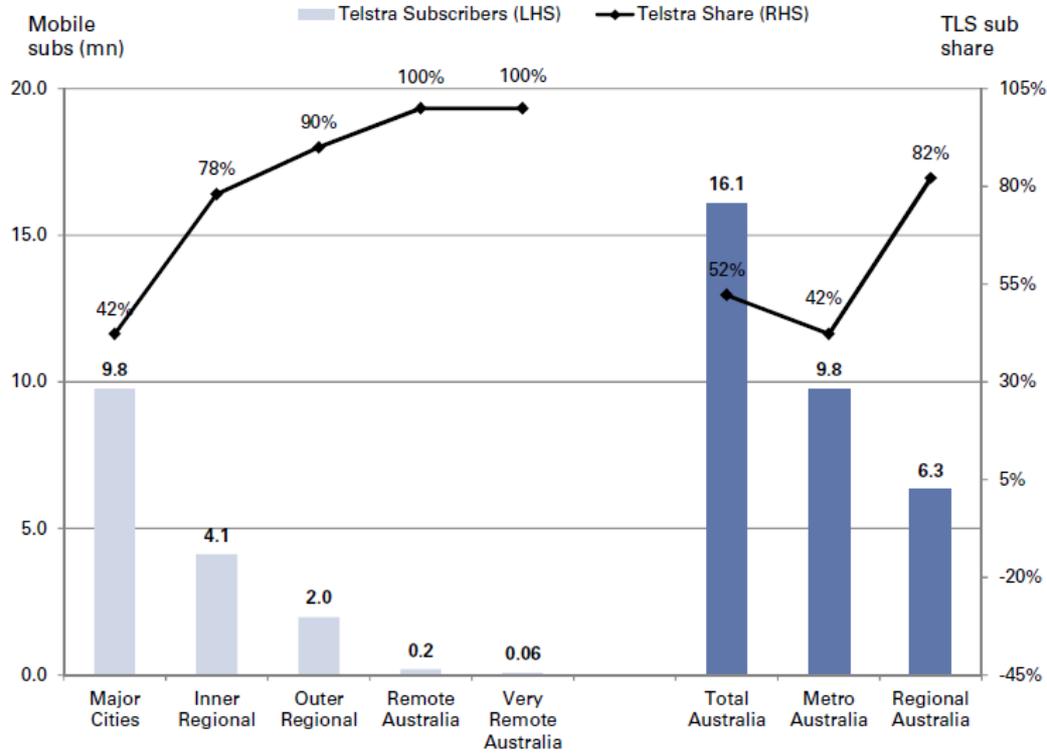


VHA submits that the key failure of the ACCC’s Draft Decision is its omission to identify that there are a significant number of ‘metropolitan’ customers, in addition to almost all ‘regional’ customers, that also require or value mobile coverage in the Telstra-only areas. VHA considers that the coverage issue extends well beyond the 200,000 consumers who live in Telstra-only coverage areas to infect competition in all regional areas and a substantial component of metropolitan areas.

VHA has provided extensive evidence in its submissions and in expert reports by Richard Feasey and Derek Ritzmann why this effect occurs. VHA has provided further evidence in this submission.

VHA’s view of the competitive dynamic in regional Australia is supported by Telstra’s market shares in different geographic areas, as illustrated by **Figure 2** below. Outside metropolitan areas, Telstra’s market share indicates that it does not face effective competition from Optus or VHA – it has a position of market dominance.

**Figure 2. Telstra’s market share according to geography**

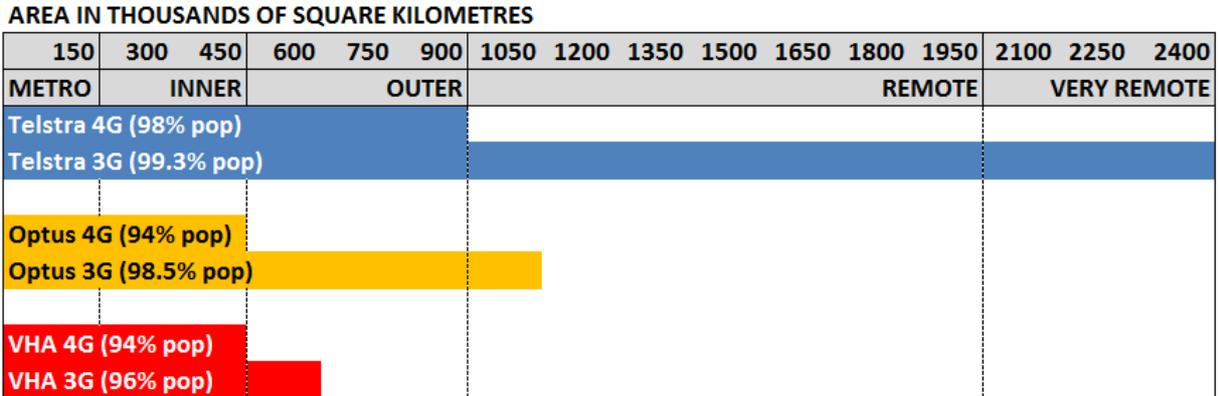


Source: Company data, Goldman Sachs Global Investment Research.

When looking at the differences in population coverage in Figure 1, the dramatic differences in market shares in Figure 2 seem inexplicable. Why would a difference of a few percentage points in population coverage drive such dramatic differences in market share? The answer to this question is provided by translating the difference in population coverage into differences in geographic coverage, as demonstrated by Figure 3 below.

**Figure 3. Network reach of each MNO**

**GEOGRAPHIC COVERAGE**



Source: VHA

When considering the differences in geographic coverage it is readily apparent that the small differences in population coverage hide dramatic differences in geographic coverage. Telstra’s coverage areas is over double the size of Optus – and some five times the coverage area of VHA.

For those consumers who value coverage, it is clear that VHA’s (and Optus’) mobile network reach cannot be a substitute for Telstra’s mobile network reach.

The question then arises, can VHA and Optus close the coverage gap? The ACCC indicates otherwise in its draft decision, but does so in contradictory and inconclusive terms. VHA submits that it is abundantly clear on the economics that VHA cannot economically deploy sufficient base stations to even match Optus, even with tower access and under the most favourable investment assumptions, let alone Telstra. We further assert that Optus cannot credibly claim to significantly close the gap in geographic coverage to Telstra. VHA has evidenced this by sharing VHA’s investment model with the ACCC and ensuring that its finance team stepped the ACCC through this model. This is the model that VHA uses to make its investment decisions, so VHA finds it astounding that the ACCC seems to have ignored or discounted it.

The lack of weight attributed by the ACCC to extensive evidence presented by VHA is a matter of serious concern to VHA in the context of this declaration inquiry. As VHA has submitted elsewhere in this submission, VHA is concerned that the ACCC has sought to raise the evidential burden on VHA to an inappropriately high level.

VHA therefore fundamentally disagrees with the ACCC that: “the ACCC does not consider that a mobile roaming service is an essential input into retail mobile services as a network operator can extend its own network into an area in order to provide a mobile service”. This conclusion is manifestly and self-evidently incorrect based on the unequivocal evidence presented to the ACCC by VHA. This conclusion is a conclusion that no reasonable decision maker in the position of the ACCC could reach based on the evidence before it.

Moreover, this conclusion also directly contradicts the ACCC's own conclusion that: "*it is logically plausible that in many remote areas of Australia, it may not be viable for there to be more than one mobile network*", as well as the ACCC's acceptance of the existence of a natural monopoly in a large extent of the Telstra-monopoly area.

Specifically, VHA considers that each network has economic limits to coverage derived of the economics of density; creating a hierarchy of networks in descending size (i.e., a cascade). Each network in the hierarchy has reached its maximum efficient scale. This means that natural (structural) barriers to expansion lead to market failure in the outer regions with lower population density, derived of mobile network economics and natural monopoly.

In essence, the key issue driving the natural monopoly is that the revenue that can be realised from a base station in an area of low population density is so low that the base station is only economic if the network owner receives most of the available revenue. This means that the revenue available to the second network operator is not sufficient for that second network operator to profitably invest (including with tower collocation). At that point, the most efficient solution is for the two operators to share the first operator's network, rather than attempting to replicate each other's networks.

The particularly low population density in Australia, in conjunction with first-mover advantages, has enabled a single network (Telstra) to dominate regional Australia in a way that cannot be challenged. Simply put, geographic areas with low population density are not contestable, so are susceptible to natural monopoly and first-mover capture. In such circumstances, the only way to ensure retail competition is to mandate the sharing of networks, as achieved by roaming.

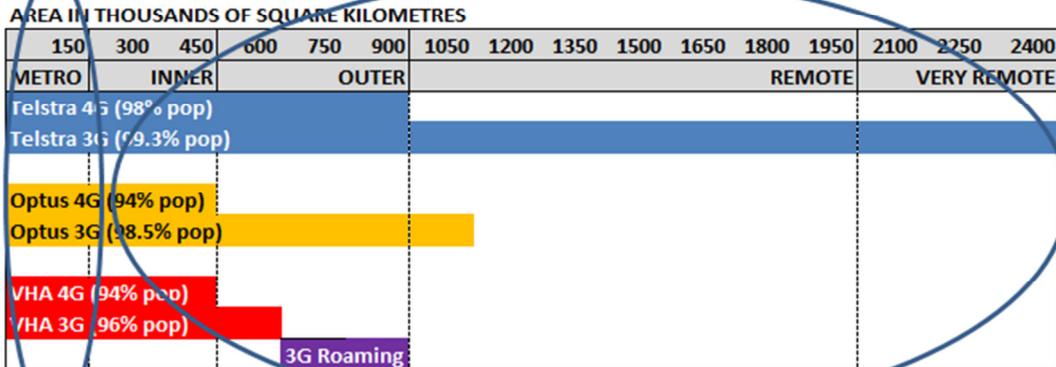
Any perception that VHA is to blame because it has "not invested" in coverage is demonstrably wrong. Simply put, VHA cannot feasibly invest. Telstra's first mover advantage, which it has partly obtained through government policies and subsidies, and through leveraging its fixed line monopoly, has enabled Telstra to capture those areas that can only viably support a single network. Optus has followed to capture those areas that can only viably support two networks. VHA has invested where it has been economically feasible to do so. Vodafone is otherwise dependent on roaming to compete for consumers that require mobile coverage in regional areas.

This is clearly demonstrated by Figure 3 above and Figure 4 below.

The ACCC's conclusion that "*there is no evidence that there is market failure in the national mobile services market*", fails to recognise that there is evidence of a market failure in regional Australia. The impact of this market failure is overwhelming and severe.

Figure 4. Network reach of each MNO – different geographic markets

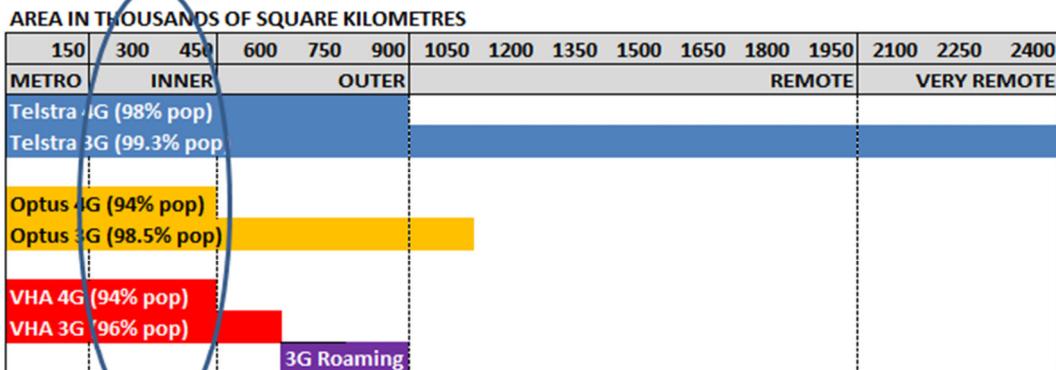
**GEOGRAPHIC COVERAGE**



Source: VHA

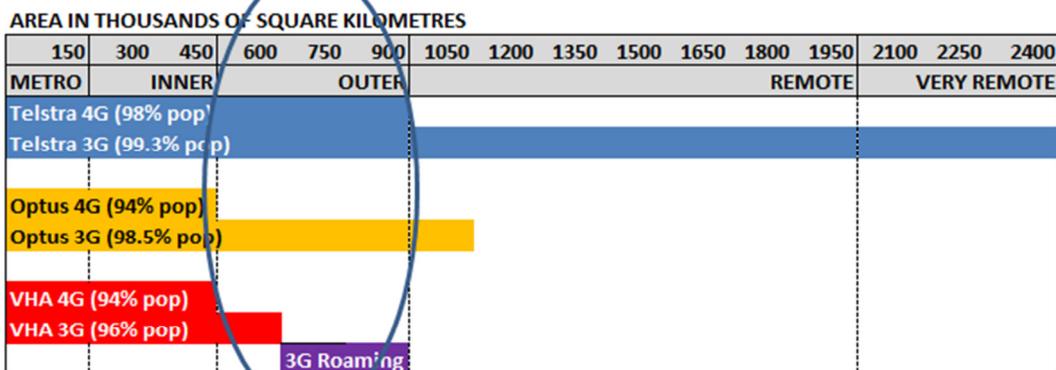
Metropolitan markets

Regional markets



Source: VHA

Telstra still has a near 80% share in inner regional areas, even with full 3G/4G network competition



Source: VHA

Vodafone is dependent on 3G roaming to deliver services in outer regional areas

As VHA understands it, the ACCC may have accepted that there are some parts of the mobile coverage area that can only economically support a single mobile network. The ACCC has also appeared to accept that, in such circumstances, sharing of network infrastructure is appropriate.

VHA therefore agrees with the ACCC that Telstra's network "*could be better utilised by making Telstra's network available for use by [VHA's] customers as a result of declaration*". Specifically, that "*declaration may result in some efficiency gains in allowing [VHA] to use the excess capacity available on [Telstra's] existing infrastructure*".

However, if this is the case, VHA is unsure why the ACCC has reached a conclusion that there is no market failure. VHA assumes this is because the ACCC is considering that the issue is limited to only a small percentage of the market. As VHA demonstrates in Figure 4, that is not correct.

When comparing network reach from Figure 3 with market share from Figure 2 it is also clear that Telstra has a near 80% market share in inner regional areas where all three MNOs have both 3G and 4G coverage, as illustrated by Figure 4. Telstra's market share in inner regional areas therefore clearly illustrates the profound implications that coverage differences in regional areas have on an MNO's ability to effectively compete.

As VHA has already explained, this effect arises because regional consumers will value full regional coverage to a much higher degree as they are more likely to travel between different regional areas and hence be exposed to call drop outs and insufficient coverage. Telstra's greater coverage footprint in regional Australia has enabled it to capture some 82% of consumers in regional Australia.

Figures 2, 3 and 4 demonstrates that a focus on population coverage in Figure 1 hides the underlying market failure caused by differences in network geographic coverage. This is particularly obvious in the 'Inner Regional' segment where Telstra's market share is near 80%. If the ACCC's view is correct (that the problem is only limited to 200,000 consumers), then one would expect to see a more even distribution of market share between the MNOs where they have the same mobile coverage. However, this is not what is observed.

Moreover, in the 'Major Cities' category, Telstra maintains a surprising high market share even though it charges substantially more for less compared to its competitors. The ACCC highlighted this with its conclusion that: "*Telstra's prices for its mobile services are generally higher than those of other MNOs and MVNOs*".

The ACCC also commented:

"..the average cost of data in Telstra's low-priced plans is substantially higher than those of its competitors, while its voice call inclusions are much lower, presenting less value for money for consumers than services offered by other mobile service providers. As a result, consumers that strongly value coverage and perceive Telstra as the only viable mobile service provider

may choose a higher-priced mobile service than they would otherwise purchase if alternative providers were available...”

The ACCC further highlighted: “*there is no evidence that Telstra is under pressure to decrease its prices*”.

Once metropolitan consumers that require mobile coverage beyond metropolitan areas are accounted for, it becomes clear that national mobile coverage is important to very substantially more than the 200,000 Australians living in the Telstra-monopoly area. Richard Feasey has sought to quantify the number of consumers in this category in his expert report, concluding that the number of consumers affected is in the order of 30-40% of mobile subscribers.

VHA has provided more evidence on these issues in its earlier submissions and in the various independent expert reports provided to the ACCC.

Again, declaration of roaming is promoted in regional areas by overcoming a structural obstacle to market access, thereby enabling end-users to access multiple networks. Again, the welfare benefits of doing so are significant and will reduce prices to both regional and metropolitan consumers

## 13 Further submissions by VHA on market definition

In light of the analysis in this paper, VHA makes the following key points:

- A purposive approach to market definition in the context of this declaration inquiry requires the ACCC to more appropriately focus on competitive effects in the regional areas in Australia. As evidenced by VHA, there is a market failure and the impact of the market failure is substantial.
- The fact that the same service package may be supplied at the same price nationally and have the same or similar elements does not detract from the fact that there are substantial geographic disparities in value and coverage that lead to different competitive dynamics in different regional areas in Australia.
- The ACCC should have regard to the manner in which retail mobile geographic markets have been defined in the United States, given that the test of market definition based on substitutability is identical between Australia and the United States. The United States considers both local markets and national markets, but gives significant weight to local market considerations in its analysis (including network coverage, quality and market shares in each local market).
- The evidence suggests that Telstra’s ‘full coverage’ product (which is both metropolitan and regionally focused) may exist in a separate product market to the ‘part coverage’ products offered by VHA and Optus (which are essentially metropolitan focused). Telstra’s ability to supply a

service without a near substitute explains Telstra's premium pricing – as Telstra has a degree of market power.

- From a demand-side perspective, the appropriate focus should be on the distribution of mobile services to consumers in a particular locality. To the extent that a consumer buys a mobile service from a retail outlet, the relevant consideration is the distance that a consumer would be willing to travel to buy a mobile service from an alternative retail outlet. Generally, a regional consumer would not travel into a metropolitan area – and vice versa.
- To the extent that a consumer buys a mobile service over the Internet, the relevant consideration for that consumer will be the level of coverage available to that consumer in the immediate locality of that consumer. The consumer will still be acquiring a service in that locality that best suit the consumers bespoke needs at that locality. Accordingly, a regional consumer will inherently be more sensitive to coverage differences than a metropolitan consumer.
- Marketing decisions are not necessarily made on a national basis as suggested by the ACCC. Marketing of mobile services is also tailored to the requirements of consumers in particular locations with regard to such matters as product segments, demographics and use. The marketing of services is heterogeneous, not homogenous. The myriad of plans and price points also enables bespoke solutions to be tailored to the needs to consumers in particular locations.
- From a supply-side perspective, the appropriate focus should be on the ability of an MNO to increase its distribution or supply of mobile services into a particular locality in response to a price rise by a rival MNO. In regional areas, this would require the MNO to have existing retail infrastructure and network coverage in the particular area, unless a roaming arrangement were in place to allow an immediate supply-side response.

Taken collectively, it is clear that the application of the law relating to substitutability, market evidence, a purposive approach, European precedent, and United States precedent, all point to a different market definition than adopted by the ACCC local in the context of this particular declaration inquiry.

VHA has provided further information for the benefit of the ACCC in Annexure 1 to this submission.

## Annexure 1 Supplementary material on product market definition

### 1 Evidence of demand side substitution

In this Annexure 1, VHA examines the evidence identified in the ACCC's Draft Decision which relates to the closeness of substitution between mobile products with differences in geographic coverage (ie the product dimension)<sup>17</sup>.

Consistent with the approach adopted in the United States (as discussed earlier in this submission), the coverage characteristic of a mobile service is a product feature of the service and is different from the geographic market in which it is supplied.

VHA considers evidence of consumer purchasing decisions including:

- consumer switching behavior between service providers;
- other factors, such as consumer perception, which may drive consumer choice between MNOs;
- geographic coverage is a salient feature of mobile services; and
- retail pricing and market share.

VHA examines each of these and the ACCC's provisional views below.

#### 1.1 Consumer switching behaviour

At page 26 of the Draft Decision, the ACCC states:

“The ACCC notes that Australian consumers are readily able to change from one mobile service provider to another”

The ACCC's provisional view appears to be based on the results of the ANU Report<sup>18</sup>. However, the ANU Report does not support the ACCC's finding.

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<sup>17</sup> VHA notes that mobile services are supplied nationally and the geographic scope of the market is not particularly instructive in defining the boundaries of the relevant retail market.

<sup>18</sup> Alex Richardson and Greg Shailer, *The state of competition in the Australian mobile resale market*, January 2016 (ANU Report).

The ANU Report makes a number of findings regarding consumers switching behaviour that the ACCC has not acknowledged in the Draft Decision, specifically:

- a significant proportion of metropolitan consumers do not switch service providers; and
- of those consumers that switch, a significant proportion of them switch because of coverage reasons.

The findings of the ANU report cannot stand for the proposition that the ACCC has credited it with establishing in the Draft Decision for the following key reasons:

- First, the results of the ANU Report were based on survey response from people, the majority of who, reside in the regions of Sydney, Canberra, Melbourne and Brisbane<sup>19</sup>. Hence regional consumers are underrepresented and the results of the ANU Report provides a view about consumers living in metropolitan areas.
- Second, the ANU Report found that 60% of respondents have been with current service provider for more than 2 years (ie these consumers have not switched for at least two 24 month post-paid contract terms) and 34% have been with current service provider for more than 5 years.<sup>20</sup> These results say that while consumers do switch from time to time, a significant number of consumers do not switch at all.
- Third, the statistic on switching cited by the ACCC cannot be considered in a vacuum and must be considered in light of the reasons why consumers switch. The ANU Report found 37% of consumers cited 'deficiencies in network coverage' as a reason for changing service providers.<sup>21</sup> This suggests that a significant proportion of metropolitan consumers switch to a mobile product with increased geographic coverage. The ACCC should enquire further as to whether those consumers switched to Telstra and how much more they had to pay to switch.

Relevantly, the ANU Report did make various findings on retail pricing that the ACCC has similarly not acknowledged in its Draft Decision. The ANU Report found that Telstra is at least 20% more expensive after adjusting for data inclusions. The ANU Report stated:<sup>22</sup>

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<sup>19</sup> ANU report, see page 69.

<sup>20</sup> ANU Report, see Table 27, page 73.

<sup>21</sup> ANU Report, see Table 37, page 79.

<sup>22</sup> ANU Report, see page 84.

“On average, the Telstra network have the most expensive offers (\$44.75), with the Vodafone network being the least expensive (\$38.61) and the Optus network averaging slightly less than Telstra (\$43.26). The Telstra network has the highest average call dollar value inclusions but the lowest amounts of data included, at around 20% less than Optus and Vodafone network offers. All three networks are seeing a shift from included dollar call values to included national minutes instead. In terms of included data and excess data costs, the Vodafone network offers the best value.”

Given the above, VHA notes that metropolitan consumers are not ‘readily’ able to switch mobile service providers, as suggested by the ACCC. Rather, there are significant impediments

Specifically, a significant proportion of metropolitan consumers currently must pay more to purchase a better coverage mobile product. Moreover, consumers that require a bigger geographic coverage mobile service cannot switch ‘down’ to a smaller geographic coverage mobile service. If these consumers switched to Telstra and they were prepared to pay a substantial (20%+) premium to do so.<sup>23</sup>

## 1.2 Consumers’ perceptions of Telstra’s network

At page 51 of the Draft Decision, the ACCC states;

“The ACCC considers that even with declaration, Telstra is likely to maintain its strong position, due to the perception that it offers high quality and reliable services.”

The ACCC appears to be saying that consumers choose Telstra<sup>24</sup> because of the perception of its network quality. Implicitly, the ACCC is therefore downplaying the importance of geographic coverage as a salient feature of a mobile service by which consumers make their purchasing decision.

VHA notes that the ACCC has not said it is differences in actual quality of service between the MNOs, but it is the differences in consumers’ *perception* of quality of service. The former can be easily tested, however the latter is more difficult – and seems to be based on the subjective perception of the ACCC.

Specifically, it is difficult to pinpoint what evidence the ACCC has relied on in reaching its provisional view on this issue – suggesting that this is entirely subjective. It also appears the ACCC has made this assertion throughout its Draft Decision without any meaningful supporting evidence,

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<sup>23</sup> There is evidence to suggest that data inclusions (and not how many voice minutes and SMS) drive consumer choice. See for example, ANU Report, Table 44, page 83.

<sup>24</sup> VHA notes that the ACCC’s emphasise on Telstra’s ability to attract and retain customers is an assessment of *competitors* and not an assessment of the *competitive process*. This is ironic for obvious reason in light of the ACCC’s comments about the Government’s proposed reforms to section 46 of the CCA.

VHA notes some examples in the table below:

ACCC Draft Decision	VHA comment
<p>At page 29:</p> <p><i>There is a perception held by many consumers that Telstra provides high quality mobile services, will provide a more reliable and better quality service. The investment that Telstra has made in its network in the past has contributed to this consumer perception.</i></p>	<p>It is unclear what evidence the ACCC relied on to make the logical leap that consumers perceive Telstra provides high quality mobile services and that investments made by Telstra contributed to this perception.</p> <p>All three MNOs have made substantial investments into their own networks. The ACCC's logic therefore does not apply exclusively to Telstra.</p>
<p>At page 32:</p> <p><i>Second, Telstra's share of the mobile broadband market also appears to suggest that consumers' perception of the quality of Telstra's mobile services is also driving consumer choice.</i></p>	<p>It is unclear how the ACCC can draw an inference about consumer perceptions from market share data alone.</p> <p>Using the same logic, one could say Toyota and Holden have high market shares and hence consumers perceive that they each offer a higher quality product and service than say Ferrari and Maserati. Such an inference is wholly unsatisfactory.</p>
<p>At page 43:</p> <p><i>However, as the existence of Boost shows, lower-priced alternatives offering wide geographic coverage to consumers do exist. Low take-up rates of this service potentially show two issues:</i></p> <ul style="list-style-type: none"> <li>• <i>regional consumers' perception that Telstra is a premium service provider such that consumers are willing to pay higher prices to acquire a perceived superior service, and</i></li> <li>• <i>low consumer transparency about retail offers in the market, including coverage information and service quality of networks.</i></li> </ul>	<p>The ACCC appears to have identified two theories to explain why Telstra can charge regional consumers more in a market that the ACCC considers to show 'reasonable effective competition'.</p> <p>The ACCC then stops itself from seeking evidence to crystallize either of its hypotheses into fact.</p> <p>The ACCC has then carried on as if its first theory is proven fact.</p>

<p>At page 53:</p> <p><i>Overall, it does not appear that geographic coverage in Telstra-only areas is a particularly important consideration for a large number of metropolitan consumers as may be demonstrated by the market share figures in Table 1. As such, it is not clear that declaration would significantly improve Optus' and VHA's ability to compete with Telstra for metropolitan consumers in the national mobile services market.</i></p> <p><i>Instead, the ACCC considers that Telstra is likely to maintain a competitive advantage, at least for some time, due to the perception it offers high quality and reliable mobile services.</i></p>	<p>The ACCC finds that metropolitan consumers are attracted to Telstra because of their perceptions about the Telstra network without identifying any evidence to support that conclusion.</p> <p>The ACCC also has not identified any evidence as to why this 'competitive advantage' will continue 'at least for some time'. The logic of the ACCC's finding is that the Telstra brand has some enduring competitive advantage that no competitor can match. This alone suggests there is some structural problems with the market.</p>
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Regardless of the above, the evidence contradicts the ACCC's provisional finding on consumers' perception about Telstra's network quality.

First, the ANU Report found that:

- only 8% of respondents ranked 'network ownership' as of vital importance<sup>25</sup>;
- only 13% of salespeople ranked 'network ownership' as of vital importance<sup>26</sup>; and
- consumers ranked 'network ownership' number 15 (out of 16) as a decision factor in choosing a mobile service, and salespeople ranked 'network ownership' dead last<sup>27</sup>.

The ANU Report showed that consumers and sales people do not place much value on which MNO owns the network that is providing the mobile service. This suggests metropolitan consumers do not care who they purchase their services from, as long as it meets their mobile service needs, including coverage,

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<sup>25</sup> ANU Report, see Table 31, page 74.

<sup>26</sup> ANU Report, see Table 43, page 82.

<sup>27</sup> ANU Report, see Table 44, page 83.

pricing and quality<sup>28</sup>. This then suggests that actual experiences is a driver of consumer choice and/or perception about the quality of Telstra’s network quality.

Actual quality is measurable and quantifiable. CommsDay published its P3 Mobile Benchmark (December 2016), which showed that in metropolitan areas, all three MNOs scored equally for various qualitative measures; VHA even scored the highest in some categories. We provide the overall result extracts in Figure 6 below.

**Figure 6 P3 CommsDay results (December 2016):**

Overall Results Voice and Data			Telstra	Optus	Vodafone
<b>VOICE</b>		max. 400 Points	<b>331</b>	<b>340</b>	<b>328</b>
Major cities	Drive testing	210	82%	85%	90%
Major cities	Walk testing	60	87%	90%	90%
Smaller cities/towns	Drive testing	60	87%	92%	91%
Connecting roads	Drive testing	70	77%	73%	44%
<b>DATA</b>		max. 600 Points	<b>536</b>	<b>497</b>	<b>484</b>
Major cities	Drive testing	315	93%	88%	91%
Major cities	Walk testing	90	90%	88%	90%
Smaller cities/towns	Drive testing	90	90%	72%	73%
Connecting roads	Drive testing	105	78%	73%	48%
<b>TOTAL</b>		max. 1000 Points	<b>867</b>	<b>837</b>	<b>812</b>
<b>GRADE</b>			very good	good	good

As the P3 CommsDay result shows, in the major cities each of the MNOs provide comparable quality of services in both voice and data categories. The P3 CommsDay results shows that beyond major cities, Optus and VHA cannot compete against Telstra on quality. This is because neither Optus<sup>29</sup> nor VHA can match the number of mobile sites Telstra has outside major cities<sup>30</sup>.

<sup>28</sup> The ANU Report ranks pricing, network coverage, network quality and data inclusions (a function of price) top 4 in consumer purchasing decision factors. See table 44, page 83.

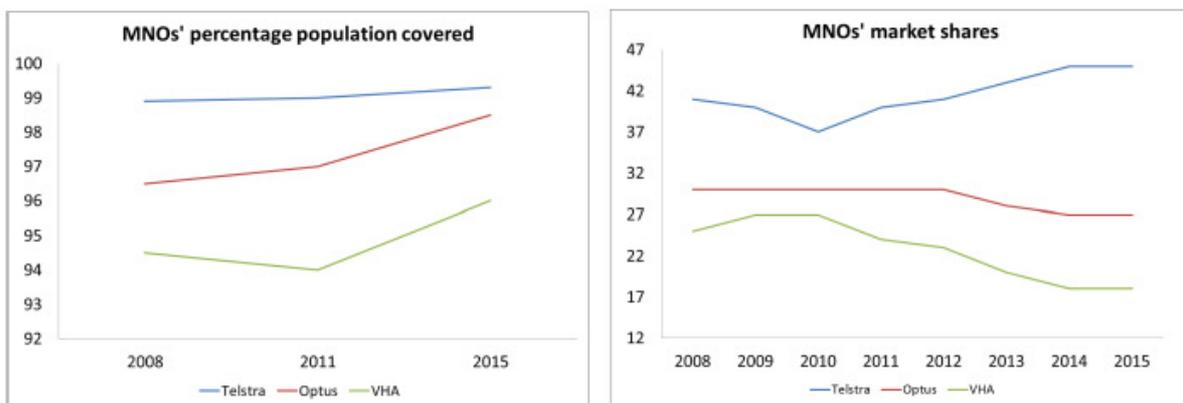
<sup>29</sup> Optus admits this freely in other context. For example, at page 15 of its submission to the ACCC on setting the 1800 MHz spectrum competition limits, Optus stated: “Spectrum holdings are a barrier to increasing competition in regional

The number of sites a MNO affects both coverage reach and quality of network (ie site density). The P3 CommsDay results above translates Telstra’s mobile site advantage into observable and measurable experiences in quality of service.

Third, the ACCC’s theory cannot explain the durability of Telstra to retain consumers after widely publicised network failures over the past two years.<sup>31</sup> Consumers’ enduring conviction about the Telstra network suggests Telstra has captured them in some fashion and consumers are unwilling or unable to switch. Even if the ACCC is right and Telstra’s durability is explained by the strength of consumers’ perceptions, it would still not explain why the ACCC is of the view that this would continue for ‘some time’ even if domestic mobile roaming is declared.

Fourth, the ACCC’s Draft Decision relies heavily on the failures of VHA to retain consumers after its widely publicised network problems in 2010<sup>32</sup>. This conclusion does not recognise that VHA was also in the processing of merging the networks of Hutchison and Vodafone to create VHA, resulting in migration of customers and consequential churn as call plans expired. Moreover, the ACCC has failed to explained why Optus also appears to be losing market share to Telstra. See for example Figure 4 of the ACCC’s Draft Decision:

**Figure 4 – MNO population coverage compared to market share over time<sup>65</sup>**



It is unsatisfactory for the ACCC to conclude that the ‘*network problems experienced by VHA in 2010 suggest that service quality is also an important factor for consumers when choosing a service*

areas. These barriers are further compounded by the **tower advantage held by Telstra, which is uneconomical for other MNOs to challenge.**” (emphasis added).

<sup>30</sup> VHA understands that the ACCC has received confidential information from each of the MNOs on the number of mobile sites each MNO has by geographic regions. VHA is of the view that the ACCC has the necessary information to test the views of VHA.

<sup>31</sup> See for example, <https://www.arnnet.com.au/article/610301/telstra-reveals-new-network-strategy-wake-outages/>.

<sup>32</sup> VHA notes that the ACCC appears to again focus on *competitors* rather than the *competitive process* in its assessment.

*provider*,<sup>33</sup> when there is evidence that does not support its theory. In this case, Optus did not suffer similar network problems and yet its market share has been in decline since 2012. This suggests the ACCC's theory is incorrect. Moreover, Telstra itself has suffered network problems in recent years, yet Telstra's market share has continued to increase.

Given all the above, it would be difficult for the ACCC to maintain an assertion that consumers place substantial value on the perceived quality of the Telstra network, and that Telstra will maintain this perceived quality advantage for 'some time'.

In VHA's view, there is a positive correlation between number of mobile sites an MNO has and its network quality. In VHA's view, actual experiences and not consumer perceptions of network quality drive consumer choice. How many mobile sites an MNO has also correlate strongly with its network reach (ie geographic coverage). Once a person travels beyond the metropolitan areas of Australia, 'coverage' and 'quality' are likely to mean the same thing as they are both determined by the number of mobile sites an MNO has in a given geographic area.

The ACCC's apparently flawed finding about consumers' perception of the Telstra network is a red herring and may have tainted the ACCC's assessment of relevant retail markets. This unexplained and unquantified 'thing' confuses the question to be asked. The ACCC should be asking whether consumers consider: (i) a mobile service with 2.4 million square kilometre coverage, (ii) a mobile service with 1 million squared kilometre coverage, and (iii) a mobile service with 600,000 square kilometre coverage to be close substitutes; not, whether consumers choose Telstra because of something other than its geographic coverage.

### **1.3 National geographic coverage is a salient feature of a mobile service**

In section 1.1 of this Annexure 1 above, VHA demonstrated that a significant proportion of consumers that live in metropolitan areas do not switch mobile service providers, and when they do switch, a significant portion of them switch because of the deficiency in geographic coverage. In section 1.2, VHA demonstrated that consumers do not choose to purchase Telstra's mobile service because of a perception about the quality of Telstra mobile network.

The next question to be answered is how close do consumers consider mobile services with differences in geographic coverage substitutes. More specifically, is there substitutability between mobile services with national coverage and less than national coverage (ie, a Telstra mobile service vs a non-Telstra mobile service) and, if so, how extensive is that substitutability?

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<sup>33</sup> ACCC Draft Decision, see page 31.

The ACCC's provisional view appears to be that it does not believe geographic coverage is a salient feature of a mobile service at all. ACCC stated in its Draft Decision:

“[T]he ACCC does not consider that there is currently evidence to support a finding that extensive geographic coverage is essential for a service provider to compete in the national mobile service market.”<sup>34</sup>

The ACCC's Draft Decision suggests that the ACCC considers a mobile service with 'extensive' geographic coverage and a mobile service with less than 'extensive' geographic coverage are close substitutes from a consumer perspective.<sup>35</sup>

What the ACCC is saying is that its starting assumption is that VHA's mobile coverage of 600,000 km<sup>2</sup> and Optus' mobile coverage of 1 million km<sup>2</sup> can compete with Telstra's 2.4 million km<sup>2</sup> of geographic coverage, and hence consumers view them as substitutes. The ACCC is careful not to make a finding about the *effectiveness* of the competition, and hence about the *closeness* of the substitution.

The ACCC's Draft Decision is a complete departure from its previous finding in 2004, where the ACCC stated:

“The Commission is of the view that national geographic coverage is an important competitive dimension and the inability of a mobile carrier to offer national coverage to its customers would have a significant adverse impact on its ability to compete.”<sup>36</sup>

The ACCC's Draft Decision does not explain why it has departed from its 2004 position so completely, and has not identified any evidence to support its implicit position that national geographic coverage is not particularly important to consumers.

From a demand side perspective, while geographic coverage is obviously critically important to some consumers, the question is whether consumers would consider a mobile service with national coverage and a mobile service with less than national coverage *close* substitutes. The answer is clearly 'no' once all the evidence is considered.

Telstra makes this very clear in its submissions. For example, Telstra submitted:<sup>37</sup>

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<sup>34</sup> ACCC, Draft Decision, see page 34.

<sup>35</sup> It is unclear what the ACCC means by 'extensive' geographic coverage. It is likely 'extensive' geographic coverage means Telstra's 2.4 million km<sup>2</sup> of mobile coverage. It is likely that something less than extensive geographic coverage means area covered by the mobile service with the next largest geographic coverage which is the Optus network of 1 million km<sup>2</sup> of mobile coverage. To avoid using the ACCC's confusing terminology, VHA will refer to the largest possible geographic coverage as 'national' coverage, consistent with the ACCC's previous decisions. Mobile services supplied by non-Telstra MNOs has less than national coverage.

<sup>36</sup> ACCC, 2004 Mobile Services Review Report, see page 34.

- *Many customers place importance on better network coverage, including coverage in regional and rural areas, and this influences their purchasing decisions about mobile services. [CIC begins]* [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] [CIC ends];

- *Customers choose their mobile service provider based on a range of factors, but coverage and price are the two most important. [CIC begins]* [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] [CIC ends];

The ACCC also acknowledges that Optus also believes that geographic coverage is of primary concern for consumers. At page 34 of the Draft Decision, the ACCC comments:

“The second Analysys Mason report provided by Optus provides further detail on this research. It notes that while the market research finds that coverage is the most important factor for most consumers, this refers to all network coverage and not just coverage in regional Australia.”

The evidence that national coverage and less than national coverage are considered not substitutable products is demonstrated by Telstra’s own admission that a substantial majority of its customers choose it because of its national coverage. Of course, one could say there is no problem with consumers self-selecting their preferred mobile service provider and that this says nothing about the closeness of the substitutability between a mobile service with national coverage and a mobile service with less than national coverage. However, it becomes clear that the two mobile services are not close substitutes once retail prices and market share data are considered.

Beyond considering substitutability, the ACCC’s provisional finding that geographic coverage is not important to competition is problematic for a number of reasons VHA outlines below.

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<sup>37</sup> Telstra, *Response to the ACCC’s Discussion Paper on the declaration of a wholesale domestic mobile roaming service*, confidential version, 2 December 2016, pages 30-32.

First, the difficulties of sustaining the ACCC's provisional position based on evidence provided by stakeholders is cogently put by Richard Feasey:

“Second, I would urge the ACCC to step back from the detail and consider its overall position. As I understand it, the ACCC's position is that declaration of domestic roaming would have little impact on the lives of most Australian consumers or upon the commercial prospects of those who serve them. In the ACCC's view, VHA is wrong to think that being able to offer national coverage would significantly alter its capacity to compete with Telstra, and Telstra is equally mistaken to think that coverage confers significant competitive advantages or perhaps even market power which it ought to fight hard to retain. The senior management in all three MNOs have invested a substantial proportion of their organisation's resources in recent months on an issue which is, in fact, of little commercial consequence for any of them. Telstra's management was apparently prepared to invest a further \$450-550 million over 3 to 5 years in an attempt to preserve its current position, a claim which I take to provide a good but crude indication of the commercial value at stake for Telstra but which the ACCC apparently does not. I assume the ACCC believes that investors were similarly misinformed about the likely consequences for competition and for Telstra's profits when they sent Telstra's share up 5% on the morning the ACCC's draft decision was announced.”<sup>38</sup>

Second, in addition to evidence provided by the MNOs, third party evidence relied on by the ACCC further demonstrates that coverage is a critically important to consumers. It is so important that the ANU Report found:

- 75% of consumers considered 'network coverage' of vital importance, see Table 31;
- 37% of consumers cited 'deficiencies in network coverage' as a reason for changing service providers, see Table 39;
- 85% of salespeople considered 'network coverage' of vital importance, see Table 43;
- Consumers ranked 'network coverage' the third most important factor (out of 16) in decision factors, see Table 44; and
- Salespeople ranked 'network coverage' the second most important factor (out of 16) in decision factors, see Table 44.

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<sup>38</sup> Richard Feasey Comments, on aspects of the ACCC's Domestic Roaming Declaration Enquiry Draft Decision (**Richard Feasey Comments**), paragraph 27.

VHA notes that the results of the ANU Report were based on survey response from people, the majority of which reside in the regions of Sydney, Canberra, Melbourne and Brisbane<sup>39</sup>. This shows that mobile coverage is critically important to a significant proportion of consumers whom reside in the most populous cities of Australia. VHA expects that regional consumers would place significantly more value on coverage, consistent with the views of many regional stakeholders who have made submissions to the ACCC in this current inquiry.

If the ACCC’s provisional finding that ‘extensive geographic coverage’ is not ‘essential for a service provider to compete in the national mobile service market’ is taken to mean that ‘consumers don’t place significant value on geographic coverage’ then the ACCC should be frank and state its position clearly. In VHA’s view that such a position would be precarious and unsustainable in the face of evidence already before the ACCC.

Third, the ACCC’s provisional finding says nothing about the effectiveness of competition, as Richard Feasey points out:

“The ACCC’s conclusion is odd. It finds ‘no evidence that extensive coverage is essential for a service provider to compete in the national mobile service market’ (p.34). It is not clear what ‘extensive coverage’ means in this context, but if the ACCC means that a failure to match Telstra will not lead to Optus or VHA exiting the Australian mobile market, then the ACCC is addressing a claim which nobody has made, so far as I am aware.”<sup>40</sup>

That is, the ACCC’s provisional finding says nothing about how differences in geographic coverage effects the quality of competition in retail mobile markets. As Richard Feasey points out, the ACCC’s provisional finding can be simply restated as: Optus and VHA is unlikely to exit the Australian mobiles market in the event that the ACCC does not declare mobile roaming.

Lastly, the ACCC’s finding that differences in geographic coverage does not have a significant impact on competition in the retail mobile market makes a number of other findings in its Draft Decision incoherent. Particularly:

ACCC Draft Decision	VHA comments
Page 17: <i>Wholesale roaming services may be supplied to cover discrete geographic areas where the</i>	If coverage differences do not have a significant impact on competition in the retail mobile market (ie coverage does not impact an MNOs ability to

<sup>39</sup> ANU report, see page 69.

<sup>40</sup> Richard Feasey Comments see paragraph 38.

<p><i>acquiring MNO does not have network coverage, or they can be provided across the whole of the access provider's network. Competitive dynamics may differ between particular geographic areas, and an MNO offering a wholesale roaming service may wish to retain a competitive advantage in regional areas where there is no, or limited, competition from other MNOs.</i></p> <p>Page 22:</p> <p><i>Based on the information the ACCC has received, it is unlikely that an MNO would offer a competitor full access to its network footprint. Access to a more limited footprint enables an MNO to retain a competitive advantage through greater network coverage. The ACCC considers that each network has some degree of market power in the retail market and that competition has a number of dimensions, including network coverage. The MNOs compete by investing in network expansion and technology meaning that, at any particular time, a network may have superior coverage in a particular geographic area which differentiates it from its rivals and gives it a competitive advantage. It is therefore rational, and an outcome of these competitive forces, that an MNO would not offer a wholesale product that would affect a source of its ability to compete.</i></p>	<p>attract and retain consumers), then there should be limited incentives for an access provider to 'retain a competitive advantage' in the retail mobiles market by offering only a limited geographic coverage wholesale roaming service and forgoing wholesale revenue it otherwise would receive.</p> <p>If it was rational for Telstra to not offer a national coverage wholesale product because it would affect its competitive advantage in the retail market then it would suggest that the benefits it receives in the retail market by reason of its coverage superiority is more than wholesale revenues it would receive. The benefits Telstra receives must be very large indeed; so large that it would simply refuse to provide a wholesale service that only it can supply and forgo what would be in effect 'monopoly' wholesale revenue.</p> <p>Furthermore, as the ACCC points out coverage is an aspect of competition and can confer an MNO with market power in retail mobile markets. VHA is of the view that such market power is commensurate with the magnitude of Telstra's geographic coverage advantage and the inability of a competitor to provide a competing service in those coverage areas.</p> <p>In the case of Telstra, its enduring monopoly coverage of 1.4 million km<sup>2</sup>, which no other MNO can hope to match and cannot access on reasonable commercial terms, gives it significant and enduring market power in retail mobile markets.</p>
<p>Page 59:</p> <p><i>The ACCC does not consider that this affects its assessment that TPG would be able to acquire a service in the future. This is because TPG has now clearly stated its intention to rollout a mobile network, and has the spectrum resources to do so. Therefore, it is now far more certain that TPG will</i></p>	<p>The ACCC should be clear on what it considers to be 'anticompetitive conduct' that would make it more difficult for TPG to enter the market.</p> <p>VHA notes that the ACCC is careful to not say that a roaming agreement would lower barriers to entry for TPG and that the ACCC is careful to not explicitly state it would consider it anti-competitive if TPG</p>

*enter the market, and therefore, there are greater incentives for MNOs to compete to gain its roaming business.*

*However, we note that it is also possible that the MNOs may choose not to supply a roaming service as it would assist a competitor who would erode their market share. The ACCC considers that the entry of a fourth MNO would be a very positive outcome for competition and consumers in the national market for mobile services. We note that if there was evidence of anti-competitive conduct to make it more difficult for a fourth MNO entering the market, it would raise concerns for the ACCC.*

was unable to acquire a roaming service. However the ACCC's preceding paragraphs suggests that the above propositions are exactly what the ACCC has in mind.

If the ACCC were to make either of the above findings, it would be directly contradictory to the ACCC's position that 'extensive geographic coverage' is not 'essential for a service provider to compete in the national mobile service market'

In the ACCC's world, TPG's anticipated mobile network that covers 80% population should be able to compete in the National Market regardless of whether or not it can acquire a roaming agreement.

Page 47:

*Based on current information, the ACCC's preliminary view is that there is evidence that coverage-based competition may continue. Such competition is not focused on the size of geographic coverage, but rather on improving the quality of networks in areas where coverage exists.*

Page 67 (see also section 5.4):

*the ACCC accepts the contention that when making decisions to invest in areas of low population density (typically regional and remote areas), an operator will not only consider the expected direct returns from such investments to justify the capital cost of building or extending a network. It will also take into account the advantage of being able to claim a greater coverage footprint and the indirect returns from attracting customers who value coverage in areas of lower population density when making those decisions.*

Page 71:

*The ACCC considers that, while declaration would have some impact on Telstra's incentives to invest in expanding its network beyond its current footprint, that impact would not be significant.*

Page 72:

*the ACCC considers there is potential for Optus to not only duplicate Telstra's coverage in the current Telstra-only areas, but to also provide a competing network with better coverage (e.g. greater depth, higher speed or newer technology). The ACCC considers the incentive to differentiate itself is likely to be strong for Optus if it extends into the Telstra-only area.*

The ACCC's finds:

- MNOs invests in extending geographic coverage because they can better attract consumers;
- declaration may have an impact on Telstra's incentives to invest in expanding its geographic coverage; and
- Optus is likely to extend its geographic coverage.

The above provisional findings are inconsistent with the ACCC provisional finding that extensive geographic coverage is not important to competition in retail mobile markets.

In the ACCC's world, there is a 'coverage race' between the MNOs but there is no prize for the winner.

Building new mobile sites in regional and rural Australia is expensive. If it were true that consumers do not value extensive geographic coverage then the ACCC must explain why it believes that Telstra or Optus would spend millions of dollars to build new mobile sites to extend coverage, and why Telstra would bother upgrading its mobile network beyond the most populous parts of Australia.

The logical extension of this position is that the MNOs are not rational and are each spending millions of dollars to build new mobile sites for no apparent reason, and the Government's Mobile Blackspots Program is equally a generous waste of resources.

## 1.4 Retail pricing and market share analysis

In 1.3 VHA demonstrates that there is a distinction between a mobile service with national coverage and a mobile with less than national coverage. The question to be answered now is whether the two products are *close* substitutes. Another way of asking this question is at what prices are consumers willing to substitute national coverage<sup>41</sup> with something less than national coverage.

In VHA's view, there is a clear segment of consumers that require and are willing to pay to acquire national geographic coverage. These consumers do not consider a mobile service with less than national geographic coverage suitable to their needs. This is explained by Richard Feasey:

“In practice, I would expect some coverage to be more valuable than others in the sense that more consumers will be more likely to roam in some places (popular holiday resorts, highways etc) than in others. But it is not clear to me that consumers will always draw this distinction when it comes to selecting a carrier. In order to do so they would have to form a clear understanding of whether the places in which a carrier offers coverage correspond to those which they are likely to value. Of course, they are likely to do this in relation to the immediate area in which they normally live or travel (although I have known examples of consumers buying mobile subscriptions and finding that they have no service when they return home), but, even assuming that consumers could anticipate where they will travel in future, I am not sure many bother to check the coverage maps with any great care. I think it more likely that most consumers who value coverage will simply gravitate towards the network which claims the ‘best coverage’ (or, as Telstra say on their website ‘the network without equal’) on the assumption that this will offer the greatest probability of obtaining service whenever and wherever they require it in future. Similarly, if one network is widely known to offer significantly better coverage than the others, this is likely to be the network to which consumers gravitate, irrespective of whether or not, in any particular instance, other operators might also represent a viable alternative.”<sup>42</sup>

There exist some consumers who do not require national geographic coverage but they nonetheless choose to purchase a mobile service with national geographic coverage because they value the option of being able to use their mobile service in case they travel beyond the metropolitan areas of Australia in sometime in the future. However, the evidence available suggests that this group of consumers are small given the differences in pricing between Telstra and its competitors.

Whether VHA's view is correct can be tested against retail pricing and market share information.

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<sup>41</sup> Telstra's mobile network has the biggest geographic coverage and by default can be considered 'national' coverage.

<sup>42</sup> Richard Feasey, *Issues arising in relation to the ACCC's domestic roaming declaration enquiry*, see paragraph 20. (First Feasey Report)

In regards to retail prices, the ACCC's assessment is seriously deficient. The ACCC's provisional finding that *'Telstra's competitors exercise some competitive constraint on Telstra, forcing it to react to industry-wide pricing'*<sup>43</sup> is misleading and uninformative about market definition or competition within the relevant markets.

In reaching its view, the ACCC has ignored substantial evidence of Telstra's price premium provided by VHA. The ACCC also ignored third party evidence it relies on; relevantly, the ANU Report found that Telstra is at least 20% more expensive after adjusting for data inclusions.<sup>44</sup>

Even the ACCC's flawed retail pricing analysis identifies there is a clear problem with Telstra's retail prices which the ACCC cannot explain. The ACCC found that Telstra is significantly more expensive (ie more than 10% on a unit price bases) compared to non-Telstra providers in all service categories except for the 'high cost' plan category.

The ACCC attempts to explain away these problems by making assertions without evidence to support its position. The ACCC notes:

“[I]t is possible Telstra's higher prices may in part be attributed to its higher network costs due to its extensive regional network and the high costs of serving regional areas. As a result, the ACCC considers that it is possible that declaration may not lead to Telstra lowering its prices to any significant extent.”<sup>45</sup>

In materials already provided to the ACCC. VHA has demonstrated that Telstra's monopoly coverage area is likely to be standalone profitable using information provided by Telstra in its submissions including the Ovum report. There is no justification based on cost recovery for Telstra's significant price premium.

It then begs the question how is it that Telstra is able to charge consumers significantly more for comparable services and maintain a dominating position in the market? Telstra enjoys a high market share<sup>46</sup> in metropolitan areas and an effective monopoly everywhere else. The ACCC asserts without evidence that Telstra's ability to charge more is due to consumer perception of its network, and that this 'competitive advantage' is likely to be enduring 'for some time'<sup>47</sup>. As VHA demonstrated in 1.2, this is incorrect.

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<sup>43</sup> ACCC, Draft Decision, page 42.

<sup>44</sup> ANU Report, see page 84.

<sup>45</sup> ACCC, Draft Decision, page 55.

<sup>46</sup> See Figure 1 above.

<sup>47</sup> ACCC, Draft Decision, page 53.

The pricing and market share evidence goes to the closeness of substitutability in a material way. The pricing evidence shows:

- Telstra's offerings are expensive and they are substantially more expensive, but
- in comparison, Optus and VHA are reasonably competitive with each other in pricing.

The market share evidence tells us that despite Telstra's prices being substantially more, consumers are willing to pay for it and are increasingly prepared to pay at the expense of both VHA and Optus.

This suggests that there is a clear distinction between consumers that require national coverage and consumers that are happy to acquire less than national coverage. The evidence suggests that there is a winner takes all element where consumers are willing to pay a lot more for national coverage; however consumers that are not willing to pay Telstra's premium for national coverage may not value coverage as highly. This second point is demonstrated by the limited price difference between Optus and VHA even though there is a geographic coverage difference between the two networks. This suggests that consumers' willingness to pay for coverage is not a linear relationship with increases in geographic coverage, and a consumer's willingness to pay does not respond to an incremental increase in geographic coverage.

VHA is of the view that consumers are rational and would not pay Telstra more for no apparent reason. VHA is of the view that from a demand side perspective, substitution between a mobile service with national coverage and a mobile service with less than national coverage is clearly not *close* or *immediate*.

## 1.5 Conclusion on evidence identified by the ACCC

The evidence as identified in the ACCC's Draft Decision paints a very clear view about demand side substitution between mobile services with differences in geographic coverage. These can be summarised as:

- a significant proportion of consumers living in metropolitan areas do not switch mobile services very often and a significant proportion of those consumers switch due to a deficiency in geographic coverage;
- there is a significant distinction between a mobile service with national coverage and a mobile service with less than national coverage (ie a Telstra mobile service vs a non-Telstra mobile service);
- Telstra charges a significant price premium (more than 10% difference in unit price) in all service segments except for the 'high cost plans' segment;

- some consumers living in metropolitan areas require national coverage and have to pay Telstra's significant price premium unless they purchase a high cost plan;
- some consumers living in metropolitan areas only require less than national coverage and are not prepared to pay Telstra's significant price premium unless they purchase a high cost plan; and
- close to all consumers living outside metropolitan areas require national coverage and have to pay Telstra's significant price premium unless they purchase a high cost plan.

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

In the matter of
Applications of AT&T Wireless Services, Inc. and
Cingular Wireless Corporation
For Consent to Transfer Control of Licenses and
Authorizations
File Nos. 0001656065, et al.
and
Applications of Subsidiaries of T-Mobile USA,
Inc. and Subsidiaries of Cingular Wireless
Corporation
For Consent to Assignment and Long-Term De
Facto Lease of Licenses
File Nos. 0001771442, 0001757186, and
0001757204
and
Applications of Triton PCS License Company,
LLC, AT&T Wireless PCS, LLC, and Lafayette
Communications Company, LLC
For Consent to Assignment of Licenses
File Nos. 0001808915, 0001810164, 0001810683,
and 50013CWAA04

WT Docket No. 04-70

WT Docket No. 04-254

WT Docket No. 04-323

MEMORANDUM OPINION & ORDER

Adopted: October 22, 2004

Released: October 26, 2004

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

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## I. INTRODUCTION

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

BellSouth Corporation (“BellSouth”). Additionally, various entities in which AT&T Wireless holds non-controlling interests have filed applications for *pro forma* transfers of control.<sup>1</sup>

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

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

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

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

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

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

<sup>3</sup> Application, ULS File No. 0001810683, Exhibit 1, at 1 (filed July 21, 2004).

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

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

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

## II. BACKGROUND

### A. Description of the Applicants

#### 1. AT&T Wireless Services, Inc.

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

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

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

<sup>6</sup> See A&T Wireless Services, Inc., Annual Report 2003, at 4-5 ("AT&T Wireless Annual Report"), available at [https://www.attwireless.com/press/annual\\_2003/](https://www.attwireless.com/press/annual_2003/) (visited July 22, 2004); AT&T Wireless Services, Inc., Form 10-K, at 5, 6, 11 (Mar. 3, 2004) ("AT&T Wireless 10-K"), available at <http://www.sec.gov/Archives/edgar/data/1138234/000095012404000701/0000950124-04-000701-index.htm>. AT&T Wireless's cellular and PCS licenses, including licenses held by entities in which AT&T Wireless holds a greater than 50% voting interest, cover 279 million POPs, or 96 percent of the United States population. See Letter from Douglas I. Brandon, Vice President, Federal Affairs, AT&T Wireless, Inc., and Brian F. Fontes, Vice President – Federal Relations, Cingular Wireless Corporation, to Erin McGrath, Assistant Division Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission, at 2, Attachment A (Oct. 5, 2004) ("October 5, Letter"); see also AT&T Wireless 10-K at 11.

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

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

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

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<sup>7</sup> See Comment Public Notice at 6185.

<sup>8</sup> AT&T Wireless 10-K at 5, 6; AT&T Wireless Annual Report at 4-5.

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

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

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

<sup>12</sup> See AT&T Wireless Form 602. Nippon Telephone and Telegraph owns approximately 61% of DoCoMo. See AT&T Wireless Form 602, Exhibit A.

<sup>13</sup> AT&T Wireless Annual Report at 62. See also AT&T Wireless 10-K at 20.

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

<sup>15</sup> See AT&T Wireless Form 602.

<sup>16</sup> AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4.

<sup>17</sup> AT&T Wireless 10-K at 2; AT&T Wireless Annual Report at 4.

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

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

## 2. Cingular Wireless Corporation

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

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

<sup>20</sup> AT&T Wireless 10-K at 4, 9.

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

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

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

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

<sup>25</sup> AT&T Wireless Annual Report at 4. *See also* October 5 Letter at Attachment A.

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

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

<sup>28</sup> Application, Exhibit 1, at 7.

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

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

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

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

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

<sup>31</sup> *Id.* at 4. Resellers represented approximately 5 percent of Cingular's total customers as of December 31, 2003. *See id.*

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

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

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

<sup>35</sup> Cingular 10-K at 2.

<sup>36</sup> *Id.* at 2.

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

<sup>38</sup> *Id.* at 7.

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

### 3. SBC Communications Inc.

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

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

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

<sup>40</sup> *Id.* at 2, 6.

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

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

<sup>43</sup> *Id.* at 1.

<sup>44</sup> *Id.* SBC publishes Yellow and White Pages directories and electronic directories. *See id.* at 6.

<sup>45</sup> *Id.* at 1, 5.

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

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

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.*

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

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

#### 4. BellSouth Corporation

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

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<sup>51</sup> *Id.*

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

<sup>53</sup> SBC Annual Report at 2.

<sup>54</sup> SBC 10-K at 2.

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

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

<sup>57</sup> SBC Annual Report at 2.

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

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

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

<sup>61</sup> BellSouth 10-K at 3.

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

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

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

## 5. T-Mobile USA, Inc.

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

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

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

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

<sup>64</sup> *Id.* at 4.

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

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

<sup>67</sup> BellSouth Annual Report at 10, 14, 15.

<sup>68</sup> *See* Application, ULS File No. 0001771442, Exhibit 1, at 1 (filed June 16, 2004) ("T-Mobile-Cingular Application"); T-Mobile-Cingular Application, Exhibit 1, at 1; T-Mobile International Reports First Quarter 2004 Results of U.S. Operations, Financial Releases, at 7 ("T-Mobile First Quarter 2004 Financial Release"), *available at* [http://www.t-mobile.com/company/investors/financial\\_releases/2003\\_Q4\\_sub.asp](http://www.t-mobile.com/company/investors/financial_releases/2003_Q4_sub.asp) (visited Aug. 31, 2004).

<sup>69</sup> T-Mobile-Cingular Application, Exhibit 1, at 1.

<sup>70</sup> T-Mobile First Quarter 2004 Financial Release at 1; T-Mobile USA Adds More Than 1 Million Net New Customers in Q4, Financial Releases, at 2 (Jan. 27, 2004) ("T-Mobile 2003 Financial Release"), *available at* [http://www.t-mobile.com/company/investors/financial\\_releases/2003\\_Q4\\_sub.asp](http://www.t-mobile.com/company/investors/financial_releases/2003_Q4_sub.asp).

<sup>71</sup> T-Mobile 2003 Financial Release at 2.

<sup>72</sup> *See* Deutsche Telekom 20-F at 38 (Mar. 30, 2004) ("Deutsche Telekom 2003 20-F"), *available at* <http://www.sec.gov/Archives/edgar/data/946770/000095013604000944/file001.htm>; *see also* Transferors, and

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Telekom AG (“Deutsche Telekom”), a corporation organized under the laws of the Federal Republic of Germany.<sup>73</sup> Deutsche Telekom offers fixed-line voice telephony products and services, mobile communications, Internet, and other services, primarily in Europe.<sup>74</sup> Deutsche Telekom holds its interest in T-Mobile USA through T-Mobile International AG & Co. KG (“T-Mobile International”), which is the mobile communications subsidiary of Deutsche Telekom.<sup>75</sup> T-Mobile International serves a total of 61 million mobile customers in Europe and the United States.<sup>76</sup>

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

## 6. Triton PCS, Inc.

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

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

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

<sup>73</sup> T-Mobile-Cingular Application, Exhibit 1, at 1.

<sup>74</sup> Deutsche Telekom-VoiceStream Press Release (May 31, 2001).

<sup>75</sup> T-Mobile 2003 Financial Release at 2.

<sup>76</sup> *Id.*

<sup>77</sup> Deutsche Telekom 2003 20-F at 38; T-Mobile 2003 Financial Release at 1.

<sup>78</sup> T-Mobile-Cingular Application, Exhibit 1, at 1-2.

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

<sup>80</sup> Triton PCS, Inc, Form 10-K, at 4 (Mar. 19, 2004) (“Triton PCS 10-K”), available at <http://www.sec.gov/Archives/edgar/data/1064735/000119312504045442/d10k.htm>.

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.* Triton PCS’s licenses cover approximately 13.6 million POPs and include 10 of the top 100 markets in the country. *See id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* AT&T Wireless holds Triton PCS Series A preferred stock. *See id.* at 5.

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

## B. Description of Transactions

### 1. Cingular – AT&T Wireless

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

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

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<sup>86</sup> *Id.* at 4-5.

<sup>87</sup> *Id.* at 5 (stating that this coverage allows Triton PCS the ability to offer competitive national rate plans).

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

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

<sup>90</sup> AT&T Wireless Proxy Statement at 24.

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

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

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

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

<sup>95</sup> See Application, File No. 0001874690, Exhibit 1, at 1 (filed Sept. 21, 2004).

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

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

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

<sup>97</sup> Application, Exhibit 1, at Attachment 8, Attachment 9.

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

<sup>99</sup> See 47 C.F.R. § 20.6, repealed January 1, 2003.

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

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

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

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

<sup>104</sup> Prior to its elimination, the Commission’s spectrum aggregation limit, 47 C.F.R. § 20.6, permitted aggregation of up to 55 MHz of applicable spectrum.

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

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

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<sup>105</sup> See, e.g., Application, File No. 0001874690, Exhibit 1, at 1 (filed Sept. 21, 2004).

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*; see also *supra* note 95 and accompanying text.

<sup>110</sup> See, e.g., Application, File No. 0001874690, Exhibit 1, at 2.

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

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

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

<sup>114</sup> Application, Exhibit 1, at 9, 20-22; Cingular 10-K at 2; February 17, 2004 News Release at 1.

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

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

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

## 2. T-Mobile USA – Cingular Joint Venture Unwind

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

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

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

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

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 6, 21.

<sup>121</sup> *Id.* at 25-41.

<sup>122</sup> *Id.* at 28-34.

<sup>123</sup> *Id.* at 25-28, 41-43.

<sup>124</sup> T-Mobile-Cingular Application, Exhibit 1, at 2.

<sup>125</sup> Deutsche Telekom 2003 20-F at 39.

<sup>126</sup> *Id.* The Applicants state that they retained ownership and control of their spectrum licenses. See *id.*

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

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

### 3. Triton PCS – AT&T Wireless

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

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<sup>127</sup> T-Mobile-Cingular Application, Exhibit 1, at 2.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1.

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

<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 3.

<sup>134</sup> Application, File No. 0001810683, Exhibit 1, at 1 (filed July, 21, 2004) (“Triton-AT&T Wireless Application”).

<sup>135</sup> *Id.*

equity is contingent upon the closing of the proposed transfer of control of AT&T Wireless to Cingular.<sup>136</sup>

### C. Applications and Review Process

#### 1. Commission Review

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

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<sup>136</sup> *See id.*

<sup>137</sup> 47 U.S.C § 310(d).

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

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

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

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

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

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

<sup>141</sup> 47 C.F.R. § 214.

<sup>142</sup> Comment Public Notice, 19 FCC Rcd. at 6189.

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

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

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

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

<sup>147</sup> *See* list of AT&T Wireless and Cingular responses in Appendix B.

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

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additional Commission inquiries, are included in the record.<sup>149</sup>

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

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

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

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

<sup>149</sup> See also list of ALLTEL Corporation, Nextel, Sprint, T-Mobile, United States Cellular Corporation, and Verizon Wireless responses in Appendix B.

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

<sup>151</sup> See, e.g., Application, File No. 0001874675, Exhibit 1, at 1 n.2.

<sup>152</sup> 47 U.S.C § 310(d).

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

<sup>154</sup> See *id.* (listing T-Mobile-Cingular Lease Applications, File Nos. 0001757186 and 0001757204).

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

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

<sup>157</sup> 47 U.S.C § 310(d).

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

## 2. Department of Justice Review

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

## III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

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

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

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

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

<sup>161</sup> 15 U.S.C. § 18.

<sup>162</sup> 47 U.S.C. §§ 214(a), 310(d).

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

(continued...)

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

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

<sup>164</sup> See, e.g., Applications for Consent to the Assignment of Licenses Pursuant to Section 310(d) of the Communications Act from NextWave Personal Communications, Inc., Debtor-in-Possession, and NextWave Power Partners, Inc., Debtor-in-Possession, to Subsidiaries of Cingular Wireless LLC, WT Docket 03-217, *Memorandum Opinion and Order*, 19 FCC Rcd. 2570, 2580-81 ¶ 24 (2004) (“*Cingular-NextWave Order*”); General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. 473, 484 ¶ 16 (2004) (“*GM-News Corp. Order*”); Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd. 20,559, 20,574 ¶ 25 (2002) (“*EchoStar-DirecTV HDO*”); AT&T Corp., British Telecommunications, PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications, IB Docket No. 98-212, *Memorandum Opinion and Order*, 14 FCC Rcd. 19,140, 19,150 ¶ 20 (1999) (“*AT&T Corp.-British Telecom. Order*”); Applications to Assign Wireless Licenses from WorldCom Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp., WT Docket No. 03-203, *Memorandum Opinion and Order*, 19 FCC Rcd. 6232, 6241 ¶ 23 (WTB, MB 2004) (“*Nextel-WorldCom Order*”); Application of TeleCorp PCS, Inc., Tritel, Inc., and Indus, Inc. and TeleCorp Holding Corp. II, L.L.C., TeleCorp PCS, L.L.C., ABC Wireless, L.L.C., Polycell Communications, Inc., Clinton Communications, Inc., and AT&T Wireless PCS, LLC, WT Docket No. 00-130, *Memorandum Opinion and Order*, 16 FCC Rcd. 3716, 3721-22 ¶ 12 (WTB 2000); GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, CC Docket No. 98-184, *Memorandum Opinion and Order*, 15 FCC Rcd. 14,032, 14,045, 14,046 ¶¶ 20, 22 (2002) (“*Bell Atlantic-GTE Order*”).

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

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

designate the application for hearing.<sup>167</sup>

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

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

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

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

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

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

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

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

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

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

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

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<sup>174</sup> 15 U.S.C. § 18.

<sup>175</sup> *AT&T-Comcast Order*, 17 FCC Rcd at 23,256 ¶ 28; *AT&T-MediaOne Order*, 15 FCC Rcd. at 9821 ¶ 10.

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

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

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

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

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

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

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

#### IV. QUALIFICATIONS OF APPLICANTS

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

##### A. The Record

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

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

<sup>183</sup> See *AOL-Time Warner Order*, 16 FCC Rcd. at 6610 ¶¶ 146-47.

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

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

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

<sup>187</sup> *Deutsche Telekom-VoiceStream Order*, 16 FCC Rcd. at 9790 ¶ 19; *SBC-BellSouth Order*, 15 FCC Rcd. at 25,465 ¶ 14.

<sup>188</sup> *SBC-BellSouth Order*, 15 FCC Rcd. at 25,465 ¶ 14.

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

<sup>190</sup> Dealers Petition to Deny at 1-12.

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

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

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<sup>191</sup> *Id.* at Attachments 1-B, 2-B, 4-B, 5-B, and 6-B.

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

<sup>193</sup> AT&T Wireless Services, Inc, Transferor, and Cingular Wireless Corporation, Transferee, WT Docket No. 04-70, Reply to Opposition to Petition to Dismiss or Deny by AW Acquisition Corp. *et al.*, filed May 20, 2004 (“Dealers’ Reply”).

<sup>194</sup> Applicants Joint Opposition to Petitions to Deny and Comments at 51.

<sup>195</sup> Thrifty Call Petition to Deny at 25.

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

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## B. Discussion of Character

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

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

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

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

<sup>197</sup> *WorldCom Order*, 18 FCC Rcd. at 26,493 ¶ 13.

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

<sup>199</sup> *GM-News Corp. Order*, 19 FCC Rcd. at 486 ¶ 23.

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

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

<sup>202</sup> *WorldCom Order*, 18 FCC Rcd. at 26,494 n.56.

<sup>203</sup> *Cingular-NextWave Order*, 19 FCC Rcd. at 2570 & n.112.

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

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

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

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

<sup>205</sup> *GM-News Corp. Order*, 19 FCC Rcd. at 486 ¶ 23. See also *Character Qualifications Recon. Order*, 6 FCC Rcd. at 3448 ¶ 6.

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

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

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

<sup>209</sup> *Character Qualifications Recon. Order*, 6 FCC Rcd. at 3448 ¶ 5.

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

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

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

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

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<sup>210</sup> Dealers Petition to Deny at 12; Dealers Reply at 2.

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

<sup>212</sup> *Northrop Grumman Order*, 17 FCC Rcd. at 24,628 ¶ 8.

<sup>213</sup> *1986 Character Qualifications Policy Statement*, 102 FCC 2d at 1219 ¶ 79.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*, 102 FCC 2d at 1,205 n.64.

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

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

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

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

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

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

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

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

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

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

## V. COMPETITIVE ANALYSIS

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

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

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

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

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

harms related to existing or future competition between wireless and wireline carriers for telecommunications services provided to mass market customers.<sup>225</sup>

## A. Mobile Telephony Competition

### 1. Introduction

#### a. The Mobile Telephony Sector

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

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

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

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

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

<sup>227</sup> *Ninth Report*, FCC 04-216, at 37 ¶ 88.

<sup>228</sup> *Id.* at 38-39 ¶ 89.

<sup>229</sup> *Id.*, Appendix A, Table 10, at A-11.

<sup>230</sup> *Id.*, Appendix A, Table 10, at A-11.

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

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

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

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<sup>231</sup> *Id.* at 27 ¶ 64.

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

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

<sup>234</sup> *Sixth Report*, 16 FCC Rcd. at 13,364; *Fifth Report*, 15 FCC Rcd. at 17,670.

<sup>235</sup> *Ninth Report*, FCC 04-216, at 18 ¶ 36.

<sup>236</sup> *Id.* at 49 ¶ 113.

<sup>237</sup> *Id.* at 49 ¶ 114.

<sup>238</sup> *Id.* at 50 ¶¶ 115-16.

<sup>239</sup> *Id.* at 74 ¶ 176; *Fifth Report*, 15 FCC Rcd. at 17,665, 17,672-73.

<sup>240</sup> *Ninth Report*, FCC 04-216, at 53 ¶ 124.

<sup>241</sup> *Id.* at 55 ¶ 130.

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

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

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

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

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<sup>242</sup> *Id.* at 55-57 ¶¶ 128, 131-32.

<sup>243</sup> *Id.* at 55, 57-58 ¶¶ 129, 133-34.

<sup>244</sup> *Id.* at 61-63 ¶¶ 146-49.

<sup>245</sup> *Id.* at 63 ¶ 152.

<sup>246</sup> *Id.* at 63 ¶ 152.

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

<sup>248</sup> *Ninth Report*, FCC 04-216, at 69 ¶¶ 165-66.

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

<sup>250</sup> *Ninth Report*, FCC 04-216, Appendix A, Table 9, at A-11.

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

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

#### b. Introduction to the Analysis

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

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

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<sup>252</sup> Morin & Mutschler, *supra* note 247, at 96.

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

<sup>254</sup> Morin & Mutschler, *supra* note 247, at 2.

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

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

<sup>257</sup> *DOJ/FTC Merger Guidelines* § 0.1, n.6.

<sup>258</sup> *Id.* § 1.0.

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

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

## 2. Market Definition

### a. Product Market Definition

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

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

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

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

<sup>261</sup> Application, Exhibit 1, Attachment 1 – Gilbert Declaration at ¶ 37 (“Gilbert Declaration”).

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

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

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

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

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<sup>262</sup> *Id.* at ¶ 46.

<sup>263</sup> *Id.* at ¶ 48.

<sup>264</sup> *Id.* at ¶ 43-44.

<sup>265</sup> *Id.* at ¶ 45.

<sup>266</sup> *See* Petition to Deny of Thrifty Call, Attachment A, at 16.

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

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

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

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

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

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

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<sup>270</sup> Governali, Barry & Soova, *supra* note 255, at 24.

<sup>271</sup> *Id.* at 28.

<sup>272</sup> Morin & Mutschler, *supra* note 247, at 87.

<sup>273</sup> *Id.*

<sup>274</sup> Governali, Barry, & Soova, *supra* note 255, at 10.

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

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

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

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

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

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

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

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

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

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

<sup>280</sup> Governali, Barry, & Soova, *supra* note 255, at 1, 9.

<sup>281</sup> *Id.* at 34.

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

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

### b. Geographic Market Definition

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

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

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

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

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

<sup>284</sup> *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); accord *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 359 (1963).

<sup>285</sup> *DOJ/FTC Merger Guidelines* § 1.21.

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

<sup>287</sup> Gilbert Declaration at ¶ 53.

<sup>288</sup> *Id.* at ¶ 56.

<sup>289</sup> *Id.* at ¶ 53.

<sup>290</sup> *Id.* at ¶ 59.

<sup>291</sup> *Id.* at ¶ 60 and Appendix.

<sup>292</sup> *Id.* at ¶ 61 and Appendix.

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

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

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

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

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

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<sup>293</sup> RCC Reply Comments at 1; Small Business Survival Committee Comments at 2-3.

<sup>294</sup> Petition to Deny of Consumers Union and Consumers Federation at 4-5.

<sup>295</sup> Thrifty Call Petition to Deny, Attachment A, at 17. Thrifty Call Reply to Joint Opposition, Attachment A, at 15.

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

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

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

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

### c. Market Participants

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

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

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

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

<sup>300</sup> Technologies include analog, TDMA, CDMA, GSM, and iDEN. *See* Gilbert Declaration at ¶¶ 39-40.

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

discussion of likely competitive effects below.<sup>302</sup>

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

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

### 3. Potential Competitive Harms

#### a. Market Concentration

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

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

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

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

<sup>304</sup> *Id.*

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

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

<sup>307</sup> *See id.* § 1.41.

<sup>308</sup> *WorldCom-MCI Order*, 13 FCC Rcd. at 18100-01, 18050.

as to which markets need more in-depth, multidimensional analysis of potential anticompetitive effects.<sup>309</sup>

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

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

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

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

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

<sup>312</sup> Gilbert Declaration at ¶ 65.

<sup>313</sup> *Id.* at ¶ 64; Gilbert Supplemental Declaration at ¶¶ 4-5, 32; Application, Exhibit 1, at 36; Joint Opposition at 21.

<sup>314</sup> Gilbert Supplemental Declaration at ¶ 6, 9; Application, Exhibit 1, at 36; Joint Opposition at 21.

<sup>315</sup> Gilbert Supplemental Declaration at ¶ 2.

<sup>316</sup> *Id.* at ¶ 6.

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

<sup>318</sup> Thrifty Call Reply to Joint Opposition, Attachment A at 12-13.

<sup>319</sup> *Id.* at 13.

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

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

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

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

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

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<sup>320</sup> Thrifty Call Petition to Deny at 14.

<sup>321</sup> *Id.*, Attachment A, at 18.

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

<sup>323</sup> Thrifty Call Petition at 9-10, Attachment A at 19-21; Thrifty Call Reply to Joint Opposition, Attachment A at 17, 20.

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

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

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

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

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

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

<sup>326</sup> Three quarters of non-nodal counties were assigned based on commuting patterns. See *id.* at 78.

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

<sup>328</sup> See *Ninth Report*, FCC 04-216, at n.188.

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

<sup>330</sup> See *id.* (“Economic nodes are metropolitan areas or similar areas that serve as centers of economic activity”).

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

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

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

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

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

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<sup>331</sup> See 47 C.F.R. § 22.909.

<sup>332</sup> *Ninth Report*, FCC 04-216, at 15 ¶ 27.

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

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

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

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

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

#### **b. Horizontal Issues**

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

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

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

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

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

**(i) Unilateral Effects**

**(a) Introduction**

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

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

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

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<sup>336</sup> DOJ/FTC Merger Guidelines § 2.

<sup>337</sup> *Id.* at § 2.2.

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

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

<sup>340</sup> DOJ/FTC Merger Guidelines § 2.2.

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

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

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

### (b) Discussion

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

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<sup>342</sup> *DOJ/FTC Merger Guidelines* § 2.21.

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

<sup>344</sup> *DOJ/FTC Merger Guidelines* § 2.211.

<sup>345</sup> *Id.* § 2.212.

<sup>346</sup> *Id.* § 2.22.

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

<sup>348</sup> Gilbert Declaration at ¶¶ 76, 82.

in the event of a price increase by either Cingular or AT&T Wireless.<sup>349</sup> In addition, they reference a Consumer Reports survey which indicates that many customers would find Sprint to be a comparable alternative to the merged firm.<sup>350</sup>

120. ThriftyCall critiques the Applicants' unilateral effects analysis by claiming that it "is inconsistent with the assumptions of the Bertrand model that assumes a single homogeneous product with capacity constraints."<sup>351</sup> ThriftyCall argues that firms are distinguished primarily on the basis of their relative advantage in serving different groups of buyers.<sup>352</sup> In addition, ThriftyCall advocates use of a "Cournot" model to describe competition in the CMRS industry. The Cournot model assumes firms produce a homogeneous product and that firms compete by choosing the optimal amounts of output to produce, rather than by choosing optimal prices.

121. The Applicants and The Communications Workers of America point to the fact that churn is quite high in the CMRS industry and that nearly one-third of mobile wireless customers leave their carriers each year. They also indicate that wireless LNP, which took effect in November 2003 and allows consumers to retain their mobile phone numbers when they switch carriers, has facilitated consumer choice and churn and has made competition more intense.<sup>353</sup> The Consumer Federation of America and Consumers Union agree that wireless LNP has removed a switching cost affecting the wireless market; however, they argue that wireless LNP simply removes a cost that is not present in most industries. Therefore, they state that the *DOJ/FTC Guidelines* should not be relaxed simply because wireless LNP has been implemented.<sup>354</sup>

122. CompTel/ASCENT argues that the transaction is likely to result in a significant loss in consumer welfare.<sup>355</sup> Based on a "merger simulation" study (an analysis employing "theoretical economic models of competition and real world data to simulate the effects of a merger between two rival firms"<sup>356</sup>), CompTel/ASCENT predicts the effect of the merger on both mobile wireless and wireline telecommunications prices. It finds that the merged entity's wireless prices are likely to increase about 10 percent, and that the total harm to mobile customers would be about \$2.7 billion.<sup>357</sup>

123. We agree with the Applicants that the market for mobile telephony service can be fairly characterized as differentiated.<sup>358</sup> Firms differ in dimensions such as network quality, thoroughness of local geographic coverage, and scope of national coverage. They compete both on price and on numerous

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<sup>349</sup> Applicants Joint Opposition to Petitions to Deny and Comments at 25.

<sup>350</sup> *Cell Phones: New Rules, New Choices*, CONSUMER REPORTS, February 2004, at 12-26.

<sup>351</sup> DeltaVector for ThriftyCall, Reply to Joint Opposition to Petitions to Deny and Comments at 10.

<sup>352</sup> DeltaVector for Thrifty Call at 18.

<sup>353</sup> Gilbert Declaration at ¶¶ 11, 42; Communications Workers of America at 6.

<sup>354</sup> Consumer Federation of America and Consumers Union Petition to Deny at 11.

<sup>355</sup> See Letter from Jonathan Lee, Sr. Vice President – Regulatory Affairs, CompTel/ASCENT, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 1, 2004) (CompTel/ASCENT Oct. 1 *Ex Parte* Letter).

<sup>356</sup> *Id.*, Attachment, at 2.

<sup>357</sup> *Id.*, Attachment, at 4, 10.

<sup>358</sup> We reject ThriftyCall's criticism that the Applicants' use of a Bertrand-based model is inconsistent with this view. While a pure Bertrand model assumes a single homogeneous product, this is not the case for a differentiated products Bertrand model, to which the Applicants are likely referring.

non-price features. Dynamic rivalry is ongoing as well, with firms competing via research and development, and via investment in new infrastructure and services.<sup>359</sup>

124. The services provided by the mobile telephony carriers are differentiated on the following key bases: (1) quality, (2) coverage, and (3) plan features. Quality includes the probability of blocked and dropped calls, and the quality of the connection. Surveys by Telephia indicate that consumers place a high value on quality in making their choices of carriers and their decisions to switch carriers.<sup>360</sup> Customer support is a separate but important dimension of service quality. Surveys indicate that customers also frequently cite this factor as important in their decisions to switch carriers.<sup>361</sup>

125. Coverage includes where the service is available either on the carrier's own network or on the network of one of its roaming partners. The breadth of a carrier's geographic coverage is important for consumers who intend to use their phone while traveling. The cellular carriers are generally more extensively built out than are the PCS carriers and thus have better local coverage.

126. Plan features include various dimensions of subscriber usage provided by the plan. Usage means minutes of voice connection defined by the time at which a call is placed, the location from which it is placed, and the destination to which it is directed. Types of usage are typically defined by "buckets" of minutes. Each bucket typically has an amount of included minutes and then a price per minute for additional minutes, although a given bucket may have no included minutes or unlimited free minutes. Buckets are first created according to when the call is placed. Plans typically include buckets of peak minutes (weekday hours) and off-peak minutes (nights and weekends). Second, buckets are also created according to where the call is placed. National plans allow the minutes of usage in each bucket to be placed anywhere in the United States. Regional and local plans allow the minutes of usage in each bucket to be placed in only a limited geographic area. Other buckets with a price per minute are then created for calls placed outside that geographic area, and, depending on the plan, a roaming charge may be assessed. Finally, buckets are created according to the destination of the call. Calls may be local or long distance. In addition, calls may terminate on a mobile or a wireline phone, and, if a call terminates on a mobile phone, it may terminate on a mobile phone on or off the carrier's network. Some plans have a separate bucket of in-network mobile-to-mobile minutes.

127. Plan features have evolved, with the number of included minutes in each bucket generally increasing. In some cases, these buckets have become unlimited minutes. However, this evolution has not been uniform across all carriers, and there are differences in the sizes of buckets offered by the carriers at the same monthly charge. For example, a recent informal survey by Commission staff of national plans offered for approximately \$40 per month on the internet showed that Verizon Wireless offered the smallest bucket of peak minutes of the six national carriers (400 minutes), and that T-Mobile offered the highest (600 minutes). Cingular and AWE each offered 450 minutes.<sup>362</sup> Sprint and Nextel each have new plans which move the customer to the plan that minimizes their monthly bill. These types of plans substantially blur the distinctions between specific buckets of minutes and illustrate the complexity of competition among mobile carriers.

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<sup>359</sup> In our discussion of possible collusive effects, below, we describe many factors that differentiate mobile wireless operators and their service offerings.

<sup>360</sup> [REDACTED]

<sup>361</sup> [REDACTED]

<sup>362</sup> See [www.cingular.com](http://www.cingular.com); [www.verizonwireless.com](http://www.verizonwireless.com); [www.nextel.com](http://www.nextel.com); [www.attwireless.com](http://www.attwireless.com); [www.t-mobile.com](http://www.t-mobile.com); [www.sprintpcs.com](http://www.sprintpcs.com).

128. In the remainder of this section, we examine in detail the issues of substitutability, the competitive strength of rival carriers, and rivals' ability to respond to potential anti-competitive unilateral actions on the part of the merged entity. We also examine network effects, spectrum availability for advanced wireless services, and the effects of an expected increase in market penetration. While we find that harm from unilateral action by a combined Cingular/AT&T Wireless is unlikely in most local markets, there are specific markets for which we believe the acquisition poses a significant threat to competition.

129. *Substitutability.* The record contains neither empirical studies nor other information that resolve conclusively the question of the closeness of substitution of the services of Cingular and AT&T Wireless relative to the other mobile telephony operators. While the record does shed light on this question, the evidence is mixed. For example, the difference in their current customer profiles may suggest the Applicants are not especially close substitutes among the group of nationwide mobile telephony operators. AT&T Wireless has had a greater focus on business customers, including Fortune 500 customers, while Cingular's focus has been primarily on residential customers.<sup>363</sup> However, there may be specific customer groups for which the firms are close substitutes. Similarly, some documents in the record suggest that Cingular and AT&T Wireless are the most closely substitutable among the wireless carriers, while other documents suggest otherwise.<sup>364</sup>

130. We have analyzed data on wireless LNP provided to the Commission by NeuStar to gauge how consumers view the substitutability of mobile wireless firms. The launch of wireless LNP occurred in the 100 largest markets on November 24, 2003 and in other markets on May 24, 2004, and we analyzed data on porting through July 2004. This information includes each instance of a customer porting a phone number from one mobile carrier to another, and indicates both the origin and destination carrier.<sup>365</sup> Thus, we can determine the aggregate customer flows between each pair of firms. These flows are summarized in the following table.

[REDACTED]

131. For several reasons, we do not believe that this porting information can reliably quantify the degree of substitutability among the various pairs of firms' product offerings, or in particular establish whether Cingular and AT&T Wireless should be viewed as the closest substitutes for one another.<sup>366</sup>

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<sup>363</sup> [REDACTED]

<sup>364</sup> [REDACTED]

<sup>365</sup> There are certain technical problems with the tracking of porting activity that likely introduce some inaccuracies into the totals in the table below. We believe, however, that the effect of these problems is minor.

<sup>366</sup> A number of ways to determine quantitatively a ranking of substitutes are suggested in the economic literature. Among these are "unit diversion ratios" and "relative unit diversion ratios." Unit diversion ratios are defined as the increase in unit sales of carrier B relative to a decrease in the sales of carrier A. Relative unit diversion ratios are defined as an increase in the unit sales of carrier B, relative to a decrease in the sales of carrier A, relative to that if substitution was proportionate to the carriers' market shares. See Werden, *supra* note 343, at 405 (1998). However, the porting data capture all subscriber switches, including but not limited to switches that may have resulted from a price increase. Switches are also likely to have occurred as a result of customer dissatisfaction with the current provider. Thus, the results derived from the porting data cannot be interpreted necessarily as a measure of the likely outcome of a price increase by the merged entity. Further, since customers often delay switching until their two-year contracts have expired, the act of switching may substantially lag the decision to switch. Therefore, while it is reasonable to assume that the carrier being ported to is the customer's current first choice provider, it may not be reasonable to assume that the carrier being ported from is any longer the customer's second choice. For example, a customer may view the carrier he/she is leaving to be perhaps the sixth best choice, so that a switch from the current

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However, we believe the overall pattern of the movements generally indicates that there is significant substitutability among *all* six nationwide carriers. We note in particular that Verizon Wireless, T-Mobile, and Nextel have attracted shares of ported numbers in excess of their national market shares during this period,<sup>367</sup> so that the net effect has been to increase their market shares. This mutual substitution appears to be present despite product differentiation that exists across the firms, and indicates that the offerings of the other nationwide carriers are serving as effective substitutes for the offerings of the Applicants.<sup>368</sup>

132. Finally, we find that shifts in subscriber-based market shares over time and high levels of churn indicate a degree of substitutability among all of the carriers. Between the fourth quarter of 1998 and the fourth quarter of 2003, Verizon Wireless's and Cingular's national market shares both declined approximately six percentage points.<sup>369</sup> In contrast, AT&T Wireless gained four percentage points, Sprint gained approximately six percentage points, Nextel gained approximately four percentage points, and T-Mobile gained approximately six percentage points.<sup>370</sup> (The share held by carriers other than the six nationwide operators declined about nine percentage points.)<sup>371</sup> Over the more recent past, both of the Applicants have been losing subscriber share nationwide, and Verizon Wireless, Nextel, and T-Mobile have made non-trivial gains. Although the regional carriers provide competitive options in certain local markets, we believe that the six national mobile providers are closer substitutes for one another than they are for the regional carriers.

133. In addition to indicating a considerable degree of substitutability among the national wireless providers, the market share and porting data suggest that Verizon Wireless, T-Mobile, and Nextel may provide more effective competitive constraints on the Applicants than their current subscriber-based market shares might indicate. The increases in market shares and the relatively high numbers of porters to these carriers indicate that Verizon Wireless, T-Mobile, and Nextel are significant future threats to Cingular and AT&T Wireless's customer base. This adds to our confidence that consumers see these firms as effective substitutes for the offerings of the Applicants.

134. *Competitive responses by rivals.* Should the merged entity attempt to raise prices or engage in other exercise of market power, we believe that in many of the markets identified by our initial screen other firms would have the incentive and ability to reposition their offerings in response.<sup>372</sup> In particular, where a firm is already present in a market, has comparable service coverage, and has excess capacity relative to its current subscriber base, it should be able to adjust rates, plan features, handsets,

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carrier to the new carrier may not indicate that these carriers are close substitutes. For these reasons, statistics derived from the porting data cannot be interpreted as corresponding exactly to any of these formal measures.

<sup>367</sup> A Telephia report also finds [REDACTED].

<sup>368</sup> Documents also confirm that churn is a competitive discipline on Cingular and AWS today. [REDACTED]

<sup>369</sup> Morin & Mutschler, *supra* note 247, at 86.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> The Applicants claim that "a unilateral effect occurs when a merger increases a firm's profit-maximizing price under the assumption that other firms in the industry do not change their prices." Gilbert Declaration, at ¶ 74. It is important to note that, while it is true that in equilibrium the prices will be set such that any one firm could not profitably raise its price assuming the prices of the other firms remain constant, it is quite possible that the equilibrium, post-merger prices of firms other than the merging parties will change from their pre-merger levels. James Langenfeld and Wenqing Li, *Critical Loss Analysis in Evaluating Mergers*, ANTITRUST BULLETIN, Summer 2001, at 318. That is, to evaluate unilateral effects, the supply responses of the non-merging firms must be taken into account.

advertising, etc., in the short run.<sup>373</sup>

135. As a technical and operational matter, it will generally be feasible for firms to add customers quickly because excess capacity is often available and because non-trivial increases in the capacity to serve customers can be realized rapidly in established cellular and PCS mobile radio systems. [REDACTED].<sup>374</sup> [REDACTED]<sup>375</sup> [REDACTED].<sup>376</sup> This equipment allows the cell site to serve more traffic per unit of time by employing additional bandwidth. The estimated capacity increases [REDACTED], are consistent with our understanding of CDMA systems' technical and operational attributes.<sup>377</sup> It should also be the case that handset manufacturers would be able to supply handsets without a significant lag to satisfy an increase in demand by other carriers. [REDACTED].<sup>378</sup>

136. To examine the issue of competitive response further, we undertook our own analysis of whether other firms could likely absorb subscribers leaving the merged entity in response to attempted exercise of market power. We analyzed a sample of ten markets identified by our initial screen as requiring further analysis, asking whether other carriers could absorb in the near term an increase in subscribers equal to 10 percent of the merged entity's subscribers in that market.<sup>379</sup> We utilized market-based performance measurements and analysis, where off-air data were collected from major carriers' networks, including those of the Applicants, for the period of June 2003.<sup>380</sup> We also integrated data on market shares and allocated spectrum for major competitive carriers. We selected sample markets that varied in attributes such as location, population, and number of carriers offering service. The results of our study indicate that, for these markets caught by the initial screen, rival carriers collectively possess the capability to respond to a unilateral price increase by absorbing at least 10 percent of the combined entity's market share.<sup>381</sup>

137. Of course, there are limits to repositioning. Firms may not be able to add quickly to their operating footprints, purchase additional spectrum if needed, secure tower siting permits, improve overall quality, or deploy a new technology. [REDACTED].<sup>382</sup> Whether addition of cell sites would always be possible even in this time frame, and whether it would always be profitable, is unclear. At a minimum, however, even a firm is present in a market and has comparable service area coverage, the possibility of competitive response is an important factor.<sup>383</sup>

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<sup>373</sup> One recent example of repositioning is the evolution of Nextel, moving from a firm solely focused on business workgroup customers, to advertising for (post-paid) residential customers, to launching a pre-paid service, to now sponsoring NASCAR.

<sup>374</sup> Aug. 26 *ex parte* letter from W. Hogg at 3. [REDACTED]

<sup>375</sup> [REDACTED]

<sup>376</sup> [REDACTED]

<sup>377</sup> See Oct. 12, 2004 *ex parte* letter from Dean R. Brenner, Senior Director, Government Affairs, QUALCOMM Incorporated.

<sup>378</sup> [REDACTED]

<sup>379</sup> We selected ten percent because a ten percent loss of customers is a plausible response to a small but significant price increase.

<sup>380</sup> [REDACTED]

<sup>381</sup> [REDACTED]

<sup>382</sup> [REDACTED]

<sup>383</sup> We also note that the merged company will only retain the Cingular brand name, and it may be the case that the particular product offerings of AT&T Wireless will disappear. Because other firms can reposition and add new

138. *Spectrum and advanced wireless services.* As a result of this transaction, the current spectrum holdings of Cingular and AT&T Wireless will be combined, resulting in aggregation by one entity of as much as 80 MHz of applicable spectrum in certain local markets.<sup>384</sup> Although we no longer have a *per se* limit on the amount of spectrum suitable for mobile telephony for which an entity may hold the usage rights in any one market, we are mindful of the unique role of spectrum as a critical input in the market for wireless services and have carefully analyzed the potential impact of this merger on that input. As noted in the introduction to mobile telephony, above, this sector is characterized by ongoing growth (in terms of both subscribers and minutes of use) as well as technological change. In particular, next generation technologies are being gradually rolled out by a number of carriers. While some carriers offering next-generation services eventually may require more spectrum than they currently have, depending on their chosen technology and the development of the market, this is not certain. Technologies offering the promise of advanced services may cause a boom in demand, but they also offer more efficient use of spectrum, *i.e.*, the ability to transmit more information per unit of time and bandwidth.

139. We believe it is speculative to predict how much spectrum which carriers will need, and when. The evidence we do have, however, suggests firms generally have access to the spectrum they need to offer next-generation services now. As noted above and in our CMRS Competition Report, we are seeing rollout of such services by a number of carriers. For example, Verizon Wireless has recently launched EV-DO service in five markets where it holds 30 MHz of bandwidth – Austin, Texas; Milwaukee, Wisconsin; and Miami, Tampa, and West Palm Beach, Florida – and in most other locations where it has begun to offer EV-DO, it is doing so with 35 MHz of spectrum.<sup>385</sup> Similarly, Dobson has recently announced launch of EDGE service throughout its 16-state territory, where it holds no more than 30 MHz of bandwidth in over 90 percent of the applicable counties.<sup>386</sup>

140. In this regard, we note that this merger does not take spectrum away from any competing carriers. Therefore, the spectrum-related harm, if any, would be that the merger could result in an imbalance in the availability of spectrum that would cause other carriers to be more spectrum-constrained than Cingular at a later point in the deployment of next-generation services. We believe, however, that the arrival of carriers' 3G-related needs for additional spectrum generally will align with the arrival of suitable spectrum in future auctions, including those for AWS, upper 700 MHz, and lower 700 MHz. We note also that the Commission is, in significant degree, in control of assuring that these auctions occur, and that clearance in these bands occurs, in a suitable timeframe.

141. Our general conclusion that mobile telephony operators have the spectrum capacity they need to provide advanced services may not be true for all operators in all markets. For that reason, we consider spectrum holdings as a part of our market-by-market analysis of local areas identified by our initial screen. In addition, as further explained below, as part of its Application Cingular has committed to divest post-transaction spectrum holdings in excess of 80 MHz in a number of areas. We condition our

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differentiated services, however, it need not be the case that the overall variety of product offerings will be reduced post-merger. One example of a new service is the announcement that, subsequent to a Cingular/AT&T Wireless combination, Sprint will resell mobile service for AT&T Corp. using the AT&T brand name.

<sup>384</sup> See discussion *supra* Section II.B.1.

<sup>385</sup> For Verizon Wireless's spectrum holdings, see the Commission's ULS database; for EV-DO launch information, see Verizon Wireless Expands Broadband Access 3G Network to Cover 14 Markets From Coast to Coast, *at* <http://news.vzw.com/news/2004/09/pr2004-09-22c.html>.

<sup>386</sup> For Dobson's spectrum holdings, see the Commission's ULS database; for EDGE launch information, see "Dobson launches EDGE services in 16-state service area," RCR Wireless News, October 18, 2004, page 22.

grant of this transaction on fulfillment of these divestitures, which will serve the public interest by making spectrum available to strengthen an incumbent competitor or to allow new entry in these markets.

142. *Network effects.* One of the most obvious consequences of this merger will be to double the size of Cingular in terms of subscribers on its network, as well as to increase its geographic coverage and ability to provide improved service quality and product features. The post-merger Cingular will have almost twice as many subscribers as it has now. Because of the nature of telecommunications and the magnitude of this increase in Cingular's size, we consider the potential network effects of this merger.

143. Network effects arise when the value of a product increases with the number of consumers who purchase it.<sup>387</sup> For example, telephone service to an individual subscriber becomes more valuable to that subscriber as the number of other people he or she can reach using the telephone increases. Since wireless carriers permit physical interconnection among their individually-owned networks, wireless subscribers may complete a call to subscribers on all other carriers' networks. Therefore, this merger does not have the potential to disadvantage any other carrier's subscribers with regard to access to the communications network. Nor does this merger raise the typical network effects possibility that the large network will attract customers away from smaller networks and drive out the smaller networks. However, network effects can arise as a result of incentives the carrier offers to its own subscribers – for example, a carrier may offer a discount or the functional equivalent to its subscribers when calling other subscribers to the same carrier (unlimited in-network calling<sup>388</sup>), or may offer discounted bundling of wireless and landline services, or the carrier may limit certain desirable network features to calls that remain within its network.

144. These carrier-specific network effects can, potentially, result in both consumer benefits and anticompetitive harms. On the one hand, discounted intra-carrier calling offers real value to consumers. On the other hand, this feature and other incentives like bundling could potentially alter a Cingular subscriber's calculation when deciding whether to stay with Cingular or switch to a different carrier, and therefore could potentially reduce the ability of other carriers to act as disciplinary forces with regard to Cingular.

145. Although there is evidence in the record that Cingular (like other carriers) is attempting to market to increase network effects, we do not have evidence yet that these effects are a major influence in consumer mobile telephony choices, or that either the benefits or the harms from these effects are particularly strong at this point. On balance, however, we find that because all mobile networks interconnect to each other – and of course to the wireline network as well – it appears unlikely that a mobile network with more subscribers would be more attractive to additional customers simply because of its size. Moreover, if this sort of network externality *were* a major factor, we would not expect to see either the significant growth of a smaller nationwide carrier such as T-Mobile or the continued viability of small and regional carriers that characterize the mobile telephony sector today. Network effects, therefore, do not weigh heavily in our analysis of the effects of the merger.

146. *Penetration.* Another factor we consider in determining the consequences of a unilateral attempt to exercise market power are the penetration rates prevailing today in local markets and the fact

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<sup>387</sup> Carl Shapiro and Hal Varian, *Information Rules*, Harvard Business School Press, Boston, 1999, at 13.

<sup>388</sup> As an example, Cingular offers a feature in many of its calling plans that permits two Cingular subscribers to speak to each other on their wireless phones without using the minutes provided under their calling plans. This free in-network calling feature is a benefit to Cingular subscribers, so long as they stay on the Cingular network. Other wireless carriers offer similar free or discounted in-network calling features. See section V.A.1.a., and the discussion earlier in this section.

that, as noted previously, increases in penetration are generally expected.<sup>389</sup> We believe this means, first, that carriers are currently planning for and investing in anticipation of significant growth. This gives added confidence that existing operators will have the capacity to attract customers and increase output should the merged entity attempt to exercise market power. Second, were the merged firm to raise prices or adversely modify plan features, it would stand to lose not only some percentage of existing customers, but also new customers in significant numbers. And, third, since new customers, by definition, are not tied by contract to an existing firm, they are able immediately to avoid less attractive offerings of the merged firm and sign up with another operator. In local markets where mobile telephony penetration is lower than the U.S. average, these effects should be particularly strong. In addition, relatively under-penetrated markets may be the most attractive markets for new entrants, all other factors being equal. Entry will be particularly likely for these markets where spectrum is available either on the secondary market or in our Auction No. 58, commencing in January 2005.

147. *Implications.* In conclusion, we find that this transaction is unlikely to result in adverse unilateral effects in most of the markets identified by the initial screen. It appears that the nationwide firms are all relatively close substitutes for each other in the eyes of consumers, and that the nationwide firms have the incentive and ability to reposition in response to any attempted exercise of market power by the merged firm. Thus, where the nationwide firms, other than the Applicants, have substantial presence in a market and the ability to add capacity and subscribers relatively quickly, unilateral harm is unlikely. In addition, of course, for consumers who do not demand price-competitive nationwide service plans, the regional service providers constitute an additional option that should further protect competition.<sup>390</sup> As further explained below, we find that in all but 22 local geographic areas competitive harm is unlikely to result from Cingular's acquisition of the operations of AT&T Wireless.

148. For many markets where the facts of a high subscriber-based HHI and a high change in HHI might seem to suggest a potential competitive problem, there is in fact little likelihood of harm. We find that the presence and capacity of other firms matter more for future competitive conditions than do current subscriber-based market shares. In particular, current market shares understate the likely future competitive importance of Verizon Wireless, Sprint, T-Mobile, and Nextel. These firms all compete fiercely for customers; all are investing substantially in capacity and new services in this sector; and Verizon Wireless, T-Mobile, and Nextel have been gaining nationwide market share over recent quarters.

149. While we find that anti-competitive unilateral effects are unlikely in most markets, however, there are specific markets in which competitive conditions are sufficiently different such that unilateral effects pose a threat to competition. Especially worrisome are markets in which the total number of providers – or the total number of providers of nationwide service – is low, and markets in which providers are present but are constrained from repositioning and expanding output for some reason such as incomplete footprint or inadequate spectrum bandwidth. In addition, because market shares do

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<sup>389</sup> See section V.A.1.a.

<sup>390</sup> The CompTel/ASCENT study of mobile prices does not undercut these judgments. There are several problems with CompTel/ASCENT's analysis of the mobile wireless sector. First, it does not allow for product repositioning (*i.e.*, reaction by other firms) which, as we have explained, we believe to be an important factor affecting the level of competition. In addition, it incorporates a greatly simplified pricing structure, and the product offerings are aggregated to the level of one per firm. Pricing and plan offerings in the wireless industry are quite complex, however, and it is therefore difficult to draw conclusions based on a simulation of this nature. Third, CompTel/ASCENT assumes that the relevant market is national and ignores local and regional conditions. Fourth, the data relied on to represent prices may lead to biased results. For example, it appears that the price for Verizon Wireless is significantly underestimated relative to those of the other wireless firms in this analysis. Therefore, we are not persuaded that CompTel/ASCENT's conclusions regarding the mobile wireless sector. See CompTel/ASCENT Oct. 1 *Ex Parte* Letter, Attachment.

tend to persist – albeit changing over time – they are not entirely unimportant. Thus, also worrisome are markets in which the combined market share of the merged entity is very high. In each of these markets with characteristics that raise special concern, we have looked closely at the interaction of all the relevant competitive circumstances, as described in Section V.A.3.d., below.

**(ii) Coordinated Interaction**

150. In markets where only a few firms account for most of the sales of a product, those firms may be able to exercise market power by either explicitly or tacitly coordinating their actions.<sup>391</sup> Accordingly, one way in which a merger may create or enhance market power or facilitate its exercise is by making such coordinated interaction among firms more likely, more successful, or more complete.<sup>392</sup> For example, by reducing the number of firms necessary to control a given percentage of total supply, a merger may lower the difficulties and costs of reaching and enforcing the terms of an agreement to restrict output. The significant increases in concentration and high post-merger concentration levels in some mobile telephony markets indicated by the structural analysis in Section V.A.3.a., above, thus raise the concern that the merger could facilitate coordinated interaction in those markets. However, such increases in concentration and high concentration levels in the relevant markets following the merger do not by themselves provide a sufficient basis for determining that the merger will facilitate coordinated interaction, for two related reasons. First, the ability to reach and enforce terms of coordination may also depend on many other distinctive characteristics of individual markets apart from concentration.<sup>393</sup> Second, and consequently, although a high concentration level is among the factors that may make coordinated interaction easier and therefore more likely, there is no unique critical threshold of market concentration above which the exercise of market power through coordinated interaction is likely.<sup>394</sup> Therefore, the Commission will also consider whether conditions in the post-merger environment other than market concentration will be conducive to reaching and enforcing the terms of coordination.

151. The *DOJ/FTC Guidelines* define coordinated interaction as comprising actions by a group of firms that are profitable for each of the firms involved only because the other firms react by accommodating these actions rather than attempting to undercut them.<sup>395</sup> Successful coordination depends critically on two key factors. The first is the ability to reach terms that are profitable for each of the firms involved, and the second is the ability to detect and punish deviations that would undermine the coordinated interaction. Rapid detection and punishment of deviations facilitates successful coordinated interaction by lowering the profitability of deviating from the terms of coordination and thereby reducing incentives to cheat. Terms of coordination need not perfectly achieve a monopoly outcome in order to harm consumers, however. Terms of coordination may omit some market participants or dimensions of competition and still result in competitive harm.<sup>396</sup>

152. A number of market conditions may affect one or both elements of coordination, including the availability of information about market conditions, the extent of firm and product homogeneity, and the presence of maverick carriers. In general, moreover, market conditions are more

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<sup>391</sup> *DOJ/FTC Merger Guidelines* § 0.1.

<sup>392</sup> *Id.* § 2.1.

<sup>393</sup> Barry C. Harris and David D. Smith, *The Merger Guidelines vs. Economics: A Survey of Economic Studies*, PERSPECTIVES ON FUNDAMENTAL ANTITRUST THEORY, American Bar Association, Section of Antitrust Law, July 2001, at 10-12.

<sup>394</sup> *Id.*

<sup>395</sup> *DOJ/FTC Merger Guidelines* § 2.1.

<sup>396</sup> *Id.* § 2.11.

likely to be conducive to coordinated interaction when the firms in a market previously have engaged in express collusion. In examining whether mobile telephony market conditions other than concentration are conducive to coordinated interaction, we focus on those market conditions that seem most pertinent to the mobile telephony sector in light of salient sector characteristics and trends. As background to this analysis, we begin with a summary of the Applicants' view of coordinated effects.

153. *Applicants' view.* After describing the market conditions that could be conducive to coordinated effects, the Applicants cite a number of reasons why coordinated effects are unlikely to result from the transaction.<sup>397</sup> First, the industry has a history of competition on price and quality as well as rapid innovation. Second, the post-transaction environment will still have five major national carriers and more than a dozen regional carriers. Third, the history of price declines and the large mix of services and price offerings are inconsistent with the stable relationship required to maintain collusive outcomes. Fourth, wireless providers compete in different dimensions, including equipment subsidies as well as monthly price, number of free minutes, breakdown by off-peak and on-peak periods, roaming charges, and other services. Fifth, wireless providers also differ with regard to quality of service and amount of excess capacity. The latter difference, in particular, creates different incentives for price-cutting by different service providers. For example, newer entrants such as T-Mobile and regional competitors such as MetroPCS are eager to take business away from more established providers and have the capacity to do so. Finally, the Applicants contend that relationships among the wireless carriers are unlikely to become less complex and varied after the merger.

154. *Transparency of information.* Terms of coordination are often easier to reach, and detection and punishment of deviations is often more rapid and more effective, when key information about specific transactions or individual price or output levels is routinely available to rival firms.<sup>398</sup> In this regard, it has been suggested that the trend toward national pricing plans raises concerns about coordinated interaction by making pricing more transparent, and that the merger would exacerbate this trend and remove a constraint on coordinated interaction by increasing industry transparency.<sup>399</sup> While this argument is not spelled out in sufficient detail to make it completely clear how national pricing plans have made pricing more transparent, one plausible interpretation is that carriers can easily observe the prices and other features of their rivals' national pricing plans, enabling them to punish one another for deviations. There is ample evidence in the record that the carriers regularly monitor their rivals' pricing plans, promotions, marketing strategies, and other aspects of their rivals' operations,<sup>400</sup> and further that the carriers use this information as a basis for designing and modifying their own pricing plans, promotions, and marketing strategies.<sup>401</sup> However, nothing in the record supports the contention that the carriers have actually used such transparency of pricing plans or other features to detect and punish deviations to date. To the contrary, the record shows that carriers try to use the information they obtain about their rivals to improve their own ability to compete in attracting and retaining customers, either by matching the offers of rivals or by making more aggressive offers.<sup>402</sup> Furthermore, there is nothing in the record to indicate that the transaction will alter market conditions in such a way as to increase the ability and incentive of the remaining carriers to exploit transparency of pricing plans and other features for the purpose of detecting and punishing deviations. In light of the fact that this merger constitutes a reduction

<sup>397</sup> Gilbert Declaration at 27-28.

<sup>398</sup> DOJ/FTC Merger Guidelines § 2.11-2.12.

<sup>399</sup> *Competitive Concerns Regarding Cingular Wireless's Acquisition of AT&T Wireless*, Presentation to FCC on Behalf of Thrifty Call, Aug. 4, 2004, at 10 and 12.

<sup>400</sup> For example, [REDACTED]

<sup>401</sup> [REDACTED]

<sup>402</sup> [REDACTED]

in competitors of no worse than six to five in most large markets and many smaller markets, we find that the structural change resulting from this merger is not sufficient to alter market conditions in this fashion.

155. Moreover, we believe that national wireless pricing innovations have been a major driver of price rivalry in the U.S. mobile telephony market, rather than a vehicle for coordinated interaction due to increased pricing transparency. The typical pattern has been that one of the major nationwide wireless carriers is the first to introduce a particular pricing innovation, and some or all of the other major wireless carriers quickly follow suit by offering a rival version of the leader's new pricing plan within the space of a year or less. This pattern suggests that intense competitive pressure, rather than coordinated interaction, has compelled the major wireless carriers to match the national pricing innovations of rival carriers. In addition, even though the first national single-rate pricing plan was introduced in 1998 and all six nationwide carriers now offer some version of a national rate pricing plan, this pattern of innovation followed by imitation has been repeated with respect to subsequent national pricing innovations such as free night and weekend minutes and free mobile-to-mobile calling. The continuation of national pricing innovations suggests that increased pricing transparency has not had the effect of facilitating coordinated interaction. To be sure, the absence of any evidence of past collusion does not ensure that collusion will not take place in the future, but it is nonetheless an important factor to consider in assessing the likely impact of the transaction on future competitive conduct. We conclude that increased pricing transparency as a result of the trend toward national pricing plans has not facilitated coordinated interaction prior to this transaction, and that there is no evidence in the record or in our own investigation to indicate that the merger is likely to alter the market in such a way as to increase industry transparency and make coordinated interaction more likely, more successful, or more complete.

156. *Firm and product homogeneity.* A market condition that may facilitate the ability to reach terms of coordination is firm and product homogeneity.<sup>403</sup> In this regard, it has been suggested that competing wireless carriers have become more similar due to the rise of nationwide carriers and the decreased presence of regional players, and that the increased carrier symmetry implied by this trend raises concerns about coordinated interaction.<sup>404</sup> However, since the proposed merger combines two nationwide carriers, it will not contribute directly to the decreased presence of regional players. Moreover, competition from the remaining large regional carriers and smaller local carriers may still be sufficient to constrain the ability of the nationwide carriers to coordinate pricing and other terms and conditions of service in the many local geographic markets in which such smaller players compete.

157. As a corollary of the above argument, it is also argued that the proposed merger will further narrow competitor asymmetries and thereby remove another constraint on coordinated interaction.<sup>405</sup> Actually, however, the way the merger will affect asymmetries among the nationwide carriers is somewhat more complicated. On the one hand, by combining two similarly sized nationwide carriers into the largest nationwide carrier, the merger would actually enhance the asymmetry between the two largest nationwide carriers, Verizon Wireless and Cingular, and the three remaining nationwide carriers (Sprint, T-Mobile, and Nextel). On the other hand, the merger would make Verizon Wireless and Cingular more similar in size to each other. There are, however, other differences between Cingular and Verizon Wireless that could make it difficult for these two carriers to reach agreement on the terms of coordination. For example, since Verizon Wireless has already differentiated its brand from rival offerings based on network coverage and voice quality,<sup>406</sup> Cingular may be less willing to agree to restrict

<sup>403</sup> *DOJ/FTC Merger Guidelines* § 2.11.

<sup>404</sup> *Competitive Concerns Regarding Cingular Wireless's Acquisition of AT&T Wireless*, Presentation to FCC on Behalf of Thrifty Call, Aug. 4, 2004, at 10.

<sup>405</sup> *Id.* at 12.

<sup>406</sup> *Ninth Report*, FCC 04-216, at 62-63 ¶ 149.

competition on other terms, such as promotions and advertising, which could offset or narrow this advantage. Cingular and Verizon Wireless also use competing 2G digital technologies and are following divergent next-generation migration paths.<sup>407</sup> Due to factors that distinguish these competing wireless standards, Cingular and Verizon Wireless face significant differences in equipment costs, the speed and cost of network upgrades, and migration prospects that may impede their ability to reach agreement on terms of coordination, including on non-price terms such as territorial restrictions.<sup>408</sup> In this regard, we note that both Verizon Wireless and AT&T Wireless have launched high-speed wireless data services in San Diego, thus setting up the first opportunity for customers in a market to compare Verizon Wireless's 1X EV-DO services with AT&T Wireless's WCDMA-based services.<sup>409</sup>

158. Apart from these differences, we note that, while Verizon Wireless and the post-transaction Cingular will be the largest wireless carriers in terms of the number of subscribers on a national basis, their respective subscriber shares in the relevant local markets vary widely across different geographic regions, and there are many local markets in which one or the other still has a relatively small subscriber share. Thus, they will not invariably be the top two players in local markets, including many local markets where the original cellular incumbents still retain relatively large market shares. Moreover, in those markets in which Verizon Wireless and either Cingular or AT&T Wireless *are* the top two players today, prior to this transaction, we do not see evidence of coordinated interaction; in general, we see vigorous and successful competition from the smaller nationwide carriers as well as regional and other carriers.

159. The three smaller nationwide carriers also differ among themselves, and from Verizon Wireless or Cingular, in ways that may make it difficult for any coalition of nationwide carriers to reach terms of coordination. For example, since Nextel has differentiated its brand based in part on its signature PTT offering,<sup>410</sup> and also is the only nationwide carrier to use iDEN, rather than CDMA or GSM/TDMA, as its 2G digital technology, the distinctive characteristics of Nextel's service offering or differences in equipment costs may prevent the other nationwide carriers from reaching an agreement with Nextel to restrict competition on price or other terms and conditions of service. Moreover, there is no evidence that similarities among some of the nationwide carriers have facilitated their reaching agreement on terms of coordination. For example, the use of CDMA has not enabled Verizon Wireless and Sprint to reach an agreement to reduce spending on the deployment of CDMA network upgrades. To the contrary, the evidence indicates that increased spending by Verizon Wireless on EV-DO deployment put pressure on Sprint to increase its capital spending on the same network upgrade.<sup>411</sup> Based on the foregoing

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<sup>407</sup> As noted previously, both Cingular and AT&T Wireless are using GSM/TDMA as their 2G digital technologies and are following the GSM migration path that will eventually lead to the deployment of WCDMA. In contrast, Verizon Wireless has been following the CDMA migration path by upgrading its 2G CDMA network first to CDMA2000 1xRTT, and more recently has been rolling out a national high-speed wireless data network based on CDMA2000 1X EV-DO.

<sup>408</sup> These distinguishing factors include the greater global coverage and usage of GSM, the backward compatibility of CDMA, and the relative ease of CDMA network upgrades. Neil Gandal, David Salant, and Leonard Waverman, *Standards in Wireless Telephone Networks*, 23 TELECOMMUNICATIONS POLICY 328-30 (2003); Governali, Barry & Soova, *supra* note 255, at 2, 6; Jonathan Chambers, *Costs of Terminating Traffic on Mobile Networks*, Callahan Associates International LLC, presentation made to the Commission on Aug. 28, 2001, at 11.

<sup>409</sup> Dan Meyer, *AWS Launches UMTS in Two More Markets*, RCR WIRELESS NEWS, Sept. 1, 2004.

<sup>410</sup> Although, as noted previously, several other major carriers recently introduced rival PTT offerings, some analysts believe these competitors' products are somewhat less attractive than Nextel's PTT service due to their longer "latency," a term that refers to delays in setting up a PTT call and the pushes between conversation breaks. *Ninth Report*, FCC 04-216, at 63-64 ¶ 152.

<sup>411</sup> Sprint previously had announced plans to delay its next network upgrade until 1XEV-DV is available for commercial deployment, rather than building out 1XEV-DO as Verizon Wireless was doing. Subsequently, (continued...)

considerations, we conclude that the extent of carrier heterogeneity may constrain the ability of competing carriers to reach terms of coordination in U.S. mobile telephony markets, and that the proposed merger will not further narrow competitor asymmetries in such a way as to remove or undermine this constraint.

160. *Presence of mavericks.* In some circumstances, maverick firms can effectively prevent or limit coordinated interaction.<sup>412</sup> Maverick firms are firms that have a greater economic incentive to deviate from the terms of coordination than do most of their rivals. Therefore, a merger may make coordinated interaction more likely, more successful, or more complete if it involves the acquisition of a maverick firm. In the context of U.S. mobile telephony markets, maverick carriers may be identified by the innovative pricing plans or services they introduce. The enhanced incentive to deviate may arise because the maverick carrier controls substantially more spectrum than it needs to serve the demands of its currently limited customer base, and also because its costs of expanding sales in the relevant market are relatively low and (or) it is well positioned to attract customers currently served by its competitors. Such a carrier has a strong incentive to deviate because it receives less benefit from the higher coordinated prices than do carriers with larger market shares and is well positioned to profit from expanding its sales.

161. In this connection it has been suggested that, in addition to increasing symmetry among carriers, the decreased presence of regional players implies the disappearance of likely mavericks, and therefore the merger will facilitate coordinated interaction by increasing the effectiveness of punishment.<sup>413</sup> However, while we recognize the critical role of maverick carriers in preventing or limiting coordinated interaction, we are not persuaded that the proposed merger will facilitate coordinated interaction due to the disappearance of likely mavericks among regional carriers. Since the proposed merger combines two nationwide carriers, it will not directly eliminate any likely maverick carriers among the regional players. In addition, although some of the large regional carriers offer nationwide service plans along with the six nationwide carriers, it is the nationwide carriers, rather than regional carriers, that have taken the lead in introducing innovations in national plans such as national single-rate pricing plans, free night and weekend minutes, and free mobile-to-mobile calling.

162. The concerns raised about the disappearance of likely mavericks might be valid if the proposed merger involved the acquisition of a nationwide carrier that is uniquely positioned to be a maverick carrier. With the introduction of its Digital One Rate plan in May 1998, AT&T Wireless emerged as a leader of innovations for national pricing plans.<sup>414</sup> However, other nationwide carriers have taken the lead in introducing other innovative pricing plans or services, including Verizon Wireless for on-network national pricing plans, Cingular for free night and weekend minutes and rollover minutes, and Nextel for PTT services.<sup>415</sup> We believe that conditions in the market for national mobile telephony services/plans are such that no single nationwide carrier is uniquely positioned to be a maverick. To the contrary, any of the three smallest nationwide carriers could find itself facing the conditions identified

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however, Sprint revised its strategy and announced plans to deploy EV-DO in the majority of top metropolitan markets in 2005. *Id.* at 57-58 ¶ 134.

<sup>412</sup> *DOJ/FTC Merger Guidelines* § 2.12.

<sup>413</sup> *Competitive Concerns Regarding Cingular Wireless's Acquisition of AT&T Wireless*, Presentation to FCC on Behalf of Thrifty Call, Aug. 4, 2004, at 10.

<sup>414</sup> *Ninth Report*, FCC 04-216, at 49 ¶ 113.

<sup>415</sup> 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 FCC Rcd. at 13,014; *Eighth Report*, 18 FCC Rcd. at 14807-08 (2003); *Ninth Report*, FCC 04-216, at 63 ¶ 152.

above as creating a strong incentive to deviate from the terms of coordination: excess spectrum and (or) network capacity relative to the traffic generated by its existing customer base, and low direct and opportunity costs of expanding sales in the relevant market. Even Verizon Wireless and the post-transaction Cingular may face such conditions in certain local markets where they still have a relatively small market share. In light of these considerations, we conclude that the proposed merger will not facilitate coordinated interaction by increasing the effectiveness of punishment. To the contrary, we believe it is likely that maverick carriers will continue to prevent or limit coordinated interaction in most of the local markets identified above despite the merger. While we do not quantify the number of markets in which it is likely that the presence of a maverick would inhibit anticompetitive coordinated interactions, we take account of this factor in our market-by-market analysis by examining the ability of rival firms in the market to expand output, as described in Section V.A.3.d., below.

163. *Existing cooperative ventures.* As noted previously, it is more likely that market conditions are conducive to coordinated interaction when market participants have previously engaged in express collusion.<sup>416</sup> In recent years, several infrastructure sharing joint ventures or agreements have been formed by different pairs of major wireless carriers. These include a Cingular/AT&T Wireless venture to build out a GSM/GPRS network along interstate highways, primarily in western and midwestern states and also New England; a Cingular/T-Mobile venture to share existing GSM networks in California, Nevada, and New York; an AT&T Wireless/Sprint agreement to cooperate in the construction of new wireless towers; and a T-Mobile/Western Wireless agreement to expand GSM/GPRS coverage in the western United States.<sup>417</sup> Such infrastructure sharing joint ventures and agreements have been cited as examples of previous cooperation among major wireless competitors that raise concerns about potential coordinated interaction.<sup>418</sup> We note, however, that one consequence of the proposed merger is that Cingular and T-Mobile have agreed to end and unwind their joint venture to share GSM networks in California, Nevada, and New York.<sup>419</sup> More importantly, viewed in the context of the historical development of the mobile telephony sector, these infrastructure sharing arrangements arguably do not represent a qualitatively new business practice, but rather can be seen as one of a variety of different types of partnerships and contractual arrangements that mobile telephony carriers have used to expand their geographic coverage in a regulatory environment based on regional licenses. In this regard, infrastructure sharing arrangements have already yielded, or show promise of yielding, the pro-competitive benefit of enabling carriers who are parties to such arrangements to launch service in regions that they previously have not served.<sup>420</sup> We conclude that the recent trend toward infrastructure sharing does not raise concerns about coordinated interaction, and we see no evidence that the merger will have any effect in this regard. We therefore conclude that the proposed merger will not alter the market in a way that would make infrastructure sharing arrangements a likely precursor of other forms of cooperation among competing wireless carriers that would harm consumers.

164. *Implications.* As indicated in the foregoing analysis, there is no evidence in the record to indicate that mobile telephony carriers have successfully restricted competition on price or non-price

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<sup>416</sup> *DOJ/FTC Merger Guidelines* § 2.1.

<sup>417</sup> *Eighth Report*, 18 FCC Rcd. at 14807-14808; *Ninth Report*, FCC 04-216, at 29 ¶ 68.

<sup>418</sup> *Competitive Concerns Regarding Cingular Wireless's Acquisition of AT&T Wireless*, Presentation to FCC on Behalf of Thrifty Call, Aug. 4, 2004, at 10.

<sup>419</sup> *Ninth Report*, FCC 04-216, at 29-30 ¶ 69. See *supra* Section II.B.2..

<sup>420</sup> For example, following the formation of their joint venture to share existing GSM networks in California, Nevada, and New York, T-Mobile launched service in California and Nevada, where Cingular already offered service, while Cingular launched service in New York, where T-Mobile already offered service. See *Eighth Report*, 18 FCC Rcd. at 14807-08.

terms through coordinated interaction in specific markets, or that this merger will make such interaction more likely as a general matter. In addition, we are persuaded by the Applicants' argument that certain characteristics of the mobile telephony market environment, including firm heterogeneity and the presence of carriers with excess spectrum or network capacity, may continue to make it difficult for carriers first to reach terms of coordination and then effectively to detect and punish deviations in specific markets. We acknowledge, however, that there is considerable variation across local geographic markets with regard to the number and identity of competing carriers, firm homogeneity, and the presence of excess spectrum or network capacity. Because of this local variation, it is difficult to generalize about the impact of the transaction in facilitating coordinated interaction to restrict competition on price or non-price terms in specific markets. Therefore, although our analysis tends strongly to discount the possibility that the transaction will make coordinated interaction more likely, more successful, or more complete, as a precaution we take the possibility of coordinated interaction into account in our analysis of specific markets by carefully scrutinizing, among other variables, the presence and capacity of rival carriers.

**c. Vertical Issues**

165. In this section, we consider the potential vertical or other non-horizontal harms of the proposed transaction. Aside from the intermodal issues discussed in Section V.B. below, the only issues of this type on the record or that we identify in our independent analysis are the possible impacts of the transaction on roaming and special access.

**(i) Roaming**

**(a) Background**

166. Wireless calling plans specify a geographic "home" area within which the subscriber can make a call without incurring additional charges. "Roaming" occurs when the subscriber of one wireless carrier travels beyond the home area and utilizes the facilities of another wireless carrier to place an outgoing call, receive an incoming call, or continue a call.<sup>421</sup> Subscribers can roam manually by giving a credit card number to the host carrier. We are concerned here with automatic roaming, whereby, pursuant to agreements established between carriers, subscribers are able to roam seamlessly on other providers' networks.<sup>422</sup> As detailed below, over the last several years automatic roaming has become widespread. Carriers may or may not impose additional per minute charges for automatic roaming on other carriers' networks, depending on the customer's service plan.

167. Cingular contends that the proposed transaction will not have an adverse effect on the availability of automatic roaming services. Cingular expects its business plan for the merged entity to benefit its roaming partners as well as enable it to provide wider coverage, improved service quality, and advanced data services for its subscribers.<sup>423</sup> In support of these claims, Cingular states that the combined company will still have over a hundred domestic roaming agreements.<sup>424</sup> Cingular further asserts that it "will continue to have strong incentives, driven by intense competition throughout the wireless industry, to enter into reasonable roaming arrangements with other carriers and will actually improve the roaming experience of other carriers' subscribers."<sup>425</sup> Cingular hopes "to have a substantial majority of its new

<sup>421</sup> See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd. 9462, 9464 ¶ 3 (1996).

<sup>422</sup> *Id.* at ¶ 2.

<sup>423</sup> Cingular Response To Information Request at 5.

<sup>424</sup> Cingular Opposition to Petition to Deny at 18.

<sup>425</sup> *Id.* at 28.

customers on national plans by the end of the year.”<sup>426</sup> Cingular typically enters into reciprocal roaming rates and has “long-term agreements with its most important roaming partners,” including T-Mobile until 2009, and Dobson and Western Wireless until 2008.<sup>427</sup> Cingular asserts that it has no incentive to drive up roaming rates because its roaming partners would simply switch to its competitors instead, thus reducing Cingular’s roaming revenues.<sup>428</sup> Cingular’s business plan for the merged entity also includes a gradual, not a “flash-cut,” transition of its tens of millions of TDMA customers to its GSM networks. Among the reasons for Cingular’s gradual migration strategy is that a short cut transition would cost billions of dollars, inconvenience its customers, and possibly lead to its roaming partners’ service disruption.<sup>429</sup>

168. Cingular states that its merger with AT&T Wireless will reduce its roaming costs because Cingular subscribers will no longer have to roam in order to receive service in many areas, including such major cities as Denver, Pittsburgh, Phoenix, and Minneapolis.<sup>430</sup> By the same token, former AT&T Wireless subscribers who stay with Cingular will no longer roam in order to receive service in a number of areas, including such major cities as Portland, Salt Lake City, and Tulsa.<sup>431</sup> Cingular contends that this elimination of roaming agreements will benefit its customers directly, because some customers will no longer be charged to roam in those areas, and indirectly because Cingular can pass its savings on to its customers through reduced price plans or improved voice service and advanced data services.<sup>432</sup>

169. Some of Cingular’s roaming partners filed comments in support of the merger. Rural Cellular Corporation (“RCC”), which has automatic roaming agreements with both AT&T Wireless and Cingular, asserts that, because Cingular intends to expand coverage and deploy next-generation services, the merger will benefit RCC customers for years to come.<sup>433</sup> Highland Cellular, LLC, a non-LEC rural wireless carrier that uses a TDMA system overlaid with GSM to provide service in one of the poorest and most sparsely populated areas of the eastern United States, claims it needs a strong GSM roaming partner, like Cingular, because it does not have the market strength to force GSM development.<sup>434</sup> If the merger allows Cingular to offer more robust national GSM roaming, Highland says it will benefit because more GSM customers will roam on Highland, providing it with valuable revenues.<sup>435</sup> Dobson Communications Corporation, a GSM roaming partner with Cingular, emphasizes that its customers will benefit from Cingular’s plans to deploy next-generation services.<sup>436</sup> Edge Wireless agrees with Cingular’s assessment that, after the merger, Cingular will be a net payor in roaming fees and, therefore, will have the incentive to enter into agreements with reasonable roaming rates.<sup>437</sup>

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<sup>426</sup> Cingular Application at 32.

<sup>427</sup> *Id.*

<sup>428</sup> Cingular Opposition to Petition to Deny at 47.

<sup>429</sup> Cingular Response to Information Request at 8, 9, 29.

<sup>430</sup> Cingular Application at 21.

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> Rural Cellular Comments at 1.

<sup>434</sup> Highland Cellular Comments at 3.

<sup>435</sup> *Id.* at 4.

<sup>436</sup> Dobson Communications Comments at 3.

<sup>437</sup> Letter from Wayne Perry, Edge Wireless, to Marlene Dortch, Secretary, Federal Communications Commission (Oct. 7, 2004).

170. Consumers Union and Consumer Federation of America, on the other hand, argue that Cingular would leverage its substantially increased subscriber share to exact discriminatory roaming rates.<sup>438</sup> They argue that “with Cingular being 50 percent larger than its nearest rival and three to five times as large as the other national players, it is almost certain to shift from being a net payor in reciprocal roaming agreements to a net receiver.”<sup>439</sup> Though it does not oppose the merger, U.S. Cellular Corporation filed a comment urging Cingular to negotiate reasonable roaming arrangements and asking the Commission to enforce vigorously the Communication Act’s prohibition against unreasonable prices.<sup>440</sup>

171. A few parties claim that Cingular and AT&T Wireless have begun engaging in anticompetitive conduct against small rural wireless providers and, therefore, request that the Commission not grant the merger application unless it imposes conditions prohibiting the merged entity from continuing this conduct.<sup>441</sup> For example, Public Service Communications (“PSC”), National Telecommunications Cooperative Association (“NTCA”), and Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) contend that Cingular and AT&T Wireless have begun shifting traffic to each other’s networks and away from rural carriers with which they used to roam and that, after the merger, Cingular might engage in discriminatory acts such as charging certain rural carriers roaming premiums.<sup>442</sup>

### (b) Discussion

172. In evaluating the impact of the proposed merger on roaming services, we focus on the potential harm to consumers of mobile telephony services, rather than to mobile telephony providers. Consumers would be harmed if, as a result of the merger, Cingular’s roaming partners pay higher roaming rates that are passed on to their customers, or the roaming partners’ customers are no longer able to obtain roaming services in certain markets and they cannot replace that loss with equivalent or superior alternatives. We distinguish such harm to consumers from effects on mobile telephony carriers such as a reduction in the roaming revenues of one or more of Cingular’s roaming partners as a result of the merger.

173. We conclude that the proposed merger will not adversely affect the availability of roaming services or raise roaming rates passed through to customers. As discussed in greater detail below, the record shows that the provision of automatic roaming services has become increasingly competitive over time, and that the continued presence of two nationwide and numerous regional carriers using GSM technology after the merger should be sufficient to ensure the continued availability of roaming services at competitive rates to Cingular’s potential roaming partners.

174. Since the first broadband PCS auction in 1995, the provision of automatic roaming services has become increasingly competitive, and roaming services have become increasingly available

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<sup>438</sup> CU and CFA Joint Petition to Deny at 11.

<sup>439</sup> CU and CFA Joint Reply at 6-7. *See also* Newcomb Comment at 3.

<sup>440</sup> U.S. Cellular Comments at 3-4.

<sup>441</sup> *See* Michael Kurtis *ex parte* letter to Marlene Dortch (Sept. 9, 2004).

<sup>442</sup> *See* Michael Kurtis *ex parte* letter to Marlene Dortch (September 9, 2004). Kaplan Telephone Company filed an informal objection in which it claimed that Cingular had refused to honor a 2003 switching agreement with Kaplan because Cingular wants AT&T Wireless to have an unfair advantage over Kaplan in certain markets in which AT&T Wireless and Kaplan compete against each other. *See* Kaplan Informal Objection at 2-3. Subsequently, however, Kaplan filed a motion to withdraw its informal objection on the basis that it and Cingular had executed an addendum to its 2003 agreement that resolved its contractual dispute. *See* Kaplan Motion at 1.

and progressively less expensive, in part because many automatic roaming agreements provide for reciprocal rates. One estimate of the average per-minute roaming rate charged to other carriers by six large regional carriers showed an 18 percent decrease from \$0.43 per minute in 1999 to \$0.36 per minute in 2000.<sup>443</sup> Similarly, Verizon Wireless has estimated that its roaming costs with various carriers declined between 5 and 64 percent from December 1999 to December 2000.<sup>444</sup> Recent trends in roaming revenues confirm that roaming rates have continued to fall. CTIA reported that roaming revenues for the mobile telephony industry declined from \$3.9 billion in 2002 to \$3.8 billion in 2003.<sup>445</sup> As explained in one recent analyst report, given that roaming revenues are driven by roaming minutes and the roaming fees negotiated among the carriers, and that roaming minutes have risen significantly, roaming revenues have trended downward because roaming fees have fallen at a rate that more than offsets the rise in roaming minutes.<sup>446</sup> Several factors have contributed to the increased availability and competitiveness of roaming services, including the entry of broadband PCS operators and their continued deployment of digital networks,<sup>447</sup> the development of dual-band and multimode handsets permitting the interoperability of cellular and broadband PCS systems,<sup>448</sup> the increasing presence of carriers with national footprints, and the introduction and spread of national single-rate pricing plans that include roaming service at no additional charge to subscribers.<sup>449</sup>

175. As broadband PCS licensees constructed their digital networks and cellular licensees began to overlay their networks with digital technology, the number of potential roaming partners multiplied in many geographic markets, making the provision of roaming services more competitive. The development of dual-band and multimode handsets that allow roaming on both cellular bands (A and B) and on PCS bands, and also between digital and analog technologies, further facilitated the ability of PCS and cellular service providers to roam with each other. Nevertheless, given the range of handsets currently available, the number of potential roaming partners in a given geographic market is still limited by technological incompatibility and frequency bands. We note in particular that TDMA/GSM carriers do not have the ability to roam with CDMA carriers, and vice versa.

176. Currently, all the major nationwide carriers as well as many regional and small carriers offer nationwide or nearly nationwide plans that include roaming service to their subscribers at no additional charge. Even the “nationwide” carriers still have holes in their licensed service areas, however, and therefore have a strong incentive to enter into roaming agreements with other carriers in order to fill in coverage gaps, compete on the basis of coverage, and thereby meet growing consumer demand for nationwide single-rate calling plans. Since the average price per minute under this type of plan is the same regardless of whether the call is initiated or received on the provider’s own network or another carrier’s network, carriers offering a single-rate price plan have a strong incentive to negotiate to lower roaming rates they pay to other carriers. Conversely, competition and the need to generate revenues prevent nationwide carriers from refusing to enter into roaming agreements with smaller local and

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<sup>443</sup> *In the Matter of 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*, 16 FCC Rcd. 13350, 13379 (2001) (“*Sixth Annual CMRS Competition Report*”).

<sup>444</sup> *Sixth Annual CMRS Competition Report*, 16 FCC Rcd. 13379 n.194; Verizon Wireless Comments at 4 (data derived from raw billing figures from four of Verizon Wireless’s largest roaming partners).

<sup>445</sup> CTIA, *Semi-Annual Wireless Industry Survey*, available at <http://www.wow-com.com/industry/stats/surveys/>.

<sup>446</sup> Colette M. Fleming, *et al.*, *US Wireless 411*, UBS Warburg, UBS Investment Research, Sept. 15, 2004, at 34.

<sup>447</sup> See Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, WT Docket No. 00-193, *Notice of Proposed Rulemaking*, 15 FCC Rcd. 21,628, 21,633 ¶ 12 (2000).

<sup>448</sup> *Id.*

<sup>449</sup> *Id.* ¶ 13.

regional carriers or raising the roaming rates they charge other carriers above competitive levels.

177. As a consequence of the proposed merger, the number of nationwide carriers using GSM as their digital standard will decrease from three to two (Cingular and T-Mobile), and the number of potential roaming partners for other GSM carriers will decrease by one in each overlapping geographic market. This raises the question of whether the merger could have anti-competitive effects that would impair the ability of Cingular's potential GSM roaming partners to negotiate reasonable roaming agreements. As a benchmark for evaluating the potential competitive effects of the merger with respect to the provision of roaming services, we note that currently there are two nationwide CDMA carriers (Verizon Wireless and Sprint), plus a number of regional and local carriers that use CDMA as their digital standard. We have heard no complaints from CDMA carriers or seen other evidence to indicate that the availability and pricing of roaming services have been less favorable for CDMA carriers than for GSM carriers. Based on this comparison, we conclude that the continued presence of two nationwide GSM carriers in conjunction with the existence of other regional and local GSM carriers should be sufficient to ensure the availability of GSM roaming services at competitive rates. Although the number of nationwide carriers using TDMA will decrease from two to one as a consequence of the proposed merger (because T-Mobile has no TDMA network), we are not overly concerned about the effect on Cingular's potential roaming partners because, like Cingular, those partners are transitioning their business from TDMA to GSM (or, in some cases, to CDMA). These carriers will have a strong incentive, in direct proportion to their dependence on roaming revenue, to accomplish their transitions away from TDMA as expeditiously as possible in order not to be left behind when their largest roaming partner phases out TDMA. Any subscribers to these smaller carriers who are denied access to advanced handsets and services because of their carriers' lagging transitions away from TDMA will have other options in the competitive mobile telephony marketplace.

178. We also consider the possible effect of the merger on the roaming market for those wireless telephony consumers who rely on analog service. There are 28 CMAs (out of 734) in which AT&T Wireless and Cingular control the two cellular licenses,<sup>450</sup> and in which the merger could therefore result in a reduction from two analog carriers to one. Because, as explained below, we order divestitures of operating units affecting six of these CMAs, there will be 22 CMAs in which this reduction will actually occur. No party has argued, and we do not find, that this two-to-one reduction in analog carriers will result in a significant adverse effect on the roaming market. These 22 CMAs are not located in the same state or region of the country,<sup>451</sup> and we think it unlikely that Cingular would attempt to restructure its roaming agreements generally so that roaming rates in these areas would be different from the rest of the country. The transactions costs of attempting to impose and enforce a higher roaming price on a roaming partner in one CMA (or in some cases, part of one CMA) when that CMA is near other CMAs in which Cingular is *not* the only analog carrier are likely to be too high to be worth the trouble, particularly in light of Cingular's historical practice of negotiating larger-scale, reciprocal roaming agreements, as well as the fact that any possible benefit will disappear after a few years.

179. In addition, the general migration to digital technology in this industry mitigates any effect that the reduction in analog carriers might have on the roaming market. Cellular licensees are required to provide analog service only until February 18, 2008.<sup>452</sup> Furthermore, except for the small number of subscribers who have analog-only phones, an "analog monopoly" is only a concern to the extent that a subscriber is in an area in which there is no appropriate digital service (in this case, TDMA/GSM) available. Our analysis indicates that, in each of these markets, there is also a carrier other

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<sup>450</sup> See FCC Universal Licensing System, *available at* [www.fcc.gov/uls](http://www.fcc.gov/uls).

<sup>451</sup> The affected CMAs are located in Florida, Ohio, and Texas.

<sup>452</sup> 47 C.F.R. § 22.901(b).

than Cingular or AT&T Wireless offering TDMA/GSM service. Finally, the fact that dual-mode handsets allow users to roam between analog and digital technologies also persuades us that the reduction in analog carriers is not likely to result in significant adverse effect on the availability and price of roaming services.

180. Finally, we stress again that our concern in this context is with the effect of this merger on consumers of mobile telephony services, not on particular mobile telephony carriers per se. In this regard, we believe that an overall disciplinary force in the context of the intercarrier market for roaming services is that customers of various firms always have the option to switch to firms employing other air interfaces. In other words, if any mobile telephony consumers – regardless of whether they are on GSM, TDMA, or analog-only plans – were to find that the roaming aspects of their wireless service plans became less favorable (whether in terms of price or in terms of coverage) as a result of this merger, they would always have the option not only to upgrade to a GSM plan (in the case of TDMA or analog customers), but to switch to a CDMA-based carrier altogether. Thus, the availability of service from Verizon Wireless, Sprint, ALLTEL, or smaller CDMA-based carriers that comes with favorable roaming arrangements should also act to constrain Cingular's behavior in this regard.

181. We are therefore not persuaded by the arguments of Consumers Union and Consumer Federation of America that, after the merger, Cingular will have the ability and the incentive to use its larger share of subscribers to exact discriminatory rates from roaming partners.<sup>453</sup> We find these claims to be unsupported speculation.<sup>454</sup> The parties making these claims have not presented any evidence, or made any specific allegations, that Cingular has taken steps in the past to charge a particular carrier unreasonable roaming rates,<sup>455</sup> and as discussed above we are not persuaded that this merger makes such action more likely in the future.

182. In addition, Cingular states that it has been and, after the merger, will continue to be a net payor of roaming fees,<sup>456</sup> and publicly available evidence tends to support this claim.<sup>457</sup> Since its practice is to enter into roaming agreements with reciprocal roaming rates (*i.e.*, Cingular and its roaming partner pay each other the same per minute roaming rate), Cingular argues that, as a net payor, its incentive is to seek reasonable roaming rates with roaming partners.<sup>458</sup> Edge Wireless, which has roaming agreements with both Cingular and AT&T Wireless, supports Cingular's assessment on this issue.<sup>459</sup> In their joint reply, CFA and CU contend that the more likely result of the merger is that Cingular will become a net

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<sup>453</sup> CU and CFA Joint Reply at 6-7.

<sup>454</sup> See *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 47-48 (D.C. Cir. 1994) (appellant's claim that Comcast, after receiving a license transfer, would engage in anticompetitive action to drive down roaming revenues of another carrier is nothing more than "unadorned speculation.").

<sup>455</sup> See CFA and CU Joint Petition to Deny at 11; Letter from Michael Kurtis, counsel for Public Service Communications to Marlene H. Dortch (Sept. 9, 2004).

<sup>456</sup> See Cingular Opposition at 47.

<sup>457</sup> Cingular's public financial reports indicate that, during fiscal year 2003, it received more incollect roaming revenues (\$757 million) than outcollect roaming revenue (\$586 million). See Cingular 10-K at 29. Incollect roaming revenue is what Cingular receives from its subscribers when they roam on other carriers' networks. Outcollect roaming revenue is what Cingular receives from other carriers when their subscribers roam on Cingular's network. Therefore, greater incollect than outcollect roaming revenue can indicate that Cingular is a net payor of roaming fees. AT&T Wireless's public financial records do not distinguish between incollect and outcollect revenue.

<sup>458</sup> See Cingular Opposition at 47-48.

<sup>459</sup> See Edge Wireless Ex Parte, dated September 14, 2004.

receiver of roaming revenues and, therefore, Cingular's incentive will be to use that position to exact discriminatory rates.<sup>460</sup> However, CU and CFA have not provided any support for this assertion. We note also that the consensus of the roaming partners who have filed comments is that they expect the merger to benefit themselves and their customers.<sup>461</sup> Nevertheless, we are concerned about the claims of PSC, NTCA, and OPASTCO that the merged entity intends to engage in allegedly anticompetitive and other unreasonable conduct such as blocking its subscribers' access to other carriers' networks.<sup>462</sup> We note that our manual roaming rule requires other carriers to complete calls initiated by Cingular's customers where Cingular cannot because it has neither its own signal nor an automatic roaming agreement.<sup>463</sup> We adopt as a condition to our grant in this Order a reciprocal duty, *i.e.*, that Cingular may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber. Finally, in the future, if a roaming partner believes that Cingular is charging unreasonable roaming rates, it can always file a complaint with the Commission under Section 208 of the Communications Act.<sup>464</sup>

### (ii) Special Access

183. Like other independent wireless or wireline carriers, AT&T Wireless enters into interconnection agreements with, and purchases special access services from, BellSouth, SBC, and other carriers. Thrifty Call argues that the Commission should reject the proposed merger because it will significantly increase BellSouth's and SBC's incentives to discriminate against Cingular's wireless competitors in the provision of interconnection and special access services.<sup>465</sup> With respect to interconnection, SBC and BellSouth are prohibited by section 251(c)(2) of the Act from discriminating against other telecommunications carriers, including wireless providers.<sup>466</sup> To the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors, whether such carriers are wireless or wireline, in the provisioning of special access services, such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing.<sup>467</sup> By addressing these issues in the context of a rulemaking, we will be able to develop a comprehensive approach based on a full record that applies to all incumbent LECs so that the Commission treats similarly-situated incumbent LECs in the same manner.

<sup>460</sup> See CFA and CU Joint Reply at 6-7.

<sup>461</sup> See discussion *supra* ¶ 169.

<sup>462</sup> See Sept. 9, 2004, Kurtis Letter to Marlene H. Dortch; Kaplan Informal objection at 2-3.

<sup>463</sup> See 47 C.F.R. § 20.12.

<sup>464</sup> 47 U.S.C. § 208.

<sup>465</sup> See Thrifty Petition at 16-18; Thrifty Reply at 15-16; Letter from Jonathan Lee, Sr. Vice President – Regulatory Affairs, CompTel/ASCENT, to Marlene H. Dortch, Secretary, FCC, Docket No. 04-70 (filed Oct. 1, 2004) (CompTel/ASCENT Oct. 1 *Ex Parte* Letter), at 1, Attach. at 14-15. Thrifty also argues that the removal of AT&T Wireless as an independent purchaser of special access services will so reduce demand for special access services provided by competitive special access providers that competition in the special access market will be negatively affected for all customers of this service. See Thrifty Petition at 17. We are not persuaded by Thrifty's argument. There is no evidence that AT&T is a significant purchaser of competitively-provided special access services and, even if it were, we do not believe that its acquisition by Cingular will affect the special access market.

<sup>466</sup> See 47 U.S.C. § 251(c)(2).

<sup>467</sup> See *Performance Measurements and Standards for Interstate Special Access Services*, CC Docket No. 01-321, Notice of Proposed Rulemaking, 16 FCC Rcd. 20,896 (2001) (inviting comment on whether the Commission should adopt metrics to prevent discrimination in the provision of special access services); AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593 (filed Oct. 15, 2002). See also 47 U.S.C. § 272(e)(1).

**d. Market-by-Market Evaluation****(i) Analytical Standard**

184. As stated previously, a calculation of the HHI in a market is only the beginning of our analysis of the competitive effects of the merger, because its purpose is to eliminate from further analysis markets in which there is no potential for competitive harm. In our analyses of potential unilateral effects, coordinated interaction, and vertical issues, above, we have undertaken a general assessment of factors beyond concentration that are important to determining likely competitive effects of the merger. On the basis of these analyses, we have concluded that, as a general matter, even the markets identified for further review by our preliminary HHI and spectrum analysis are unlikely to suffer anticompetitive effects as a result of the merger. In any one of these markets, however, the actual array of factors that we have evaluated on a generalized basis could lead to a different conclusion for that market. Our next step, therefore, was to apply those general analyses on a market-specific basis to determine those markets in which anticompetitive effects are likely. The variables we used to conduct this analysis, which we drew from those larger analyses, can be divided into two basic categories, discussed in greater detail below. The first category consists of variables selected to take account of the response of rival carriers to a price increase and output reduction, or an adverse change in other terms and conditions of service, by the combined entity. In addition to unilateral effects, the variables in the first category also take account of conditions affecting the likelihood of adverse coordinated effects. The second category consists of variables selected to account for distinguishing characteristics of the combined entity that may affect its incentive to raise price and suppress output, or to make an adverse change in other terms and conditions of service. Apart from the variables relating to the response of rival carriers and the characteristics of the merged entity, we also examined whether the near-term availability of additional spectrum suitable for the provision of mobile telephony services will affect the likelihood of adverse competitive effects in specific markets.

185. *Potential Rival Response.* The combined carrier will have little incentive to raise its price or alter other terms and conditions of service to the detriment of consumers if, after such action, a sufficiently large number of its customers could obtain comparable services on what would now be better terms from other carriers. This depends, in turn, on both the presence and the capacity of rival carriers in specific markets, rather than simply on their current subscriber market shares. To take account of the presence of rival carriers, we counted the number of rival carriers that have launched service in the relevant market.<sup>468</sup> However, because the transaction will eliminate one of the six nationwide carriers, we were particularly concerned to ensure that rival carriers will have the ability to respond to a unilateral price increase for nationwide service plans that include roaming services at no additional charge to subscribers. Accordingly, in determining the number of rival carriers in each market, we particularly focused on those carriers offering competitive nationwide service plans as well as regional and local plans.

186. If rival carriers face binding capacity constraints, such as limited access to spectrum that cannot be overcome economically in a reasonably short period of time, then they likely will not be able to respond to the combined carrier's price increase or other harmful conduct in a manner sufficient in the aggregate to make the action of the combined carrier unprofitable. In other words, if the rival carriers do not have the capacity to add customers (or do not have the capacity to do so without a noticeable deterioration in service quality), then they will not be attractive alternatives for customers and will not restrain the combined carrier's price increase. On the other hand, as discussed in Section V.A.3.b.(i),

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<sup>468</sup> Although, for reasons outlined above, we were more concerned in this instance about the possibility of adverse unilateral effects than coordinated effects in specific markets, we note that this variable would also be useful for identifying specific markets in which adverse coordinated effects are likely.

above, even rival carriers with relatively small market shares currently may have the ability to discipline the market in the future if they do have adequate capacity to add customers. To account for the capacity of rival carriers, we examined the amount of spectrum suitable for the provision of mobile telephony services that each rival carrier controls in the relevant market and also the geographic coverage of each rival carrier's network in the market.<sup>469</sup>

187. As discussed previously, in the section on coordinated effects, the fewer the rivals in a market, the easier it may be for them to reach an understanding, either explicit or tacit, not to compete vigorously against each other. In addition, a rival carrier may have a strong incentive to deviate from the terms of coordination if it has excess spectrum and (or) network capacity relative to the traffic generated by its existing customer base. Therefore, the variables selected to measure the presence and capacity of rival carriers were used to take into account coordinated effects as well as unilateral effects.

188. *Incentive of Merged Entity.* There are two variables in the second category. The first variable is the subscriber market share of the combined entity. The transaction affords the combined entity a larger base of sales on which to gain from a price increase, and eliminates a competitor to which customers otherwise might have diverted their business. However, the incentive to raise price depends on whether the gain on sales made at the higher price outweighs the loss in sales due to the price increase. A large market share may make it more likely that a price increase will be profitable by reducing the size of the output restriction needed to produce a given price increase. The second variable in this category is the amount of spectrum suitable for the provision of mobile telephony services that the combined entity would control in the relevant markets. The transaction may make a price increase particularly profitable in markets where it enables the combined carrier to acquire control of a large share of the total relevant spectrum and thereby eliminate capacity that otherwise might have been used by competing carriers to attract its customers.

189. *Access to Additional Spectrum.* Apart from the presence and current capacity of rival carriers, the response of rivals to a price increase or reduction in quality by the merged entity may also depend on their ability to obtain access to additional spectrum suitable for the provision of mobile telephony services in the relevant market in a reasonably short period of time. Access to additional spectrum may also deter adverse unilateral effects in specific markets by making possible the entry of new carriers. We were especially concerned about this factor in dense urban areas, where call traffic at any given cell site can put high demand on available bandwidth, which can result in blocked and dropped calls. Although there are several significant blocks of suitable spectrum due to be auctioned by the Commission in the future, for the purposes of this transaction we limited our analysis of the potential competitive impact of additional suitable spectrum to two specific sources of spectrum. The first is the Commission's Auction No. 58, which is currently scheduled to begin on January 12, 2005. This will be an auction for 242 broadband PCS licenses comprising spectrum that had been offered previously in other auctions, but was returned to the Commission as a result of license cancellation or termination.<sup>470</sup> In addition, inasmuch as a significant portion of the spectrum to be re-auctioned in Auction No. 58 was returned as a result of a settlement agreement between the Commission and NextWave, we also consider the possibility that the broadband PCS licenses that NextWave retained under this settlement agreement may be made available for purchase, or lease, on the secondary market directly from NextWave in a

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<sup>469</sup> We placed greater weight in this regard on the six national carriers and the three major regional carriers. We assumed that each of these carriers operating in the market already has significant name recognition and advertising presence in the market, and had sufficient access to any capital or equipment necessary to expand.

<sup>470</sup> Broadband PCS Spectrum Auction Scheduled For January 12, 2005, *Public Notice*, DA 04-1639, Report No. AUC-03-58-A (Auction No. 58) (rel. June 18, 2004); Revised Inventory For Broadband PCS Spectrum Auction, *Public Notice*, DA 04-2451, Report No. AUC-04-58-C (Auction No. 58) (rel. Aug. 3, 2004).

reasonably short period of time.<sup>471</sup> However, we acknowledge the possibility that NextWave may use all or some of the broadband PCS licenses it has retained under the settlement agreement to launch its own service in certain markets.

190. *Interaction of Variables.* To summarize, we relied on the following variables to identify markets where the transaction is likely to diminish competition: (1) the number of rival carriers that offer competitive nationwide service plans as well as regional and local plans; (2) the spectrum holdings of each of the rival carriers identified in (1) above; (3) the geographic coverage of their respective networks; (4) the combined entity's post-transaction market share; (5) the share of spectrum suitable for the provision of mobile telephony services controlled by the combined entity; and (6) whether additional spectrum suitable for the provision of mobile telephony services will be made available in the Commission's Auction No. 58 or in the secondary market directly from NextWave.<sup>472</sup> In reaching determinations on specific markets, we balanced these factors on a market-specific basis, and considered the totality of the circumstances in each market. Thus, if our count of the number of rival carriers and our scrutiny of their spectrum holdings and network coverage indicated that the response of rival carriers will likely be sufficient to limit the ability and incentive of the combined entity to raise price unilaterally, we found that the transaction is not harmful to competition in a specific market even in the presence of a relatively high post-transaction market share of the combined entity. We also scrutinized, and based our determinations on, the uniformity of competitive conditions in local markets. Thus, in some instances, we found that the transaction is not harmful to competition in a particular market if the potential harm from the transaction is confined to a small enclave within the market, and this harm is likely to be ameliorated by the more favorable competitive conditions in the majority of the market.

## (ii) Results of Analysis

191. Our general conclusion, as discussed above, is that there is not a significant likelihood of unilateral effects or coordinated interaction as a result of this transaction, except in certain circumstances. Applying our analysis case by case confirmed that this is true for most markets, and in particular for those markets in which there will still be five or more genuine competitors in the market, post-transaction, each with a sufficiently built out network and sufficient bandwidth to discipline Cingular post-merger through the ability to attract customers away from Cingular should it attempt to increase price or reduce service. In these markets, we conclude that even a relatively high post-merger market share for Cingular does not indicate likely competitive harm. At the other end of the spectrum, we find that, in any market in which the merger would reduce the number of competitors to two or fewer, a market with this degree of concentration presents a significant likelihood of successful unilateral effects and/or coordinated interaction even if the merged entity's market share is not especially high. In between these situations were markets that presented less clear pictures with regard to the factors discussed above, and we have

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<sup>471</sup> In April 2004, NextWave entered into a settlement agreement with the FCC whereby it will retain certain of its licenses, and will return the remaining licenses to the FCC. This settlement agreement was approved by the bankruptcy court on May 25, 2004. Order Granting Motion Pursuant to Section 363 of the Bankruptcy Code, *In re: NextWave Personal Communications, Inc. et al.*, 98B21529 (Bankr. S.D.N.Y.) (May 25, 2004).

<sup>472</sup> The impact of entry is incorporated into our overall analysis in two ways. First, as discussed in the unilateral effects section, we place considerable importance on the ability of firms already built-out in a market to expand capacity. This is one of the factors underlying our choice of threshold values for the variables used to identify problem markets. Second, we find that spectrum aggregation by the Applicants in markets where additional spectrum licenses will be auctioned in January 2005 is less potentially harmful than aggregation in other markets. The entry that this auction will enable is largely within the Commission's control, and thus we can be relatively confident it will occur. Beyond this one upcoming auction, we do not rely on other planned auctions of mobile spectrum to enable entry, because they are too far in the future and involve encumbered spectrum. Moreover, we do not rely at all on entry by firms entirely new to the sector to ameliorate any anti-competitive harms.

examined each in detail to determine whether there would be sufficient competitive forces remaining after the merger to conclude that the merger is not likely to result in competitive harm in that market.<sup>473</sup>

192. Using the analytical standard outlined above, our market-specific analysis eliminated all but 22 of the markets identified for further review by the initial screen. Based on our examination of the different variables and the interaction among them, we find that, in these eliminated markets, the transaction is unlikely to diminish competition through either unilateral action by the merged entity or coordinated interaction among competing carriers. Thus, although the structure of these eliminated markets will change as a result of the transaction, our market-specific analysis indicates that competitive pressure to attract and retain customers will still be sufficient to constrain carrier conduct with regard to pricing and other terms and conditions of service.

193. Below are the markets in which our case-by-case analysis indicated that competitive harm is likely as a result of this transaction. Detailed discussion of these markets is contained in Appendix D. As we note above, the transaction would almost certainly be harmful to competition if it resulted in a reduction in the number of rival carriers from 2 to 1, or 3 to 2. We see a reduction in the number of rival carriers from 3 to 2 in seven areas,<sup>474</sup> and in each case we find competitive harm and impose a remedy. We see no markets with a reduction from 2 carriers to 1. The remaining markets are on the list based on the totality of the circumstances, or the interaction of the variables we analyzed. In particular, they represent markets in which the post-transaction market share or spectrum holdings of the combined entity likely make it profitable for the entity to raise price and restrict output, and the presence and capacity of rival carriers, taking into account near-term opportunities to obtain access to additional spectrum, are such that the response of rival carriers is likely insufficient to deter such unilateral actions.

194. Most of the 16 markets in the first list, below, are smaller markets with high market shares for the merged entity and fewer competing carriers than in the majority of markets we reviewed. In these markets, we are concerned that there will not be enough competing carriers remaining, post-merger, to deter anticompetitive behavior by the merged entity. We also find these conditions in one larger market (Oklahoma City).

<b>Market</b>	<b>Market Name</b>
CMA045	Oklahoma City, OK
CMA292	Sherman-Denison, TX
CMA293	Owensboro, KY

<sup>473</sup> For example, in a number of markets, although rival carriers may not currently have sufficient capacity to absorb Cingular's customers if those customers were to choose to leave because of a price increase, additional spectrum is either currently available (*e.g.*, from NextWave) or will be shortly (in Auction No. 58). In several smaller, more rural markets, although Cingular's market share is large, AT&T Wireless's is very small (*e.g.*, 2% or 3%) and there are other national carriers present with either higher or comparable market shares to AT&T Wireless. In these markets, we find that the merger would not significantly add to Cingular's market power or substantially decrease the present level of competition. There are other markets in which, although the merger will decrease the number of competitors to three or four in terms of our market share data, additional nationwide carriers have recently launched and, since they have sufficient spectrum to offer competitive features across the market, we judge that they will be significant competitive forces in these markets. T-Mobile, for example, as a recent entrant in many markets, has experienced rapid share growth. In still other markets, the potential harms we investigated were present primarily in smaller or more sparsely populated parts of the market, and in many of these cases we judged it to be unlikely that the benefit to Cingular of attempting to impose and enforce higher prices or lesser plan characteristics in such areas would outweigh the cost of attempting to do so, so long as the competitive landscape in the bulk of the market was such that Cingular could not raise price or cut plan features generally.

<sup>474</sup> CMAs 213, 326, 327, 328, 329, 330, and 517. See discussion in Appendix D.

CMA326	Arkansas 3-Sharp
CMA327	Arkansas 4-Clay
CMA328	Arkansas 5-Cross
CMA329	Arkansas 6-Cleburne
CMA330	Arkansas 7-Pope
CMA357	Connecticut 1-Litchfield
CMA443	Kentucky 1-Fulton
CMA494	Mississippi 2-Benton
CMA496	Mississippi 4-Yalobusha
CMA517	Missouri 14-Barton
CMA598	Oklahoma 3-Grant
CMA657	Texas 6-Jack
CMA662	Texas 11-Cherokee

195. The two markets in the second list, below, are denser urban markets in which the merged entity would have particularly high spectrum holdings throughout the market. Our concern in these markets is not that there will be too few remaining carriers to sustain the level of competition that the markets have enjoyed, but instead that, in light of the higher spectrum demands in a denser market, not all the remaining carriers have sufficient bandwidth for us to be confident that they can increase output and compete effectively for Cingular's customers should Cingular attempt to raise price or reduce output.

Market	Market Name
CMA009	Dallas, TX
BTA 112	Detroit, MI

196. In each of the four markets in the third list, below, the competitive problem we identify is caused by one of the Applicants' partial, non-passive ownership interest in a competing mobile telephony carrier. Because, in each case, this interest is significant enough to influence the degree to which these carriers actually compete with each other, for purposes of this competitive analysis we therefore attribute to the Applicants (and thus to the merged entity) this other carrier's market share and spectrum holdings. With these attributions in these four markets, the merged entity would have very high market shares and levels of spectrum aggregation, and there would be fewer fully independent carriers than in the majority of markets we reviewed. We are therefore concerned that there will not be enough competing carriers remaining, post-merger, to deter anticompetitive behavior by the merged entity.

Market	Market Name
CMA100	Shreveport, LA
CMA213	Pittsfield, MA
CMA275	St. Joseph, MO
CMA454	Louisiana 1-Claiborne

197. With regard to a number of additional markets identified for further review by the initial screen, our market-specific review might have found that the merger was likely to cause competitive harm, absent the consummation of related transactions being undertaken by Cingular and AT&T

Wireless. First, a number of markets in California and Nevada are subject to an agreement whereby T-Mobile shares Cingular's infrastructure in those areas. Pursuant to these sharing agreements, Cingular also shares T-Mobile's infrastructure in New York City. As a result of its acquisition of AT&T Wireless, Cingular will no longer need to rely on T-Mobile's infrastructure in New York City, and it would therefore be in a position to terminate the infrastructure-sharing joint venture, with the potential result that T-Mobile would lose access to any network facilities in the California and Nevada markets. Cingular's acquisition of AT&T Wireless therefore has the potential to eliminate not just one, but effectively two mobile telephony competitors in these markets. However, Cingular and T-Mobile have reached an agreement to unwind the infrastructure-sharing joint venture, whereby T-Mobile will acquire from Cingular the joint venture's network facilities in California and Nevada, as well as certain of its spectrum holdings. For the first time, T-Mobile will control the necessary assets for full, facilities-based competition in these markets. Our further review of these markets (listed in Appendix E), taking into account what T-Mobile will acquire from Cingular, indicates that the transaction is unlikely to diminish competition in these markets because there will be sufficient competitors (nowhere fewer than five) with sufficient coverage and capacity to deter anticompetitive behavior. In particular, T-Mobile, which is a relatively new and energetic entrant in these markets that has experienced rapid growth in market share, will now have both the incentive and the ability to be a significant competitive force. In order to ensure that this conclusion is realized, we condition grant of the Application on consummation of Cingular's agreement with T-Mobile.

198. Second, because of AT&T Wireless's current equity interest in Triton, we attribute Triton's market share and spectrum holdings in a number of markets in the southeastern United States to AT&T Wireless (and thus to the merged entity). These markets are now the subject of a transaction whereby AT&T Wireless will sell its Triton interest to Triton. Our further review of these markets (listed in Appendix F), taking into account what Triton will acquire from AT&T Wireless, indicates that the transaction is unlikely to diminish competition in these markets because there will be sufficient competitors (nowhere fewer than six) with sufficient coverage and capacity to deter anticompetitive behavior. In order to ensure that this conclusion is realized, we condition our grant of the Application on consummation of AT&T Wireless's agreement with Triton.

199. In addition, we note that, as part of the Application, Cingular indicated that it would divest any post-transaction spectrum holdings in excess of 80 MHz. Specifically, Cingular indicates that "the combined company will divest spectrum in excess of 80 MHz in any county in which it has interests in more than 80 MHz of cellular and Broadband PCS spectrum."<sup>475</sup> Our analysis indicates that this commitment applies to 43 counties (in 9 CEAs or 12 CMAs, and listed in Section VI.A.2. below) in addition to the divestiture areas already discussed above. Because Cingular committed itself to making these divestitures without regard to any finding of competitive harm in these markets, our grant of the Application does not include authorization to hold more than 80 MHz of applicable spectrum in any area, and we therefore condition our grant on Cingular's fulfillment of this commitment. This condition will serve the public interest by making spectrum available to strengthen an incumbent competitor or to allow new entry in these markets.

200. Finally, we note that, as part of the Application, Cingular indicated that, if the Application is granted and the merger is consummated, it would not apply to bid in Auction 58 for any licenses in any BTA in which Cingular controls, or has a 10 percent or greater interest in, 70 MHz or more of cellular and/or PCS spectrum.<sup>476</sup> Cingular committed itself to this restriction without regard to

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<sup>475</sup> Cingular Opposition at 9; *see also* Application at 19 n.82.

<sup>476</sup> *See* Letter from Brian F. Fontes, Vice President-Federal Relations, Cingular Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 22, 2004).

any finding that obtaining additional spectrum in Auction 58 would result in competitive harm in any of these markets, and we condition our grant of the Application on Cingular's commitment not to apply to bid in Auction 58, as described above.

#### 4. Public Interest Benefits

##### a. Introduction

201. In addition to assessing the potential competitive harms of the proposed transaction, we also consider whether the combination of these companies' wireless operations is likely to generate verifiable, merger-specific public interest benefits.<sup>477</sup> In doing so, we ask whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the combination.

202. The Applicants claim that a number of public interest benefits will result from this transaction. They contend that the proposed transaction will create a stronger and more efficient competitor in the wireless telecommunications marketplace, with sufficient spectrum, infrastructure, and capital resources to achieve: (1) significantly improved quality of service, compared to the current performance of either company; (2) substantially greater geographic coverage than either existing company currently has or could achieve on its own in the foreseeable future; (3) more robust advanced wireless services, delivered to more of the country and in less time than either company could on its own; and (4) more robust and reliable homeland security and public safety applications than either company alone could deliver. The Applicants also maintain that the combined entity will achieve economies of scale and scope and operating synergies resulting in billions of dollars in savings.<sup>478</sup>

203. As discussed below, we find that the proposed transaction is likely to result in some merger-specific public interest benefits, although many of these benefits may be challenging to achieve because of sizable technological and financial requirements and may therefore be realized only over the course of a number of years. As a result, it is difficult for us to quantify very precisely either the magnitude of or the time horizon in which these benefits will be realized.

##### b. Analytical Framework

204. The Commission has recognized that "[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products."<sup>479</sup> Under Commission precedent, however, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transfer outweigh the potential public interest harms.<sup>480</sup>

205. There are several criteria the Commission applies in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction-

<sup>477</sup> BA/GTE Order, FCC 00-221, ¶ 209; SBC/Ameritech Order, 14 FCC Rcd. at 14,825, ¶ 255; WorldCom/MCI Order, 13 FCC Rcd. at 18,134-35, ¶ 194.

<sup>478</sup> See Application, Exhibit 1, at 9-25.

<sup>479</sup> See *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20,630 ¶ 188; Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control, 12 FCC Rcd. 19,885, 20,063, ¶ 158 (1997) ("*Bell Atlantic-NYNEX Order*"); see also *DOJ/FTC Merger Guidelines* § 4.

<sup>480</sup> See, e.g., *EchoStar-DirecTV HDO*, 17 FCC Rcd. at 20630 ¶ 188; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd. at 20,063 ¶ 157; Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer of Control, 14 FCC Rcd. 14,712, 14,825, ¶ 256 (1999) ("*SBC-Ameritech Order*").

or merger-specific. This means that the claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>481</sup> Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the Applicants, they are required to provide sufficient evidence supporting each benefit claim so that the Commission can verify the likelihood and magnitude of the claimed benefit.<sup>482</sup> In addition, as the Commission has noted, “the magnitude of benefits must be calculated net of the cost of achieving them.”<sup>483</sup> Furthermore, speculative benefits that cannot be verified will be discounted or dismissed. Thus, as the Commission explained in the *EchoStar-DirectTV HDO*, “benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.”<sup>484</sup> Third, the Commission has stated that it “will more likely find marginal cost reductions to be cognizable than reductions in fixed cost.”<sup>485</sup> The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.<sup>486</sup>

206. Finally, the Commission applies a “sliding scale approach” to evaluating benefit claims. Under this sliding scale approach, where potential harms appear “both substantial and likely, the Applicants’ demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”<sup>487</sup>

### c. Improvements in Service Quality

207. The Applicants note that both existing companies have been criticized for the quality of

<sup>481</sup> *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,630 ¶ 189; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd. at 20063, ¶ 158 (“Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”); *SBC-Ameritech Order*, 14 FCC Rcd. at 14,825, ¶ 255 (“Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger.”); *Comcast-AT&T Order*, 17 FCC Rcd. 23,246, 23,313, ¶ 173 (Commission considers whether benefits are “merger-specific”). Cf. *DOJ/FTC Merger Guidelines* § 4.

<sup>482</sup> *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,630, ¶ 190; see also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd. at 20,063, ¶ 157 (“These pro-competitive benefits include any efficiencies arising from the transaction if such efficiencies . . . are sufficiently likely and verifiable . . .”); *AT&T-Comcast Order*, 17 FCC Rcd. at 23,313, ¶ 173 (Commission considers whether benefits are “verifiable”); *SBC-Ameritech Order*, 14 FCC Rcd. at 14,825, ¶ 255; *DOJ/FTC Merger Guidelines* § 4 (“[T]he merging firms must substantiate efficiency claims so that the Agency can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), [and] how each would enhance the merged firm’s ability to compete. . .”).

<sup>483</sup> *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,630, ¶ 190.

<sup>484</sup> *Id.*

<sup>485</sup> *Id.*; see also *DOJ/FTC Merger Guidelines* § 4.

<sup>486</sup> See *EchoStar-DirectTV HDO*, 17 FCC Rcd. at 20,630 ¶ 191; see also *DOJ/FTC Merger Guidelines* § 4.

<sup>487</sup> *Id.* at 20,630, ¶ 192 (citing *SBC-Ameritech Order*, 14 FCC Rcd. at 14,825). Cf. *DOJ/FTC Merger Guidelines* § 4 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

their service, including the number of blocked and dropped calls and calls of marginal quality.<sup>488</sup> The Applicants assert that “[t]he ability of Cingular and AT&T Wireless to improve quality ... has been hampered by the amount of spectrum each holds,”<sup>489</sup> and that “by combining spectrum and network assets, the new company can offer higher quality service and achieve dramatic efficiencies not otherwise available to Cingular or AT&T Wireless individually. These efficiencies will allow the company to offer service with better voice and data quality, fewer dropped calls, and lower blocking rates.”<sup>490</sup> Because the proposed combination involves integrating not just spectrum assets but also existing networks, the Applicants maintain that improvements in service quality will be more significant and will be realized more quickly than would be possible through either company’s mere acquisition of additional spectrum.<sup>491</sup> Not only will the combined entity be able to take advantage quickly of increased capacity where the carriers already have effectively overlapping cell sites, they assert, it will also be able to address many coverage holes where their cell sites are *not* exactly overlapping.<sup>492</sup> “As a result,” they argue, “consumers will quickly experience improved service quality, such as a reduction in blocking and dropped calls during peak call hours.”<sup>493</sup>

208. The Applicants currently operate similar networks based on two standards: IS-136 and GSM. IS-136 combines analog and digital time division multiple access, TDMA, to provide voice capabilities. GSM, also a digital standard, provides both voice and data capabilities.<sup>494</sup> The Applicants project benefits based not just on aggregating their spectrum holdings and network operations but also on spectral efficiencies to be achieved by combining their networks. Under best-case scenarios, and assuming seamless network integration, Cingular estimates that blocked calls will be reduced by 50 percent and that dropped calls will be reduced by 10 percent to 30 percent. These percentages will vary by local area based on pre-merger system loading and spectrum utilization (affecting blocked calls and dropped calls, respectively).<sup>495</sup> As an example, the Applicants state that their analysis of a metropolitan area currently served by both companies indicates that the integration of the two systems<sup>496</sup> will result in 180,000 fewer blocked calls per day, or more than 66,000,000 fewer blocked calls annually.<sup>497</sup>

209. Thrifty Call disagrees that improvements in quality of service should be recognized as

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<sup>488</sup> Application, Exhibit 1, at 12. *See also* Application, Exhibit 1, Attachment 2 - Declaration of William Hogg and Mark Austin at 1 (“Hogg and Austin Declaration”).

<sup>489</sup> Application, Exhibit 1, at 10.

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> Application, Exhibit 1, Attachment 4 – Declaration of Marc P. Lefar at 10.

<sup>493</sup> Application, Exhibit 1, at 13. The Communications Workers of America also support the Applicants’ argument in this respect. Comments of CWA at 2-3.

<sup>494</sup> TDMA, or “time division multiple access,” is used interchangeably with the TIA IS 136 Standard. While both IS 136 and GSM use TDMA, the two standards are incompatible. GSM uses a specific number of time slots to carry the GSM Packet Radio Service, or GPRS, and the Enhanced Data rate for Global Evolution (EDGE). GPRS and EDGE provide up to 115kbps and 470 kbps, respectively. In some cellular markets the Applicants provide CDPD, Cellular Digital Packet Data, with speeds up to 19.2 Kbps. GSM and IS136 use both 850 MHz and 1900 MHz frequency bands, while CDPD is confined to the 850 MHz band. *See* Hogg and Austin Declaration at 5.

<sup>495</sup> *See* Cingular Response at 84. *See also* Cingular Technology – FCC Presentation at 26 (Mar. 12, 2004).

<sup>496</sup> Assumes full site collocation and fully compatible core, switching, and RF networks; further assumes that subscribers use dual-band and dual-technology handsets. The Applicants do not differentiate between TDMA and GSM with respect to blocked and dropped call behavior.

<sup>497</sup> Application, Exhibit 1, at 14. *See also* Hogg and Austin Declaration at 18.

benefits of the merger because, it asserts, consumers can already get service superior to the Applicants' from other carriers.<sup>498</sup> In Thrifty Call's words, "poor service is simply the result of Cingular's bad business decision-making that makes its service less efficient and more costly. Consumers will realize no direct benefit from this acquisition because consumers already can be relieved of the inferior service that Cingular says it and [AT&T Wireless] provide by simply switching" to another carrier.<sup>499</sup> Thrifty Call also asserts that Cingular's "operational and network ailments" could be "solved for far less than the \$41 billion" price it is paying to acquire AT&T Wireless, if SBC and BellSouth simply invested more into improving Cingular's network.<sup>500</sup> Alternatively, Thrifty Call suggests that, if the companies need additional spectrum, acquiring it at auction is a viable alternative to this proposed transaction, an alternative which Thrifty Call says would avoid the public interest harms posed by this transaction.<sup>501</sup>

210. On the basis of our assessment of the Applicants' technical submissions, we agree that the combination of the Applicants' spectrum and network assets is likely to enable the combined entity to achieve improvements in service quality, generally in the manner and for the reasons asserted by the Applicants. Once the combined entity integrates the two existing systems, including consolidating what will be duplicate analog, TDMA, and GSM/GPRS/EDGE networks, the amount of spectrum available to support current as well as new customers will be greater than either existing company currently commands. Where conditions enable the combined entity to take advantage of spectral and trunking efficiencies, the effective increase in available spectrum will be greater than is represented by the simple addition of the two companies' holdings. The increased effective capacity should enable the merged entity to make progress in reducing the number of blocked, dropped, and marginal calls currently experienced by Cingular and AT&T Wireless customers.

211. Examining field performance data supports this conclusion. Superimposing Telephia's "trouble spots" data<sup>502</sup> included in the record for both Cingular and AT&T Wireless in several tested metropolitan areas<sup>503</sup> suggests that both existing companies' customers would experience improvements in service quality as a result of combining the two companies' existing cell sites into one network, at least where subscribers' current handsets are capable of exploiting the benefits of the combined networks' capacity and coverage. In San Francisco, for example, we estimate that combining the two 1900 MHz GSM networks would result in substantial reductions in the number of trouble spots currently experienced by AT&T Wireless customers, and smaller but still significant reductions in the number of trouble spots currently experienced by Cingular Wireless customers.<sup>504</sup> Our analysis of other markets, including Seattle, Dallas, Boston, and Atlanta, suggests that similar improvements in trouble spots are likely. These are improvements which cannot be obtained without the addition of network and spectrum assets, both of which Cingular will acquire in significant quantity as a result of this merger in a significantly shorter timeframe than it would otherwise be able to do.

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<sup>498</sup> Thrifty Call Petition to Deny at iv-v, 21-24.

<sup>499</sup> Thrifty Call Petition to Deny at 21.

<sup>500</sup> Thrifty Call Petition to Deny at 21.

<sup>501</sup> Thrifty Call Reply at ii, 10.

<sup>502</sup> Telephia provides comparative market-specific performance studies in which data is collected on multiple carriers' networks simultaneously. In these reports, Trouble Spots include: Dropped Calls, No Service, Connect Timeout, Fast Busy/Failed Access, Reorder, Below Average Audio Quality, and Bad Coverage.

<sup>503</sup> [REDACTED]

<sup>504</sup> Telephia provides plots designating trouble spots for the traveled roadways within a given area. [REDACTED] Of course, we cannot exactly quantify this effect on the basis of visual analysis, but this analysis is sufficient to suggest the nature and general scale of the improvement the merged entity can expect.

212. We disagree with Thrifty Call's argument that any improvements in quality of service resulting from this merger should not be counted as benefits of the merger because they would merely correct for past failures of the two companies. Even if it were the case that any benefits resulting from this transaction in the area of service quality would only bring the combined entity up to the service quality level of its competitors, such benefits would nevertheless be real to current and future consumers. Thrifty Call's argument that, in a competitive marketplace, consumers can relieve themselves of poor Cingular or AT&T Wireless service by moving their business to another carrier is of course true, but it does not undermine the public interest benefit offered by this merger; better performance on the part of the combined entity has the potential to improve the competitiveness of the market as a whole by enabling Cingular to present a greater service-quality competitive challenge to the other carriers – with the result that not only Cingular's customers, but all wireless customers will benefit.

213. As for Thrifty Call's argument that the same benefits the Applicants claim for this merger could be achieved through network investments and/or participation in spectrum auctions, we partially agree. On the one hand, we agree with the Applicants that the service quality benefits discussed above are likely to be more easily and quickly achievable as a result of this transaction, which will make additional spectrum available to Cingular sooner than would be likely via auction, at least in some markets, and which will also bring Cingular existing network assets to deploy in lieu of at least some new network development. However, it seems likely that at least some of the network improvements Cingular anticipates could have been achieved through investment into Cingular's network of a portion of the purchase price associated with this transaction.<sup>505</sup>

214. Moreover, we cannot confirm either the magnitude of these benefits or the speed with which they are likely to be achieved. We note, to begin with, that the ability of the combined entity to take advantage of the potential increase in capacity offered by this transaction will largely be determined at the market and regional levels and will be limited by a number of factors, including: whether Cingular and AT&T Wireless are both currently operating in the same frequency band(s) (either 850 MHz or 1900 MHz or both) at a particular site, how compatible their current TDMA systems (which are provided by more than one vendor) are,<sup>506</sup> whether customers have handsets that can take advantage of dual-mode (TDMA/GSM) and dual-band (850 MHz and 1900 MHz) service offerings,<sup>507</sup> and post-merger subscriber growth. As a result, at least in many locations, the improvements may not be immediately achievable. For example, 25 percent of AT&T Wireless's GSM customer base is made up of 1900 MHz GSM users; the combined entity will need to equip these customers with dual-band handsets in order to access the additional capacity represented by Cingular's 850 MHz GSM networks.<sup>508</sup> A specific instance of such an integration issue will be Baton Rouge, LA (CMA 80), where AT&T Wireless has 1900 MHz spectrum with both TDMA and GSM systems, while Cingular provides analog, TDMA, and GSM spectrum service at 850 MHz.

215. Furthermore, the two service quality improvement elements the Applicants discuss in this

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<sup>505</sup> Thrifty Call also asserts that Cingular's ability to pay \$41 billion for AT&T Wireless is the result of the ill-gotten gains of SBC and BellSouth, the two ILEC parents of Cingular. Thrifty Call Petition to Deny at 22-23. This assertion is beyond the scope of our analysis here, which focuses on the competitive harms posed and benefits offered by the proposed transaction.

<sup>506</sup> As the Applicants integrate their TDMA systems, they may need to accommodate equipment from multiple vendors at the individual market level. [REDACTED] The Applicants' ability to achieve trunking efficiencies in this area is dependent on their ability to integrate these systems. This same concept applies to integrating GSM networks, although GSM equipment is generally more compatible across vendors.

<sup>507</sup> See Declaration of William Hogg and Mark Austin at 21 n.24.

<sup>508</sup> See Application, Exhibit 1, Attachment 6 – Declaration of Greg Slemons at 2.

context – increased capacity and reduced coverage holes – must to some extent be traded off against each other, at least in the short run. While closely overlapping cell sites<sup>509</sup> will enable the combined entity to achieve increased utilizable capacity by combining the sites, they will not address coverage holes. In addition, a large increase in frequencies per cell site may force shorter re-use distances, thus increasing interference exposure and requiring Cingular to add (or move retired) cell sites in order to maintain system quality. By contrast, non-overlapping cell sites<sup>510</sup> will enable Cingular to address coverage holes but will not lead to more efficient trunking.

#### d. Increased Coverage

216. The Applicants assert that, in addition to addressing service quality issues, the combined entity will have a significantly larger service footprint than either of the two existing companies, resulting in higher functionality and more ubiquitous coverage for its customers: “[T]he 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. ... The combination of AT&T Wireless 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.”<sup>511</sup> Cingular indicates that, with the merger, it will be able to offer service in 97 of the top 100 markets nationwide, making it a more effective competitor against the other nationwide mobile telephony providers.<sup>512</sup>

217. The Commission has previously noted the consumer benefits that flow from expanded footprints for nationwide carriers.<sup>513</sup> With a larger footprint, not only can a carrier offer competitive service to more consumers across the country, but also its customers may enjoy enhanced service and/or lower prices because of factors such as the wider area in which the carrier’s full handset functionality is operative and the carrier’s lessened reliance on roaming agreements to fill out its coverage.

218. The combined entity’s service footprint will certainly be broader than either of the existing companies’ current footprints. AT&T Wireless will bring to the combined entity’s network very significant areas of the country in which Cingular does not currently offer service – especially in the Upper Midwest and Rocky Mountain areas, Oregon, major parts of Florida, and certain areas in the Northeast. As a result, while Cingular is currently serving 87 of the top 100 markets nationwide,<sup>514</sup> in 43 states, the combined entity will reach six new states and provide service in 97 of the top 100 markets (excepting only the Newport News, Norfolk, and Richmond markets, all in Virginia). The combined entity’s network footprint is estimated to encompass 250 million people, compared with Cingular’s current 226 million POPs coverage and AT&T Wireless’s 226 million POPs coverage.<sup>515</sup> The combined

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<sup>509</sup> [REDACTED]

<sup>510</sup> [REDACTED]

<sup>511</sup> Application, Exhibit 1, at 15.

<sup>512</sup> *Id.* at 9. Communications Workers of America also support the Applicants argument in this respect. Comments of CWA at 3.

<sup>513</sup> See, e.g., *SBC-BellSouth Order*, 15 FCC Rcd. at 25,480 ¶ 48.

<sup>514</sup> Application, Exhibit 1, at 20.

<sup>515</sup> See October 5 Letter at Attachment A; UBS Securities LLC, UBS Investment Research – US Wireless 411, at 12 (Sept. 15, 2004) (reporting Cingular’s network coverage POPs); see also discussion *supra* note 110 (discussing issues regarding calculation of licensed POPs); *supra* note 111 (discussing issues regarding calculation of network coverage POPs). Cingular has not provided nor has it “publicly reported network coverage figures for its network.” October 5 Letter at 3.

entity's licensed footprint is estimated to encompass 286 million people, compared with Cingular's current 236 million POPs coverage and AT&T Wireless's 279 million.<sup>516</sup> This increase in current (and potential future) service coverage should directly benefit both existing and new customers and is not likely to be attained as quickly absent the merger.

219. Thrifty Call argues that Cingular's coverage problems can be overcome through roaming agreements and do not depend on Cingular acquiring AT&T Wireless.<sup>517</sup> However, roaming may not be an equally acceptable solution, because in many cases a carrier is able to provide coverage more economically from its own facilities than it can through roaming agreements – generating marginal cost reductions that, in a competitive marketplace, are likely to benefit consumers through lower price and/or increased service. Moreover, in many cases a consumer who is roaming on another carrier's network does not have access to the full range of features offered by the consumer's own carrier and supported by the handset the customer is carrying. For reasons such as these, the Commission has consistently supported facilities-based competition, instead of infrastructure-sharing, as ultimately more effective in delivering robust competition to consumers.

220. Nevertheless, we note that the combined entity will still need to rely on numerous roaming agreements to fill out its footprint in many parts of the country, including virtually the entire Great Plains. In this respect, the incremental increase toward a truly nationwide network represented by this transaction is not as significant as it was in the Bell Atlantic-Vodafone transaction which created Verizon Wireless, or indeed as it was in the SBC-BellSouth transaction which created Cingular in the first place.<sup>518</sup> We also recognize, however, that the combined entity will have increased ability to extend its network into licensed areas neither company currently serves, since it will pool the capital resources of the two existing companies and will be able to construct one set of facilities instead of two. We expect that the impact of this future extension of the network will be especially important in rural areas, which are most likely to go unserved or underserved today in any carrier's network. The two companies' current "GSM Corridor" joint venture, which has constructed shared network facilities along rural highways in a number of states,<sup>519</sup> demonstrates the potential benefits to rural areas of such combined efforts. On the other hand, the joint venture also indicates that such benefits are not entirely dependent on consummation of this merger, and we discount this benefit accordingly.

#### e. Promotion of Next-Generation Services

221. The Applicants assert that, because of spectrum constraints, each current company is restricted in its ability to deploy "advanced wireless services"<sup>520</sup> on a significant scale and within the

<sup>516</sup> See October 5 Letter at Attachment A; see also discussion *supra* note 110 (discussing issues regarding calculation of licensed POPs).

<sup>517</sup> Thrifty Call Petition to Deny at 23-24.

<sup>518</sup> Cingular Wireless initially covered 175 million POPs; compare SBC's wireless companies' pre-merger POPs coverage of 120 million and BellSouth's 57 million. The two pre-merger wireless operations overlapped in only 3 MTAs. See *SBC-BellSouth Order*, 15 FCC Rcd. at 25,460-25,462.

<sup>519</sup> Including Alabama, Colorado, Kansas, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Texas, Utah, and Vermont.

<sup>520</sup> The Applicants define "advanced services" to include streaming video, high-speed Internet transmission, multimedia messaging, and other services that require large bandwidth and high throughput speed. Declaration of William Hogg and Mark Austin at Appendix 1 – Mapping of Services to Preferred Speeds. In its Seventh Annual CMRS Competition Report, the Commission spoke of "next-generation services" to include "high-speed advanced mobile data services and the next generation of technologies – beyond the 2G technologies of CDMA, TDMA, GSM, and iDEN – that will make such services possible." *Seventh Report*, at 12990, n.32. In the most recent CMRS Competition Report, the Commission characterized "all of the network technologies beyond 2G that carriers

(continued...)

timeframe required by the market. They maintain that the proposed transaction will speed the companies' ability to offer these services in the majority of their service territory by providing the merged entity with the spectrum necessary to deploy such services without unduly disrupting existing services.<sup>521</sup>

222. Both of the Applicants have selected the Universal Mobile Telecommunications System ("UMTS") as their technology to support next-generation services. UMTS uses a wide band code division multiple access protocol, or "W-CDMA," for its common air interface, and requires a total of 10 MHz per RF carrier (5 MHz for the down link and 5 MHz for the uplink).<sup>522</sup> The Applicants assert that, although each of the existing companies is in some stage of testing or early market trials of advanced services using UMTS, neither company has the spectrum necessary to deploy a new UMTS network offering broad coverage while simultaneously supporting their existing operations. Cingular asserts that, absent the proposed transaction, it would not be able to offer such service in more than 38 of the top 100 markets, but that with the combined spectrum assets of the two companies it expects to offer such service in 70–80 of the top 100 markets.<sup>523</sup> Two specific benefits it adduces in this regard are the advantages a more ubiquitous network provides to all subscribers to such services, and the increased ability the combined entity will have to offer such services in rural areas.

223. The crux of the Applicants' argument in this regard is that, unlike the other nationwide carriers, they each must support four separate wireless networks, both now and for some time to come, and must dedicate separate bands of spectrum to each of them.<sup>524</sup> Like some but not all other carriers, both Cingular and AT&T Wireless have 850 MHz cellular licenses in a number of markets, one of the obligations of which is to offer analog service until February 18, 2008.<sup>525</sup> Unlike any of the other nationwide carriers, both Cingular and AT&T Wireless selected TDMA (IS-136) as their initial digital air interface, and both subsequently selected GSM/GPRS/EDGE as their platform for "2.5G" services. Migration from TDMA to GSM requires construction of a new network, as does migration from GSM to UMTS.<sup>526</sup> As the Applicants point out, Verizon Wireless, by contrast, selected CDMA as its initial digital common air interface, and its migration path to more advanced services – including not only "2.5G" but also "3G" services – is generally by improvements to its CDMA network that do not require wholesale

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have deployed, as well as those that they plan to deploy in the future" as "next-generation network technologies." *Ninth Report*, FCC 04-216, at 54-55 n.314. As the Commission noted, "[t]here is ambiguity among other industry players, however, as to which network technologies constitute 3G and which constitute interim technologies, often labeled '2.5G.'" *Id.* For purposes of this discussion, we generally encompass in the term "advanced wireless services" or "next-generation services" all those services provided over next-generation networks.

<sup>521</sup> Application, Exhibit 1, at 15-19. The Communications Workers of America and The Alliance for Public Technology both support the Applicants argument in this respect. CWA Comments at 4; APT Comments at 1-3.

<sup>522</sup> As with other CDMA mobile (PCS or cellular) systems, a re-use distance of 1 applies.

<sup>523</sup> Cingular's Response to FCC's General Information Request, Cingular's Response, June 30, 2004 at 91, 92. *See also* Application, Exhibit 1, at 19; Hogg and Austin Declaration at 22.

<sup>524</sup> Dobson Communications Corp., Highland Cellular, and RCC, all of which are rural carriers migrating from TDMA to GSM, indicate that they face similar network and spectrum challenges, and they support Cingular's arguments in this regard. Dobson at 2-3; Highland Cellular Comments at 1-2; RCC Reply Comments at 1-2. Lucent Technologies also supports the merger as helping to speed deployment of next-generation services. Lucent Technologies Comment at 1.

<sup>525</sup> 47 C.F.R. § 22.901(b). Note that PCS (1900 MHz) operations do not have an analog requirement.

<sup>526</sup> GSM/GPRS/EDGE and UMTS may share some core network elements. UMTS requires an RF overlay since the common air interface (based on CDMA) is different from that of GSM (which is TDMA based). Some RF components at the base station may be shared, depending on the frequency bands.

construction of a new network.<sup>527</sup>

224. In the Applicants' characterization, therefore, Verizon Wireless can support its existing and future services on two networks, analog and CDMA – and eventually just one, if Verizon Wireless phases out analog service. However, since there is no software-based migration path from TDMA to GSM, in many markets both Cingular and AT&T Wireless are currently operating three separate networks to support analog, TDMA, and GSM services.<sup>528</sup> Deployment of UMTS requires still a fourth network. Both companies apparently plan to phase out analog service when the Commission's cellular analog requirement sunsets; both represent that they are actively engaged in building out their GSM/GPRS/EDGE networks and transitioning customers from TDMA to GSM service; and both appear to envision an end state in which they are operating only two networks, providing GSM and UMTS services. However, phasing out analog and TDMA service will take time (the first largely for regulatory reasons, the second because their GSM networks are not yet as extensive as their TDMA networks), and the Applicants assert that neither company's current spectrum holdings are sufficient to serve existing customers adequately, improve service quality, accommodate new customers, and develop UMTS networks of sufficient scale and robustness to be competitive. The Applicants argue that they need 80 MHz of spectrum to accomplish all of this: 50 MHz to support their current networks and 30 MHz to support UMTS.<sup>529</sup> With regard to the latter, the Applicants note that UMTS requires 10 MHz blocks and assert that they need three such blocks – one to launch basic service, a second to accommodate projected growth in demand, and a third to support broadband services.<sup>530</sup>

225. We agree with the Applicants that the additional spectrum the combined entity will have available, in terms of both capacity and geographic coverage, should facilitate the combined entity's deployment of more robust and ubiquitous advanced services. However, this benefit is difficult to quantify in terms either of effect or time, and we are also not convinced that this benefit is fully merger-specific. We accept that Cingular will acquire spectrum more quickly via this transaction than it is likely to via auction, at least in some markets. However, while the merged entity will be able to concentrate its resources and efforts in the construction of one next-generation network, instead of two, we are not convinced that Cingular could not have achieved at least some of these same network gains by investing a portion of the \$41 billion purchase price associated with this transaction into improvements to its own network.

226. Having reviewed the Applicants' technical submissions as well as documents submitted in response to our General Information Request, we are also not convinced that the combined entity will need 80 MHz in every market in order to realize these achievements. However, in making our finding with regard to the benefits likely to result from this proposed transaction, it is not necessary for us to quantify exactly how much spectrum the combined entity "needs" or to confirm or dispute the

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<sup>527</sup> A cdma2000 1x EV (single carrier evolutionary) network is implemented by installing an RF overlay on a cdma2000 1xRTT (single carrier radio transmission technology) network. Accomplishing this requires a backbone software upgrade and new channel card at the base station, without having to change out the RF system components (frequency band dependent) at the base station. Overall, 1x EV shares the core network with 1xRTT, but requires a separate RF network overlay (*i.e.*, a separate RF common air interface). See THEODORE S. RAPPAPORT, WIRELESS COMMUNICATIONS PRINCIPLES AND PRACTICE 39 (2002).

<sup>528</sup> Application, Exhibit 1, at 5 ("Both companies provide service utilizing three distinct networks using three distinct technologies.").

<sup>529</sup> In its comments, Dobson "confirm[s] the validity of the statements ... that as much as 80 MHz is needed." Dobson Comments at 3. An email from Craig Paul, which we have entered into the record in this proceeding, disputes that Cingular and AT&T Wireless need 80 MHz of spectrum. Comments of Craig Paul at 1.

<sup>530</sup> Hogg and Austin Declaration at 21.

Applicants' representations in that regard. We do not conduct such an inquiry in the context of a spectrum auction before allowing a bidder to participate or before issuing a license to a winning bidder, and we do not think it is appropriate in this context either. Instead, our inquiry with regard to the combined entity's spectrum holdings is: (1) whether the level of concentration of spectrum available for mobile telephony services that would result from this transaction presents likely competitive harms (which we have addressed in Section V.A.3.b.(i), above, as well as in our market-specific analysis as described in Section V.A.3.d., above), and (2) whether the combination of these two companies and their spectrum and other assets is likely to produce verifiable public interest benefits. On the latter question, as discussed above, we find that the combination will likely produce some public interest benefits with regard to the deployment of advanced wireless services.

227. For these reasons, we do not agree with the arguments made by Consumer Federation of America and Consumers Union ("CFA/CU") that the Commission (1) should require Cingular to return "spectrum in excess of 40 MHz" after Cingular accomplishes its migration away from the "multiple technologies" it currently supports,<sup>531</sup> and (2) should not "reward" the Applicants (by allowing them to keep certain spectrum holdings) for what they characterize as poor technology choices and poor operations.<sup>532</sup> CFA/CU's objection is essentially that, even if the Applicants were correct that they need a large amount of spectrum (*e.g.*, 80 MHz) in order to support their existing operations and deploy next-generation services, the Commission should not recognize this combination of spectrum as providing a benefit to the public because that need would be the result of poor technology choices by Cingular and AT&T Wireless (to wit, the selection of TDMA), compounded by poor operating performance, resulting in inefficient use of the limited spectrum public resource. In CFA/CU's words, allowing this combination to go forward would "reward[] vastly inefficient companies for their bad stewardship of spectrum."<sup>533</sup> First, we note that we do not place much weight on the claimed benefit in this instance, as discussed above. Furthermore, it is a long-standing principle of the Commission not to dictate technology choices,<sup>534</sup> and while the Commission is not required to "reward" the Applicants for difficulties that may have resulted from their choice of technology, neither is it our role to punish them for those difficulties or those choices. It *is* our responsibility to assess the likely competitive effects of the level of spectrum holdings involved in this transaction, which we have done in Sections V.A.3.b.(i) and V.A.3.d., above. In those sections of our analysis, we have found that, in the vast majority of the local markets affected by this transaction, the merged entity's level of spectrum holdings does not present any anticompetitive concern. In those markets in which we *have* found likely competitive harm, all the remedies we order (as described in Section VI, below) include divestiture of spectrum licenses or relevant interests therein.

#### **f. Support for Homeland Security and Public Safety**

228. Building on the improvements in service quality and network coverage that they argue will result from the combination of the two companies, the Applicants assert that the proposed transaction will enhance homeland security and public safety by "strengthening the resiliency and survivability of Cingular's network"<sup>535</sup> and "facilitating a faster more widespread deployment of Wireless Priority Service."<sup>536</sup> The Consumers Federation of America and Consumers Union ("CFA/CU") reject this

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<sup>531</sup> CFA/CU Reply at 2.

<sup>532</sup> See generally CFA/CU Comments, Introduction at 1-4.

<sup>533</sup> CFA/CU Comments, Summary at 2; see also CFA/CU Reply at 2-3. Thrifty Call makes a similar argument. Thrifty Call Petition at 21-23.

<sup>534</sup> See, *e.g.*, Spectrum Policy Task Force Report at 14.

<sup>535</sup> Application, Exhibit 1, at 3, 9.

<sup>536</sup> *Id.* at 5.

benefit claim, arguing that Cingular's inefficient use of spectrum makes it unlikely that Cingular would "be able to handle the massive increase in call volumes that are attendant on major security events."<sup>537</sup>

229. We take considerations of homeland security and public safety extremely seriously, and we agree that a single network with greater coverage and capacity, as opposed to two networks with more coverage gaps, may "enhance service to both priority personnel and the general public in emergency situations, when wireless networks experience extreme congestion."<sup>538</sup> In principle, we agree with the Applicants that "diversified routing, greater redundancy and increased reliability in both the signaling and data networks ... will improve the ability of Cingular's wireless network to function if certain assets are destroyed or damaged in an emergency."<sup>539</sup>

230. However, any benefits for homeland security and public safety will not be realized overnight – they depend on the successful integration of the two existing networks, with all of the difficulties entailed in that effort, as we have discussed above. Moreover, the Applicants themselves indicate that a primary reason for this merger is to alleviate current capacity constraints and that they expect to take full advantage of their new capabilities for commercial services going forward. In this respect, we take note of CFA/CU's concern that if Cingular and AT&T Wireless are having operational difficulties in the pre-merger world because of capacity constraints or other factors, such difficulties are unlikely to be eliminated immediately by the combined entity. The magnitude of the potential enhancements to homeland security and public safety is therefore not clear to us. Furthermore, to a certain degree the benefits to priority personnel even after full network integration is achieved depend on factors not under Cingular's control, such as the extent to which first responders carry dual-band phones in areas in which one of these companies currently has an 850 MHz cellular license and the other has a 1.9 GHz PCS license. Therefore, while we agree that the proposed transaction presents the potential for security and safety benefits as the result of the formation of a more robust, more ubiquitous network, with greater survivability, we do not place tremendous weight on this potential benefit.

#### **g. Economies of Scale and Operating Synergies**

231. Finally, Cingular asserts that it "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 AT&T Wireless."<sup>540</sup> In addition to the elimination of redundant networks,<sup>541</sup> Cingular represents that these synergies will include "greater purchasing and billing system efficiencies and reductions in common expenses – such as network expansion expenses and maintenance and administrative costs."<sup>542</sup> Cingular also points to operating synergies it expects to realize as a result of sharing best practices in "distribution, procurement, advertising, and other functions,"<sup>543</sup> Cingular's expertise at combining billing systems and call centers

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<sup>537</sup> CFA/CU Reply at 7-8. Thrifty Call also complains that the Applicants did not provide any support from homeland security or public safety personnel affirming the claimed benefits and did not explain why these benefits are not achievable absent the merger. Thrifty Call Reply at 11. We note that we have subsequently received a number of letters from public safety organizations and other officials expressing support for this transaction. *See, e.g.,* Connecticut Police Chiefs Association Comment at 1; National Emergency Number Association Comment at 1.

<sup>538</sup> *Id.* at 5, 23-24.

<sup>539</sup> *Id.* at 5, 23-24.

<sup>540</sup> *Id.* at 22.

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> *Id.*

and implementing Local Number Portability,<sup>544</sup> AT&T Wireless's expertise in serving business customers,<sup>545</sup> and improved handset functionality resulting from the merged entity's greater purchasing power and the larger customer base over which it will be able to spread development and deployment costs.<sup>546</sup>

232. Based on the evidence presented by Applicants, we believe that the transaction is likely to enable the merged entity to achieve certain economies of scope and scale and operating synergies of the type asserted and that, absent the transaction, the parties individually could not have achieved. However, the record does not contain sufficient supporting evidence for us to verify and quantify the claimed savings or to determine the extent to which they are specific to this transaction. Thus, we cannot confirm the total savings estimated by Applicants and do not give significant weight to them in our balancing of potential public interest harms and benefits.

233. However, we do recognize one specific category of cost savings in this context. Cingular's merger with AT&T Wireless will reduce its roaming costs in overlapping geographic markets, and the elimination of roaming agreements in these overlapping markets will directly benefit those of its customers who will no longer be charged to roam in those areas. We further recognize that the cost savings generated by the elimination of roaming agreements in overlapping markets have the potential to benefit Cingular's customers indirectly by giving Cingular the ability and the incentive to compete more aggressively with regard to pricing, coverage, and the provision of advanced data services. We emphasize, however, that the realization of these indirect benefits and their magnitude will depend on whether, and the extent to which, Cingular passes on cost savings to its customers through lower prices or product improvements such as better voice service and advanced data services.

#### **h. Disability Issues**

234. Self Help for Hard of Hearing People ("SHHH") asserts that the proposed transaction will benefit people with hearing loss because Cingular is a leader in "address[ing] the technological barriers to people who have hearing loss," and the combined entity would increase the reach of that leadership.<sup>547</sup> This assertion has been supported by representations from other organizations, such as the National Spinal Cord Injury Association, the American Council for the Blind, the American Foundation for the Blind, and the Alliance for Technology Access.<sup>548</sup> The Commission has long been concerned to increase the availability of wireless services to Americans with hearing difficulties, as demonstrated by action we have taken in a number of other proceedings.<sup>549</sup> While the record in this proceeding is insufficient for us to determine with exactitude the degree to which approval of this transaction will materially aid in that effort, we recognize this important potential public interest benefit.

#### **i. Labor Issues**

235. The Communications Workers of America assert that "the merger will benefit working

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<sup>544</sup> *Id.* at 23.

<sup>545</sup> *Id.*

<sup>546</sup> *Id.*

<sup>547</sup> SHHH Comments at 1-2.

<sup>548</sup> *Ex parte* letter from Marcie Roth, Executive Director, National Spinal Cord Injury Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 13, 2004).

<sup>549</sup> In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, WT Docket No. 01-309, RM-8658, *Report and Order*, FCC 03-168 (rel. Aug. 14, 2003), *recon. pending*.

families and communities with high-wage, high-skill union jobs” because of Cingular’s commitment to “progressive human resources policies,” and that these benefits will ultimately be realized by consumers in the form of improved customer service.<sup>550</sup> However, the record is insufficient for us to draw any conclusions in this regard, and – unlike in the case of benefits based on technical factors – we do not have any independent basis on which to review this claim.

#### j. Conclusion

236. In sum, while we find that this transaction is likely to result in transaction-specific public interest benefits, we are not able on the basis of this record, using the sliding scale approach described above, to conclude that they are sufficiently large or imminent to outweigh the potential harms we have identified in certain individual markets. In those markets, therefore, remedies are necessary to reduce the harms.

### B. Intermodal Competition

237. The Commission has taken note of the increasing development of intermodal competition between wireline and wireless services.<sup>551</sup> In this proceeding, evidence indicates that a limited but growing proportion of consumers in the mass market<sup>552</sup> use wireless as their primary line or have chosen to cut the cord and use wireless services in lieu of wireline services for all of their local exchange services.<sup>553</sup> We find it relevant, in analyzing this proposed transaction, that Cingular is owned by the second and third largest RBOCs.<sup>554</sup> Because BellSouth and SBC derive such a significant portion of their

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<sup>550</sup> CWA Comments at 4-5.

<sup>551</sup> See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978, 17,119 ¶ 230 (2003) (“Triennial Review Order”), corrected by Errata, 18 FCC Rcd. 19,020 (2003), *aff’d in part, remanded in part, vacated in part on other grounds, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), petitions for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004); Application by SBC Communications Inc., Nevada Bell Telephony Company, and Southwestern Bell Communications Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Nevada, WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd. 7196, 7210 ¶ 26 (2003) (“SBC Nevada Order”). The Commission has also taken note of the increasing migration of toll calls from wireline to wireless services (*i.e.*, “minute substitution” as opposed to replacement of one service with another); see also *Ninth Report*, FCC 04-216, at ¶ 213; In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112, *Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 10,914, 10,919 ¶ 8 (2003) (noting increasing substitution of mobile wireless service for traditional wireline service, “particularly for interstate calls”); In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd. 24,952, 24,965, ¶ 21 (2002) (adjusting wireless carriers’ safe harbor for universal service contributions based on increase in the extent to which mobile wireless consumers utilize their wireless phones for interstate calls).

<sup>552</sup> The mass market consists of residential customers and very small business customers. These categorizations are consistent with the Commission’s approach in prior merger orders. See, e.g., *WorldCom-MCI*, 13 FCC Rcd. 18,025, 18,040-41 ¶¶ 25-26 (1998); *GTE-Bell Atlantic*, 15 FCC Rcd. at 14,088-89 ¶ 102; *Triennial Review Order*, 18 FCC Rcd. at 17,063 ¶ 126.

<sup>553</sup> See *infra* ¶ 241.

<sup>554</sup> SBC has approximately 28.8 million retail residential and 18.3 million retail business access lines within its region. See SBC 10-K at 5. BellSouth has approximately 14.1 million retail residential and 6.9 million retail business lines within its region. See BellSouth 10-K at 30.

revenues from their in-region wireline operations,<sup>555</sup> these companies have an incentive to protect their wireline customer base from intermodal and intramodal competition. In this section, we examine the potential impact on intermodal competition of Cingular's merger with the largest independent wireless carrier.<sup>556</sup>

238. We conclude that any potential public interest harm to intermodal competition arising from the loss of AT&T Wireless as an independent competitor is mitigated by the limited level of wireless-wireline competition at this point in time, and by the continued existence of a number of independent national and regional wireless carriers in the markets relevant to this transaction.<sup>557</sup> We also find that any potential harm is outweighed by the potential benefits that the merged entity could bring to the majority of mass market consumers. At the same time, we caution that further losses of significant independent wireless carriers to wireline-affiliated carriers will be closely scrutinized, and absent significant offsetting public interest benefits, may lead to different conclusions.

### 1. Substitution between Wireless and Wireline Services

239. The Commission has previously found that consumers tend to use wireless and wireline services in a complementary manner and view the services as distinct because of differences in functionality.<sup>558</sup> As a result, a relatively limited number of mass market consumers have chosen to substitute one service for the other.<sup>559</sup> Thus, for purposes of this proceeding, we believe it would be

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<sup>555</sup> SBC's wireline operations generate approximately 72.6 percent of its annual revenues, whereas BellSouth's wireline operations generate approximately 61.8 percent of its annual revenues. Cingular generates approximately 20.7 percent of SBC's annual revenue and approximately 18.5 percent of BellSouth's annual revenue. See SBC 10-K at 5-10; BellSouth at 24-34.

<sup>556</sup> See, e.g., Consumer Federation of America and Consumers Union Petition to Deny at 5, 9; Consumer Federation of America and Consumers Union Reply at 8, 12-15. We use the term independent wireless carrier to mean a wireless carrier that is not owned or controlled by an incumbent LEC, or, if owned or controlled by an incumbent LEC, one that has wireline operations significantly smaller than its wireless operations. For example, we classify Sprint as an independent wireless carrier given that it operates as an incumbent LEC in a relatively small number of markets compared to its wireless footprint; it has significantly fewer local exchange access lines than wireless customers; and it derives a significantly larger portion of its revenues from its wireless operations than from its wireline operations. Sprint's local wireline operation has approximately 7.9 million access lines, whereas it has more than 20 million wireless subscribers. See Sprint SEC Form 10-K for Year-End December 31, 2003 at 25-38; Sprint SEC Form 10-K for Year-End December 31, 2003, Attach. F at 4.

<sup>557</sup> Our conclusion is based on compliance with any conditions necessary to address horizontal concentration in individual wireless markets, as discussed elsewhere in this Order. We also note that SBC and BellSouth face competition in the mass market from other intermodal providers such as cable operators and VoIP providers, as well as intramodal competitors (e.g., carriers purchasing unbundled loop access). See Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, Local Telephone Competition: Status as of Dec. 31, 2003, at 1-2 (rel. June 2003), available at <http://www.fcc.gov/wcb/iatd/stats.html>; Anne Kandra, *Should You Switch to a Net Phone? Making Calls Over Your Broadband Connection Can Save You Some Money*, PC World, Nov. 2004 (2004 WL 65832115), at 1 ("The Yankee Group expects there will be 1 million VoIP subscribers by the end of 2004, up from just 131,000 last year."). At the same time, we note that facilities-based competition is greater for enterprise services than for mass market services.

<sup>558</sup> See, e.g., *Triennial Review Order*, 18 FCC Rcd at 17,119 ¶ 230.

<sup>559</sup> See *Ninth Report*, FCC 04-216, at ¶ 212; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, 3757 ¶ 11 (2002); *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20,599, 20,624 ¶ 32 (1998). Whereas wireless services may have a comparative advantage over wireline services in providing the consumer mobility, wireline local exchange services may have comparative advantages in reliability,

(continued...)

premature to consider the existence of a separate relevant market in which wireline and wireless services compete for mass market consumers.<sup>560</sup> Instead, in evaluating the extent of intermodal competition between wireline and wireless telecommunications voice services, we consider the number of consumers that have chosen to “cut the cord,” *i.e.*, those that have substituted wireless for wireline service.<sup>561</sup>

240. As the Commission has noted in other proceedings, a number of wireless carriers offer plans designed as a landline replacement service, *e.g.*, MetroPCS, Leap Wireless (Cricket), and Triton, as these plans include unlimited local calling within some specified local calling area and offer a traditional monthly recurring fee long distance calling option that closely resembles the cost for wireline local exchange service.<sup>562</sup> Other wireless service plans that may also serve as a wireline replacement for some consumers are those that (1) are priced competitively to analogous wireline services, (2) include sufficient anytime minutes to accommodate a customer’s normal inbound and outbound calling patterns, and (3) avoid overage charges.<sup>563</sup> While we have insufficient information to determine the particular combination of anytime minutes and price points most desirable to mass market consumers that have either cut the cord or would consider cutting the cord, some record evidence indicates that wireless plans priced no greater than [REDACTED], with a significant number of anytime minutes, could result in a significant

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E-911 coverage, ubiquity, and lower-cost unlimited local calling. *See, e.g., Triennial Review Order*, 18 FCC Rcd at 17,119 ¶ 230.

<sup>560</sup> We do not separately consider a bundled wireline and wireless service package in connection with this proposed transaction because these service packages have only recently become available on the market, demand for them has been severely limited, and it is too early to evaluate their competitive impact. *See* Thrifty Petition to Deny at 4, 7; Applicants’ Joint Opposition to Petitions to Deny and Comments at 42-43.

<sup>561</sup> This approach is consistent with the Applicants’ position in other proceedings that the Commission must consider mobile wireless in its analysis of competition for local exchange and long distance services. *See, e.g.,* Letter from Mary L. Henze, Asst. Vice President – Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-112, CC Docket No. 00-175, Attach. at 1-10 (filed Oct. 21, 2003); Letter from Brett A. Kissel, Assoc. Director – Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-112, CC Docket No. 00-175, Attach. at 12-15, 21 (filed Dec. 16, 2004); *see also* Letter from Dee May, Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 02-112, CC Docket No. 00-175, Attach. at 8-11 (filed Feb. 13, 2004); SBC Reply Comments, Reply Declaration of Dennis W. Carlton, Hal Sider and Allan Shampine, WC Docket No. 02-112, CC Docket No. 00-175, ¶ 32 (filed May 19, 2003) (“Bundled local/long distance services offered by ILECs and CLECs compete not only with each other but also with local services and long distance services offered on an unbundled basis and with bundled services offered by wireless carriers.”). It is also consistent with SBC’s position and our finding in the *SBC Nevada Order* that SBC had met the requirements of section 271(c)(1)(A) for residential consumers in Nevada solely based on evidence that mass market residential customers subscribed to Cricket (a PCS mobile telephony service) in lieu of wireline local exchange service in SBC’s region in Nevada. *See SBC Nevada Order*, 18 FCC Rcd at 7206 ¶ 18; *see also* Application of Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota, WC Docket No. 03-11, *Memorandum Opinion and Order*, 18 FCC Rcd. 7325, 7339, ¶ 26 (2003).

<sup>562</sup> *See, e.g., Ninth Report*, FCC 04-216, at ¶¶ 215-16.

<sup>563</sup> We assume a consumer looking for a wireline replacement plan will consider only those wireless telecommunications voice service plans that are economical for him given his preferences for vertical features and his local and long distance calling patterns (*e.g.*, frequency, duration, and time preference) and that have a relatively small price premium relative to wireline service. *See* AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC00194000-48; AWSFCC00194193-208; AWSFCC00197204-13; AWSFCC00197955-98; BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00038343-69; BLSFCC00096193-248; BLSFCC00098191-212.

number of households choosing to cut the cord.<sup>564</sup>

241. The record evidence demonstrates that while a small proportion of consumers have chosen to cut the cord, intermodal competition is growing and wireless services may become a more significant direct competitor to wireline services for a larger portion of the mass market in the future. Although the Census Bureau estimates that six percent of households have cut the cord nationwide, documents provided by Cingular, its parent companies, and AT&T Wireless indicate that this percentage is likely to grow in the near future.<sup>565</sup> These documents also indicate that there is significant variation in the proportion of consumers that have cut the cord across metropolitan areas and demographic groups.<sup>566</sup> The growing significance of intermodal competition is revealed in the evidence that these carriers consider the prospect of consumers' subscription to wireless services in lieu of wireline services when engaging in research, and development of corporate strategies and market offerings.<sup>567</sup> However, other evidence suggests that most consumers may still continue to find the costs (including opportunity costs<sup>568</sup>) of cutting the cord and using wireless telecommunications services in lieu of wireline telecommunications services to be prohibitive.<sup>569</sup> For example, the opportunity costs that the consumer may consider before cutting the cord could include the loss of an option to access the Internet via broadband or dial-up,

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<sup>564</sup> AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC00193510-604; AWSFCC00193606-641; AWSFCC00194193-208.

<sup>565</sup> See C. Tucker, *et al.*, *2004 Telephone Service in U.S. Households in 2004*, paper presented at the 59th Annual Meeting of the American Association for Public Opinion Research, May 2004 (*2004 Telephone Service Paper*). The U.S. Census Bureau estimates that there are approximately 115.9 million households in the United States. Thus, we estimate that there are approximately 7 million households that have cut the cord. See also AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC00194000-48; AWSFCC00194193-208; AWSFCC00195361-410; AWSFCC00197204-13; AWSFCC00197237-43; BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00008365-402; BLSFCC00098191-212; BLSFCC00155178-205.

<sup>566</sup> [REDACTED]. The U.S. Census Bureau results suggest the proportion of consumers that have cut the cord is increasing across demographic groups. See AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWS00197955-98; SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00013167; SBCFCC00016362-409; see also BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00002658-71; BLSFCC00096067-115; BLSFCC00211764-91; *2004 Telephone Service Paper*.

<sup>567</sup> See discussion of AT&T Wireless's incentives and Cingular's product offerings below; see also BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00002658-71; BLSFCC00005025-33; BLSFCC00008365-402; BLSFCC00038763-71; BLSFCC00096067-115; BLSFCC00098191-212; BLSFCC00155178-91; BLSFCC00177285-355; BLSFCC00211675-719; BLSFCC00212603-48; Cingular July 15 *Ex Parte* Letter, Confidential Attach. at CNGFCC02995653-65; CNGFCC02998932-55; CNGFCC02998975-96; CNGFCC03000023-29; CNGFCC03098350-71; CNGFCC03099586-606; SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00000037-50; SBCFCC00000061-129; SBCFCC00002065-76; SBCFCC00002567-78; SBCFCC00069982-70013; Letter from Douglas I. Brandon, Vice President - External Affairs and Law, AT&T Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 04-70, Confidential Attach., Declaration of Ted Stine, ¶¶ 2-7 (confidential) (filed Sept. 7, 2004) (AT&T Wireless Sept. 7 *Ex Parte* Letter).

<sup>568</sup> The opportunity cost of an action is the value of the foregone alternative action. THE MIT DICTIONARY OF MODERN ECONOMICS, edited by David W. Peace, at 315 (1996).

<sup>569</sup> See Hearings before the House Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, 108th Congress, 2004 WL 84558556 (Feb. 4, 2004) (statement of Frank Louthan, Vice President Equity Research, Raymond James Financial, Inc.) ("Factors such as a need for common points of contact, wireless handset and battery quality, connections to security/monitoring services, and other practical limitations of wireless phones are . . . expected to play a part in multiple-person households retaining a wireline phone.") See also BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00096193-248; SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00014806-66.

possible effects on his credit rating, or inexpensive access to a home security system.<sup>570</sup> Prior to the recent implementation of wireless LNP, the consumer's opportunity cost to disconnect his wireline local exchange service also included the forfeiture of his landline phone number.<sup>571</sup>

242. Thus, while there is some evidence of a small, but growing number of consumers that have chosen to cut the cord and use wireless services in lieu of wireline service, this trend is a relatively recent phenomenon. Although we find that substitution between wireless and wireline services is currently limited, we nevertheless conclude that it has the potential to be a substantial source of facilities-based competition in the future.<sup>572</sup>

## 2. AT&T Wireless's Incentives as an Independent Wireless Carrier

243. As an independent wireless carrier, AT&T Wireless's consumer offerings are designed to add subscribers to its network without regard to any adverse effect these offerings may have on subscription to wireline services.<sup>573</sup> Thus, unlike Cingular whose strategies are influenced by SBC's and BellSouth's concerns about wireline revenues and access lines, AT&T Wireless is not likely to be concerned with the impact of its strategies on wireline revenues or access lines, except to the extent that they represent a potential source of new wireless customers. In fact, the documentary evidence indicates that AT&T Wireless sought to encourage mass market consumers to cut the cord,<sup>574</sup> and to develop technological enhancements and service offerings to encourage consumers to abandon the wireline network and to use wireless services in lieu of wireline services.<sup>575</sup> While there is no evidence that its strategies were discontinued in response to the proposed acquisition,<sup>576</sup> it seems likely that AT&T

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<sup>570</sup> "Choosing Cell Over Landline Can Bring Unexpected Pain," *Wall Street Journal*, July 9, 2004. Absent the availability of cable modem service at his residence or a non-BOC affiliated DSL provider in a consumer's residential area, the consumer would forfeit his ability to obtain broadband service within SBC's territory or within BellSouth's territory in Georgia and Louisiana. [http://www02.sbc.com/DSL\\_new/content\\_new/1,,18,00.html?pl\\_code=MSBC245C8952P192180B0S0&pl\\_code=MSBC245C8952P185794B192143S0](http://www02.sbc.com/DSL_new/content_new/1,,18,00.html?pl_code=MSBC245C8952P192180B0S0&pl_code=MSBC245C8952P185794B192143S0) (visited Sept. 23, 2004); [http://www.fastaccess.com/content/consumer/conditions.jsp#one\\_month\\_free](http://www.fastaccess.com/content/consumer/conditions.jsp#one_month_free) (visited Sept. 23, 2004).

<sup>571</sup> While wireless LNP has yet to result in a significant movement of wireline phone numbers to a wireless carrier, the documents indicate that wireless LNP has increased the willingness of some consumers to cut the cord. From December 2003 through July 2004, the number of phone numbers ported (or moved) from a wireline to wireless carrier during a month ranged from 13,000 to 165,000. Over this same time period, the number of phone numbers ported from a wireless to wireline carrier ranged from 1,000 to 3,000 per month. In contrast, the number of phone numbers ported from one wireline carrier to another ranged from 561,000 to 809,000 per month while 591,000 to 873,000 phone numbers per month were ported from one wireless carrier to another. (Calculations are based on confidential data, as of Aug. 12, 2004, from the Number Portability Administration Center databases maintained by NeuStar, Inc.)

<sup>572</sup> The Commission estimates that the number of cable telephony lines, another form of intermodal competition for mass market wireline services, increased from 3 million to 3.2 million lines during the second half of 2003. Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, Local Telephone Competition: Status as of Dec. 31, 2003, at 2 (rel. June 2003), available at <http://www.fcc.gov/wcb/intd/stats.html>.

<sup>573</sup> See, e.g., AT&T Wireless Sept. 7 *Ex Parte* Letter, Confidential Attach., Declarations of Ted Stine, ¶¶ 2-7, and Judith E. Cavalieri, ¶¶ 2-7.

<sup>574</sup> AT&T Wireless Sept. 7 *Ex Parte* Letter, Confidential Attach., Declarations of Ted Stine, paras. 2-7, and Judith E. Cavalieri, paras. 2-7; see also AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC00019144-56; AWSFCC00194000-48; AWSFCC00197237-43; AWSFCC00198124-96.

<sup>575</sup> See AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC00016637-728; AWSFCC00017128-50; AWSFCC00194049-68; AWSFCC00194333-80; AWSFCC00195361-410; AWSFCC00197204-13; AWSFCC00198124-96.

<sup>576</sup> AT&T Wireless Sept. 7 *Ex Parte* Letter, Confidential Attach., Declaration of Judith E. Cavalieri at ¶ 7.

Wireless would have continued to investigate and pursue methods to encourage the displacement of wireline services by wireless services because there is no evidence that AT&T Wireless disbanded the division tasked with these issues.<sup>577</sup>

### 3. Cingular's Product Offerings

244. Evidence in the record indicates that Cingular has developed and marketed many of its wireless products and services to complement – and specifically not to replace – residential wireline voice services. Cingular developed this strategy largely because SBC and BellSouth play a significant role in Cingular's business decisions. For instance, the carriers created cross-company teams which have developed products and services for Cingular.<sup>578</sup> These products and services are designed to integrate Cingular's wireless services with SBC's and BellSouth's wireline services, and thus, address the growth of wireline substitution.<sup>579</sup> Since 2002, the carriers have developed and refined a number of such products and services,<sup>580</sup> and Cingular has rolled out some of the initiatives into the market.<sup>581</sup> Evidence

<sup>577</sup> AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC00026639-51; *see also* AT&T Wireless Sept. 7 *Ex Parte* Letter, Confidential Attach., Declaration of Judith E. Cavalieri, ¶ 1.

<sup>578</sup> SBC states that SBC, BellSouth and Cingular “have dedicated significant resources and senior management attention to successfully implement their integration initiative: [r]epresentatives from nearly every SBC discipline are helping to bring the products to market; Cingular's product development budget is one of the largest in its history; [t]he companies created a working structure that includes joint product-development teams and joint alliance, technology and marketing councils that include each company's chief marketing, technology and information officers.” *See* [http://www.sbc.com/Common/files/pdf/sbc\\_fact\\_sheet.pdf](http://www.sbc.com/Common/files/pdf/sbc_fact_sheet.pdf) (visited Sept. 23, 2004); *see also* SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00000037-50; SBCFCC00004899-902; SBCFCC00100487-95; Cingular July 15 *Ex Parte* Letter, Confidential Attach. at CNGFCC03099262-3.

<sup>579</sup> According to SBC, “SBC Communications Inc., BellSouth and Cingular Wireless . . . are executing a ground breaking initiative to spur customer acquisition and retention by creating a new category of products that integrate wireline and wireless features and functionality – all through a wireless network overlap competitors cannot match. The integrated products will deliver greater value, simplicity and productivity to customers and will create marketplace distinction for all three companies.” *See* [http://www.sbc.com/Common/files/pdf/sbc\\_fact\\_sheet.pdf](http://www.sbc.com/Common/files/pdf/sbc_fact_sheet.pdf) (visited Sept. 23, 2004); *see also* BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00002658-71; BLSFCC00005025-32; BLSFCC00008859-927; BLSFCC00010005-35; BLSFCC00038546-76; BLSFCC00063774-93; BLSFCC00095363-402; BLSFCC00095436-533; BLSFCC00096193-248; BLSFCC00098191-212; Cingular July 15 *Ex Parte* Letter, Confidential Attach. at CNGFCC02995653-65; SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00000488-500; SBCFCC00002567-78; SBCFCC00012856-99; SBCFCC00012900-57; SBCFCC00112914-21.

<sup>580</sup> SBC states that it “is leveraging [Cingular's and SBC's] extensive wireline-wireless network overlap to create robust product bundles and to make more comprehensive use of distribution channels and marketing programs . . . [which allows] customers to consolidate their communications services with SBC companies or BellSouth,” and that “[c]ustomers will be able to make a single call and receive discounted SBC or BellSouth wireline and Cingular wireless services on a single bill. Fully integrating these removes the distinction between wireline and wireless services, networks and devices.” *See* [http://www.sbc.com/Common/files/pdf/sbc\\_fact\\_sheet.pdf](http://www.sbc.com/Common/files/pdf/sbc_fact_sheet.pdf) (visited Sept. 23, 2004); *see also* BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00211675-719; BLSFCC00214008-22; SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00001383-409; SBCFCC00002269-330; SBCFCC00069651-66; SBCFCC00069982-70013; SBCFCC00100270-4; SBCFCC00100608-32; SBCFCC00103689-703; SBCFCC00104927-68; SBCFCC00113666-87; SBCFCC00121701-34; SBCFCC00129640-707.

<sup>581</sup> For example, in June 2003, Cingular, SBC, and BellSouth introduced MinuteShare as “a new service enabling SBC or BellSouth residential customers to share a single bucket of wireline long distance and [Cingular] wireless local and long distance minutes.” *See* [http://www.cingular.com/about/latest\\_news/03\\_09\\_09](http://www.cingular.com/about/latest_news/03_09_09) (visited Sept. 23, 2004). In September 2003, SBC and Cingular ran promotional discounts ranging from 5 percent to 20 percent for SBC landline customers who chose specified Cingular plans and also combined their wireline and

(continued...)

shows that there are current plans for products in 2005 which continue to address wireline retention issues,<sup>582</sup> and the record also demonstrates that SBC and BellSouth plan to use the acquisition of AT&T Wireless to further Cingular's existing wireline retention/integration initiatives.<sup>583</sup> Thus, it is clear from the record that SBC and BellSouth influence the development of Cingular's products and services; that some of Cingular's products and services are focused on retaining/integrating with its Bell Operating Company ("BOC") corporate parents' wireline customers; and that SBC and BellSouth plan to use the acquisition of AT&T Wireless, to some degree, to further this goal.

#### 4. Potential Loss of Intermodal Competition

245. It is likely that Cingular's acquisition of AT&T Wireless will have some impact on the development of intermodal competition.<sup>584</sup> Cingular has sought to win wireless customers by encouraging them to use wireless service in a complementary manner to their wireline service, which is likely provided by one or the other of Cingular's parent companies in the SBC and BellSouth regions. With the acquisition, Cingular will have a greater number of wireless subscribers in its parent company regions, which increases the number of actual or potential Cingular subscribers that have SBC or BellSouth as their wireline provider. This would further reduce Cingular's incentives to make available wireless substitute offerings, as Cingular wireless customers would end up reducing the number of SBC and BellSouth wireline access lines by cutting the cord. As a result, it appears that Cingular is unlikely to initiate its own wireless substitute offering post-acquisition in the SBC and BellSouth regions.<sup>585</sup> Thus, one potential harm arising from Cingular's acquisition of AT&T Wireless is an increased disincentive for the merged entity to offer new innovative plans that would further intermodal competition in these areas.

246. The acquisition will also affect intermodal competition through the likelihood that

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landline billing. [http://www.sbc.com/Common/files/pdf/ff\\_wireless\\_momentum.pdf](http://www.sbc.com/Common/files/pdf/ff_wireless_momentum.pdf) (visited Sept. 23, 2004). In addition, the carriers have also rolled out the following initiatives: "Simplified Ordering" — allows customers to order wireless service through SBC and BellSouth wireline sales channels; "Extensive Distribution Channels" — SBC and BellSouth call centers and Cingular retail locations are used to cross-sell wireline and wireless service; SBC Yahoo! DSL is also available in some Cingular retail stores; and "Wireless Co-branding" — the companies promote a co-branded tag line closely tying the SBC and BellSouth brands to the Cingular brand in advertising and marketing activities. [http://www.sbc.com/Common/files/pdf/sbc\\_fact\\_sheet.pdf](http://www.sbc.com/Common/files/pdf/sbc_fact_sheet.pdf) (visited Sept. 23, 2004); *see also* SBC July 15 *Ex Parte* Letter, Confidential Attach. at SBCFCC00069982-70013; SBCFCC00100608-32; SBCFCC00103689-703; SBCFCC00113666-87.

<sup>582</sup> According to SBC, the wireline/wireless integrated platform "will allow possible future offerings, such as a single wireless and wireline phone number, interoperability between wireless and wireline instant messaging service, and integrated voice-activated services, such as voice-activated dialing and voice portal services that will allow customers to verbally request Internet content. Products include "Unified Communications," which "gives subscribers a single message center that makes voice mail, e-mails and faxes accessible via phone, computer, or a PDA." *See* [http://www.sbc.com/Common/files/pdf/sbc\\_fact\\_sheet.pdf](http://www.sbc.com/Common/files/pdf/sbc_fact_sheet.pdf) (visited Sept. 23, 2004); *see also* BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00005029-32.

<sup>583</sup> BellSouth July 15 *Ex Parte* Letter, Confidential Attach. at BLSFCC00015716; Cingular July 15 *Ex Parte* Letter, Confidential Attach. at CNGFCC02997390-466; CNGFCC02997441-2.

<sup>584</sup> Consumer Federation of America and Consumer Union Petition to Deny at 12; Thrifty Petition to Deny at 4. *But see* Joint Opposition to Petitions to Deny and Comments at 21, n.68.

<sup>585</sup> Although a review of carriers' pricing plans in connection with this transaction indicates that some LEC-affiliated carriers may offer more attractive pricing plans outside of their LEC region, we note that Cingular does not appear to demonstrate strong regional differences in its plans. Cingular has filed an affidavit consistent with this analysis. Letter from David G. Richards, Cingular Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 04-70, Confidential Attach., Declaration of Marc P. Lefar, ¶ 2 (filed Sept. 2, 2004).

Cingular will not pursue AT&T Wireless's extensive plans for wireline replacement offerings. As discussed above, before the merger between the two wireless providers was announced, AT&T Wireless had consistently worked to develop an unlimited local wireless offering that could be marketed or used as a substitute for wireline service. Post-merger, AT&T Wireless's incentive to continue offering service packages designed to induce consumers to cut the cord may be reduced. Even with an acquisition, AT&T Wireless's plans could have been kept in place, so long as AT&T Wireless was acquired by an independent wireless carrier. Under that scenario, the merged entity would have experienced an increase in concentration of spectrum that could have prompted the introduction of innovative plans designed to encourage wireline replacement.<sup>586</sup>

## 5. Public Interest Harms and Benefits

247. After considering the issues raised in the record, we conclude that the public interest harm potentially arising from the loss of AT&T Wireless as an intermodal competitor is presently quite limited.<sup>587</sup> As the record makes clear, most wireline customers do not now consider wireless service to be a close substitute for their primary line obtained from a wireline carrier.<sup>588</sup> Consumers are just beginning to evaluate the attractiveness of low-priced, high-minute plans as a possible replacement for their traditional wireline services. In addition, as the Commission has previously recognized, there remain qualitative differences between wireless and wireline services.<sup>589</sup> We therefore consider it likely that many wireline customers will continue to perceive wireline service as necessary for at least some of their communications needs, and thus limit the extent of primary line substitution between wireline and wireless for the foreseeable future.

248. To the extent additional wireline customers come to see wireless service as a close substitute for their primary line, moreover, other independent wireless carriers will have every incentive

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<sup>586</sup> We do not find much harm in the loss of AT&T Wireless as a potential partner in a competitive LEC's offering of a wireline/wireless service bundle as consumers have shown relatively low interest in such offerings. Additionally, other independent wireless carriers, such as Sprint, may be willing to enter into these relationships. *See Mediacom to Sell Phone Service over Cable in Deal with Sprint*, WALL STREET J., Aug. 25, 2004; *see also* AT&T Wireless July 15 *Ex Parte* Letter, Confidential Attach. at AWSFCC0018378-403; AWSFCC00331190-203.

<sup>587</sup> We are not persuaded by the study submitted by CompTel/ASCENT showing that prices for wireless and wireline services will increase as a result of the proposed acquisition because many of the study's underlying assumptions, as well as the methodology of the study itself, are flawed. For example, the model used by the study to project the price change for wireline services (local exchange and interexchange services) assumes that SBC and BellSouth exercise monopoly power for all wireline services. This assumption is inconsistent with the regulation of local exchange services, the market structure for wireline interexchange services, and the ability of consumers to migrate wireline interexchange minutes to their wireless service. The analysis also fails to consider that wireline and wireless service are purchased in localized markets, which include significant variability in service plans across markets. Without an analysis of more disaggregated data, it is difficult to make informed conclusions about potential harms in any particular relevant geographic market or to consumer welfare in general. Furthermore, CompTel/ASCENT's proposed remedies do not adequately show a nexus between the alleged harms and proposed remedies. *See* CompTel/ASCENT Oct 1 *Ex Parte* Letter at 2, Attach. at 5, 11-17.

<sup>588</sup> *See* 2004 Telephone Service Paper.

<sup>589</sup> *See, e.g., Triennial Review Order*, 18 FCC Rcd at 17119 ¶ 230 (recognizing that wireless services may have a comparative advantage in mobility, but wireline services may have comparative advantages with respect to reliability and ubiquity); *Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon, and South Dakota*, WC Docket No. 03-11, 18 FCC Rcd 7325, 7334-5 ¶ 18 (2003) (acknowledging that "there are certain technical and functional differences between broadband PCS and wireline exchange service" where commenters had raised differences related to E-911 coverage and the use of multiple handsets, among others).

to exploit that market opportunity. After this merger, several national carriers as well as numerous regional carriers will continue to compete as independent wireless carriers in markets affected by this transaction.<sup>590</sup> The existence of such market participants should be sufficient to ensure that wireline subscribers willing to cut the cord will be able to choose from among several competitive alternatives.<sup>591</sup> The loss at this juncture of a single independent wireless carrier accordingly should have only a small adverse effect on the overall level of intermodal competition.

249. We also find that the potential public interest benefits from the proposed transaction outweigh the relatively limited public interest harm arising from the loss of AT&T Wireless as an independent wireless carrier. These benefits include the improvements in service quality that likely will arise from the combination of the Applicants' spectrum and network assets, as well as the merged entity's increased ability to extend its network into licensed areas that neither Applicant presently serves. The additional spectrum available to the merged entity also should facilitate its deployment of more robust and ubiquitous advanced services. In addition, this merger will create a stronger intermodal competitor outside of the SBC and BellSouth regions, which could possibly spark a competitive response from other wireless carriers. We find these public interest benefits sufficient to prevent the limited harm from loss of an independent wireless carrier from tipping the balance against the proposed transaction.

250. We caution, however, that we may take a different view with regard to any future transactions that would diminish significantly the ability of independent wireless carriers to offer intermodal alternatives to wireline service. At this time, we recognize that there are benefits to consumers from both wireline replacement offerings and complement offerings. We intend to monitor carefully further developments in this marketplace that may affect intermodal competition, and to consider carefully future transactions that may impede our efforts in that regard. The Commission has worked hard to create the regulatory conditions for robust intermodal competition, and it remains strongly committed to achieving that important policy goal.

## VI. CONDITIONS/REMEDIES

251. Using the analytical standards outlined above, we found that the Applicants' proposed transaction would pose significant competitive harms in a number of local mobile telephony markets. We conclude that, in these markets, these potential harms would not be outweighed by the proposed transaction's alleged public interest benefits. Thus, if our analysis ended at this point, we would have to conclude that the Applicants have not demonstrated that the proposed transaction, on balance, would serve the public interest, convenience, and necessity.

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<sup>590</sup> Our conclusion is based on compliance with any conditions necessary to address horizontal concentration in individual wireless markets, as discussed elsewhere in this Order. We also note that SBC and BellSouth face competition in the mass market from other intermodal providers such as cable operators and VoIP providers, as well as intramodal competitors (e.g., carriers purchasing unbundled loop access). See Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, Local Telephone Competition: Status as of Dec. 31, 2003, at 1-2 (rel. June 2003), available at <http://www.fcc.gov/wcb/iatd/stats.html>; Anne Kandra, *Should You Switch to a Net Phone? Making Calls Over Your Broadband Connection Can Save You Some Money*, PC World, Nov. 2004 (2004 WL 65832115), at 1 ("The Yankee Group expects there will be 1 million VoIP subscribers by the end of 2004, up from just 131,000 last year."). At the same time, we note that facilities-based competition is greater for enterprise services than for mass market services.

<sup>591</sup> We note that regional carriers, such as MetroPCS and Leap Wireless, already offer plans that are designed to persuade consumers to cut the cord. These plans generally allow unlimited local calling within some specified local calling area and include a traditional monthly recurring fee long distance calling option that closely resembles the cost for wireline local exchange service. We also note that a national carrier, T-Mobile, already offers a plan with 3,000 anytime local and long distance minutes for \$49.99 per month within specified regional calling areas. Gilbert Declaration, Appendix at A5.

252. In its review of transactions, the Commission is empowered to impose conditions on the transfer of control of Commission licenses to mitigate the harms the transaction would likely create. Such conditions are tailored to address the specific harms anticipated based on economic analysis, examination of documents submitted in response to our inquiry, and public comment contained in the record of this proceeding. We conclude that the conditions set forth below alter the public interest balance of the proposed transaction by mitigating the potential public interest harms. Accordingly, with the conditions that we adopt in this Order, and assuming the Applicants' compliance with these conditions, we find that the Applicants have demonstrated that the proposed transfer of licenses will serve the public interest, convenience, and necessity.

253. We received a number of additional proposals during the comment period from commenters. As we discuss more fully below, we decline to impose additional conditions proposed by various commenters which we find are not tied to merger-specific harms.

## A. Divestitures

### 1. Operating Units

254. In Section V.A.3.d.(ii), we found that the transaction, as proposed, would be likely to cause significant competitive harm in certain geographic markets. Specifically, our analysis indicated that, in certain markets, there will not be enough competing carriers remaining, post-merger, with sufficient network and spectrum assets, to deter anticompetitive behavior by the merged entity. We therefore condition this grant of authority to transfer control of licenses from AT&T Wireless to Cingular on the divestiture of AT&T Wireless operating units (including spectrum associated with such operating units) in the following markets:

Market	Market Name
CMA045	Oklahoma City, OK
CMA292	Sherman-Denison, TX
CMA293	Owensboro, KY
CMA326	Arkansas 3-Sharp
CMA327	Arkansas 4-Clay
CMA328	Arkansas 5-Cross
CMA329	Arkansas 6-Cleburne
CMA330	Arkansas 7-Pope
CMA357	Connecticut 1-Litchfield
CMA443	Kentucky 1-Fulton
CMA494	Mississippi 2-Benton
CMA496	Mississippi 4-Yalobusha
CMA517	Missouri 14-Barton
CMA598	Oklahoma 3-Grant
CMA657	Texas 6-Jack
CMA662	Texas 11-Cherokee

### 2. Spectrum

255. In two large markets with high population density, we found that the combined entity would have particularly high spectrum holdings. We found, specifically, that because these are dense

urban areas, spectrum needs by competing carriers would likely be higher. We therefore condition our approval of the transaction on divestitures of 10 MHz of PCS spectrum in each of these markets in order to enable competing carriers to acquire sufficient bandwidth to compete effectively against the combined entity:

<b>Market</b>	<b>Market Name</b>
BTA112	Detroit, MI
CMA009	Dallas, TX

256. In addition, as discussed in Section V.A.3.d.(ii), above, the Applicants have committed to divest spectrum held by the combined entity in excess of 80 MHz in any county in which it has interests in more than 80 MHz of cellular and Broadband PCS spectrum.<sup>592</sup> We find that this commitment will require spectrum divestitures in the following counties in addition to the divestitures we have ordered above, and we condition our approval of the transaction on divestiture down to no more than 80 MHz of such spectrum in each of the following counties:

<b>County</b>	<b>CMA</b>	<b>CEA</b>
Anderson, TN	CMA079	CEA147
Blount, TN	CMA079	CEA147
Knox, TN	CMA079	CEA147
Union, TN	CMA079	CEA147
Neuces, TX	CMA112	CEA1880
San Patricio, TX	CMA112	CEA1880
Victoria, TX	CMA300	CEA8750
Murray, GA	CMA371	CEA520
Whitfield, GA	CMA371	CEA520
Floyd, GA	CMA373	CEA520
Polk, GA	CMA373	CEA520
Campbell, TN	CMA645	CEA147
Cumberland, TN	CMA645	CEA341
Hancock, TN	CMA645	CEA147
Morgan, TN	CMA645	CEA147
Roane, TN	CMA645	CEA147
Scott, TN	CMA645	CEA147
Cocke, TN	CMA646	CEA147
Grainger, TN	CMA646	CEA147
Hamblen, TN	CMA646	CEA147
Jefferson, TN	CMA646	CEA147
Sevier, TN	CMA646	CEA147
Loudon, TN	CMA649	CEA147
McMinn, TN	CMA649	CEA053
Monroe, TN	CMA649	CEA053
Jasper, TX	CMA668	CEA840
Newton, TX	CMA668	CEA840
Tyler, TX	CMA668	CEA840
Dimmit, TX	CMA669	CEA7240

<sup>592</sup> See Cingular Opposition at 9; *see also* Application, Exhibit 1, at 19 n.82.

Kinney, TX	CMA669	CEA7200
Maverick, TX	CMA669	CEA7240
Val Verde, TX	CMA669	CEA7200
Zavala, TX	CMA669	CEA7240
Brooks, TX	CMA670	CEA1880
Duval, TX	CMA670	CEA1880
Jim Wells, TX	CMA670	CEA1880
Kenedy, TX	CMA670	CEA1880
Kleberg, TX	CMA670	CEA1880
Live Oak, TX	CMA670	CEA1880
Aransas, TX	CMA671	CEA1880
Bee, TX	CMA671	CEA1880
Edwards, TX	CMA671	CEA7200
Refugio, TX	CMA671	CEA1880

257. We decline to require further limitation-based spectrum divestitures, as some commenters proposed,<sup>593</sup> because we believe such limitations too closely resemble our former cap on spectrum aggregation. In the analysis represented in this Order, we have fully taken account of the likely competitive effect of the aggregation of spectrum resulting from this transaction, and we have imposed remedies consistent with that analysis.

### 3. Operation of Divestitures

258. Divestiture of operating units including associated spectrum, as well as bare spectrum (the “Divestiture Assets”) as set forth above, will be accomplished in the following way. A management trustee (“Management Trustee”) shall be appointed to serve as manager of the Divestiture Assets until such assets are sold to third party purchasers or transferred to a divestiture trustee (who may be the same person as the Management Trustee). During the period in which the Management Trustee is in day-to-day control of the Divestiture Assets, the Applicants shall retain *de jure* control and shall have the sole power to market and dispose of the Divestiture Assets to third party buyers, subject to the Commission’s regulatory powers and process with respect to license transfers and assignments.

259. Accordingly, we require that, within three calendar days from the date of release of this Order, the Applicants file an appropriate application with the Wireless Telecommunications Bureau to transfer the Divestiture Assets into the trust with the Management Trustee, which application shall also include a request to approve the identity of the Management Trustee and the terms of the trust agreement. We further require that the Divestiture Assets shall be transferred to the trust pursuant to this Order no later than 12 calendar days from that date on which the Applicants file their application. The trust agreement shall include all reasonable and necessary rights, powers, and authorities to permit the Management Trustee to perform his duties of day-to-day management of the Divestiture Assets, in the ordinary course of business, in order to permit expeditious divestiture.<sup>594</sup> The Management Trustee will

<sup>593</sup> See, e.g., Comments of Donald Newcomb at 1 (arguing for 60 MHz cap in urban markets); Comments of Craig Paul at 1 (advocating reauction of spectrum that is not “actually required for service”); CFA/CU Petition to Deny at 9 (suggesting condition that Applicants return spectrum in excess of 40 MHz in each market).

<sup>594</sup> The duties and responsibilities of the Management Trustee and the terms relating to how the Divestiture Assets are to be preserved during the term of the trust are more fully set forth in that certain Preservation of Assets Stipulation and Order (“Stipulation”), and Final Judgment (“Final Judgment”) signed by the Applicants on October 25, 2004 and entered by the District Court for the District of Columbia. Except to the extent that any provisions

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serve at the cost and expense of the Applicants.

260. From the date of release of this Order, and until the divestitures ordered herein have been consummated, both the Applicants and the Management Trustee shall preserve, maintain, and continue to support the Divestiture Assets and shall take all steps to manage them in a way as to permit prompt divestiture. We require that the Applicants and the Management Trustee abide by the same provisions relating to the duties of the Management Trustee and the preservation of the Divestiture Assets as those contained in the Stipulation that the Applicants have entered into with the DOJ. We also require that, to the extent the Stipulation requires that the Applicants or the Management Trustee provide the DOJ with any reports or requires that the Applicants seek any approvals from the DOJ, the Applicants will also provide such reports to, and seek such approvals from, the Commission.

261. The Applicants will be allowed 120 days from the date of entry of the Final Judgment to divest the Divestiture Assets prior to the second stage of the divestiture procedures becoming operative. Upon application by the Applicants to the Bureau, the Bureau may grant one extension of no more than 60 days to allow the Applicants further time to dispose of the Divestiture Assets.<sup>595</sup>

262. Upon expiration of the 120-day period, together with any approved extension, any Divestiture Assets that remain owned by the Applicants shall be irrevocably transferred to a divestiture trustee (the "Divestiture Trustee") who shall be solely responsible for accomplishing disposal of the Divestiture Assets. The Applicants will submit to the Wireless Telecommunications Bureau (the "Bureau"), for approval, both the name of the proposed Divestiture Trustee and a draft of the trust agreement<sup>596</sup> to be entered into with said trustee together with an appropriate application to effect such transfer no later than 30 days prior to the expiration of the Management Trustee period set forth in paragraph 260 above.<sup>597</sup> The Divestiture Trustee will serve at the cost and expense of the Applicants and shall file monthly reports with the Bureau setting forth his efforts to divest the Divestiture Assets.

263. The Divestiture Trustee shall use its best efforts to sell the Divestiture Assets within six months of his appointment, subject to the Commission's regulatory powers and process with respect to license transfers and assignments. The expeditious disposal of the Divestiture Assets during this period is of greater importance than the price that might otherwise be obtained for such assets. If a sale of any of the Divestiture Assets that consist of operating units and associated spectrum has not been effectuated within such period, the Divestiture Trustee shall file a report with the Bureau explaining the Divestiture Trustee's efforts to sell the Divestiture Assets, the reasons why the Divestiture Assets have not been sold, and the Divestiture Trustee's recommendations. The Commission will consider such report and will issue such further orders as it considers appropriate.

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herein conflict, we require that the Applicants and the Management Trustee fully comply with such provisions as if they were set forth herein *in extenso*.

<sup>595</sup> If the Applicants have filed an application with the Commission seeking consent to the sale of any of the Divestiture Assets to a third party within the time periods set forth above but the Commission has not acted by the end of such period, such period will be extended and shall expire five days after the Commission's action with respect to such Divestiture Assets.

<sup>596</sup> The Bureau will consult with the Office of General Counsel on matters relating to the name of the proposed divestiture trustee and the terms of the divestiture trust.

<sup>597</sup> Except to the extent that any provisions herein conflict, the duties and responsibilities of the Divestiture Trustee are more fully set forth in the Final Judgment and we require that the Applicants and the Divestiture Trustee fully comply with such provisions as if they were set forth herein *in extenso*.

264. To the extent that any of the Divestiture Assets are included within the Stipulation and Final Judgment, we are willing to allow the Applicants to proceed to divest such assets in accordance with the terms of the agreements that are contained in those documents. To the extent that this Order requires divestitures in any market that are more extensive than those required by the DOJ, we require that the Applicants comply with this Order and completely dispose of the Divestiture Assets included in such markets. To the extent that we are requiring divestitures in additional markets to those of the DOJ, we will require the Applicants, prior to closing their transaction, to provide the Commission with documentation substantially similar to that provided to the DOJ with respect to the additional divestitures that we require herein.

### **B. Treatment of Partial Interests**

265. Our market-specific analysis also indicated that certain partial, non-passive interests retained by the Applicants in competing mobile telephony carriers could cause competitive harm.<sup>598</sup> Our analysis indicated that, if we attributed these partial interests to the Applicants, and granted the transfer of control without a condition, the combined entity would have a very high market share, as well as a high level of spectrum aggregation. We also found that there were fewer competing carriers in certain of these markets. Therefore, in the following markets, we require the combined entity to convert its partial non-passive interests held into partial passive interests:

<b>Market</b>	<b>Market Name</b>
CMA100	Shreveport, LA
CMA213	Pittsfield, MA
CMA275	St. Joseph, MO
CMA454	Louisiana 1-Claiborne

266. Specifically, with respect to CMAs 100 and 454, such interests are held by Cingular through a limited partnership called ALLTEL Communications of North Louisiana Cellular Limited Partnership. The interest in CMA 213 is held by AT&T Wireless through Pittsfield Cellular Telephone Co., and in CMA 275 by AT&T Wireless through CellTel Co. Such interests may be made passive to satisfy the requirements of this Order in one of two ways. The Applicants may treat such assets as part of the Divestiture Assets and dispose of them in the same way as any of the other Divestiture Assets herein. As an alternative, the Applicants may elect to retain such interests, provided that they demonstrate to the Wireless Telecommunications Bureau, after such bureau has consulted with the Office of General Counsel, that the retained minority interest will become irrevocably and entirely passive and will not significantly diminish competition. If the Applicants elect to retain their interests, the Applicants must demonstrate that the interests have been made irrevocably and entirely passive within three calendar days from the date of release of this Order.

### **C. Other Remedies**

267. We condition our grant of this transaction on the consummation of two related transactions: (1) the Joint Venture Unwind agreement between Cingular and T-Mobile, as described in Section II.B.2., above, and discussed in Section V.A.3.d., above; and (2) AT&T Wireless's agreement with Triton, as described in Section II.B.3., above, and discussed in Section V.A.3.d., above. In addition, the Applicants committed to a restriction on Cingular's participation in our upcoming Auction 58. We condition our grant of this transaction on Cingular being so restricted, as described in Section V.A.3.d.,

<sup>598</sup> See discussion *supra* Section V.A.3.d.(ii).

above. Finally, we condition our grant of this transaction on the imposition of a condition regarding manual roaming, as described in Section V.A.3.c.(ii), above.

## VII. REQUESTS FOR WAIVER OF THE CELLULAR CROSS-INTEREST RULE

268. As part of the Application, the Applicants are seeking a waiver of section 22.942 of the Commission's rules ("Cellular Cross-Interest Rule")<sup>599</sup> to allow Cingular to acquire from subsidiaries of AT&T Wireless cellular licenses in eleven rural service areas ("RSAs").<sup>600</sup> Under this rule, which is still technically in effect but which the Commission has recently decided to eliminate, Cingular is prohibited from acquiring the cellular A-block licenses currently held by AT&T Wireless subsidiaries,<sup>601</sup> because Cingular subsidiaries hold the cellular B-block licenses in parts of these eleven RSAs.<sup>602</sup> In the *Rural Report and Order*, the Commission decided to eliminate the Cellular Cross-Interest Rule in favor of the case-by-case analysis used in reviewing the competitive effects of all assignment and transfer of control applications, pursuant to section 310(d) of the Communications Act.<sup>603</sup> The Commission found that reliance on case-by-case review for aggregations of spectrum and cellular cross interests is a better approach than utilizing a prophylactic rule,<sup>604</sup> because "the public interest is better served by the benefits of case-by-case review with its greater degree of flexibility to reach the appropriate decision in each case, reduced likelihood of prohibiting beneficial transactions or levels of investment both in urban and rural areas, and ability to account for the particular attributes of a transaction or market."<sup>605</sup> We have performed such review of these markets in the context of our general case-by-case analysis of this transaction, and have made individual judgments regarding any potential harms and the need for any remedies in these markets. Given that the Commission has decided to eliminate the rule and it remains in force only due to a procedural consideration,<sup>606</sup> we hereby waive the rule wherever necessary to effect the

<sup>599</sup> 47 C.F.R. § 22.942. The Cellular Cross-Interest Rule states that an entity "that actually controls a licensee for one channel block in a [cellular geographic service area ("CGSA")] may not have a direct or indirect ownership interest of more than 5 percent in the licensee, ... or entity that actually controls a licensee for the other channel block in an overlapping CGSA." 47 C.F.R. § 22.942. The Commission, however, has stated that it will entertain and grant waivers of this rule if there is no "significant likelihood of substantial competitive harm." 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, WT Docket No. 01-14, *Report and Order*, 16 FCC Rcd. 22,668, 22,669 2 (2001).

<sup>600</sup> See Application, Exhibit 1, at 43.

<sup>601</sup> The licenses for which a waiver of section 22.942 is requested are: KNKN833 (CMA357, Connecticut 1 – Litchfield); KNKN555 (CMA360, Florida 1 – Collier), KNKQ386 and KNKQ421 (CMA361, Florida 2 – Glades); KNKN738 (CMA363, Florida 4 – Citrus); KNKN550 and KNKQ422 (CMA364, Florida 5 – Putnam); KNKN627 (CMA598, Oklahoma 3 – Grant); KNKN472 (CMA657, Texas 6 – Jack); KNKN428 (CMA662, Texas 11 – Cherokee); KNKN456 (CMA669, Texas 18 – Edwards); KNKN525 (CMA670, Texas 19 – Atascosa); and KNKN452 (CMA671, Texas20 – Wilson).

<sup>602</sup> Application, Exhibit 1, at 43. The cellular A- and B-block overlaps occur in 53 counties which are contained in parts of these eleven RSAs. See Application, Exhibit 1, at 49.

<sup>603</sup> Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, WT Docket No. 02-381, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-166, at 36, 39 ¶¶ 63-64, 68 (rel. Sept. 27, 2004) ("*Rural Report and Order*") ("We believe that no cross interest or transaction should be presumptively prohibited in RSAs and that we should consider such proposals under an approach that is consistent with the same case-by-case analysis that is employed in all other CMRS contexts").

<sup>604</sup> *Id.* at 36 ¶ 63.

<sup>605</sup> *Id.* at 38 ¶ 67.

<sup>606</sup> The Cellular Cross-Interest Rule will be eliminated on 60 days after the *Rural Report and Order* is published in the Federal Register. *Id.* at 88 ¶ 180.

market-specific judgments we have made above.

### VIII. CONCLUSION

269. As discussed above, we find that competitive harm is unlikely in most mobile telephony markets as a result of this transaction, primarily because of the presence of multiple other carriers who have the ability to act as effective competitive constraints on the behavior of the merged entity. Therefore, while the structure of these markets will change as a result of the transaction, we find that carrier conduct will remain sufficiently competitive to ensure that market performance will not be impaired, and, given the expected benefits, the public interest will be enhanced on balance. However, with regard to local mobile telephony markets, our case-by-case analysis shows that likely competitive harms exceed likely benefits of the transaction, and we therefore require remedies to ameliorate the expected harm and thereby ensure that carrier conduct in these markets will likewise remain effectively competitive and that market performance will not be impaired

270. We emphasize that our judgment in this matter does not mean that our analysis would be the same if additional consolidation in this sector were to be proposed in the future. Clearly, there is a point beyond which further consolidation would not be in the public interest. As we have here, when reviewing any future applications of this nature we will look closely at the competitive circumstances pertaining at that time in the affected markets and will make a considered judgment based on careful weighing of all the relevant circumstances.

### IX. ORDERING CLAUSES

271. Accordingly, having reviewed the applications, the petitions, and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the transfer of control of licenses from AT&T Wireless to Cingular ARE GRANTED, to the extent specified in this order and subject to the conditions specified below.

272. IT IS FURTHER ORDERED that, pursuant to sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), and sections 0.331 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 0.331 and 1.925, the Request for Waiver of the Commission's Cellular Cross-Interest Rule, 47 C.F.R. § 22.942, IS GRANTED.

273. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the *pro forma* transfer of control of minority interests held by AT&T Wireless to Cingular ARE GRANTED, to the extent specified in this order and subject to the conditions specified below.

274. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the *pro forma* assignment and transfer of control of licenses to effectuate the reorganization of Cingular ARE GRANTED.

275. IT IS FURTHER ORDERED that the above grant shall include authority for Cingular to acquire control of: (a) any license or authorization issued to AT&T Wireless and its subsidiaries during the Commission's consideration of the transfer of control applications or the period required for consummation of the transaction following approval; (b) construction permits held by such licensees that mature into licensees after closing; and (c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

276. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of

1934, as amended, 47 U.S.C. § 214, and section 63.18 of the Commission's rules, 47, C.F.R. § 63.18, the application to transfer control of AT&T Wireless's international Section 214 authorization to provide global resale service and limited global facilities-based service, excluding the U.S.-South Africa route, to Cingular Wireless Corporation is GRANTED subject to the conditions applicable to international section 214 authorizations.

277. IT IS FURTHER ORDERED that, pursuant to section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and section 63.10 of the Commission's rules, 47, C.F.R. § 63.10, AT&T Wireless Services, Inc. SHALL BE CLASSIFIED as a dominant international carrier in the provision of service on the U.S.-South Africa route.

278. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the assignment of licenses from Cingular to T-Mobile ARE GRANTED.

279. IT IS FURTHER ORDERED that, pursuant to sections 1.9005 and 1.9030 of the Commission's rules, 47 C.F.R. §§ 1.9005, 1.9030, the applications filed by T-Mobile and Cingular to implement long-term *de facto* spectrum leasing arrangements ARE GRANTED.

280. IT IS FURTHER ORDERED that the licenses to be acquired and the leases to be entered into by T-Mobile are subject to compliance with the provisions of the Agreement between Deutsche Telekom AG, VoiceStream Wireless Corporation, and VoiceStream Wireless Holding Corporation on the one hand, and the Department of Justice and the Federal Bureau of Investigation on the other, dated January 12, 2001, which Agreement is designed to address national security, law enforcement, and public safety issues of the FBI and the DOJ regarding the authority granted herein. Nothing in the Agreement is intended to limit any obligation imposed by Federal law or regulation including, but not limited to, 47 U.S.C. § 222(a) and (c)(1) and the Commission's implementing regulations.

281. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the application for the assignment of a license from Lafayette to Triton and the applications for the exchange of licenses between Triton and AT&T Wireless ARE GRANTED.

282. IT IS FURTHER ORDERED that the grant of the transfer of control of licenses from AT&T Wireless to Cingular is conditioned upon consummation of the T-Mobile Cingular Joint Venture Unwind and AT&T Wireless's agreement with Triton.

283. IT IS FURTHER ORDERED that the Commission's grant of the transfer of control of licenses from AT&T Wireless to Cingular is conditioned upon the completion of the divestitures described in Section VI.

284. IT IS FURTHER ORDERED that the grant of the transfer of control of licenses from AT&T Wireless to Cingular is conditioned upon Cingular's commitment not to apply to bid in Auction 58 for any license in any BTA in which Cingular controls or has a 10 percent or greater interest in 70 MHz or more of cellular and/or PCS spectrum.

285. IT IS FURTHER ORDERED that, with respect to roaming, Cingular may not prevent its customers from completing calls in the manner contemplated in 47 C.F.R. § 20.12(c), unless specifically requested to do so by a subscriber.

286. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petitions to Deny the transfer of control of licenses and authorizations from AT&T Wireless to Cingular filed by AW

Acquisition Corp., Pace Communications Services Corporation, Edward Garcia dba Comm One Systex of Ohio and Conn One Wireless of Chicago, Ed Wicks dba Mercedes Wireless, Inc., Kempner Mobile Electronics, Inc., and Airborne Beepers and Video, Inc.; William Burnley; Cellular Emergency Alert Service Association; Consumer Federation of America and Consumers Union; Richard Giandomenica; Andrew Shepherd; and Thrifty Call, Inc. are DENIED for the reasons stated herein.

287. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A  
LIST OF COMMENTERS****Petitions to Deny Filed by:**

1. AW Acquisition Corp., Pace Communications Services Corporation, Edward Garcia dba Comm One Systex of Ohio and Conn One Wireless of Chicago, Ed Wicks dba Mercedes Wireless, Inc., Kempner Mobile Electronics, Inc., and Airborne Beepers and Video, Inc.\*
2. William Burnley\*
3. Cellular Emergency Alert Service Association\*
4. Consumer Federation of America and Consumers Union\*
5. Richard Giandomenico\*
6. Andrew Shepherd\*
7. Thrifty Call, Inc.\*

**Comments Filed by:**

1. Alabama National Emergency Number Association
2. American Farm Bureau Federation
3. Marsha Biancota
4. City of Tulsa Oklahoma, Telecommunications and Information Services Department, Public Safety Communications Division
5. ComCARE Alliance
6. Communications Workers of America\*
7. CompTel/ASCENT
8. Connecticut Police Chiefs Association
9. Office of the Washington State Attorney General, Consumer Protection Division \*
10. Etowah County Communications District
11. First Cellular of Southern Illinois
12. Representative Tre Hargett, Republican Leader, Tennessee House of Representatives
13. Highland Cellular, LLC\*
14. Lee County Communications Center
15. Lexington Fayette Urban County Government
16. Massachusetts High Technology Council
17. Mississippi Farm Bureau Federation
18. Chris Nascimento
19. National Emergency Number Association

20. National Emergency Number Association, Pennsylvania State Chapter
21. National Spinal Cord Injury Association
22. Donald R. Newcomb\*
23. Richard O'Krepki
24. Representative David W. Palsrok, Michigan House of Representatives
25. Craig Paul\*
26. Wayne Perry, Edge Wireless
27. Public Service Communications, Rural Telecommunications Group, National Telecommunications Cooperative Association, and Organization for the Promotion and Advancement of Small Telecommunications Companies
28. Representative Roger Roy, Chairman, Telecommunications, Internet and Technology Committee, Delaware House of Representatives
29. Rural Enterprises of Oklahoma Incorporated
30. B.J. Sanchez
31. Self Help for Hard of Hearing People (SHHH)\*
32. Small Business Survival Committee\*
33. South Carolina Farm Bureau Federation
34. State of Connecticut, Department of Public Safety, Division of Fire, Emergency and Building Services, Office of Statewide Emergency Telecommunications
35. Bill Stoval, Speaker of the House Designate, Arkansas House of Representatives
36. Representative Brad Street, Michigan House of Representatives
37. Richard N. Taylor, ENP
38. Tennessee Emergency Number Association
39. Marlin Todd\*
40. Town of Manchester
41. United States Cellular Corporation (USCC)\*

**Joint Opposition to Petitions to Deny and Comments Filed by:**

1. Cingular and AT&T Wireless

**Reply Comments Filed by:**

1. Alliance for Public Technology\*

2. AW Acquisition Corp., Pace Communications Services Corporation, Edward Garcia dba Comm One Systex of Ohio and Conn One Wireless of Chicago, Ed Wicks dba Mercedes Wireless, Inc., Kempner Mobile Electronics, Inc., and Airborne Beepers and Video, Inc.
3. Cellular Emergency Alert Systems Association
4. Cingular and AT&T Wireless
5. CompTel/ASCENT Alliance
6. Consumer Federation of America and Consumers Union
7. Dobson Communications Corporation\*
8. Kempner Mobile Electronics, Inc.
9. Lucent Technologies, Inc.\*
10. Rural Cellular Corporation (RCC)\*
11. Thrifty Call, Inc.
12. T-Mobile USA, Inc.

\* Pleadings filed during comment period.

**APPENDIX B  
LIST OF RESPONSES****Responses from AT&T Wireless:**

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 15, 2004) (providing data and narrative responses to the Commission’s June 30, 2004 Information Request).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 15, 2004) (providing the documents responsive to the Commission’s June 30, 2004 Information Request on compact discs).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 16, 2004) (providing a portion of the boxes containing the documents responsive to the Commission’s June 30, 2004 Information Request).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 22, 2004) (providing additional documents on compact discs responsive to the Commission’s June 30, 2004 Information Request).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 22, 2004) (replacing hard drives containing responses to the Commission’s June 30, 2004 Information Request with new hard drives).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 26, 2004) (providing a portion of the boxes containing the documents responsive to the Commission’s June 30, 2004 Information Request).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 6, 2004) (providing the remaining boxes containing the documents responsive to the Commission’s June 30, 2004 Information Request).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 17, 2004) (providing reformatted compact disks responsive to the Commission’s June 30, 2004 Information Request).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 23, 2004) (replacing incorrect August 17, 2004 compact disks with corrected and reformatted versions).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 31, 2004) (responding to inquiries concerning intermodal competition).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 7, 2004) (responding to inquiries regarding business plans from the Wireline Competition Bureau).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 10, 2004) (providing revised data files requested by Martin Perry).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 20, 2004) (providing revised data files requested by Martin Perry).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 23, 2004) (submitting copies of agreements).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, and Brian F. Fontes, Vice President-Federal Relations, to Erin McGrath, Assistant Division Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 5, 2004) (providing information regarding license, network, and service coverage areas)

### **Responses from Cingular:**

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Mar. 22, 2004) (providing data and written responses to the Commission's June 30, 2004 Information Request).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (July 14, 2004) (submitting boxes, on behalf of Cingular, containing a portion of the documents and document production summary responsive to the Commission's June 30, 2004 Information Request).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 15, 2004) (providing data and written responses to the Commission's June 30, 2004 Information Request).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (July 15, 2004) (submitting boxes, on behalf of Cingular and SBC, containing a portion of the documents and document production summary responsive to the Commission's June 30, 2004 Information Request).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (July 15, 2004) (submitting boxes, on behalf of Cingular and BellSouth, containing a portion of the documents and document production summary responsive to the Commission's June 30, 2004 Information Request).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (July 15, 2004) (submitting copies of documents, on behalf of Cingular, SBC, and BellSouth, on compact discs responsive to the Commission's June 30, 2004 Information Request).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 16, 2004) (submitting compact disks of materials supplementing July 15, 2004 response).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 19, 2004) (supplementing and replacing certain exhibits on compact discs associated with Cingular's July 15, 2004 response).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 3, 2004) (supplementing Cingular's July 15, 2004 response with price plan data and more granular data on compact disks).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 9, 2004) (supplementing Cingular's July 15, 2004 response with additional price plan information on compact discs).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 19, 2004) (supplementing Cingular's July 15, 2004 response with additional information on compact discs).

Letter from David G. Richards, Cingular Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 19, 2004) (responding to questions posed by the Wireless Telecommunications Bureau regarding unilateral effects).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 23, 2004) (providing color copies of select pages of Cingular's July 15, 2004 response).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 23, 2004) (supplementing Cingular's July 15, 2004 response).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 27, 2004) (responding to questions posed by the Wireline Competition Bureau).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 30, 2004) (submitting corrected August 19, 2004 information supplementing and correcting minor errors in data in Cingular's July 15, 2004 response).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 30, 2004) (supplementing Cingular's July 15, 2004 response with information regarding handset availability and measurements of capacity).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 30, 2004) (supplementing Cingular's July 15, 2004 response).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 2, 2004) (supplementing Cingular's July 15, 2004 response).

Letter from David G. Richards, Cingular Wireless, to Erin McGrath, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 2, 2004) (responding to inquiries from the Wireline Competition Bureau).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 22, 2004) (submitting copies of partnership agreements).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 23, 2004) (submitting additional materials relating to the partnership agreements submitted on September 22, 2004).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 29, 2004) (informing the Commission of a swap of minority partnership interests).

Letter from Douglas I. Brandon, Vice President – External Affairs & Law, AT&T Wireless, and Brian F. Fontes, Vice President-Federal Relations, to Erin McGrath, Assistant Division Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 5, 2004) (providing information regarding license, network, and service coverage areas)

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Erin McGrath, Assistant Division Chief, Spectrum and Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 12, 2004) (responding to questions regarding NRUF data).

Letter from L. Andrew Tollin, counsel to Cingular Wireless Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 13, 2004) (providing confidential material to the Commission).

Letter from Brian F. Fontes, Vice President-Federal Relations, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 18, 2004) (providing written responses to questions posed by Commission Staff regarding Cingular's subscriber data).

#### **Response from ALLTEL:**

Letter from Glenn S. Rabin, Vice President, Federal Communications Counsel, ALLTEL Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 2, 2004) (providing ALLTEL's response to July 16, 2004 Information Request).

#### **Responses from Nextel:**

Letter from To-Quyen T. Truong, counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 12, 2004) (submitting Nextel's first response to the July 16, 2004 Information Request).

Letter from To-Quyen T. Truong, counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 27, 2004) (submitting Nextel's second response to the July 16, 2004 Information Request).

Letter from To-Quyen T. Truong, counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 10, 2004) (submitting Nextel's third response to the July 16, 2004 Information Request).

Letter from To-Quyen T. Truong, counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 14, 2004) (submitting Nextel's fourth response to the July 16, 2004 Information Request).

Letter from To-Quyen T. Truong, counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 15, 2004) (submitting Nextel's fifth response to the July 16, 2004 Information Request).

Letter from To-Quyen T. Truong, counsel to Nextel Communications, Inc., to Susan Singer Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 24, 2004) (submitting Nextel's sixth response to the July 16, 2004 Information Request).

**Responses from T-Mobile:**

Letter from Cheryl A. Tritt, counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (July 24, 2004) (reporting a call seeking clarification of July 16, 2004 letter and requesting an extension of reply date).

Letter from Cheryl A. Tritt, counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 4, 2004) (submitting copies of documents and information responsive to the July 16, 2004 letter).

Letter from Cheryl A. Tritt, counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 8, 2004) (submitting supplemental materials responsive to the July 16, 2004 letter).

**Responses from Sprint:**

Letter from Roger C. Sherman, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 27, 2004) (reporting a call seeking clarification of July 16, 2004 letter and requesting an extension of reply date).

Letter from Roger C. Sherman, Senior Attorney, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 19, 2004) (submitting information responsive to the July 16, 2004 letter).

**Responses from USCC:**

Letter from Mark D. Schneider, counsel to United States Cellular Corporation, to Susan Singer, Wireless Telecommunications Bureau, Federal Communications Commission (July 30, 2004) (submitting a portion of the information responsive to the July 16, 2004 letter and requesting additional time to provide the remaining information).

Letter from Mark D. Schneider, counsel to United States Cellular Corporation, to Susan Singer, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 6, 2004) (supplementing July 30, 2004 response).

Letter from Mark D. Schneider, counsel to United States Cellular Corporation, to Susan Singer, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 24, 2004) (delivering the remaining information requested in the July 16, 2004 letter).

**Responses from Verizon Wireless:**

Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 6, 2004).

Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 13, 2004).

Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 23, 2004).

Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 2, 2004) (providing a portion of the information requested in the Commission's July 16, 2004 Information Request).

Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless, to Erin McGrath, Assistant Chief, Mobility Division, Wireless Telecommunications Bureau, Federal Communications Commission (Sept. 24, 2004) (providing a portion of the information requested in the Commission's July 16, 2004 Information Request).

**APPENDIX C**  
**LIST OF MARKETS IDENTIFIED FOR FURTHER ANALYSIS BY INITIAL SCREEN**

**CEAs:**

CEA	Name
CEA0120	Albany, GA
CEA0220	Alexandria, LA
CEA0240	Allentown-Bethlehem-Easton, PA
CEA0440	Ann Arbor, MI
CEA0450	Anniston, AL
CEA0480	Ashville, NC
CEA0500	Athens, GA
CEA0520	Atlanta, GA-AL-NC
CEA0600	Augusta-Aiken, GA-SC
CEA0640	Austin-San Marcos, TX
CEA0680	Bakersfield, CA
CEA0720	Baltimore, MD
CEA0743	Barnstable-Yarmouth, MA
CEA0760	Baton Rouge, LA-MS
CEA0840	Beaumont-Port Arthur, TX
CEA0860	Bellingham, WA
CEA0920	Biloxi-Gulfport-Pascagoula, MS
CEA1000	Birmingham, AL
CEA1020	Bloomington, IN
CEA1123	Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH-RI
CEA1145	Brazoria, TX
CEA1150	Bremerton, WA
CEA1240	Brownsville-Harlingen-San Benito, TX
CEA1260	Bryan-College Station, TX
CEA1350	Casper, WY-ID-UT
CEA1440	Charleston-North Charleston, SC
CEA1520	Charlotte-Gastonia-Rock Hill, NC-SC
CEA1560	Chattanooga, TN-GA
CEA1600	Chicago, IL
CEA1620	Chico-Paradise, CA
CEA1640	Cincinnati, OH-KY-IN
CEA1660	Clarksville-Hopkinsville, TN-KY
CEA1740	Columbia, MO
CEA1760	Columbia, SC
CEA1880	Corpus Christi, TX
CEA1920	Dallas, TX-OK
CEA2000	Dayton-Springfield, OH
CEA2020	Daytona Beach, FL
CEA2030	Decatur, AL

CEA	Name
CEA2160	Detroit, MI
CEA2190	Dover, DE
CEA2320	El Paso, TX
CEA2440	Evansville-Henderson, IN-KY-IL
CEA2560	Fayetteville, NC
CEA2580	Fayetteville-Springdale-Rogers, AR-MO-OK
CEA2650	Florence, AL
CEA2655	Florence, SC
CEA2680	Fort Lauderdale, FL
CEA2710	Fort Pierce-Port St. Lucie, FL
CEA2720	Fort Smith, AR-OK
CEA2750	Fort Walton Beach, FL
CEA2800	Fort Worth-Arlington, TX
CEA2840	Fresno, CA
CEA2880	Gadsden, AL
CEA2900	Gainesville, FL
CEA2960	Gary, IN
CEA2975	Glens Falls, NY
CEA2980	Goldboro, NC
CEA3120	Greensboro-Winston-Salem-Hight Point, NC-VA
CEA3160	Greenville-Spartanburg-Anderson, SC-NC
CEA3200	Hamilton-Middletown, OH
CEA3240	Harrisburg-Lebanon-Carlisle, PA
CEA3283	Hartford-New Britain-Middletown-Bristol, CT
CEA3350	Houma, LA
CEA3360	Houston, TX
CEA3440	Huntsville, AL-TN
CEA3480	Indianapolis, IN
CEA3560	Jackson, MS-LA
CEA3580	Jackson, TN
CEA3600	Jacksonville, FL-GA
CEA3605	Jacksonville, NC
CEA3620	Janesville-Beloit, WI
CEA3660	Johnson City-Kingsport-Bristol, TN-VA
CEA3710	Joplin, MO-KS-OK
CEA3800	Kenosha, WI
CEA3810	Killeen-Temple, TX
CEA3840	Knoxville, TN
CEA3880	Lafayette, LA
CEA3920	Lafayette, IN
CEA3960	Lake Charles, LA
CEA4000	Lancaster, PA
CEA4080	Laredo, TX
CEA4120	Las Vegas, NV-AZ-UT

CEA	Name
CEA4280	Lexington, KY-TN-VA-WV
CEA4400	Little Rock-North Little Rock, AR
CEA4420	Longview-Marshall, TX
CEA4480	Los Angeles-Long Beach, CA
CEA4520	Louisville, KY-IN
CEA4680	Macon, GA
CEA4720	Madison, WI
CEA4880	McAllen-Edinburg-Mission, TX
CEA4900	Melbourne-Titusville-Palm Bay, FL
CEA4920	Memphis, TN-AR-MS-KY
CEA4940	Merced, CA
CEA5000	Miami, FL
CEA5015	Middlesex-Somerset-Hunterdon, NJ
CEA5080	Milwaukee-Waukesha, WI
CEA5160	Mobile, AL
CEA5170	Modesto, CA
CEA5200	Monroe, LA
CEA5280	Muncie, IN
CEA5330	Myrtle Beach, SC
CEA5345	Naples, FL
CEA5360	Nashville, TN-KY
CEA5483	New Haven-Bridgeport-Stamford-Danbury-Waterbury, CT
CEA5523	New London-Norwich, CT
CEA5560	New Orleans, LA-MS
CEA5640	Newark, NJ-PA
CEA5775	Oakland, CA
CEA5790	Ocala, FL
CEA5880	Oklahoma City, OK
CEA5910	Olympia, WA
CEA5945	Orange County, CA
CEA5960	Orlando, FL
CEA5990	Owensboro, KY
CEA6080	Pensacola, FL
CEA6120	Peoria-Pekin, IL
CEA6160	Philadelphia, PA-NJ
CEA6240	Pine Bluff, AR
CEA6323	Pittsfield, MA-VT
CEA6483	Providence-Warwick-Pawtucket, RI
CEA6580	Punta Gorda, FL
CEA6680	Reading, PA
CEA6720	Reno, NV-CA
CEA6740	Richland-Kennewick-Pasco, WA
CEA6780	Riverside-San Bernardino, CA-AZ

CEA	Name
CEA6920	Sacramento, CA
CEA7000	St. Joseph, MO-KS
CEA7040	St. Louis, MO-IL
CEA7120	Salinas, CA
CEA7160	Salt Lake City-Ogden, UT-ID
CEA7200	San Angelo, TX
CEA7240	San Antonio, TX
CEA7320	San Diego, CA
CEA7360	San Francisco, CA
CEA7400	San Jose, CA
CEA7480	Santa Barbara-Santa Maria-Lompoc, CA
CEA7485	Santa Cruz-Watsonville, CA
CEA7500	Santa Rosa, CA
CEA7510	Sarasota-Bradenton, FL
CEA7520	Savannah, GA-SC
CEA7600	Seattle-Bellevue-Everett, WA
CEA7640	Sherman-Denison, TX-OK
CEA7680	Shreveport-Bossier City, LA-AR
CEA7920	Springfield, MO
CEA8003	Springfield, MA
CEA8120	Stockton-Lodi, CA
CEA8140	Sumter, SC
CEA8320	Terre Haute, IN-IL
CEA8360	Texarkana, TX-Texarkana, AR-AR-OK
CEA8440	Topeka, KS
CEA8480	Trenton, NJ
CEA8560	Tulsa, OK-KS
CEA8600	Tuscaloosa, AL
CEA8640	Tyler, TX
CEA8680	Utica-Rome, NY
CEA8720	Vallejo-Fairfield-Napa, CA
CEA8735	Ventura, CA
CEA8750	Victoria, TX
CEA8780	Visalia-Tulare-Porterville, CA
CEA8800	Waco, TX
CEA8840	Washington, DC-MD-VA-WV
CEA8960	West Palm Beach-Boca Raton, FL
CEA9160	Wilmington-Newark, DE-MD
CEA9200	Wilmington, NC
CEA9260	Yakima, WA
CEA9270	Yolo, CA
CEA9280	York, PA
CEA9340	Yuba City, CA
CEA9504	Jonesboro, AR-MO

<b>CEA</b>	<b>Name</b>
CEA9515	Paducah, KY-IL
CEA9516	Bowling Green, KY
CEA9518	Salisbury, MD-DE-VA
CEA9524	Hattiesburg, MS
CEA9526	Meridian, MS-AL
CEA9527	Tupelo, MS-AL-TN
CEA9528	Greenville, MS
CEA9528	Greenville, MS
CEA9559	Lufkin, TX
CEA9566	Bluefield, WV-VA

**CMAs:**

<b>CMA</b>	<b>Name</b>
CMA002	Los Angeles-Long Beach/Anaheim
CMA003	Chicago, IL
CMA004	Philadelphia, PA
CMA005	Detroit/Ann Arbor, MI
CMA006	Boston-Lowell-Brockton-Lawrence-Haverhill, MA-NH
CMA007	San Francisco-Oakland, CA
CMA008	Washington, DC-MD-VA
CMA009	Dallas-Fort Worth, TX
CMA010	Houston, TX
CMA011	St. Louis, MO-IL
CMA012	Miami-Fort Lauderdale-Hollywood, FL
CMA014	Baltimore, MD
CMA017	Atlanta, GA
CMA018	San Diego, CA
CMA020	Seattle-Everett, WA
CMA021	Milwaukee, WI
CMA023	Cincinnati, OH-KY-IN
CMA027	San Jose, CA
CMA028	Indianapolis, IN
CMA029	New Orleans, LA
CMA032	Hartford-New Britain-Bristol, CT
CMA033	San Antonio, TX
CMA035	Sacramento, CA
CMA036	Memphis, TN-AR-MS
CMA037	Louisville, KY-IN
CMA038	Providence-Warwick-Pawtucket, RI
CMA039	Salt Lake City-Ogden, UT
CMA040	Dayton, OH

<b>CMA</b>	<b>Name</b>
CMA041	Birmingham, AL
CMA045	Oklahoma City, OK
CMA046	Nashville-Davidson, TN
CMA048	Toledo, OH-MI
CMA049	New Haven-West Haven-Waterbury-Meriden, CT
CMA051	Jacksonville, FL
CMA054	Gary-Hammond-East Chicago, IN
CMA055	Worcester-Fitchburg-Leominster, MA
CMA057	Tulsa, OK
CMA058	Allentown-Bethlehem-Easton, PA
CMA060	Orlando, FL
CMA061	Charlotte-Gastonia, NC
CMA062	New Brunswick-Perth Amboy-Sayreville, NJ
CMA067	Greenville-Spartanburg, SC
CMA069	Wilmington, DE-NJ-MD
CMA071	Raleigh-Durham, NC
CMA072	West Palm Beach-Boca Raton, FL
CMA073	Oxnard-Simi Valley-Ventura, CA
CMA074	Fresno, CA
CMA075	Austin, TX
CMA076	New Bedford-Fall River, MA
CMA079	Knoxville, TN
CMA080	Baton Rouge, LA
CMA083	Mobile, AL
CMA084	Harrisburg, PA
CMA085	Johnson City-Kingsport-Bristol, TN
CMA087	Canton, OH
CMA088	Chattanooga, TN-GA
CMA090	Charleston-North Charleston, SC
CMA091	San Juan-Caguas, PR
CMA092	Little Rock-North Little Rock, AR
CMA093	Las Vegas, NV
CMA095	Columbia, SC
CMA097	Bakersfield, CA
CMA099	York, PA
CMA100	Shreveport, Louisiana
CMA101	Beaumont-Port Arthur, TX
CMA105	Lancaster, PA
CMA106	Jackson, MS
CMA107	Stockton, CA
CMA108	Augusta GA/SC
CMA111	Vallejo-Fairfield-Napa, CA
CMA112	Corpus Christi, TX
CMA113	Madison, WI

<b>CMA</b>	<b>Name</b>
CMA115	Utica-Rome, NY
CMA116	Lexington-Fayette, KY
CMA118	Reading, PA
CMA119	Evansville, IN/KY
CMA120	Huntsville, AL
CMA121	Trenton, NJ
CMA123	Santa Rosa-Petaluma, CA
CMA124	Santa Barbara-Santa Maria-Lompoc, CA
CMA126	Salinas-Seaside-Monterey, CA
CMA127	Pensacola, FL
CMA128	McAllen-Edinburg-Mission, TX
CMA136	Lorain-Elyria, OH
CMA137	Melbourne-Titusville-Palm Bay, FL
CMA142	Modesto, CA
CMA145	Hamilton-Middletown, OH
CMA146	Daytona Beach, FL
CMA147	Ponce, PR
CMA149	Fayettesville, NC
CMA150	Visalia-Tulare-Porterville, CA
CMA154	New London-Norwich, CT
CMA155	Savannah, GA
CMA160	Killeen-Temple, TX
CMA163	Springfield, MO
CMA165	Fort Smith AR-OK
CMA167	Sarasota, FL
CMA169	Mayaguez, PR
CMA171	Reno, NV
CMA174	Lafayette, LA
CMA175	Santa Cruz, CA
CMA179	Topeka, KS
CMA180	Springfield, OH
CMA182	Fayetteville-Springdale, AR
CMA183	Ashville, NC
CMA184	Houma-Thibodaux, LA
CMA185	Terre Haute, IN
CMA191	Yakima, WA
CMA194	Waco, TX
CMA197	Lake Charles, LA
CMA202	Arecibo, PR
CMA204	Aguadilla, PR
CMA205	Alexandria, LA
CMA206	Longview-Marshall, TX
CMA208	Fort Pierce, FL
CMA209	Clarksville-Hopkinsville, TN/KY

<b>CMA</b>	<b>Name</b>
CMA211	Bradenton, FL
CMA212	Bremerton, WA
CMA213	Pittsfield, MA
CMA214	Richland-Kennewick-Pasco, WA
CMA215	Chico, CA
CMA216	Janesville-Beloit, WI
CMA217	Anderson, IN
CMA218	Wilmington, NC
CMA219	Monroe, LA
CMA222	Tuscaloosa, AL
CMA226	Florence, AL
CMA227	Anderson, SC
CMA234	Athens, GA
CMA236	Muncie, IN
CMA237	Tyler, TX
CMA239	Joplin, MO
CMA242	Olympia, WA
CMA244	Kenosha, WI
CMA245	Ocala, FL
CMA247	Lafayette, IN
CMA249	Anniston, AL
CMA252	Pascagoula, MI
CMA254	Redding, CA
CMA258	Jacksonville, NC
CMA264	Florence, SC
CMA265	Fort Walton Beach, FL
CMA266	Glens Falls, NY
CMA270	Bellingham, WA
CMA271	Kokomo, IN
CMA272	Gadsden, AL
CMA274	Yuba City, CA
CMA275	St. Joseph, MO
CMA277	Sheboygan, WI
CMA278	Columbia, MO
CMA280	Burlington, NC
CMA281	Laredo, TX
CMA282	Bloomington, IN
CMA287	Bryan-College Station, TX
CMA291	Pine Bluff, AR
CMA292	Sherman-Denison, TX
CMA293	Owensboro, KY
CMA300	Victoria, TX
CMA303	Aurora-Elgin, IL
CMA304	Joliet, IL

<b>CMA</b>	<b>Name</b>
CMA307	Alabama 1 - Franklin
CMA326	Arkansas 3 - Sharp
CMA327	Arkansas 4 - Clay
CMA328	Arkansas 5 - Cross
CMA329	Arkansas 6 - Cleburne
CMA330	Arkansas 7 - Pope
CMA331	Arkansas 8 - Franklin
CMA333	Arkansas 10 - Garland
CMA334	Arkansas 11 - Hempstead
CMA335	Arkansas 12 - Ouachita
CMA339	California 4 - Madera
CMA343	California 8 - Tehama
CMA345	California 10 - Sierra
CMA346	California 11 - El Dorado
CMA347	California 12 - Kings
CMA357	Connecticut 1 - Litchfield
CMA359	Delaware 1 - Kent
CMA360	Florida 1 - Collier
CMA361	Florida 2 - Glades
CMA362	Florida 3 - Hardee
CMA363	Florida 4 - Citrus
CMA364	Florida 5 - Putnam
CMA371	Georgia 1 - Whitfield
CMA373	Georgia 3 - Chattooga
CMA374	Georgia 4-Jasper
CMA378	Georgia 8-Warren
CMA381	Georgia 11 - Toombs
CMA384	Georgia 14 - Worth
CMA396	Illinois 3 - Mercer
CMA399	Illinois 6 - Montgomery
CMA407	Indiana 5 - Warren
CMA409	Indiana 7 - Owen
CMA410	Indiana 8 - Brown
CMA443	Kentucky 1 - Fulton
CMA444	Kentucky 2 - Union
CMA445	Kentucky 3 - Meade
CMA448	Kentucky 6 - Madison
CMA449	Kentucky 7 - Trimble
CMA450	Kentucky 8 - Mason
CMA452	Kentucky 10-Powell
CMA453	Kentucky 11 - Clay
CMA454	Louisiana 1 - Claiborne
CMA456	Louisiana 3 - De Soto
CMA457	Louisiana 4 - Caldwell

<b>CMA</b>	<b>Name</b>
CMA458	Louisiana 5 - Beauregard
CMA459	Louisiana 6 - Iberville
CMA460	Louisiana 7 - West Feliciana
CMA461	Louisiana 8 - St. James
CMA471	Massachusetts 2 - Barnstable
CMA493	Mississippi 1 - Tunica
CMA494	Mississippi 2 - Benton
CMA495	Mississippi 3 - Bolivar
CMA496	Mississippi 4 - Yalobusha
CMA497	Mississippi 5 - Washington
CMA498	Mississippi 6 - Montgomery
CMA499	Mississippi 7 - Leake
CMA500	Mississippi 8 - Claiborne
CMA511	Missouri 8 - Callaway
CMA514	Missouri 11 - Moniteau
CMA517	Missouri 14 - Barton
CMA521	Missouri 18 - Perry
CMA522	Missouri 19 - Stoddard
CMA545	Nevada 3 - Storey
CMA546	Nevada 4 - Mineral
CMA568	North Carolina 4-Henderson
CMA570	North Carolina 6-Chatham
CMA575	North Carolina 11-Hoke
CMA577	North Carolina 13- Greene
CMA594	Ohio 10 - Perry
CMA598	Oklahoma 3 - Grant
CMA623	Pennsylvania 12 - Lebanon
CMA625	South Carolina 1-Oconee
CMA626	South Carolina 2-Laurens
CMA627	South Carolina 3-Cherokee
CMA628	South Carolina 4-Chesterfield
CMA629	South Carolina 5-Georgetown
CMA630	South Carolina 6-Clarendon
CMA631	South Carolina 7-Calhoun
CMA632	South Carolina 8-Hampton
CMA643	Tennessee 1 - Lake
CMA646	Tennessee 4 - Hamblen
CMA647	Tennessee 5 - Fayette
CMA648	Tennessee 6 - Giles
CMA649	Tennessee 7 - Bledsoe
CMA650	Tennessee 8-Johnson
CMA651	Tennessee 9 - Maury
CMA657	Texas 6 - Jack
CMA660	Texas 9 - Runnels
CMA662	Texas 11 - Cherokee

<b>CMA</b>	<b>Name</b>
CMA663	Texas 12 - Hudspeth
CMA668	Texas 17 - Newton
CMA669	Texas 18 - Edwards
CMA670	Texas 19 - Atascosa
CMA673	Utah 1 - Box Elder
CMA674	Utah 2 - Morgan
CMA681	Virginia 1-Lee
CMA682	Virginia 2-Tazewell
CMA690	Virginia 10-Frederick
CMA691	Virginia 11 - Madison
CMA691	Virginia 11-Madison
CMA692	Virginia 12-Caroline
CMA693	Washington 1 - Clallam
CMA697	Washington 5 - Kittitas
CMA698	Washington 6 - Pacific
CMA723	Puerto Rico 1 - Rincon
CMA724	Puerto Rico 2 - Adjuntas
CMA725	Puerto Rico 3 - Ciales
CMA726	Puerto Rico 4 - Aibonito
CMA727	Puerto Rico 5 - Ceiba
CMA728	Puerto Rico 6 - Vieques
CMA729	Puerto Rico 7 - Culebra

**APPENDIX D  
MARKET-SPECIFIC ANALYSIS**

**[REDACTED]**<sup>607</sup>

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<sup>607</sup> This is a confidential exhibit which is available pursuant to the terms of the Protective Order. A redacted version of this Appendix D will be made available separately.

**APPENDIX E**  
**LIST OF T-MOBILE – CINGULAR JOINT VENTURE MARKETS**

**CEAs:**

CEA	Name
CEA0680	Bakersfield, CA
CEA1620	Chico-Paradise, CA
CEA2840	Fresno, CA
CEA4120	Las Vegas, NV-AZ-UT
CEA4480	Los Angeles-Long Beach, CA
CEA4940	Merced, CA
CEA5170	Modesto, CA
CEA5775	Oakland, CA
CEA5945	Orange County, CA
CEA6780	Riverside-San Bernadino, CA-AZ
CEA6920	Sacramento, CA
CEA7120	Salinas, CA
CEA7320	San Diego, CA
CEA7360	San Francisco, CA
CEA7400	San Jose, CA
CEA7480	Santa Barbara-Santa Maria-Lompoc, CA
CEA7485	Santa Cruz-Watsonville, CA
CEA7500	Santa Rosa, CA
CEA8120	Stockton-Lodi, CA
CEA8720	Vallejo-Fairfield-Napa, CA
CEA8735	Ventura, CA
CEA8780	Visalia-Tulare-Porterville, CA
CEA9270	Yolo, CA
CEA9340	Yuba City, CA

**CMAs:**

CMA	Name
CMA002	Los Angeles/Long Beach, CA
CMA007	San Francisco, CA
CMA018	San Diego, CA
CMA027	San Jose, CA
CMA035	Sacramento, CA
CMA073	Ventura, CA
CMA074	Fresno, CA
CMA093	Las Vegas, NV
CMA097	Bakersfield, CA

<b>CMA</b>	<b>Name</b>
CMA107	Stockton, CA
CMA111	Vallejo-Fairfield-Napa, CA
CMA123	Santa Rosa-Petaluma, CA
CMA124	Maria-Lompoc, CA
CMA126	Monterey, CA
CMA142	Modesto, CA
CMA150	Visalia-Tulare-Porterville, CA
CMA171	Reno, NV
CMA175	Santa Cruz, CA
CMA215	Chico, CA
CMA254	Redding, CA
CMA274	Yuba City, CA
CMA339	California 4-Madera
CMA343	California 8-Tehama
CMA345	California 10-Sierra
CMA346	California 11-El Dorado
CMA347	California 12-Kings
CMA545	Nevada 3-Storey
CMA546	Nevada 4-Mineral

**APPENDIX F  
LIST OF TRITON MARKETS**

**CEAs:**

CEA	Name
CEA0480	Ashville, NC
CEA0500	Athens, GA
CEA0600	Augusta-Aiken, GA-SC
CEA1440	Charleston-North Charleston, SC
CEA1760	Columbia, SC
CEA2560	Fayetteville, NC
CEA2655	Florence, SC
CEA2980	Goldsboro, NC
CEA3120	Greensboro-Winston-Salem-Hight Point, NC-VA
CEA3160	Greenville-Spartanburg-Anderson, SC-NC
CEA3605	Jacksonville, NC
CEA3660	Johnson City-Kingsport-Bristol, TN-VA
CEA5330	Myrtle Beach, SC
CEA8140	Sumter, SC
CEA9200	Wilmington, NC
CEA9528	Greenville, MS

**CMAs:**

CMA	Name
CMA067	Greenville-Spartanburg, SC
CMA085	Johnson City-Kingsport-Bristol, TN
CMA090	Charleston-North Charleston, SC
CMA095	Columbia, SC
CMA108	Augusta GA/SC
CMA149	Fayettesville, NC
CMA155	Savannah, GA
CMA183	Ashville, NC
CMA218	Wilmington, NC
CMA227	Anderson, SC
CMA234	Athens, GA
CMA258	Jacksonville, NC
CMA264	Florence, SC
CMA280	Burlington, NC
CMA374	Georgia 4-Jasper
CMA378	Georgia 8-Warren

<b>CMA</b>	<b>Name</b>
CMA452	Kentucky 10-Powell
CMA568	North Carolina 4-Henderson
CMA570	North Carolina 6-Chatham
CMA575	North Carolina 11-Hoke
CMA577	North Carolina 13- Greene
CMA625	South Carolina 1-Oconee
CMA626	South Carolina 2-Laurens
CMA627	South Carolina 3-Cherokee
CMA628	South Carolina 4-Chesterfield
CMA629	South Carolina 5-Georgetown
CMA630	South Carolina 6-Clarendon
CMA631	South Carolina 7-Calhoun
CMA632	South Carolina 8-Hampton
CMA650	Tennessee 8-Johnson
CMA681	Virginia 1-Lee
CMA682	Virginia 2-Tazewell
CMA690	Virginia 10-Frederick
CMA691	Virginia 11-Madison
CMA692	Virginia 12-Caroline

**SEPARATE STATEMENT OF  
CHAIRMAN MICHAEL K. POWELL**

*Re: Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, For Consent to Transfer of Control of Licenses and Authorizations, WT Docket No. 04-70, et al. (Adopted October 22, 2004).*

Today the Commission concludes -- with significant conditions -- that Cingular's request to combine with AT&T Wireless serves the public interest. Cingular will emerge a stronger competitor with better coverage, improved customer service and a renewed commitment to innovation. This will not only be true in the voice market but also increasingly for data. The diverse cross section of support the transaction garnered from groups with disabilities, rural carriers, as well as labor and public safety organizations aptly demonstrates its benefits.

Even in light of these attributes, the Commission concluded that the deal could not go forward absent several conditions, including: business unit divestitures in 16 markets, limits on Cingular's acquisition of spectrum in an upcoming auction, and additional spectrum divestitures. The Commission has assessed, on a market-by-market basis, whether Cingular's acquisition of AT&T's customers and spectrum holdings pose a threat to competition. Only after we looked seriously at the proposed transactions effect upon intermodal competition did we conclude that the transaction was in the public interest. We believe our conditions, combined with the benefits to the consumer experience brought by Cingular's new scale and scope, will ensure the public interest is served by this transaction. Indeed, both before and after, this transaction the wireless market is the most competitive and innovative within the Commission's jurisdiction.

In their partial dissent, my colleagues incorrectly assert that we confined our merger evaluation to wireless intramodal issues. To the contrary, I took very seriously the complex issues that arise from the combination of wireless and wireline companies. This was and will remain a matter of focus and concern. However, at the end of the day, we did not believe that the evidence in the record was sufficient to justify and substantiate additional conditions beyond those already imposed by the *Order*.

Finally, this *Order* is the culmination of an enormous amount of work by a talented and dedicated FCC staff. The researchers and drafters of this *Order* did an extraordinary job of identifying specific harms and crafting appropriate detailed conditions. It is primarily because of their dedicated efforts that we are able to bring this decision to a close today.

**STATEMENT OF  
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re: Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer of Control of Licenses And Authorizations, WT Docket No. 04-70 (adopted October 22, 2004).*

I am pleased to support this decision approving the merger of AT&T Wireless Services and Cingular Wireless, because, with the conditions we have imposed, it will lead to significant consumer benefits.

One of the real success stories of the United States telecommunications market has been the competitive nature of the wireless industry. The wireless industry, and in particular the mobile wireless sector, is a shining example of what a well-functioning market can achieve when it is not hindered by unnecessary regulation. The FCC reaffirmed in its recent annual report on the state of wireless competition that the industry has continued to show significant growth despite a difficult economic environment. More specifically, the Commission found that the wireless industry continued to innovate, offered a wider variety of service offerings, and increased the availability of its services, all while reducing the prices charged to consumers. The wireless industry by all accounts is competitive, demonstrating how market-based solutions can best serve customers. Because of competition, the Commission found that 97 percent of the total population of the United States lives in a county with access to three or more different operators offering mobile telephone service, up from 95 percent in the previous year, and up from 88 percent in 2000, the first year these statistics were kept.

It is against this competitive backdrop that I reviewed the merger of AT&T Wireless and Cingular to determine if its approval would serve the public interest, convenience, and necessity. After an extensive review of data that was submitted to the Commission to determine the competitive effects of this transaction, we have concluded that competitive harm is unlikely in most mobile telephony markets, primarily because of the presence of multiple carriers that have the capacity to add subscribers and the ability to supplement their current capacity as well. More specifically, even after the merger, 97 percent of the total U.S. population will continue to live in a county with access to three or more different operators offering mobile telephone service. In addition, populations in many other counties will have access to 4, 5, 6 or even 7 or more different mobile telephone operators.

However, our careful review of the transaction did raise competitive concerns in several mobile telephony markets where our case-by-case review revealed that likely competitive harms exceed the likely benefits of the transaction. In these markets, the divestiture conditions that we are adopting should effectively ameliorate the expected harm. Therefore, with these conditions in place, in no area of the country will harm to users of mobile telephony services result from this acquisition.

I also believe that consumers are likely to recognize many benefits in the forms of efficiencies from this merger. These include improvements in service quality that will likely arise from the combination of the applicants' network operations and spectrum holdings, more ubiquitous and robust advanced services being deployed because of the additional spectrum available to the merged entity, and the ability of the merged entity to expand into previously unserved markets, among others. In the long term, it will be competitive marketplace that determines whether the merged entity is successful.

Finally, just as this transaction will benefit consumers of wireless services, I am likewise convinced that it will not undermine competition in the wireline communications market. Opponents of the transaction raise two concerns, neither of which persuades me to oppose the merger or support additional conditions. First, some parties assert that SBC and BellSouth, Cingular's corporate parents, will have the incentive and ability to discriminate against unaffiliated wireless providers. To the extent

such an incentive exists, it is unchanged by the merger with AT&T Wireless — the BOCs' wireline operations *already* overlap substantially with Cingular's footprint. And, more importantly, section 202 of the Act squarely prohibits SBC and BellSouth from according Cingular preferential treatment, making further merger conditions unnecessary. I am committed to stringent enforcement of this statutory provision. Second, some parties contend that the withdrawal of AT&T Wireless as a competitor will give the BOCs undue dominance in the mass market. While the withdrawal of one wireless competitor from the marketplace may slightly reduce the competitive pressures confronting SBC and BellSouth in the short term, those LECs will face ample competition going forward from other wireless carriers, VoIP providers, CLECs, and others.

I therefore conclude that the transaction, with the conditions we adopt, will serve the public interest.

**STATEMENT OF FCC COMMISSIONER  
MICHAEL J. COPPS  
Approving in part, dissenting in part**

*RE: Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer of Control of Licenses and Authorizations (Memorandum Opinion & Order).*

Among the FCC's many responsibilities under the public interest merger review standard, two stand out for purposes of analyzing this particular transaction. First, we must examine whether the combination results in a level of competition adequate to protect consumers as of this moment in time and as illuminated by our retrospective data. In this Order the FCC confines that analysis to an examination of intramodal wireless competition. Second, we must examine whether the merger will make changes to the communications marketplace that endanger Congress's public interest goals more generally. For purposes of this merger, that analysis largely concerns damage to intermodal competition and the relationship between the merged entity and its wireline parents. I support the Order as it relates to intramodal competition within the wireless market. With the divestitures achieved in this order, I believe that an acceptable level of competition will continue to characterize the wireless market. I must dissent to those parts of the Order relating to the intermodal aspects of the merger, however, because of the increased potential for discrimination by the merged entities' wireline parent companies and also because I find the lack of rigorous competitive analysis troubling.

**Intramodal Competition**

I have closely examined the data that the FCC staff has presented to me. My conclusion is that after the merger, an acceptable level of intramodal competition will remain in place in the wireless market in most geographic areas. While U.S. wireless telecommunications are characterized by effective competition in most markets, the market shares of various carriers are not equally distributed. In many markets the merged entity will have a nearly 50 percent market share. In some smaller markets the entity's market share will be significantly higher. In most of these markets, however, four or more able competitors will continue to compete post-merger. Even where the market shares of these competitors are substantially below that of the merged entity, under current market conditions they retain the ability to constrain excessive pricing. These competitors stand ready to snatch away Cingular/AWE customers who would become dissatisfied if the merged entity were to raise prices too high. Today, in fact, even in markets where the pre-merger Cingular has a very high market share, it has been unable to raise prices, presumably due to this competition.

In some markets, however, the proposed merger would have created unacceptable competitive harms. The Order therefore imposes competitive remedies where markets would become dangerously concentrated post-merger. The Order concludes that even where a market contains four or more able competitors to the merged entity, if the merged entity's market share is too high, competitors would not be able to discipline behavior. In one market, for example, the merged entity's post-transaction market share would be close to 60 percent. Other substantial national carriers compete in this market; one with 18 percent, a second with 17 percent, and a third with 4 percent. In this market, despite the presence of competing carriers, the order concludes that competitors would not be able to discipline the merged entity's behavior.<sup>1</sup>

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<sup>1</sup> I have not identified the market in this example in order not to reveal proprietary information. Those with access to the unredacted version of the Order can reference the "Individual Market Analysis" to identify this market.

In other cases, even though another substantial carrier is competing, the Order concludes that “the merger would lead to an effective duopoly ... [and that] [w]e have previously been highly skeptical of mergers that would lead to a duopoly, and the courts have found that mergers to duopoly are generally unacceptable.” The Order also finds that there are markets where the merged entity would control such a large amount of spectrum that competitors would not have the spectral resources to discipline its behavior. In many of these markets, the Order requires a spectrum divestiture. In other markets it imposes a condition that the merged entity cannot participate in the upcoming Auction 58. This latter enhancement of the Order will prevent the merged entity from denying new spectrum resources to potential competitors.

In the interest of improving and quickening the review of future mergers, I must note that the data that we relied upon in making these decisions were not what they could have been. The item relies almost exclusively on the NRUF database of telephone numbers to determine market shares. I am not convinced that this database alone is adequate for this important determination. Recognizing this possibility, the Commission requested data from wireless firms about actual customers, so it would not have to rely so heavily on potentially faulty NRUF database. But today the Commission largely ignores the valuable data that we collected from carriers. Limited analysis of this data demonstrated that it might produce significantly different results than the NRUF database. Unfortunately, these important data were not made available to Commissioners. Going forward, now that we know of the potential for inconsistency in the data, we must insist upon the provision of these data and the opportunity to compare them to the NRUF database before rendering a decision. This option was unavailable to me in this case.

I also want to note that the Order includes an analysis of Cingular’s efforts to provide communications technologies to the disabilities community. I have been very favorably impressed with Cingular’s efforts and the expansion of these efforts through the merger contributes significantly in Cingular’s favor in the public interest analysis. I look forward to this work continuing in the merged entity. It is vitally important to the disability community and, indeed, to the nation.

Overall, I believe that the merger will not reduce intramodal competition in most markets to dangerous levels. It will, however, reduce this competition to some extent. The number of national carriers will shrink to five. A major competitor will disappear in hundreds of markets. The FCC has always been proud of the level of competition in the wireless market and of the fact that it has continuously grown. Here we create the potential for wireless competition to shrink, so we must now be far more vigilant to protect consumers. We are drawing down on the storehouse of intramodal competition that industry investment and wise FCC policy throughout the 1990’s created. With less competition left in the storehouse by today’s order, we need to be constantly monitoring, analyzing and preparing ourselves to deal with any competitive threats arising in the aftermath of this transaction.

### **Intermodal Competition**

Turning now to our second responsibility, the Commission must examine whether the merger will make changes to the communications marketplace that endanger public interest goals more generally. In today’s Order, this analysis largely concerns damage to intermodal competition and the relationship between the merged entity and its wireline parents.

This proceeding was harmed by the absence of rigorous analysis of the implications of this merger for intermodal competition. Again and again over the past few years the FCC has undermined competition to wireline incumbents. As a result, competitors have become far less effective. AT&T, the nation’s largest long distance competitor to the Bells, has announced huge layoffs. Indeed, the company has said that it will, amazingly, exit the residential long distance market. Nonetheless, we are told not to be alarmed or to fear that phone rates will rise—because intermodal competition will save the day. In

other words, even if there is inadequate wireline-to-wireline competition to the incumbent carriers, other competitors using non-wireline technologies will fight the Bell operating companies for customers, thereby keeping prices low.

But who will these intermodal competitors be? Someday broadband over powerline may offer real competition. But today there are less than 10,000 BPL customers in the whole country. Maybe VoIP? I have high hopes here. But we need always to remember that as end-users of facilities-based carriers, VoIP competitors are beholden to the Bell and cable companies. We can cross our fingers and hope that growing duopoly does not discriminate so as to snuff out growing competition—but absent any commitment on the part of this Commission to insist on non-discrimination rules, I remain concerned for independent VoIP providers. Additionally, all customers desiring VoIP for their voice service must subscribe to expensive broadband services. As the U.S. continues its free-fall broadband descent—we are now Number 13 in the world in penetration—and with broadband prices still out of the reach of many Americans, there is much to be done if VoIP is to fulfill its potential.

So that leaves wireless. My colleagues often point to wireless as a strong intermodal competitor. After this merger, however, the chance that wireless will compete effectively with wireline incumbents is diminished. AT&T Wireless was the largest non-Bell-affiliated wireless company in the country. Cingular and Verizon, both affiliates of BOCs, will now be the number one and two wireless carriers. Together the Bell-affiliated companies will now be more than 5 times larger than the next largest competitor.<sup>2</sup> Once Cingular acquires AT&T Wireless, more than half of all wireless customers will be controlled by the Bell companies for the first time ever. In many markets BOC control of wireless customers will be even higher.

Can we expect that Bell owned wireless carriers will compete tooth-and-nail against their wireline parents? I don't think so. Even the Order agrees: "The acquisition will also affect intermodal competition through the likelihood that Cingular will not pursue AT&T Wireless's extensive plans for wireline replacement offerings." It also notes that rather than developing products designed to compete with wireline services, "Cingular has developed and marketed many of its wireless products and services to complement – and specifically not to replace – residential wireline voice services. Cingular developed this strategy largely because SBC and BellSouth play a significant role in Cingular's business decisions." The Order continues, "it appears that Cingular is unlikely to initiate its own wireless substitute offering post-acquisition in the SBC and BellSouth regions." In other words, Bell-controlled wireless carriers will likely not be in-region intermodal competitors. Because Cingular and Verizon Wireless are the largest wireless carriers in their respective parents' wireline regions, this means that many Americans can expect intermodal competition by wireless carriers to suffer from this merger.

Despite these concerns, the Order devotes a mere 13 paragraphs of a more than 100 page order to the intermodal competition that stands at the center of so much of this Commission's competition philosophy. In the end the Order dismisses the problem posed by the merger by asserting that wireless was never really an intermodal competitor after all because "most wireline customers do not now consider wireless service to be a close substitute in the antitrust sense for their primary line obtained from a wireline carrier," and because "there remain qualitative differences between wireless and wireline services." I guess this means we won't be hearing so much rhetoric in the future about the power of wireless as an intermodal competitor.

I also believe that the FCC should have followed the precedent of past mergers by including a non-discrimination condition. Specifically, the Commission should have prohibited SBC and BellSouth,

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<sup>2</sup> Securities and Exchange Commission, "Carrier Subscribers and Capital Expenditures," Second Quarter 2004.

in regions where they are the wireline incumbent, from discriminating against Cingular's wireless competitors. Today's Order allows Cingular to combine with AT&T Wireless in many markets where the merged entity will have a very large market share compared to its nearest wireless competitor. In theory, such a market still will be characterized by adequate competition. This is because if the merged entity raises prices above a certain level, its customers will be able to leave and sign up with a competitor. In order for competitors to be able to discipline the merged entity's behavior in this way, however, competitors must have the ability to absorb customers who want to leave because of the higher prices.

In order for wireless competitors to ramp up to compete with the merged entity in such a situation, competitors will need to purchase inputs from a wireline carrier in the market at issue, unless they have excess capacity currently laying fallow. Even if they have excess capacity, they must rely on a wireline carrier to maintain their current service without raising prices. In particular, if special access or interconnection is offered to an independent wireless carrier at higher rates or with less favorable terms or conditions compared with a Bell-affiliated wireless carrier, the independent carrier will find it extremely difficult to provide a competitive check on the affiliated carrier. If the incumbent wireline carrier controls the largest wireless carrier in a region, it has an incentive to provide superior special access and interconnection rates, terms, and conditions to its affiliate. That is because by crippling potential competitors it will enhance its affiliate's profits and thereby enhance its own profits. We could have made it clear that such behavior is unacceptable by including a non-discrimination condition in this merger. I welcome my colleagues' assertion that Section 202 already prohibits such behavior. The test will come when we are asked to use Section 202 to combat discrimination. The history here is not encouraging and I would have much preferred to be explicit so we would have a more powerful tool if and when we are presented with such a challenge.

To conclude, despite inadequate analysis and too dismissive an attitude toward the danger to intermodal competition posed by this merger, I welcome the Commission's strong warning about the future. "We caution, however, that we may take a different view with regard to any future transactions that would diminish significantly the ability of independent wireless carriers to offer intermodal alternatives to wireline service. At this time, we recognize that there are benefits to consumers from both wireline replacement offerings and complement offerings. We intend to monitor carefully further developments in this marketplace that may affect intermodal competition, and to consider carefully future transactions that may impede our efforts in that regard. The Commission has worked hard to create the regulatory conditions for robust intermodal competition, and it remains strongly committed to achieving that important policy goal." I agree.

**SEPARATE STATEMENT OF  
COMMISSIONER KEVIN J. MARTIN**

*Re: Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent To Transfer of Control of Licenses and Authorizations, Memorandum Opinion and Order, WT Docket No. 04-70*

The wireless industry is the poster child for the success of competition. There are now more than 161 million wireless subscribers in this country. There are over 205,000 jobs in the wireless industry. The industry has invested more than \$146 billion. 96.8% of the population live in counties with three or more wireless competitors. 93% live in counties with four or more. With this merger vigorous competition will remain.

As the Order explains, we find that the license transfers at issue are in the public interest and that competitive harm is unlikely in most markets. We also find that any potential public interest harm to competition in the wireline market is mitigated by the limited level of wireless-wireline competition.

These were difficult issues, as was deciding the appropriate divestitures and merger conditions. In the end, however, I think we put appropriate protections in place to address any concerns. Accordingly, I support this Order.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
APPROVING IN PART, DISSENTING IN PART**

*Re: Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation,  
For Consent to Transfer of Control of Licenses and Authorizations;  
WT Docket No. 04-70 et al*

I generally approve this merger because I believe it will create a stronger, more vibrant provider of mobile wireless communications. Our deliberation has been a challenging one, though, and I am pleased that, with one notable exception, we generally have imposed conditions appropriate for a merger of this magnitude.

The growth of mobile wireless services over the last 10 years has been historic. Offering what was once considered a luxury item, only affordable to a few, the mobile wireless industry now serves more than 169 million customers – over a 50 percent penetration rate. Millions of customers have even “cut the cord,” forgoing or canceling their wireline service in favor of going exclusively wireless. We frequently hear about customers substituting wireline minutes with wireless ones as “bucket” and nationwide calling plans are exploited by subscribers.

Competition has been the key driver of this growth. Without competition, we simply would not be where we are today. The Commission’s policies encouraged innovation and development, and the mobile wireless industry responded with vigorous competition. It has been an unabashed success.

So now we have before us a merger of historic proportions. And it is up to this Commission to ensure that the competition that has benefited not only U.S. consumers, but the U.S. economy, is maintained. I take this charge seriously, and have viewed this merger through a number of different lenses. I have tried to consider the impact on customers in our larger, more populated cities, as well as those living in rural America. I have listened to groups representing our nation’s disabled community, as well as those advocating on behalf of competitive carriers and rural wireless companies. This merger touches on so many different stakeholders, and it is crucial to make sure that everyone is given fair consideration.

At bottom, I support a large portion of this merger because for the most part the public interest benefits outweigh a number of the concerns identified in the item. I am hopeful about the creation of a stronger, more vibrant competitor that will dedicate its resources to provide better wireless service in more areas of the country. Cingular already has launched a campaign to work with its partners in rural America to push out the deployment of third generation wireless services. This is a positive development, and I believe the merger before us will drive wireless broadband services deeper and farther across America.

I have heard the loud chorus of supporters of this merger. For example, several of the nation’s disability advocates support the merger and its impact on accessibility of telecommunications products and services for people with disabilities. We also have heard from many public safety entities that the merger will continue the increasingly rapid deployment of wireless E911 services. Union leaders have promoted the merger as being good for the economy and our nation’s workers. Finally, a number of rural wireless carriers believe that the merger will improve wireless services in rural areas because the merged entity will be a more effective provider across the country and thus a more effective partner in rural areas.

Of course, a merger of this size requires a vigorous review to ensure that we do not inadvertently disadvantage the very communities we are trying to protect. An unchecked merger of this type could harm the competitive environment in some communities in ways that the market is unlikely to overcome.

Initially, it was unclear if our analysis took full advantage of the data available to us given time constraints, but I am pleased that we made some progress over the last few days by conducting a further review of some of the most sensitive markets affected by this merger.

That is why I fully support our decision to require divestiture in the markets identified in the item. While I have lingering concerns that the item does not dig deep enough, I think that with our recent work, we have done our best to ensure that few, if any, markets have fallen through the cracks. I appreciate very much the efforts of the Commission staff in pulling this information together, and am pleased that my colleagues were willing to consider additional divestiture actions.

I also am pleased that we have accepted an offer from the applicants to limit the ability of the merged entity to participate in Auction 58 with respect to a handful of markets. This is a simple but meaningful step that allows this transaction to go forward while ensuring that the merged entity does not gain even more spectrum within certain in-region markets so shortly after this massive transaction. In these limited markets, we ensure that a competitor will secure the Auction 58 spectrum, which will in turn appropriately protect competition in these markets.

Unfortunately, the majority falls short in addressing the impact of the improved market position and incentives of Cingular and its parent companies in the SBC and BellSouth regions. In many major in-region markets, Cingular now will have almost half of the mobile wireless market share. And in allowing the acquisition of AT&T Wireless, we permanently remove an independent source of competition to Cingular, SBC and BellSouth.

The majority declines to adopt any condition to ensure that intermodal competition does not disproportionately suffer as a result of our approval of the merger. They do so even though the item itself concludes that intermodal competition will suffer as a result of this merger. I find the unwillingness to confront this issue far too short-sighted for a Commission that is perfectly willing to look prospectively towards communications landscapes on the horizon when that approach is more convenient. For example, we could have dug deeper into bundling issues and tried to determine how we can minimize the competitive impact of the merger on this expanding market, as even the item recognizes that wireless-wireline bundling may be a significant product offering in the future. Ultimately, there were reasonable alternatives available to the Commission to guard against the merger's potentially negative impact on competition, but the majority declines to adopt any such protective measures.

As a result, Cingular, not to mention SBC and BellSouth, essentially gets a "pass" from the majority on these intermodal competition issues. For this reason, I must dissent in part from the item. I can only hope that, notwithstanding our rushed review, intermodal competition will not disproportionately suffer, and that the treatment of the next such merger application will be more considered.

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

In the Matter of
Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations
Application of Cricket License Company, LLC and Leap Licenseco Inc. for Consent to Assignment of Authorization
WT Docket No. 13-193

MEMORANDUM OPINION AND ORDER

Adopted: March 13, 2014

Released: March 13, 2014

By the Acting Chief, Wireless Telecommunications Bureau, and Chief, International Bureau:

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**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we approve, subject to conditions, the applications of AT&T Inc. (“AT&T”) and Leap Wireless International, Inc. (“Leap”) (together, the “Applicants”) for Commission consent to the transfer of control of, and assignment of, a number of AWS-1, PCS, and associated microwave licenses and international section 214 authorizations from Leap’s subsidiaries, Cricket License Company, LLC and STX Wireless License, LLC, to AT&T.

2. As a result of the proposed transaction, approximately 4.6 million customers, as well as spectrum, network equipment, and other assets, will be transferred from Leap to AT&T. Based on our analysis, we find that the proposed transaction has the potential to cause some competitive and other public interest harms in several local markets, as well as to value-conscious consumers. The possibility of public interest harms resulting from the proposed transaction would likely be counterbalanced to some degree by certain claimed public interest benefits. Even taking into consideration those benefits, however, we remain concerned about the potential for the proposed transaction to result in certain public interest harms.

3. AT&T has made certain voluntary commitments, however, that will ameliorate the potential public interest harms and that will help to ensure the achievement of the asserted public interest benefits. Those commitments include spectrum divestitures in certain markets, which will help ensure that AT&T’s competitors have access to spectrum. AT&T has also made commitments to deploy LTE service using unused Leap spectrum within 90 days or 12 months of closing, which will ensure that that spectrum is being deployed and that consumers in the current Leap service areas will benefit from network improvements to AT&T’s advanced 4G network technologies. AT&T has also made commitments to build out LTE service in six specific markets in south Texas within 18 months, which will ensure that consumers in those markets have access to advanced 4G services. In addition, AT&T has committed to offer certain rate plans targeted to help value-conscious and Lifeline customers. AT&T also has agreed to offer a device trade-in credit program and a feature phone device trade-in program to certain Leap customers prior to discontinuing CDMA service in a particular area in order to ensure that Leap

customers have future access to wireless service. The commitments providing for spectrum divestitures, the deployment of unused spectrum, the build out of LTE service, rate plans, and customer migration will all apply to south Texas markets. They will ameliorate the potential harms and ensure public interest benefits in those markets by, among other things, ensuring that AT&T has every incentive to provide higher quality service, and minimizing customer dislocations that might result from the proposed transaction. In addition, in order to ensure that CDMA roaming services remain available while AT&T transitions Leap's CDMA network, AT&T has made a commitment to honor existing CDMA roaming agreements that AT&T is assuming from Leap so long as it operates the CDMA network. Finally, AT&T has offered a commitment to dispose of Leap's interests in a competitive wireless telecommunications provider if they are not sold prior to closing as well as certain other commitments to protect against possible anticompetitive effects before those interests are sold.

4. Based on our review of the record and in light of these commitments, which become conditions to our approval, we find that the public interest benefits of the proposed transaction outweigh the likelihood of significant public interest harms, such that overall, the proposed transaction is in the public interest.

## II. BACKGROUND

### A. Description of the Applicants

#### 1. AT&T

5. AT&T, headquartered in Dallas, Texas, is a communications holding company that ranks among the leading providers of telecommunications services in the United States.<sup>1</sup> As of December 31, 2013, AT&T reported 110 million wireless subscribers, and approximately \$70 billion in wireless service revenues, which accounted for approximately 54 percent of total revenues.<sup>2</sup> AT&T's nationwide wireless network currently covers approximately 308 million people, or 99.9 percent of the population of the mainland United States.<sup>3</sup> AT&T reports that it covers all major metropolitan areas and nearly 280 million people with its fourth generation Long Term Evolution ("LTE") mobile technology, and the company expects to cover 300 million people by the summer of 2014.<sup>4</sup> In May of 2013, AT&T announced the creation of Aio Wireless, a subsidiary of AT&T offering prepaid wireless service "to value-conscious customers interested in an unlimited talk/text/data plan with no annual contract."<sup>5</sup> Aio Wireless service is currently available nationwide to customers who order online, although Aio Wireless only has dealers in a limited number of markets.<sup>6</sup>

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<sup>1</sup> See AT&T Inc., SEC Form 10-K, at 1 (filed Feb. 21, 2014) ("AT&T 10-K"), available at <http://www.sec.gov/Archives/edgar/data/732717/000073271714000010/0000732717-14-000010-index.htm>.

<sup>2</sup> See AT&T Inc. 2013 Annual Report, Ex. 13 (filed Feb. 21, 2014), at 1, 5, available at <http://www.sec.gov/Archives/edgar/data/732717/000073271714000010/ex13.htm>.

<sup>3</sup> Of the 308 million people covered by its wireless network, AT&T covers 304.9 million people with 3G, 299.4 million people with High Speed Packet Access+ ("HSPA+"), and 266.8 million people with LTE. Mosaik Solutions Data ("Mosaik"), January 2014.

<sup>4</sup> See AT&T 10-K at 2.

<sup>5</sup> See Aio Wireless™ Announces New Nationwide Voice and Data Service (May 9, 2013), available at <http://www.att.com/gen/press-room?pid=24185&cdvn=news&newsarticleid=36421&mapcode=> (last visited Feb. 20, 2014).

<sup>6</sup> See Aio Wireless™ Available Soon for All U.S. Customers (Aug. 29, 2013), available at <http://www.att.com/gen/press-> (continued....)

## 2. Leap Wireless

6. Leap, headquartered in San Diego, California, provides wireless services in the United States under the Cricket brand.<sup>7</sup> For the fiscal year 2013, Leap reported approximately \$2.90 billion in revenues.<sup>8</sup> As of December 31, 2013, Leap had approximately 4.6 million customers.<sup>9</sup> As of the same date, Leap held licenses covering approximately 137 million people, of whom approximately 97 million are covered by Leap's network footprint.<sup>10</sup> The Applicants contend that Leap is not a nationwide facilities-based provider and has no current plans to become one; it has attempted to expand its retail footprint through a 3G Mobile Virtual Network Operator ("MVNO") arrangement, but has attracted a relatively small number of customers.<sup>11</sup>

### B. Description of the Transaction

7. On August 1, 2013, AT&T and Leap filed the Applications<sup>12</sup> pursuant to sections 214 and 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), seeking Commission consent to the transfer of control of, and assignment of, a number of principally AWS-1, PCS, and associated microwave licenses and international section 214 authorizations. The Applications are part of AT&T's agreement to acquire Leap in an all-cash transaction.<sup>13</sup> The total cash consideration is \$15 per share and expected to be approximately \$1.3 billion, and AT&T would acquire all of Leap's outstanding indebtedness.<sup>14</sup> Leap had a net debt of approximately \$2.7 billion as of June 30, 2013.<sup>15</sup> Leap will become a wholly-owned subsidiary of AT&T.<sup>16</sup>

8. In the proposed transaction, AT&T is proposing to acquire 10 to 50 megahertz of spectrum in 1,354 counties in 356 Cellular Market Areas nationwide.<sup>17</sup> Post-transaction, in markets in

(Continued from previous page) \_\_\_\_\_  
 room?pid=24753&cdvn=news&newsarticleid=36953&mapcode=consumer%7Cfinancial (last visited Feb. 20, 2014).

<sup>7</sup> Lead Application, Exhibit 1, Description of Transaction, Public Interest Showing and Related Demonstrations at 1 ("Public Interest Statement").

<sup>8</sup> See Leap Wireless International, Inc., LLC, SEC Form 10-K, at 43 (filed Mar. 6, 2014) ("Leap 10-K"), available at <http://www.sec.gov/Archives/edgar/data/1065049/000106504914000003/leap-december2013q4x10k.htm> (last visited Mar. 10, 2014).

<sup>9</sup> See Leap 10-K at 4.

<sup>10</sup> See Public Interest Statement at 1.

<sup>11</sup> See *id.* at 10-11.

<sup>12</sup> A list of the Applications is contained in Appendix A.

<sup>13</sup> See Public Interest Statement at 2.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See Public Interest Statement at 2. AT&T's agreement with Leap requires Leap to dispose of its ownership interest in PR Wireless, LLC. *Id.* at 2 n. 7. On March 5, 2014, PR Wireless repurchased all of the interests in PR Wireless that were held by Cricket Communications, Inc. See Letter from James H. Barker, Esq. and Elizabeth R. Park, Esq., counsel for Leap Wireless International, Inc. and Cricket Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193 (filed Mar. 7, 2014).

<sup>17</sup> See AT&T Inc., Leap Wireless International, Inc., Cricket License Company, LLC, And Leap Licenseco, Inc. Seek Consent To The Transfer Of Control of AWS-1 Licenses, PCS Licenses, And Common Carrier Fixed Point- (continued....)

which there is geographical overlap, the merged entity would hold 46 to 180 megahertz of spectrum covering approximately 137 million people, or approximately 44 percent of the population of the continental United States.<sup>18</sup> Leap covers approximately 31 percent of the population nationwide with its network footprint; 100 percent of this population is also covered by AT&T.<sup>19</sup> The Applicants assert that the proposed transaction would combine AT&T's nationwide network with Leap's prepaid/no-contract business to the benefit of consumers seeking a high-quality, competitively-priced prepaid wireless experience.<sup>20</sup> Further, according to the Applicants, the transaction will result in an improved network experience for customers of both companies.<sup>21</sup> The Applicants also contend AT&T can make use of Leap's PCS and AWS-1 spectrum more efficiently to enhance AT&T's LTE deployment.<sup>22</sup> The Applicants contend as well that the transaction will result in substantial operating synergies and substantial savings in roaming and resale expenses because the combined company will offer a significantly greater on-net footprint and expanded coverage compared to Leap's current network.<sup>23</sup>

9. In addition to cash, Leap's shareholders will each receive a contingent value right ("CVR"), that will entitle them to net proceeds received from the sale of Leap's Lower 700 MHz A Block license in Chicago (the "Chicago License").<sup>24</sup> Leap Licenseco, a subsidiary of AT&T, will become the licensee for the Chicago License.<sup>25</sup> According to the Applicants, however, Laser, Inc. ("Laser"), a newly formed indirect, wholly-owned subsidiary of AT&T, will serve as the stockholders' representative and will exercise *de facto* control over the Chicago License.<sup>26</sup> The stockholders' representative will have the power to make all decisions and to act on behalf of and as agent for the CVR holders, including the authority to conduct a sale process with respect to the Chicago License for the benefit of the former Leap shareholders.<sup>27</sup> If the stockholders' representative fails to enter into an agreement to sell the Chicago License within two years after the closing of the AT&T/Leap transaction (or if an agreement has been entered into, but the Chicago License has not been sold by the third anniversary of the closing of the AT&T/Leap transaction), then AT&T will have the right to sell the license, and the net proceeds will go to the former Leap shareholders.<sup>28</sup>

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To-Point Microwave Licenses, and International 214 Authorizations, and the Assignment of One 700 MHz License, WT Docket No. 13-193, *Public Notice*, 28 FCC Rcd 12776, 12777 (WTB IB 2013) ("*Accepted for Filing PN*").

<sup>18</sup> *See id.*

<sup>19</sup> *See* Mosaik, January 2014.

<sup>20</sup> *See* Public Interest Statement at 7-13.

<sup>21</sup> *See id.* at 13.

<sup>22</sup> *See id.* at 13-17.

<sup>23</sup> *See id.* at 19-20.

<sup>24</sup> *See* Public Interest Statement at 3.

<sup>25</sup> *See id.*

<sup>26</sup> *See id.*

<sup>27</sup> *See id.* In addition, as part of the stockholders' representative's responsibility for maintaining the Chicago License, Laser will have the authority to enter into a consensual arrangement to address the technical issues relating to the digital television protection criteria applicable to the Channel 51 broadcast station signal adjacent to the Chicago License. *Id.*

<sup>28</sup> *See* Public Interest Statement at 3.

10. Cricket Communications, Inc. (“CCI”), a subsidiary of Leap, has been a minority owner of Flat Wireless, LLC (“Flat”), since 2010.<sup>29</sup> Flat is a regional wireless telecommunications provider that operates in Texas, Colorado, Arizona, and California.<sup>30</sup> CCI currently holds [BEGIN CONFIDENTIAL INFORMATION]

[END

CONFIDENTIAL INFORMATION].<sup>31</sup> In its Public Interest Statement, the Applicants represented that Leap was contractually committed to dispose of its interest in Flat prior to closing on the proposed transaction.<sup>32</sup> AT&T, however, has recently informed the Commission that it has agreed to waive that condition prior to consummation of this transaction.<sup>33</sup> There is a dispute between CCI and Flat about the ability of CCI to dispose of its membership interests in Flat.<sup>34</sup> An arbitrator has stayed the disposition of CCI’s interests in Flat pending resolution of the arbitration.<sup>35</sup>

### C. Transaction Review Process

11. On August 1, 2013, the Applicants filed the Applications. On August 20, 2013, the Applicants amended the Applications to make a supplemental filing providing additional information requested by staff.<sup>36</sup> On August 28, 2013, the Commission released a public notice announcing acceptance of the Applications for filing and establishing a pleading cycle, with petitions to deny due September 27, 2013, oppositions due October 7, 2013, and replies due October 15, 2013.<sup>37</sup> Due to the government shutdown, the pleading schedule was revised; oppositions were due October 23, 2013, and replies were due October 31, 2013.<sup>38</sup> In response to the Comment Public Notice, the Commission received eight petitions and one comment, a Joint Opposition from the Applicants, and seven replies.<sup>39</sup>

<sup>29</sup> See Letter from Donald J. Evans, Esq., counsel for Flat Wireless, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193, at 1 (filed Jan. 6, 2014) (“Jan. 6, 2014 Flat Wireless *Ex Parte*”).

<sup>30</sup> Jan. 6, 2014 Flat Wireless *Ex Parte* at 1.

<sup>31</sup> See *id.* Leap responds that “Cricket has irrevocably and forever waived” its interest in those warrants. See Letter from James H. Barker, Esq. and Alexander Maltas, Esq., counsel for Leap Wireless International, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193, at 2-3 (filed Jan. 16, 2014) (“Leap January 16, 2014 *Ex Parte*”).

<sup>32</sup> See Public Interest Statement at 2 n.7.

<sup>33</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 2 (updated Mar. 11, 2014).

<sup>34</sup> Jan. 6, 2014 Flat Wireless *Ex Parte* at 2. See also Leap January 16 *Ex Parte* at 2.

<sup>35</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 2.

<sup>36</sup> Applications, Letter from William E. Cook, Jr., Esq., counsel for AT&T and James H. Barker, Esq., counsel for Leap Wireless International, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Aug. 20, 2013) (“Aug. 20, 2013 Applicants Supplemental Response”).

<sup>37</sup> *Accepted for Filing PN.*

<sup>38</sup> Revised Filing Deadlines Following Resumption Of Normal Commission Operations, *Public Notice*, 28 FCC Rcd 14091, 14092 (CGB EB IB MB PS&HSB WTB WCB OET OGC OMD 2013).

<sup>39</sup> A list of filings in this proceeding is contained in Appendix B. On November 4, 2013, The Greenlining Institute reported that, based on discussions it had with AT&T, it no longer opposed the Applications, so long as there was no material change in the transaction, and subject to the following conditions: (1) Cricket will remain an ETC in California and will continue to offer the federal Lifeline discount to existing and new Lifeline-eligible customers who reside in the geographic area served by Cricket’s facilities-based CDMA network at merger closing for a period of eighteen months after merger close; (2) In any application to relinquish Cricket’s ETC status in California, the (continued....)

We address issues raised in these filings below.<sup>40</sup>

12. On August 29, 2013, the Wireless Telecommunications Bureau (“WTB” or “the Bureau”) released a public notice announcing that Numbering Resource Utilization and Forecast (“NRUF”) reports and local number portability (“LNP”) data would be placed into the record and adopted a protective order pursuant to which the Applicants and third parties would be allowed to review the specific NRUF reports and LNP data placed into the record.<sup>41</sup> Also, on November 8, 2013, pursuant to section 308(b) of the Communications Act, the Bureau requested additional information and documents from AT&T and Leap.<sup>42</sup> The Bureau also released protective orders to ensure that any confidential or proprietary documents submitted to the Commission would be adequately protected from public disclosure, and to announce the process by which interested parties could gain access to confidential information filed in the record.<sup>43</sup>

### III. STANDARD OF REVIEW

13. Pursuant to sections 214(a) and 310(d) of the Act,<sup>44</sup> we must determine whether the Applicants have demonstrated that the proposed transfer of control of licenses and authorizations will serve the public interest, convenience, and necessity. In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act,<sup>45</sup> other applicable

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 effective date will be no earlier than eighteen months after merger close; and (3) Every six months, AT&T California executives, including AT&T California President Ken McNeely, will meet with Greenlining's Executive Director, Orson Aguilar, and members of the Greenlining Coalition. At these meetings, AT&T California will provide updates on AT&T's commitments. These meetings will occur for a period of at least eighteen months after merger close. Based upon those representations, Greenlining no longer opposes the transaction. See Letter from Orson Aguilar, Executive Director, The Greenlining Institute to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Nov. 4, 2013).

<sup>40</sup> As a preliminary matter, Maneesh Pangasa urged the Commission to combine its review of the AT&T/ATN transaction and this proposed transaction. That request is now moot. See Maneesh Pangasa Statement for the Record (filed Sep. 9, 2013).

<sup>41</sup> See Applications of AT&T, Leap Wireless International, Inc., Cricket License Company, LLC, and Leap Licenseco, Inc. For Consent to Transfer Control And Assign Licenses and Authorizations, Numbering Resource Utilization and Forecast Reports and Local Number Portability Reports to Be Placed Into the Record, Subject to Protective Order, WT Docket No. 13-193, *Public Notice*, 28 FCC Rcd 12821 (WTB 2013); Applications of AT&T, Leap Wireless International, Inc., Cricket License Company, LLC, And Leap Licenseco, Inc. For Consent to Transfer Control and Assign Licenses and Authorizations, WT Docket No. 13-193, *Protective Order*, 28 FCC Rcd 12810 (WTB 2013).

<sup>42</sup> See Letter from Jim Schlichting, Acting Chief, Wireless Telecommunications Bureau to Michael P. Goggin, AT&T Inc., WT Docket No. 13-193 (rel. Nov. 8, 2013); Letter from Jim Schlichting, Acting Chief, Wireless Telecommunications Bureau to Robert D. Irving, Jr., Leap Wireless International, Inc., WT Docket No. 13-193 (rel. Nov. 8, 2013)

<sup>43</sup> See Applications of AT&T., Leap Wireless International, Inc., Cricket License Company, LLC, and Leap Licenseco, Inc. For Consent to Transfer Control and Assign Licenses and Authorizations, WT Docket No. 13-193, *Protective Order*, 28 FCC Rcd 11796 (WTB 2013); Applications of AT&T., Leap Wireless International, Inc., Cricket License Company, LLC, and Leap Licenseco, Inc. For Consent to Transfer Control and Assign Licenses and Authorizations, WT Docket No. 13-193, *Second Protective Order*, 28 FCC Rcd 11803 (WTB 2013); AT&T-Leap, Revised Appendix A to the Second Level Protective Order, WT Docket No. 13-193, 28 FCC Rcd 15860 (WTB 2013).

<sup>44</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>45</sup> Section 310(d) requires that we consider the application as if the proposed assignee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. See, e.g., Applications of Sprint Nextel Corp. and SoftBank (continued....)

statutes, and the Commission’s rules, including whether the applicants are qualified to hold licenses.<sup>46</sup> If the transaction does not violate a statute or rule, we next consider whether the transaction could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.<sup>47</sup> We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.<sup>48</sup> The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.<sup>49</sup>

14. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.<sup>50</sup> Our public interest analysis also entails assessing whether the proposed transaction will affect the quality of communications services or result in the provision of new or additional services to consumers.<sup>51</sup> In conducting this analysis, we may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>52</sup>

15. Our competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.<sup>53</sup> The Commission and the Department of Justice (“DOJ”) each have independent authority to examine the competitive impacts of proposed communications mergers and transactions involving transfers of Commission licenses, but the standards governing the Commission’s competitive review differ somewhat from those applied by the DOJ.<sup>54</sup> Like the DOJ, the Commission considers how a transaction will affect competition by defining a relevant

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Corp. and Starburst II, Inc. for Consent to Transfer Control of Licenses and Authorizations, IB Docket No. 12-343, Memorandum Opinion and Order, *Declaratory Ruling, and Order on Reconsideration*, 28 FCC Rcd 9642, 9650, ¶ 23 (2013) (“*SoftBank-Sprint Order*”); Applications of Celco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC For Consent To Assign AWS-1 Licenses, WT Docket No. 12-4, *Memorandum Opinion and Order and Declaratory Ruling*, 27 FCC Rcd 10698, 10710 ¶ 28 (2012) (“*Verizon Wireless-SpectrumCo Order*”).

<sup>46</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9650, ¶ 23; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10710, ¶ 28; Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations, WT Docket No. 11-18, *Order*, 26 FCC Rcd 17589, 17598-99 ¶ 23 (2011) (“*AT&T-Qualcomm Order*”).

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9651, ¶ 24; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17603, ¶ 32, n.96.

<sup>51</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9651, ¶ 24; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10752, ¶ 143.

<sup>52</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9651, ¶ 24; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17599, ¶ 24.

<sup>53</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9651, ¶ 25; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10710, ¶ 29.

<sup>54</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9652 ¶ 25; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17599-600 ¶ 25; Applications of AT&T Inc. and Celco Partnership d/b/a/ Verizon Wireless, WT Docket No. 09-104, *Memorandum Opinion and Order*, 25 FCC Rcd 8704, 8717 ¶ 24 (2010) (“*AT&T-Verizon Wireless Order*”).

market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction.<sup>55</sup> The DOJ, however, reviews telecommunications mergers pursuant to section 7 of the Clayton Act, and if it sues to enjoin a merger, it must demonstrate to a court that the merger may substantially lessen competition or tend to create a monopoly.<sup>56</sup> The DOJ review is also limited solely to an examination of the competitive effects of the acquisition, without reference to diversity, localism, or other public interest considerations.<sup>57</sup> The Commission's competitive analysis under the public interest standard is somewhat broader, for example, considering whether a transaction will enhance, rather than merely preserve, existing competition, and takes a more extensive view of potential and future competition and its impact on the relevant markets.<sup>58</sup> If we are unable to find that the proposed transaction serves the public interest for any reason or if the record presents a substantial and material question of fact, we must designate the application(s) for hearing.<sup>59</sup>

16. Finally, our analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.<sup>60</sup> For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.<sup>61</sup> Our public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.<sup>62</sup> Section

<sup>55</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9652, ¶ 25; Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition For Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17462 ¶ 28 (2008) (“*Verizon Wireless-ALLTEL Order*”).

<sup>56</sup> 15 U.S.C. § 18.

<sup>57</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9652 ¶ 25; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 28.

<sup>58</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9652 ¶ 25; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17599 ¶ 25.

<sup>59</sup> 47 U.S.C. § 309(e); see also *SoftBank-Sprint Order*, 28 FCC Rcd at 9652 ¶ 25; News Corp. and DIRECTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control, MB Docket No. 07-18, *Memorandum Opinion and Order*, 23 FCC Rcd 3265, 3277 ¶ 22 (2008); Applications of EchoStar Communications Corp., General Motors Corp. and Hughes Electronics Corp., and EchoStar Communications Corp., CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002).

<sup>60</sup> See, e.g., *AT&T-Qualcomm Order*, 26 FCC Rcd at 17600 ¶ 26; Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, *Memorandum Opinion and Order*, 26 FCC Rcd 4238, 4249 ¶ 25 (2011) (“*Comcast-NBCU Order*”); *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 29; see also *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10711 ¶ 30.

<sup>61</sup> See, e.g., *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 29.

<sup>62</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9652 ¶ 25; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10711 ¶ 30; *Comcast-NBCU Order*, 26 FCC Rcd at 4249 ¶ 25; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 29; Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 04-70, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21545, ¶ 43 (2004) (“*Cingular-AT&T Wireless Order*”) (conditioning approval on the divestiture of operating units in select markets). See also Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 FCC Rcd 18025, 18115 ¶ 156 (conditioning approval on the divestiture of MCI's Internet assets); Applications of VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and (continued....)

303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.<sup>63</sup> Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”<sup>64</sup> Indeed, unlike the role of antitrust enforcement agencies, our public interest authority enables us to rely upon our extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest benefits.<sup>65</sup> In exercising this broad authority, the Commission generally has imposed conditions to confirm specific benefits or remedy specific harms likely to arise from transactions and that are related to the Commission’s responsibilities under the Act and related statutes.<sup>66</sup>

#### IV. QUALIFICATIONS OF APPLICANTS

17. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”<sup>67</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction – both the assignee and the assignor – meet the requisite qualifications requirements to hold and transfer licenses under section 310(d) and the Commission’s rules.<sup>68</sup>

18. *Discussion.* As an initial matter, we note that no parties have raised issues with respect to the basic qualifications of Leap. The Commission generally does not reevaluate the qualifications of  
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Deutsche Telekom AG, Transferee, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001) (conditioning approval on compliance with agreement with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

<sup>63</sup> 47 U.S.C. § 303(r). *See also* *SoftBank-Sprint Order*, 28 FCC Rcd at 9652, ¶ 25; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10711 ¶ 30; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17600 ¶ 26; *Comcast-NBCU Order*, 26 FCC Rcd at 4249 ¶ 25; *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station’s primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

<sup>64</sup> 47 U.S.C. § 214(c). *See also* *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, 18303 ¶ 19 (2005).

<sup>65</sup> *See, e.g., Comcast-NBCU Order*, 26 FCC Rcd at 4249 ¶ 25; Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, *Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd 12348, 12366, ¶ 33 (2008) (“*Sirius-XM Order*”); *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545, ¶ 43. *See also* *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7<sup>th</sup> Cir. 1992) (discussing Commission’s authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

<sup>66</sup> *See, e.g., Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10711 ¶ 30; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17600 ¶ 26; *Comcast-NBCU Order*, 26 FCC Rcd at 4249 ¶ 25; *Sirius-XM Order*, 23 FCC Rcd at 12366, ¶ 33; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17462 ¶ 29.

<sup>67</sup> 47 U.S.C. §§ 308, 310(d); *see also, e.g.,* Applications of GCI Communication Corp., ACS Wireless License Sub, Inc., ACS Of Anchorage License Sub, Inc., And Unicom, Inc. For Consent To Assign Licenses To The Alaska Wireless Network, LLC, WT Docket No. 12-187, 28 FCC Rcd at 10433, 10444 ¶ 28 (“*Alaska Wireless Order*”); *SoftBank-Sprint Order*, 28 FCC Rcd at 9652 ¶ 26; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10712 ¶ 33.

<sup>68</sup> *See* 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; *see also, e.g., Alaska Wireless Order*, 28 FCC Rcd at 10444-45 ¶ 28; *SoftBank-Sprint Order*, 28 FCC Rcd at 9652-53 ¶ 26; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10712 ¶ 33.

assignors unless issues related to basic qualifications have been sufficiently raised in petitions to warrant designation for hearing.<sup>69</sup> We find that there is no reason to reevaluate the requisite citizenship, character, financial, technical, or other basic qualifications under the Communications Act and our rules, regulations, and policies, of Leap.

19. In addition, no issues have been raised with respect to the basic qualifications of AT&T. AT&T previously and repeatedly has been found qualified to hold Commission licenses.<sup>70</sup> We find that there is no reason to reevaluate the requisite citizenship, character, financial, technical, or other basic qualifications under the Communications Act and our rules, regulations, and policies, of AT&T.

## V. POTENTIAL PUBLIC INTEREST HARMS

20. In reviewing applications involving a proposed transaction, the Commission evaluates the potential public interest harms, including potential competitive harms that may result from the transaction.<sup>71</sup> The Commission undertakes a case-by-case review of the competitive effects of any increase in market concentration or in spectrum holdings in the relevant markets.<sup>72</sup> The Commission's competitive analysis of wireless transactions focuses initially on markets where the acquisition of customers and/or spectrum would result in significant concentration of either or both, and thereby could lead to competitive harm.<sup>73</sup> In its analysis, the Commission has used an initial screen to help identify those markets that provide particular reason for further competitive analysis. As set out in various transactions orders, however, the Commission has not limited its consideration of potential competitive harms solely to markets identified by its initial screen, if it encounters other factors that may bear on the public interest inquiry.<sup>74</sup>

### A. Competitive Overview and Market Definitions

#### 1. Competitive Overview

21. Horizontal transactions such as the proposed transaction, in which rival firms in the same market are combining, raise potential competitive concerns when the combined entity has the incentive

<sup>69</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10445 ¶ 29; *SoftBank-Sprint Order*, 28 FCC Rcd at 9653 ¶ 27; Applications of AT&T Mobility Spectrum LLC, New Cingular Wireless PCS, LLC, Comcast Corporation, Horizon Wi-Com, LLC, NextWave Wireless, Inc., and San Diego Gas & Electric Company For Consent to Assign and Transfer Licenses, WT Docket No. 12-240, *Memorandum Opinion and Order*, 27 FCC Rcd 16459, 16466 ¶ 18 (2012) (“*AT&T-WCS Order*”).

<sup>70</sup> See, e.g., Applications of AT&T Inc., Cellco Partnership d/b/a Verizon Wireless, Grain Spectrum, LLC, and Grain Spectrum II, LLC, WT Docket No. 13-56, *Memorandum Opinion and Order*, 28 FCC Rcd 12897, 12885-86 ¶ 17 (WTB 2013) (“*AT&T-Verizon Wireless-Grain Order*”); *AT&T-WCS Order*, 27 FCC Rcd at 16466-67 ¶ 19.

<sup>71</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9656 ¶ 34; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10716 ¶¶ 47-48, 10734 ¶ 95; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17598-99 ¶ 23, 17622-23 ¶ 81.

<sup>72</sup> See, e.g., *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10716 ¶ 48; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17602 ¶ 31; Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, WT Docket No. 08-246, *Memorandum Opinion and Order*, 24 FCC Rcd 13915, 13938 ¶ 50 (2009) (“*AT&T-Centennial Order*”).

<sup>73</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9656 ¶ 34.

<sup>74</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9656 ¶ 35; *AT&T-WCS Order*, 27 FCC Rcd at 16467 ¶ 21 (recognizing the proposition that the “Commission is not . . . limited in its consideration of potential competitive harms solely to markets identified by its initial screen”); *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10716 ¶ 48; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17609-10 ¶¶ 49-50 (recognizing that up to three markets could be triggered by the screen, but considering more broadly AT&T's post-transaction holdings under 1 GHz).

and the ability, either by itself or in coordination with other service providers, to raise prices, lower quality, or otherwise harm competition in a relevant market.<sup>75</sup> To begin our market-by-market analysis, we examine the likelihood of competitive harm by first estimating the extent to which market concentration, as measured by the Herfindahl-Hirschman Index (“HHI”), would increase as a result of the proposed transaction.<sup>76</sup> We assess the potential competitive effects, post-transaction, of these increases in market concentration. In our market-by-market analysis, we also examine the likely competitive effects of an increase in spectrum holdings on the marketplace.<sup>77</sup> Spectrum is an essential input in the provision of mobile wireless services, and ensuring that sufficient spectrum is available for incumbent licensees as well as potential new entrants is critical to promoting effective competition and innovation in the marketplace.<sup>78</sup> In our final analysis of the potential effects of increased market or spectrum concentration, we consider various other factors that help to predict the likelihood of competitive harm post-transaction. These competitive variables include, but are not limited to: the total number of rival service providers; the number of rival firms that can offer competitive nationwide service plans; the coverage by technology of the firms’ respective networks; the rival firms’ market shares; the combined entity’s post-transaction market share and how that share changes as a result of the transaction; the amount of spectrum suitable for the provision of mobile telephony/broadband services controlled by the combined entity; and the spectrum holdings of each of the rival service providers.<sup>79</sup>

## 2. Market Definitions

22. We begin our competitive analysis by determining the appropriate market definitions for the proposed transaction,<sup>80</sup> including a determination of the product market, the geographic market, the input market for spectrum suitable and available for the provision of mobile wireless services, and the market participants.

23. *Product Market.* In recent transactions, the Commission has defined the product market as a combined “mobile telephony/broadband services” product market that is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services).<sup>81</sup>

24. Public Knowledge argues that the relevant market for this transaction is the market for

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<sup>75</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9656 ¶ 34; *AT&T-Centennial Order*, 24 FCC Rcd at 13931-32 ¶ 34, 13939-42 ¶¶ 54, 56-57, 59, 61, 13948 ¶ 75; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17468-69 ¶¶ 40-43, 17484-85 ¶¶ 82-83, 17487-88 ¶¶ 91-92.

<sup>76</sup> To assess whether the increase in horizontal market concentration is significant or not, we consider the absolute level of the post-transaction HHI, a widely utilized measure of market concentration, as well as the change in the HHI. See section V.B.1. *infra*.

<sup>77</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10446 ¶ 33; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10716 ¶ 48; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17602 ¶ 31.

<sup>78</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16467 ¶ 20; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10716 ¶ 48; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17601-02 ¶ 30.

<sup>79</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10454-56 ¶¶ 51-55; *AT&T-WCS Order*, 27 FCC Rcd at 16472 ¶ 34; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10725-26 ¶ 72.

<sup>80</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10447 ¶ 34; *SoftBank-Sprint Order*, 28 FCC Rcd at 9657 ¶ 36; *AT&T-WCS Order*, 27 FCC Rcd at 16468 ¶ 23.

<sup>81</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10447 ¶ 35; *SoftBank-Sprint Order*, 28 FCC Rcd at 9657 ¶ 37; *AT&T-WCS Order*, 27 FCC Rcd at 16468 ¶ 24.

prepaid wireless service.<sup>82</sup> Public Knowledge asserts that prepaid plans are distinct from postpaid plans because they often cost less, do not require lengthy contracts, and generally do not involve credit checks.<sup>83</sup> Public Knowledge cites to the Department of Justice Horizontal Merger Guidelines in support of its argument that a prepaid market for mobile wireless services exists, arguing that a hypothetical monopolist could easily and profitably impose a “small but significant and non-transitory price increase” in the prepaid market at the expense of customers.<sup>84</sup> Greenlining urges the Commission to adopt a combined mobile telephony/broadband services’ product market but recognize the existence of a separate submarket for “value-conscious services.”<sup>85</sup> Public Knowledge asserts that prepaid customers are distinct from the postpaid customers in that they may exhibit one of the following characteristics: a lower creditworthiness, lower employment rates, or less purchasing power.<sup>86</sup> Public Knowledge contends that AT&T, as well as other major providers, rely on separate stores, bands, pricing, support and service to differentiate the prepaid and postpaid markets.<sup>87</sup>

25. The Applicants argue that there is no separate product market for prepaid or “value-conscious” services.<sup>88</sup> The Applicants assert that prepaid and postpaid offerings have increasingly overlapped in terms of devices, network quality, features, and price points, and recent marketplace developments have further blurred the line between “value” and other wireless offerings.<sup>89</sup> The Applicants claim that their market observations are confirmed by an analysis of survey data that provide information on subscribers switching between post-paid and pre-paid plans.<sup>90</sup> The Applicants claim that the results of this analysis show that there is significant switching by customers from postpaid to prepaid plans, and vice versa.<sup>91</sup>

26. We decline to modify our product market definition based on the record before us, but will consider potential product differentiation in the offering of prepaid or value-conscious wireless services, as appropriate, when we analyze the competitive effects. We continue to use the product market definition that the Commission has applied in recent transactions: a combined “mobile

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<sup>82</sup> See Public Knowledge Petition to Deny at 11-14; Public Knowledge Reply at 2-6.

<sup>83</sup> See Public Knowledge Petition to Deny at 12; Public Knowledge Reply at 4-5. See also David K. Smith (“Smith”) Petition to Deny at 9.

<sup>84</sup> See Public Knowledge Petition to Deny at 3 (citing *2010 DOJ/FTC Horizontal Merger Guidelines* at section 4).

<sup>85</sup> See Greenlining Petition to Deny at 5-7.

<sup>86</sup> See Public Knowledge Petition to Deny at 4-5 (claiming that prepaid customers have substantially less average revenue per user and they are more likely to be women).

<sup>87</sup> See Public Knowledge Petition to Deny at 4-5, 13 (citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, WT Docket No. 11-186, *Sixteenth Report*, 28 FCC Rcd 3700, FCC 13-34 (Mar. 21, 2013) (“*Sixteenth Annual Competition Report*”).

<sup>88</sup> See Joint Opposition at 21-24.

<sup>89</sup> See Joint Opposition at 22. See also Israel Declaration at ¶ 13 (asserting that one historical distinction between contract and no-contract plans was that providers would offer upfront handset subsidies that were recouped via payments over the life of the contract or a penalty for early termination; however, marketplace developments largely have rendered this distinction between contract and no-contract plans moot).

<sup>90</sup> See Joint Opposition at 22-23; Israel Reply Declaration at ¶¶ 14-16. The analysis uses deactivation surveys for both AT&T and Leap as well as a general industry survey to calculate percentages of subscribers that switch from a post-paid plan to a pre-paid plan, and vice versa. See Israel Reply Declaration at ¶¶ 14-15.

<sup>91</sup> See Joint Opposition at 22-23 (citing Israel Reply Declaration at ¶¶ 14-16).

telephony/broadband services” product market that is comprised of mobile voice and data services, including mobile voice and data services provided over advanced broadband wireless networks (mobile broadband services).<sup>92</sup> As set out in prior transaction proceedings, the product market we define encompasses differentiated services (*e.g.*, voice-centric or data-centric), devices (*e.g.*, feature phone, smartphone, tablet, etc.), and contract features (*e.g.*, prepaid vs. postpaid),<sup>93</sup> which are distinctions that wireless providers often recognize in their internal analyses of the marketplace.<sup>94</sup> While such distinctions may suggest the possibility of smaller markets nested within that product market, we find it unnecessary to examine that possibility in order to analyze the potential competitive effects of the proposed transaction. We consider these aspects of product differentiation, as appropriate, when we analyze the competitive effects of the transaction within the markets we define.

27. *Geographic Markets.* In prior transactions, the Commission has found that the relevant geographic markets for certain wireless transactions generally are “local” and also has evaluated a transaction’s competitive effects at the national level where a transaction exhibits certain national characteristics that provide cause for concern.<sup>95</sup> As discussed below, for this proposed transaction, we continue to use CMAs as the local geographic markets, and in addition, analyze the nationwide competitive effects on the mobile telephony/broadband services market.<sup>96</sup>

28. Youghiogheny Communications and Public Knowledge argue that Leap is an important local and national wireless carrier and that the proposed transaction will have a harmful effect at the national level for prepaid wireless services.<sup>97</sup> The Applicants contend that it does not matter whether the geographic market is viewed as local or national in the proposed transaction because AT&T and Leap are not close competitors and, they assert, Leap exerts no influence on the competitive decision making of AT&T.<sup>98</sup>

29. Because most consumers use their mobile telephony/broadband services at or close to where they live, work, and shop, they purchase mobile telephony/broadband services from service

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<sup>92</sup> See, *e.g.*, *Alaska Wireless Order*, 28 FCC Rcd at 10447 ¶ 35; *SoftBank-Sprint Order*, 28 FCC Rcd at 9657 ¶ 37; *AT&T-WCS Order*, 27 FCC Rcd at 16468 ¶ 24.

<sup>93</sup> See, *e.g.*, *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10717 ¶ 53 n.119; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17603 ¶ 33; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13932 ¶ 37. The Commission has previously determined that there are separate relevant product markets for interconnected mobile voice and data services, and also for residential and enterprise services, but found it reasonable to analyze all of these services under a combined mobile telephony/broadband services product market. See *AT&T-Qualcomm Order*, 26 FCC Rcd at 17603 ¶33; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8721 ¶ 35; *AT&T-Centennial Order*, 24 FCC Rcd at 13932 ¶ 37.

<sup>94</sup> See, *e.g.*, ATT-FCC-001306080 at 2-5; ATT-FCC-000978727.

<sup>95</sup> See, *e.g.*, *SoftBank-Sprint Order*, 28 FCC Rcd at 9657 ¶ 38; *AT&T-WCS Order*, 27 FCC Rcd at 16468 ¶ 25; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10718 ¶ 54.

<sup>96</sup> See *e.g.*, *SoftBank-Sprint Order*, 28 FCC Rcd at 9657 ¶ 38; *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 28; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 58.

<sup>97</sup> See Public Knowledge Petition to Deny at 16 (arguing that Leap is an important disruptive force in the U.S. prepaid market); Youghiogheny Communications Petition to Deny at 3 (stating that “[t]here can be no doubt that the loss of Leap would leave a significant hole in both the national and the local market for prepaid and less costly wireless services”); Youghiogheny Communications Reply at 4-5.

<sup>98</sup> See Public Interest Statement at 23-26. See also Israel Declaration at ¶¶ 29-30, 32-38.

providers that offer and market services locally.<sup>99</sup> Service sold in distant locations is generally not a good substitute for service near a consumer's home or work.<sup>100</sup> In addition, service providers compete at the local level in terms of coverage and service quality.<sup>101</sup> Consistent with past transactions, we will use CMAs as the local geographic markets in which we analyze the potential competitive harms arising from spectrum aggregation as a result of these transactions.<sup>102</sup>

30. However, as the Commission has previously recognized, two key competitive variables – monthly prices and service plan offerings – do not vary for most providers across most geographic markets.<sup>103</sup> The four nationwide mobile telephony/broadband service providers (AT&T, Verizon Wireless, Sprint, and T-Mobile), as well as some other providers, including Leap, set the same rates for a given plan everywhere and advertise nationally.<sup>104</sup> In addition, certain key elements in the provision of mobile wireless services, such as the development of mobile broadband equipment and devices, are done largely on a national scale.<sup>105</sup>

31. For the purposes of evaluating the competitive effects of the proposed transaction, we use local geographic markets, but also analyze its potential national effects. Although the proposed transaction does not cover all markets in the United States, it does span 356 CMAs that are geographically dispersed throughout the United States, 51 of which are Top 100 markets.<sup>106</sup> Moreover, AT&T is currently the second largest nationwide service provider in the United States, and Leap, a multi-metropolitan service provider, is the sixth largest provider. Leap covers approximately 31 percent of the population nationwide with its network footprint, and 100 percent of this population is also covered by AT&T.<sup>107</sup> As a result of the proposed transaction, in the markets in which there is geographical overlap of spectrum holdings, the combined company would cover approximately 44 percent of the population in the United States.<sup>108</sup> We therefore find that, in analyzing the relevant geographic markets, it is appropriate to consider any potential competitive effects that may result from the proposed transaction on both local and national markets.

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<sup>99</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9657 ¶ 38; *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 26; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10718 ¶ 56; see also *Sixteenth Annual Competition Report*, 28 FCC Rcd at 3735 ¶¶ 22-23.

<sup>100</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10448 ¶ 37; *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 26; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10718 ¶ 56.

<sup>101</sup> See *id.*

<sup>102</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 26; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10718 ¶ 56; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17604 ¶ 34.

<sup>103</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 27; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10718 ¶ 57; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17604-05 ¶¶ 34-37.

<sup>104</sup> See, e.g., *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 27; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10718-19 ¶ 57; *Sixteenth Annual Competition Report*, 28 FCC Rcd at 3797-3818 ¶¶ 137-174.

<sup>105</sup> See *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 27; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 57.

<sup>106</sup> In those 356 CMAs, Leap holds 10 to 50 megahertz of spectrum, including 10 to 40 megahertz of spectrum in the Top 100 markets. In addition, Leap has a substantial market presence in 38 CMAs, primarily in Texas, California, Arkansas, Colorado, and Arizona, including 17 Top 100 markets (as ranked by 2010 U.S. Census data).

<sup>107</sup> See Mosaik, January 2014.

<sup>108</sup> See *Accepted for Filing PN*, 28 FCC Rcd at 12777.

32. *Input Market for Spectrum.* When a proposed transaction would increase the concentration of spectrum holdings in any local market, the Commission evaluates the acquiring firm's post-transaction holdings of spectrum that is "suitable" and "available" in the near term for the provision of mobile telephony/broadband services.<sup>109</sup> The Commission previously has determined that cellular, broadband PCS, Specialized Mobile Radio ("SMR"), and 700 MHz band spectrum, as well as Advanced Wireless Services ("AWS-1") and Broadband Radio Service ("BRS") spectrum where available,<sup>110</sup> and most recently, Wireless Communications Services ("WCS") spectrum, all meet this definition, and they have therefore been included in the initial spectrum screen.<sup>111</sup> The Commission traditionally has applied an initial screen to help identify local markets where a proposed transaction might raise particular concerns with respect to spectrum holdings.<sup>112</sup> The current screen identifies local markets where an entity would hold more than approximately one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services post-transaction.<sup>113</sup>

33. RWA and Youghioghny Communications set forth arguments regarding the type and amount of spectrum the Commission should include as suitable and available spectrum for mobile telephony/broadband services. Youghioghny Communications addresses the availability of BRS spectrum as it relates to certain markets in south Texas that are involved in the proposed transaction.<sup>114</sup> In particular, Youghioghny Communications asserts that BRS service is actually available to consumers in only three of these south Texas markets.<sup>115</sup> Concerning the south Texas markets identified in their petition,<sup>116</sup> Youghioghny Communications claims that although BRS spectrum has been "transitioned" in these markets, the spectrum is not available to consumers for mobile broadband service and therefore should not be considered "operating."<sup>117</sup> In its comments, RWA contends that the current spectrum screen should be modified to include only 14 megahertz of SMR spectrum and 70 megahertz of 700 MHz Band spectrum.<sup>118</sup>

34. For purposes of our analysis of the instant transaction, we decline to modify the current input market for spectrum and continue to apply the spectrum screen that the Commission has used in

<sup>109</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10448-49 ¶ 38; *SoftBank-Sprint Order*, 28 FCC Rcd at 9657-58 ¶ 39; *AT&T-WCS Order*, 27 FCC Rcd at 16469 ¶ 29; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 59.

<sup>110</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10449 ¶ 38; *SoftBank-Sprint Order*, 28 FCC Rcd at 9658 ¶ 39; Sprint Nextel Corporation and Clearwire Corporation Applications for Consent To Transfer Control of Licenses, Leases, and Authorizations, WT Docket No. 08-94, *Memorandum Opinion and Order*, 23 FCC Rcd 17570, 17591-92 ¶ 53 (2008).

<sup>111</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10449 ¶ 38; *SoftBank-Sprint Order*, 28 FCC Rcd at 9659-60 ¶ 42; *AT&T-WCS Order*, 27 FCC Rcd at 16470-71 ¶ 31.

<sup>112</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10449 ¶ 38; *AT&T-WCS Order*, 27 FCC Rcd at 16470 ¶ 29; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 59.

<sup>113</sup> See *Alaska Wireless Order*, 28 FCC Rcd at 10449 ¶ 38; *AT&T-WCS Order*, 27 FCC Rcd at 16470 ¶ 29; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 59; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17473 ¶ 54.

<sup>114</sup> See Youghioghny Communications Petition to Deny at 6-8, Appendix A.

<sup>115</sup> See *id.* at 6, Appendix A.

<sup>116</sup> See *id.* at Appendix A.

<sup>117</sup> See *id.* at 7, Appendix A.

<sup>118</sup> See RWA Comments at 6-7.

recent mobile wireless transactions.<sup>119</sup> Regarding Youghioghenny Communications' arguments concerning the suitability and availability of BRS spectrum, we note that, under its analysis, it does not consider BRS spectrum to be suitable and available in a county unless Clearwire is actually providing commercial service in that county.<sup>120</sup> The Commission has held that 55.5 megahertz of BRS spectrum is suitable and available in a market once the BRS spectrum in that market has transitioned to the new band plan established by the Commission in 2004.<sup>121</sup> In each of the south Texas markets identified by Youghioghenny Communications, BRS licensees have transitioned to the new band plan.<sup>122</sup> Youghioghenny Communications has failed to provide any justification for fundamentally modifying the Commission's approach and instead including spectrum in the screen in a local market only after it is being used as part of a commercial service. Concerning the other modifications of the spectrum screen, including RWA's request, we note that this issue and the type and amount of spectrum included in the input market generally, along with a range of other related issues, are being considered by the Commission in its ongoing review of its policies regarding mobile spectrum holdings.<sup>123</sup>

35. *Market Participants.* In previous transactions, the Commission has considered only facilities-based entities providing mobile telephony/broadband services using cellular, PCS, SMR, 700 MHz, AWS-1, BRS, and WCS spectrum to be market participants, but has assessed the competitive effect of MVNOs and resellers.<sup>124</sup>

36. The Applicants assert that Leap offers its facilities-based services to less than one-third of the U.S. population,<sup>125</sup> and its attempt to expand outside its retail footprint through an MVNO agreement has "fallen short of expectations."<sup>126</sup> Youghioghenny Communications argues that Leap has held itself out to be a national provider, by both its facilities-based operations and its MVNO capabilities.<sup>127</sup> Public

<sup>119</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10449 ¶ 38; *SoftBank-Sprint Order*, 28 FCC Rcd at 9659-60 ¶ 42; *AT&T-WCS Order*, 27 FCC Rcd at 16470-71 ¶ 31.

<sup>120</sup> See Youghioghenny Communications Petition to Deny at Exhibit A ("Each zip code was then run through Clearwire's online service locator (at Clearwire.com) to determine whether or not Clearwire was available in that particular area. Counties that contain zip codes with Clearwire service available contain a 'YES' under 'BRS Available?' on the above chart. Any county listed with a 'NO' in the BRS column did not have Clearwire service available in any of the zip codes within its boundaries.")

<sup>121</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9658 n.120; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17606 n.120.

<sup>122</sup> See post-transition notifications filed in WT Docket No. 06-136.

<sup>123</sup> See generally Policies Regarding Mobile Spectrum Holdings, WT Docket No. 12-269, *Notice of Proposed Rulemaking*, 27 FCC Rcd 11710 (2012) ("*Mobile Spectrum Holdings NPRM*"). In the *Mobile Spectrum Holdings NPRM*, the Commission noted that during the pendency of the rulemaking proceeding, it would continue to apply its current case-by-case approach to evaluate mobile spectrum holdings in secondary market transactions and initial spectrum licensing after auctions. See *Mobile Spectrum Holdings NPRM*, 27 FCC Rcd 11710, 11718 ¶ 16 n.59. See also *AT&T-WCS Order*, 27 FCC Rcd at 16470 ¶ 30.

<sup>124</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10449-50 ¶ 41; *SoftBank-Sprint Order*, 28 FCC Rcd at 9660 ¶ 43; Applications of Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. for Consent to Transfer of Control of Licenses and Authorizations, WT Docket No. 12-301, *Memorandum Opinion and Order and Declaratory Ruling*, 28 FCC Rcd at 2333-34 ¶ 34, 2334-5 ¶ 37 (WTB, IB 2013) ("*T-Mobile-MetroPCS Order*").

<sup>125</sup> See Public Interest Statement at ii.

<sup>126</sup> See *id.* at 11.

<sup>127</sup> See Youghioghenny Communications Petition to Deny at 3.

Knowledge contends that MVNOs are dependent on the networks of facilities-based providers and they are fundamentally limited in the ways they can compete with facilities-based providers and cannot, for instance, improve their networks in particular areas to gain a competitive edge.<sup>128</sup> In response, the Applicants maintain that MVNOs are significant providers of prepaid and value services.<sup>129</sup> The Applicants argue that TracFone, for example, is the largest single provider of prepaid service in the country, with the ability to serve customers nationally, and that many other MVNOs are also competitors.<sup>130</sup> The Applicants assert that, unlike other MVNOs, Leap has a limited geographic footprint and is unable to offer 4G LTE service.<sup>131</sup> The Applicants maintain that Leap's MVNO operations have not made Leap a "meaningful national competitor" and that Leap's 3G MVNO offering has only attracted a relatively small number of customers.<sup>132</sup>

37. For purposes of our analysis of the instant transaction, we note that Leap offers both facilities-based service options and MVNO service options. As in previous transactions, we will exclude MVNOs and resellers from consideration when computing initial concentration measures,<sup>133</sup> and thus, facilities-based service providers only will be taken into account in our calculations of market concentration. However, MVNOs and resellers may provide additional constraints against any anticompetitive behavior.<sup>134</sup> Therefore, as in previous transactions, we will consider only facilities-based entities providing mobile telephony/broadband services using cellular, PCS, SMR, 700 MHz, AWS-1, BRS, and WCS spectrum to be market participants, but will continue to assess the effect of MVNOs and resellers in our competitive evaluation.<sup>135</sup>

#### **B. Competitive Effects of the Proposed Transaction**

38. In analyzing the competitive effects of the proposed transaction, we consider the various arguments in the record, which raise issues regarding the potential effects of the transaction in particular local markets and on a broader national scale. We also conduct our own market-by-market review of certain local markets where there appears to be a particular potential for competitive harm.

39. As an initial step, we apply the Commission's two-part initial screen to identify local geographic markets that may be of particular competitive concern in this transaction because of the loss of Leap as a competitor.<sup>136</sup> The number of local markets triggered by the screen also helps identify the potential for competitive effects that are broader than individual markets. However, the initial screen is only the beginning of our competitive analysis because we then analyze the impact of the proposed

<sup>128</sup> See Public Knowledge Reply at 6-8. See also Public Knowledge Petition to Deny at 15-16.

<sup>129</sup> See Joint Opposition at 28.

<sup>130</sup> See *id.* at 28-29.

<sup>131</sup> See *id.* at 29.

<sup>132</sup> See Joint Opposition at 20; Public Interest Statement at 11; Public Interest Statement, Hutcheson Declaration at ¶¶ 8, 13 ("Hutcheson Declaration").

<sup>133</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8722 ¶ 41; *AT&T-Centennial Order*, 24 FCC Rcd at 13936 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92.

<sup>134</sup> See, e.g., *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724 ¶ 41; *AT&T-Centennial Order*, 24 FCC Rcd at 13936 ¶ 45.

<sup>135</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10449-50 ¶ 41; *SoftBank-Sprint Order*, 28 FCC Rcd at 9660 ¶ 43.

<sup>136</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42; *SoftBank-Sprint Order*, 28 FCC Rcd at 9660 ¶ 44; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720-21 ¶ 32.

transaction on the local markets identified by the screen.<sup>137</sup> As set out in various transactions orders, our consideration of potential competitive harms is not limited solely to markets identified by the screen, we also consider other factors that may bear on our public interest inquiry.<sup>138</sup>

40. After application of the initial screen, we address the most significant competitive arguments raised by parties that are not specific to individual local markets. We then turn to a market-by-market analysis before finishing with a discussion of roaming and other issues raised in the record.

### 1. Initial Screen

41. As discussed above, we apply a two-part initial screen to help identify local markets where competitive concerns are more likely.<sup>139</sup> The first part of the screen is based on the size of the post-transaction HHI, and the change in the HHI.<sup>140</sup> The second part of the screen, which is applied on a county-by-county basis, identifies CMAs where an entity would hold more than approximately one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services post-transaction.<sup>141</sup>

42. *Record.* RWA asserts that the Commission should promulgate new industry-wide rules so that a provider cannot hold more than 25 percent of all suitable or available spectrum and no more than 40 percent of suitable and available spectrum below 1 GHz.<sup>142</sup> If the instant transaction is reviewed prior to the Commission setting forth new rules on spectrum holdings,<sup>143</sup> RWA contends that the Commission should require AT&T to divest or lease spectrum in excess of a 25 percent threshold or permit AT&T to hold greater than 25 percent of all suitable and available spectrum and 40 percent of suitable and available spectrum below 1 GHz in any given market with certain conditions regarding roaming and mobile devices.<sup>144</sup> CCA also argues for a new threshold for spectrum below 1 GHz, and they suggest that this

<sup>137</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42; *AT&T-WCS Order*, 27 FCC Rcd at 16467 ¶ 21.

<sup>138</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9656 ¶ 35; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10716 ¶ 48.

<sup>139</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42; *SoftBank-Sprint Order*, 28 FCC Rcd at 9660 ¶ 44; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720-21 ¶ 32.

<sup>140</sup> The initial HHI screen identifies, for further case-by-case market analysis, those markets in which, post-transaction: (1) the HHI would be greater than 2800 and the change in HHI would be 100 or greater; or (2) the change in HHI would be 250 or greater, regardless of the level of the HHI. See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42 n. 135; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8724-25 ¶ 42.

<sup>141</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42; *AT&T-WCS Order*, 27 FCC Rcd at 16470 ¶ 29; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 59. In particular, the spectrum screen is triggered where the Applicants would have, on a market-by-market basis, a 10% or greater interest in: 102 megahertz or more of cellular, PCS, SMR, 700 MHz, and WCS spectrum, where neither BRS nor AWS-1 spectrum is available; 121 megahertz or more of spectrum, where BRS spectrum is available, but AWS-1 spectrum is not available; 132 megahertz or more of spectrum, where AWS-1 spectrum is available, but BRS spectrum is not available; or 151 megahertz or more of spectrum where both AWS-1 and BRS spectrum are available. See *AT&T-WCS Order*, 27 FCC Rcd at 16471 ¶ 33 n.94.

<sup>142</sup> See RWA Comments at i, 3-7, 9-10; see generally RWA Reply.

<sup>143</sup> RWA also argues that until the Commission completes its review in the mobile spectrum holdings proceeding, the Commission should review any proposed spectrum transaction, including this transaction, with “a reduced spectrum screen and an analysis that fosters the existence of at least four separate carriers with sufficient spectrum in every affected county.” RWA Comments at 4-5.

<sup>144</sup> See RWA Comments at i, 5-10; RWA Reply at 3-4. RWA asserts that the Commission should impose the following conditions for the markets where AT&T’s spectrum holdings would exceed RWA’s recommended 25 (continued....)

threshold should be one-quarter of the “useable spectrum in a given market.”<sup>145</sup> In addition, CCA further contends that there should be “a new national threshold set somewhat below the level that would correspond to one-third of the spectrum deemed suitable and available for mobile broadband.”<sup>146</sup> While Public Knowledge does not assert that the Commission should modify its existing spectrum screen, Public Knowledge maintains that the Commission should consider analyzing AT&T’s spectrum concentration by band.<sup>147</sup> Public Knowledge contends that, for example, AT&T would have 50 percent or more of the available PCS spectrum post-transaction in a significant number of counties.<sup>148</sup>

43. Several petitioners contend that the application of the spectrum screen triggers many local markets and gives rise to competitive concerns at the local level. Public Knowledge asserts that the instant transaction triggers the spectrum screen in 40 CMAs<sup>149</sup> in nearly two dozen states.<sup>150</sup> In particular, Public Knowledge claims that Nevada, Texas, and Idaho would have the largest increases in spectrum concentration post-transaction.<sup>151</sup> In addition, CCA argues that the spectrum screen is triggered in local markets that cover approximately seven million people and, they contend, the Applicants should therefore be required to divest spectrum in every local market where the proposed transaction exceeds the spectrum screen.<sup>152</sup> Moreover, Public Knowledge advocates for a thorough case-by-case review of the local markets in order to fully measure the proposed threat of harm that may occur as a result of spectrum consolidation.<sup>153</sup>

44. RWA, Youghioghny Communications, and Mr. Smith urge the Commission to hold the proposed transaction in abeyance until the Commission completes its mobile spectrum holdings rulemaking proceeding.<sup>154</sup> Mr. Smith asserts that this rulemaking proceeding will address “the harmful threats of greater market power and spectrum consolidation in the wireless industry,” which he argues are

(Continued from previous page) \_\_\_\_\_  
percent threshold: (1) offer data roaming at rates that are on par with what AT&T charges MVNOs; (2) offer fully interoperable devices to AT&T customers; and (3) ensure that all mobile devices sold by AT&T are capable of being unlocked by consumers and used on the networks of those carriers who utilize the same technology as AT&T.

<sup>145</sup> See CCA Petition to Condition at 13. See also CCA Reply at 9.

<sup>146</sup> See CCA Petition to Condition at 13. CCA does assert that the Commission should continue to use its current one-third threshold for evaluating an entity’s aggregated spectrum holdings. See CCA Petition to Condition at 13.

<sup>147</sup> See Public Knowledge Petition to Deny at 5-6; Public Knowledge Reply at 11.

<sup>148</sup> See Public Knowledge Petition to Deny at 5; Public Knowledge Reply at 11. Public Knowledge claims that the proposed transaction would result in AT&T having 50% or greater of all available PCS spectrum in 74 counties, with a population of nearly 5 million, and more than 33% of all PCS spectrum in almost one-third of all counties. See Public Knowledge Petition to Deny at 5.

<sup>149</sup> See Public Knowledge Petition to Deny at 6; Public Knowledge Reply at 8. Public Knowledge argues that the Applicants count of CMAs triggering the screen is different from the number calculated by Public Knowledge because of methodological differences. See Public Knowledge Reply at 9-10.

<sup>150</sup> See Public Knowledge Petition to Deny at 5.

<sup>151</sup> See Public Knowledge Petition to Deny at 5. Public Knowledge contends that in Nevada, Texas, and Idaho there would be an increase in concentration at 21%, 18%, and 14% over the spectrum screen, respectively. See *id.*

<sup>152</sup> See CCA Reply at 10-11.

<sup>153</sup> See Public Knowledge Petition to Deny at 11.

<sup>154</sup> See Smith Petition to Deny at 1-2, 13-15; Smith Reply at 1, 3-6; RWA Comments at 5; Youghioghny Communications Petition to Deny at 10.

the same threats posed by the instant transaction.<sup>155</sup> CCA maintains that the Commission should modify its spectrum screen by completing the mobile spectrum holdings proceeding “immediately” because this will allow for increased clarity and consistency in the upcoming auctions.<sup>156</sup> Youghioghenny Communications further contends that instead of deciding on transactions such as this transaction during the pendency of the mobile spectrum holdings rulemaking, the Commission should either hold a hearing or condition any approval of the proposed transaction on the outcome of that rulemaking proceeding.<sup>157</sup>

45. Regarding the current spectrum screen, the Applicants argue that the Commission should continue to apply the existing screen, which applies to all spectrum.<sup>158</sup> The Applicants apply the existing screen and assert that the screen is triggered in 38 CMAs.<sup>159</sup> The Applicants also assert that the Commission should not single out PCS spectrum for a separate screen.<sup>160</sup> Concerning the pending mobile spectrum holdings proceeding, the Applicants contend that the Commission should not modify its current screen during the pendency of that proceeding.<sup>161</sup> The Applicants argue that, as the Commission has done in the past, it should address the spectrum proposals put forth in the mobile spectrum holdings proceeding and apply the existing screen to the instant transaction.<sup>162</sup> Further, the Applicants assert that the Commission should reject the requests by Youghioghenny Communications and Mr. Smith to freeze all secondary spectrum market transactions until the mobile spectrum holdings proceeding is completed.<sup>163</sup>

46. *Discussion.* For purposes of the instant transaction, we decline to modify the current spectrum screen with respect to trigger level and weighting or separate screen based on type of spectrum, as requested by certain parties. As noted above, the Commission is reviewing these issues, along with a number of related issues, in the ongoing mobile spectrum holdings rulemaking proceeding,<sup>164</sup> and we will not hold the proposed transaction in abeyance.

47. Accordingly, we apply our two-part initial screen to this transaction to help identify local markets where competitive concerns are more likely.<sup>165</sup> For purposes of determining HHIs in this transaction, we use June 2013 NRUF data, which includes phone number usage by all

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<sup>155</sup> See Smith Reply at 1, 3-6; see also Smith Petition to Deny at 1-2, 13-15. Similarly, CCA argues that the spectrum screen “should account for the unique competitive challenges facing today’s consolidating industry.” CCA Petition to Condition at 13; CCA Reply at 9.

<sup>156</sup> See CCA Petition to Condition at 13-14. See also CCA Reply at 9.

<sup>157</sup> See Youghioghenny Communications Petition to Deny at 9-10. See also Letter from Donald J. Evans, Counsel for Youghioghenny Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 2 (filed Dec. 16, 2013) (“Youghioghenny Communications Dec. 16, 2013 *Ex Parte*”).

<sup>158</sup> See Joint Opposition at 17.

<sup>159</sup> See *id.* at 12.

<sup>160</sup> See *id.* at 17.

<sup>161</sup> See *id.*

<sup>162</sup> See *id.* at 17-18.

<sup>163</sup> See *id.* at 18.

<sup>164</sup> See *Mobile Spectrum Holdings NPRM*, 27 FCC Rcd at 11725-28 ¶¶ 33-39.

<sup>165</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42; *SoftBank-Sprint Order*, 28 FCC Rcd at 9660 ¶ 44; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8720-21 ¶ 32.

telecommunications service providers.<sup>166</sup> Consistent with our discussion of the local geographic markets above, in calculating HHIs and the change in the HHI, we analyze service provider data by CMA. The second part of the screen (which we apply on a county-by-county basis) identifies CMAs where an entity would hold more than approximately one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services post-transaction.<sup>167</sup>

48. Our application of the HHI screen to the proposed transaction triggers 84 local markets.<sup>168</sup> In applying the spectrum screen, 38 local markets are triggered.<sup>169</sup> There are 18 local markets triggered by both the HHI screen and the spectrum screen.<sup>170</sup> Of the markets triggered by the HHI screen, 33 local markets are considered Top 100 markets.<sup>171</sup> There is one local market that was triggered by the HHI screen and the spectrum screen that is a Top 100 market.<sup>172</sup> We evaluate whether it is likely that there would be any competitive or other public interest harms resulting from increased market or spectrum concentration in these markets.

## 2. Competitive Analysis

49. The market for mobile telephony/broadband services in the United States is differentiated. Service providers compete not only on the basis of price but also on other variables such as plan features, call quality, geographic coverage, and customer service.<sup>173</sup> Competition may be harmed

<sup>166</sup> These data indicate the number of assigned phone numbers that a wireless service provider has in a particular wireline rate center. Rate centers are geographic areas used by local exchange carriers for a variety of reasons, including the determination of toll rates. See HARRY NEWTON, NEWTON'S TELECOM DICTIONARY: 19<sup>TH</sup> EXPANDED & UPDATED EDITION 660 (July 2003). All mobile wireless providers must report to the FCC the quantity of their phone numbers that have been assigned to end users, thereby permitting the Commission to calculate the total number of mobile subscribers. For purposes of geographical analysis, the rate center data can be associated with a geographic point, and all of those points that fall within a county boundary can be aggregated together and associated with much larger geographic areas based on counties.

<sup>167</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10450 ¶ 42; *AT&T-WCS Order*, 27 FCC Rcd at 16469-70 ¶ 29; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10719 ¶ 59. In particular, the spectrum screen is triggered where the Applicants would have, on a market-by-market basis, a 10% or greater interest in: 102 megahertz or more of cellular, PCS, SMR, 700 MHz, and WCS spectrum, where neither BRS nor AWS-1 spectrum is available; 121 megahertz or more of spectrum, where BRS spectrum is available, but AWS-1 spectrum is not available; 132 megahertz or more of spectrum, where AWS-1 spectrum is available, but BRS spectrum is not available; or 151 megahertz or more of spectrum where both AWS-1 and BRS spectrum are available. See *AT&T-WCS Order*, 27 FCC Rcd at 16471 ¶ 33 n.94.

<sup>168</sup> See Appendix C.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> The one Top 100 market that was triggered by the HHI screen and the spectrum screen is McAllen-Edinburg-Mission, TX (CMA 128). See Appendix C.

<sup>173</sup> While service providers can change some of these conduct variables, for example, price and customer service, relatively quickly, other variables – particularly non-price variables such as quality and coverage – require investments in spectrum or infrastructure and are not easily modified. See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent To Transfer Control of Licenses, Authorizations, and Spectrum Manager and *De Facto* Transfer Leasing Arrangements and Petition For Declaratory Ruling that the Transaction Is Consistent with Section 310(b)(4) of the Communications Act, WT Docket No. 08-95, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444, 17485 ¶ 85 (2008) (“*Verizon Wireless-ALLTEL Order*”); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, WT Docket No. 04-70, (continued....)

either through unilateral actions by the combined entity, or through coordinated interaction among service providers competing in the relevant markets. Unilateral effects arise when the merged firm finds it profitable to alter its behavior following the merger by increasing its price or otherwise harming competition.<sup>174</sup> In the case of the provision of mobile telephony/broadband services, in addition to increasing prices, this might take the form of delaying improvements in service quality, adversely adjusting the features of a service offering without changing the price of the plan, or reducing the rate of new product development or other innovation in a relevant market. Coordinated effects arise when firms take actions that are profitable for each of them only as a result of the accommodating reactions of others.<sup>175</sup> Either or both unilateral and coordinated effects may arise from a proposed transaction, and the distinction between them is not always clear cut.<sup>176</sup> In the record, no one directly argues that coordinated effects may arise from this proposed transaction.

50. Below we address competitive concerns in the record with respect to any unilateral effects and other potential competitive concerns arising out of this proposed transaction. In reviewing the application involving the proposed transaction, we first discuss arguments related to the loss of Leap as an independent facilities-based competitor. These arguments include claims that (1) Leap is a disruptive force in the wireless market and has ability to act as a maverick; (2) the loss of Leap as a substitute to AT&T would generate upward pricing pressure on the merged entity's services post-transaction; and (3) the loss of Leap as a value provider in competition with Aio Wireless in certain market segments would cause competitive harms in that market segment. We then undertake a case-by-case review of markets where the acquisition of customers and/or spectrum would result in significant concentration of either or both.<sup>177</sup>

**a. General Arguments Regarding Loss of Leap as an Independent Facilities-Based Provider**

**(i) Record**

51. Many petitioners raise general concerns about the loss of Leap as an independent facilities-based provider. RWA contends that the loss of Leap as an independent, facilities-based provider would separate the marketplace into two distinct groups: small, rural, and local providers on one side and on the other side, four nationwide providers, harming consumers.<sup>178</sup> Youghioghny Communications asserts that AT&T and Leap have repeatedly characterized Cricket as a national carrier

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*Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21570 ¶ 116 (2004).

<sup>174</sup> See, e.g., Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, at § 6, p. 20 (“2010 DOJ/FTC Horizontal Merger Guidelines”) (“A merger between firms selling differentiated products may diminish competition by enabling the merged firm to profit by unilaterally raising the price of one or both products above the pre-merger level.”). See also, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10451 ¶ 44; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2336 ¶ 42; *AT&T-Centennial Order*, 24 FCC Rcd at 13939-40 ¶ 54; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17485 ¶ 84.

<sup>175</sup> A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. *2010 DOJ/FTC Horizontal Merger Guidelines* at § 7, p. 24. See also, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10460-61 ¶ 65; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2336-37 ¶ 43; *Verizon Wireless-ALLTEL Order*, 23 FCC Rcd at 17491 ¶ 101; *AT&T-Centennial Order*, 24 FCC Rcd at 13942 ¶ 59.

<sup>176</sup> See *2010 DOJ/FTC Horizontal Merger Guidelines* at § 2. See also, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10446 ¶ 33 n.104.

<sup>177</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9656 ¶ 34.

<sup>178</sup> See RWA Comments at 2.

in filings before the Commission and have argued that the elimination of Cricket as an independent player in the national market reduces the number of national facilities-based actors from five to four.<sup>179</sup> CCA, Greenlining, and Youghioghenny Communications, for instance, argue that the proposed transaction would result in harm to consumers because Leap is an important competitor.<sup>180</sup> Mr. Smith argues that the proposed transaction would harm competition at the local level because it would eliminate a chief local competitor and reduce consumer choice.<sup>181</sup>

52. The Applicants contend that Leap does not compete as a facilities-based provider at the national level, and that because this proposed transaction does not reduce the number of national wireless providers, it will not have an adverse impact on national competition.<sup>182</sup> The Applicants assert that Leap's declining presence in the markets in which it operates demonstrates its current market share, which they claim, overstates Leap's current, and particularly its future, competitive prospects.<sup>183</sup> The Applicants contend that since 2011, Leap's competitive significance has declined significantly.<sup>184</sup> In addition, the Applicants claim that Leap has deployed LTE in only a small portion of its network footprint and Leap's financial resources and limited spectrum depth make it uneconomic to upgrade its current 3G CDMA platform to LTE across its network.<sup>185</sup> Leap asserts that as wireless data traffic continues to rise, the constraints on Leap's LTE deployment will likely increasingly hamper its ability to compete with national wireless service providers.<sup>186</sup> Finally, the Applicants assert that Leap's MVNO operations have not made Leap a "meaningful national competitor."<sup>187</sup>

53. *Loss of a Maverick Competitor.* Some petitioners express particular concern about the effects of eliminating Leap as a competitor on the market because, they contend, Leap is a disruptive or

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<sup>179</sup> See Youghioghenny Communications Reply 4-5.

<sup>180</sup> See CCA Petition to Condition at 5-7; CCA Reply at 4-5; Greenlining Petition to Deny at 8-9; Youghioghenny Communications Petition to Deny at 18-21; Youghioghenny Communications Dec. 16, 2013 *Ex Parte* at 2-3. See also Letter from Alan Pearce and Martyn Roetter, Information Age Economics, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 1 (filed Feb. 28, 2014) ("IAE Feb. 28, 2014 *Ex Parte*").

<sup>181</sup> See Smith Reply at 8-9.

<sup>182</sup> See Public Interest Statement at iii, 24-34; Joint Opposition at 10, 19-21.

<sup>183</sup> See Joint Opposition at 32.

<sup>184</sup> See Joint Opposition at 19 (asserting that Leap has lost an estimated 22 percent of its subscriber base and saw its estimated national market share decline to [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent between March 31, 2012 and June 30, 2013). See *id.* According to Leap, in response to this decline in subscribership, Leap implemented cost cutting initiatives and made changes to its wireless plans, including the elimination of its daily Cricket PAYGo (pay-as-you-go) plan in October of 2012. See Leap Wireless International, LLC, SEC Form 10-K, at 3 (filed Feb. 25, 2013), available at <http://www.sec.gov/Archives/edgar/data/1065049/000106504913000003/leap-dec2012q4x10k.htm> (last visited Mar. 11, 2014); Hutcheson Declaration at ¶¶ 5-6. See also Leap's Cricket dumps PAYGo daily plans, <http://www.fiercewireless.com/story/leaps-cricket-dumps-paygo-daily-plans/2012-10-24> (last visited Mar. 10, 2014). Leap continues to offer *monthly* Cricket PAYGo plans. See <http://www.leapwireless.com/brands> (last visited Mar. 10, 2014).

<sup>185</sup> See Joint Opposition at 19. See also Public Interest Statement, Hutcheson Declaration at ¶¶ 5-7, 9-13.

<sup>186</sup> See Hutcheson Declaration at ¶¶ 9, 11.

<sup>187</sup> See Joint Opposition at 20. See also Hutcheson Declaration at ¶¶ 13-15.

maverick competitor.<sup>188</sup> Mr. Smith asserts that Leap serves a valuable function at both the national and local levels, challenging the existing market leaders to offer competitive prices and innovative services.<sup>189</sup> Mr. Smith contends that Leap plays a critical role at the national level, and that Leap has developed industry-changing products, such as Muve Music.<sup>190</sup> Similar to Mr. Smith's contentions, RWA argues that the proposed transaction would result in denying consumers competitive pricing and innovative services and technologies.<sup>191</sup> Public Knowledge argues that Leap is a disruptive force in the prepaid market because Leap was one of the first prepaid providers to offer unlimited talk, text, and data offerings as well as being the first U.S. prepaid providers to offer the iPhone.<sup>192</sup>

54. In response to the petitioners' arguments that Leap is a "disruptive maverick," the Applicants contend that a firm cannot be a maverick if the provider has not affected competition significantly.<sup>193</sup> The Applicants assert that this term cannot be applied to a provider such as Leap because it has been losing market share and has not evoked competitive responses.<sup>194</sup>

55. *Upward Pricing Pressure.* The Applicants also argue that loss of Leap would not materially affect the pricing or other key competitive decisions of the nationwide wireless providers,<sup>195</sup> and that, in particular, this transaction is unlikely to lead to significant upward pressure on post-transaction prices.<sup>196</sup> The Applicants claim that AT&T and Leap are not close substitutes, and that Sprint and T-Mobile are closer substitutes to Leap than AT&T.<sup>197</sup> The Applicants analyze porting data obtained

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<sup>188</sup> See CCA Petition to Condition at 5-6; Youghioghny Communications Petition to Deny at 18-21; Youghioghny Communications Reply at 4; Smith Petition to Deny at 6-7; Smith Reply at 6-10; Public Knowledge Petition to Deny at 8-10, 16. See also Letter from Donald J. Evans, Counsel for Youghioghny Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 2 (filed Jan. 29, 2014). ("Youghioghny Communications Jan. 29, 2014 *Ex Parte*").

<sup>189</sup> See Smith Reply at 6-8; Smith Petition to Deny at 9-10.

<sup>190</sup> See Smith Reply at 7-8 (noting that AT&T and Leap argued that in 2011 Leap was a disruptive force in the national market in the *AT&T/T-Mobile* proceeding). See also Youghioghny Communications Petition to Deny at Exhibit B.

<sup>191</sup> See RWA Comments at 5.

<sup>192</sup> See Public Knowledge Petition to Deny at 16-17 (contending that if AT&T is interested in the prepaid market, it has adequate resources to enter the market without eliminating a disruptive competitor).

<sup>193</sup> See Joint Opposition at 20.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.* at 30 (citing Israel Declaration at ¶ 25, where he states, "[A] lower diversion ratio means that the firms in question are not particularly close competitors, thus limiting any competitive concerns.>").

<sup>196</sup> See Israel Declaration at ¶ 24.

<sup>197</sup> See Public Interest Statement at 25-29; Israel Declaration at ¶¶ 27-38; Hutcheson Declaration at 7-8; Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 6-7. The Applicants calculate T-Mobile's percent of Leap's ports out 2 years before T-Mobile's acquisition of MetroPCS and Leap's ports out after the T-Mobile/MetroPCS transaction. From 2 years prior to the T-Mobile/MetroPCS transaction to after the close of the transaction Leap's ports out to T-Mobile increased from [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] %. See Israel Reply Declaration at ¶¶ 24-38. The Applicants also argue that there are certain limitations with porting data such as: (1) porting data include only subscribers who keep their phone numbers when switching, meaning that the data capture only a subset of switchers; (2) porting data do not capture only those customers who switch due to changes in quality-adjusted prices, but rather include customers who switch for any reason. See Israel Declaration at ¶ 26. These calculations do not reflect porting at the local or national level but instead align with Leap's facilities-based service area. They reflect all local areas where (continued....)

from AT&T and Leap,<sup>198</sup> and conclude that consumers do not view AT&T and Leap as close substitutes.<sup>199</sup> They also argue that the rate of substitution calculated from the porting data compared with AT&T's and Leap's market shares indicates that competitive concerns from high market shares are not warranted.<sup>200</sup> The Applicants claim that this limited substitution between AT&T and Leap is not surprising given the differentiated nature of their products.<sup>201</sup> The Applicants argue that the product offerings of Sprint's pre-paid brands, Boost and Virgin Mobile, and T-Mobile's MetroPCS brand are closer substitutes for Leap's offerings than AT&T's.<sup>202</sup> The Applicants further claim that in the markets where T-Mobile has introduced the MetroPCS brand there has been an increase in the number of ports out by Leap customers to T-Mobile's customers.<sup>203</sup>

56. The Applicants also argue that this transaction is unlikely to lead to significant upward pressure on post-transaction prices based on the results of a Gross Upward Pricing Pressure Index ("GUPPI") analysis submitted in response to the Information and Discovery Request.<sup>204</sup> Their analysis estimates nationwide and Leap-service-area GUPPIs for the AT&T-Leap transaction,<sup>205</sup> as well as CMA- (Continued from previous page) \_\_\_\_\_  
AT&T has at least one port out to Leap and all of Leap's port out data for all geographies where Leap provides a facilities-based service. See Aug. 20, 2013 Applicants Supplemental Response at 7.

<sup>198</sup> See Israel Declaration at ¶ 26.

<sup>199</sup> See Israel Declaration ¶¶ 27-28; Hutchinson Declaration at 7. According to the Applicants' analysis of the data, only 13% of subscribers port from Leap to AT&T, and that only 3.3% of subscribers port from AT&T to Leap. See Israel Declaration at ¶ 27-28.

<sup>200</sup> See Public Interest Statement at 26; Israel Declaration at ¶¶ 27-28; Joint Opposition at 30; see also Aug. 20, 2013 Applicants Supplemental Response at 6-8.

<sup>201</sup> See Public Interest Statement at 25; Israel Declaration at ¶¶ 27-31.

<sup>202</sup> See Public Interest Statement at 26-29; Israel Declaration at ¶¶ 32-38; Joint Opposition at 24-27; Israel Reply Declaration at ¶¶ 25-29. The Applicants also point to MVNOs such as TracFone/Straight Talk as being a closer substitute for Leap, although they do not have porting data to support this claim. See Public Interest Statement at 28-29, 28 n.134; Joint Opposition at 28-29. Leap anticipates increased head-to-head competition from T-Mobile's MetroPCS brand which has begun to expand aggressively into Leap's markets. See Hutchinson Declaration at 7; Joint Opposition at 24.

<sup>203</sup> See Joint Opposition at 26; Israel Reply Declaration at ¶¶ 23-26; Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 8. Leap's ports out to T-Mobile since its introduction of the MetroPCS brand into Leap markets has increased from [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] %. See Joint Opposition at 26; Israel Reply Declaration at ¶¶ 26-27.

<sup>204</sup> See Nov. 22, 2013 AT&T Initial Response at 12-14; Jan. 3, 2014 AT&T Second Supplemental Response at 1, Exhibit 4.1 at 2, 10-17. As described by AT&T, the GUPPI is an economic tool designed to analyze the unilateral incentives to raise price that may arise from a merger of two firms competing in a differentiated products industry, before considering the synergies and efficiencies arising from the transaction. See Nov. 22, 2013 AT&T Initial Response at 1.

<sup>205</sup> See Nov. 22, 2013 AT&T Initial Response at 14; Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 2, 10-17. The average AT&T and Leap GUPPIs are less than [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] % across all CMAs and less than [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] % across all CMAs where Leap has an estimated market share of at least two percent. See Nov. 22, 2013 AT&T Initial Response at 14. Leap reduced its national distribution footprint from approximately 13,000 retail outlets in 2012 to approximately 5,000 retail outlets in 2013 in order to further reduce its costs. See Public Interest Statement, Hutcheson Declaration at ¶ 8.

level GUPPIs for seven south Texas CMAs and three Central Valley, California CMAs.<sup>206</sup> The Applicants contend that their GUPPI analysis does not change the conclusion that the transaction would not lead to any upward price increases because pricing is national and competitive conditions in any particular CMA would have, at most, a limited effect on pricing in that CMA.<sup>207</sup>

57. Youghiogheny Communications contests the Applicants' claims that AT&T and Leap are not close competitors.<sup>208</sup> Youghiogheny Communications argues that Leap competes with AT&T's pre-paid GoPhone and Aio Wireless service offerings, and with MVNOs that access the AT&T network.<sup>209</sup> Further Youghiogheny Communications claims that competition between post- and pre- paid mobile wireless services is intensifying, and therefore consumers view these as substitute services.<sup>210</sup> Youghiogheny Communications also contests the Applicants' claims that the porting data confirm that AT&T and Leap are not close competitors, noting that the data on Leap's porting rates shows that Leap's customers are porting to the four nationwide providers, including AT&T, although the porting to AT&T is less than to Sprint or T-Mobile.<sup>211</sup>

58. *Effects on Value-Conscious Consumers.* Mr. Smith maintains that Leap serves a valuable function as a rival competitor and an important low cost alternative at the national and local level.<sup>212</sup> Mr. Smith further contends that the proposed transaction undermines competition by removing one of the wireless market's chief regional carriers and providers of prepaid, no-contract wireless services.<sup>213</sup> Moreover, Public Knowledge contends that independent competitors, such as Leap, promote competition in the wireless market and avoid excessive spectrum aggregation.<sup>214</sup>

59. CCA, Greenlining, and Youghiogheny Communications contend that, in addition to the loss of Leap as a competitor, the instant transaction would cause the elimination of Aio Wireless, thus

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<sup>206</sup> See Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 21-25. In the 10 selected CMAs, none of the weighted average GUPPIs is greater than [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] % and most are below [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] %. See Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 23. Leap states that its network operates primarily on 3G CDMA EVDO technology, and it is not providing 4G services on an MVNO basis. Leap maintains that, given its financial constraints and limited spectrum resources, it has limited its deployment of LTE to 11 metropolitan areas, covering approximately 21 million people. See Public Interest Statement, Hutcheson Declaration at ¶¶ 9, 13.

<sup>207</sup> See Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 22. Given the results of their GUPPI analysis, Applicants did not construct or submit an economic model, such as a merger simulation model, that could take into account responses by other mobile wireless service providers, and may also incorporate efficiencies resulting from the transaction.

<sup>208</sup> See Youghiogheny Communications Petition to Deny at 17-18; IAE Declaration at 14-15; IAE Reply Declaration at 5-7; IAE *Ex Parte*, Jan. 6, 2014 at 4-5, Appendix 1. Youghiogheny Communications argues that rather than finding AT&T and Leap to not be close competitors, the proper terminology should be "weak" competitor. See IAE Reply Declaration at 5-6.

<sup>209</sup> See IAE Declaration at 14.

<sup>210</sup> See *id.* at 15; Youghiogheny Communications Reply at 7-8.

<sup>211</sup> See IAE *Ex Parte* Jan. 6, 2014 at 4.

<sup>212</sup> See Smith Petition to Deny at 4-5; Smith Reply at 7-8.

<sup>213</sup> See Smith Petition to Deny at 4-5.

<sup>214</sup> See Public Knowledge Petition to Deny at 8-9 (asserting that AT&T has been acquiring significant amounts of spectrum on the secondary market both through acquiring competitors and through purchasing licenses).

resulting in harm to competition. These petitioners assert that the Aio Wireless brand was intended to compete directly against Leap in the prepaid market and the proposed transaction would result in the elimination of Aio Wireless as an important competitive force that prompted AT&T to act to enter the prepaid market in the first place.<sup>215</sup> In particular, CCA claims that, while AT&T would still offer prepaid services, the proposed transaction would eliminate a competitor, and they claim that this would diminish innovation, eliminate options, and likely raise prices for consumers.<sup>216</sup>

60. The Applicants maintain that even if the Commission examined a narrower prepaid or “value” segment, it should find that the proposed transaction does not threaten competition.<sup>217</sup> The Applicants contend that prepaid/no-contract service will continue to be provided by numerous providers offering a wide and growing variety of options for consumers.<sup>218</sup> The Applicants point to T-Mobile/MetroPCS and Sprint, and contend that these are significant competitors that each have a nationwide presence and offer more extensive, advanced 4G rollouts and service offers than Leap.<sup>219</sup> Moreover, the Applicants contend that MVNOs are significant providers of prepaid and value services.<sup>220</sup>

61. The Applicants argue that the proposed transaction is procompetitive given Leap’s declining significance and claims about the loss of potential competition from Aio Wireless are unfounded.<sup>221</sup> Concerning Aio Wireless, the Applicants assert that in combining Aio Wireless with Leap’s existing operations under the Cricket brand name,<sup>222</sup> AT&T would continue to build and expand its value offerings, and the proposed transaction would accelerate and strengthen the competitive effect of those offerings by allowing AT&T to integrate Leap’s assets and expand the Cricket brand nationwide.<sup>223</sup>

62. *Spectrum Aggregation.* CCA, RWA, and Mr. Smith claim that the marketplace is already dominated by AT&T and Verizon Wireless, due in large part to their dominant spectrum positions, and that the proposed transaction would only increase AT&T’s dominant position thereby making it more difficult for other providers to compete.<sup>224</sup> CCA further asserts that with the majority of the available spectrum resources controlled by these two providers, it stymies the ability of other industry stakeholders to provide competitive services to consumers.<sup>225</sup> CCA maintains that AT&T’s dominance in the wireless market through spectrum acquisitions could result in significant competitive advantages over smaller providers.<sup>226</sup> Youghioghny Communications argues that there are concerns regarding industry

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<sup>215</sup> See CCA Reply at 4-5; Greenlining Petition to Deny at 9-11; Youghioghny Communications Petition to Deny at 17.

<sup>216</sup> See CCA Petition to Condition at 4-7; CCA Reply at 4-5; Greenlining Petition to Deny at 8-9.

<sup>217</sup> See Joint Opposition at 24.

<sup>218</sup> See *id.*

<sup>219</sup> See *id.* at 24-28.

<sup>220</sup> See *id.* at 28-29.

<sup>221</sup> See *id.* at 31.

<sup>222</sup> See Nov. 22, 2013 AT&T Initial Response at 43 (citing ATT-FCC-000032674 at 2).

<sup>223</sup> See Joint Opposition at 31-32. See also Nov. 22, 2013 AT&T Initial Response at 50-51.

<sup>224</sup> See CCA Petition to Condition at 2, 4, 7-12; CCA Reply at 7-9; RWA Comments at i., 2,4-5; RWA Reply at 1-2; Smith Petition to Deny at 1, 6-8; Smith Reply at 1, 3-4. See also Youghioghny Communications Jan. 29, 2014 *Ex Parte* at 2.

<sup>225</sup> See CCA Petition to Condition at 7-8, 10. See also Youghioghny Communications Dec. 16, 2013 *Ex Parte* at 2.

<sup>226</sup> See CCA Petition to Condition at 7-8; CCA Reply at 7-8; Smith Petition to Deny at 6.

consolidation and a resulting duopoly,<sup>227</sup> and contends that the Commission should broaden its review to include the impact of all acquisitions in the wireless marketplace rather than in isolation because a narrow focus blinds the Commission to the incremental effects of previous cases.<sup>228</sup> RWA argues that competitive harm would result from spectrum concentration in any market with fewer than four providers and occurs regardless of whether those providers are nationwide providers.<sup>229</sup> Public Knowledge argues that the proposed transaction will increase AT&T's spectrum holdings in some particular markets.<sup>230</sup>

63. The Applicants contend that the post-transaction spectrum aggregation does not result in competitive concerns, and the Commission's current spectrum screen "confirms the absence of competitive harm."<sup>231</sup> The Applicants contend that, concerning the potential competitive effects on the national level, the instant transaction would affect less than two percent of the spectrum available and suitable nationwide for mobile services, and in every market involved in this transaction, the four national carriers already hold spectrum, and there are other spectrum holders that can deploy their spectrum or make it available for use by other providers.<sup>232</sup> The Applicants refer to Dr. Israel's Declaration, which concludes that there should not be concern here, where spectrum "is dispersed across other national carriers, additional licensees have unused spectrum, and a substantial additional amount of spectrum is about to be licensed."<sup>233</sup>

64. *Interoperability.* In addition, Youghioghny Communications and James Jones raise interoperability-related concerns. Youghioghny Communications contends that approval of the proposed transaction should be conditioned on AT&T offering interoperable devices.<sup>234</sup> Mr. Jones argues that the Chicago License should be used for "real world" interoperability testing.<sup>235</sup>

65. With respect to interoperability concerns, the Applicants argue that the interoperability issue is being resolved in the separate proceeding and that any harms relating to interoperability are not specific to the proposed transaction, particularly since AT&T is not acquiring any 700 MHz spectrum from Leap (other than the transaction relating to the Chicago License).<sup>236</sup>

## (ii) Discussion

66. *Discussion.* We are not persuaded by certain general arguments raised by petitioners, for

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<sup>227</sup> See Youghioghny Communications Jan. 29, 2014 *Ex Parte* at 2; Youghioghny Communications Dec. 16, 2013 *Ex Parte* at 1-2.

<sup>228</sup> See Youghioghny Communications Reply at 3-4. See also Youghioghny Communications Dec. 16, 2013 *Ex Parte* at 1-2.

<sup>229</sup> See RWA Comments at 2-3, 5.

<sup>230</sup> See Public Knowledge Petition to Deny at 5-6, Appendix. A - Revised Spectrum Aggregation Chart at 35, Appendix. B - Competitors Chart at 265-266 (arguing that AT&T will control more than half of all available PCS spectrum in some markets).

<sup>231</sup> See Joint Opposition at 12. See also Joint Opposition at 13-17.

<sup>232</sup> See Public Interest Statement at iv, 32-34; Joint Opposition at 10-11. The Applicants also assert that substantial additional spectrum is planned to be available for mobile services in the near-term, including through the PCS H Block and broadcast incentive auctions. See Joint Opposition at 12.

<sup>233</sup> See Joint Opposition at 14 (citing Israel Declaration at ¶ 45 and Israel Reply Declaration at ¶¶ 49-53).

<sup>234</sup> See Youghioghny Communications Petition to Deny at 24-25.

<sup>235</sup> Jones Comments at 2.

<sup>236</sup> See Joint Opposition at 43.

instance that the loss of Leap is likely to have significant nationwide competitive effects. Leap offers facilities-based services in markets covering approximately one-third of the population of the United States, as well as MVNO services beyond its network footprint, but its nationwide significance has been declining. Leap generally has a modest market presence today, and with only a handful of exceptions, each of the four nationwide service providers will continue to compete in the markets where Leap operates, and in some markets, there is additional competition from regional providers.<sup>237</sup> We do find, however, that there is some potential for competitive harm in certain local markets, and that Leap has been providing a meaningful alternative for value-conscious consumers through its facilities-based prepaid service offerings.

67. *Loss of a Maverick Competitor.* When evaluating the competitive effects of a transaction, we consider whether a firm has acted as a “disruptive force,” or “maverick,” providing more of a competitive constraint in the market than would otherwise be expected of a firm of its size.<sup>238</sup> In general, the elimination of a firm that acts as a disruptive force in a highly concentrated market raises the likelihood of anticompetitive conduct that might have been constrained before the proposed transaction.<sup>239</sup> Based on our evaluation of the record, we find that Leap has not recently been a maverick or a disruptive force at the national or local level.

68. When Leap initially entered the wireless market, it was among the first to offer both prepaid plans and unlimited calling plans. Contrary to petitioners’ arguments, however, our evaluation of the entire record does not support the proposition that Leap’s actions since then have been disruptive. Certain petitioners point to Leap’s introduction of the Muve music service, which Leap bundled with some of its plans, as evidence of this type of disruptive behavior.<sup>240</sup> However, there is no support in the record that Leap’s actions had a significant effect on the industry, and the other providers who once offered similar services have since ceased doing so. AT&T recently introduced its own streaming music service, which it offers for an additional fee. But not only did AT&T’s action occur after it agreed to purchase Leap, it occurred well after Leap’s introduction of the Muve music service.<sup>241</sup> Disruptive behavior usually has a stronger and more immediate effect. For example, on July 10, 2013, T-Mobile announced a ground-breaking new offer, “Jump!<sup>(TM)</sup>,” which allows T-Mobile subscribers to “upgrade their phones when they want, up to twice a year as soon as six months from enrollment.”<sup>242</sup> In response, on July 16, 2013, AT&T announced “AT&T Next,” a program providing AT&T subscribers with a new

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<sup>237</sup> See Public Interest Statement at 32-33.

<sup>238</sup> See 2010 DOJ/FTC Horizontal Merger Guidelines, at § 2.1.5 at 3; § 7.1 at 25.

<sup>239</sup> See *United States v. H&R Block, Inc.*, No. 11-00948, slip op. at 63 (D.D.C. Nov. 10, 2011) (citing *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997)); *DOJ/FTC Horizontal Merger Guidelines* §§ 2.1.5, 7.1; see also ABA Section of Antitrust Law, *Antitrust Law Developments* (6th ed. 2007) at 356 (*Antitrust Law Developments* (Sixth)) (citing 1992 *Horizontal Merger Commentary* at 24).

<sup>240</sup> See, e.g., Smith Petition to Deny at 8; Smith Reply at 7. Further, without more, we do not credit either AT&T’s or Leap’s then statements that Leap, or companies “like” Leap, has been a maverick or a leading industry innovator.

<sup>241</sup> We also note that in February 2013 Leap stated that it intended to spin-off the Muve music service as a separate company with the hope that other wireless companies would offer the service to their customers, which Leap believed they might have been unwilling to do while it was a “Leap” product. See Youghiogheny Communications Petition to Deny at Exhibit B.

<sup>242</sup> See T-Mobile Announces Boldest Moves Yet as America's Un-carrier, <http://newsroom.t-mobile.com/phoenix.zhtml?c=251624&p=irol-newsarticle&ID=1836669> (last visited Mar. 12, 2014).

smartphone or tablet every year,<sup>243</sup> and, on July 18, 2013, Verizon Wireless announced its own early update plan, allowing its subscribers to upgrade their devices after six months if 50 percent of the purchase price has been paid.<sup>244</sup>

69. The petitioners point to no other examples of allegedly disruptive behavior by Leap. We disagree that evidence of a provider striving to compete in the market, for instance,<sup>245</sup> or responding to price changes,<sup>246</sup> indicates that a provider is a maverick. In conclusion, we have not found support in the record for the petitioners' assertions that Leap has been a competitor that has recently operated as a maverick or been a disruptive force in the market.

70. *Upward Pricing Pressure.* In response to competitive concerns regarding whether the loss of Leap would materially affect the pricing or other key competitive decisions of the nationwide wireless providers, we find that, although AT&T and Leap are not each other's closest substitutes over Leap's entire facilities-based service area,<sup>247</sup> Leap has provided meaningful choices for certain consumers, particularly in specific local markets. For instance, the porting rate between AT&T and Leap, in certain geographic markets, is much higher than the average porting rate between AT&T and Leap calculated over all markets where Leap has a facilities-based presence. For example, in Pine Bluff, AR (CMA 291) approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent of Leap's customers port to AT&T and in Laredo, TX (CMA 281) approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent of AT&T's customers port to Leap.<sup>248</sup> Therefore given certain local market characteristics, AT&T and Leap are much closer substitutes in some markets than they are when aggregated throughout Leap's facilities-based service areas. However, porting data alone is not dispositive of potential competitive harms that may arise from a particular transaction in either local or national markets and any conclusion on the likelihood of competitive harms for any relevant market requires consideration of other factors.<sup>249</sup>

<sup>243</sup> See AT&T Customers Can Get a New Smartphone or Tablet Every Year With No Down Payment With "AT&T Next," <http://www.att.com/gen/press-room?pid=24538&cdvn=news&newsarticleid=36749&mapcode=> (last visited Mar. 12, 2014).

<sup>244</sup> See Verizon gives handset upgrades every 6 months with new Edge program, <http://www.fiercewireless.com/story/verizon-gives-handset-upgrades-every-6-months-new-edge-program/2013-07-18> (last visited Mar. 12, 2014).

<sup>245</sup> See CCA Petition to Condition at 5-6; Smith Reply at 7-8; see also Youghioghny Communications Petition to Deny at 17-18; Youghioghny Reply at 7-9.

<sup>246</sup> See Youghioghny Communications Petition to Deny at 16.

<sup>247</sup> [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION]

<sup>248</sup> 2013 LNP Data. According to the Applicants' data, in Laredo approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent of AT&T's customers port to Leap and approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent of AT&T's prepaid ports go to Leap. See Nov. 22, 2013 AT&T Initial Response Exhibit 25\_3\_a-c.

<sup>249</sup> See AT&T-Qualcomm Order at 17598-99 ¶ 23; Sprint- Nextel Order at 14004-05 ¶ 102.

71. We are not persuaded that the Applicants' GUPPI analysis demonstrates that this transaction presents no, or little, potential competitive harm in terms of upward pricing pressure. As set out in the *2010 DOJ/FTC Horizontal Merger Guidelines*, a GUPPI analysis is one method of assessing the likelihood of upward pricing pressure that may result from a transaction.<sup>250</sup> Generally, adverse upward pricing pressure is considered unlikely if the GUPPI is less than five percent.<sup>251</sup> The GUPPIs calculated by the Applicants are below five percent for the entire Leap service area, although they are higher than five percent in select markets.<sup>252</sup> We note, however, the choice of assumptions may significantly affect the GUPPI results. For example, one key assumption here is the recapture rate used to calculate the diversion ratio.<sup>253</sup> For customers leaving Leap, the Applicants **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent recapture rate, which is the share of customers leaving a wireless provider due to a price increase that switch to another provider within some reasonable period of time.<sup>254</sup> If a higher recapture rate had been assumed, then the GUPPIs would have increased, potentially well above five percent.<sup>255</sup> In addition, while GUPPI analysis may provide evidence of the likelihood of upward pricing pressure, it is not dispositive of the presence or absence of competitive harms.

72. *Effects on Value-Conscious Consumers.* We find that the market for mobile telephony/broadband services in the United States is differentiated. Service providers compete not only on the basis of price but also on other variables such as plan features, call quality, geographic coverage, and customer service. The record indicates that although Leap's nationwide importance has been declining, it serves a valuable function as a low-cost alternative in its footprint and specifically with respect to the narrower prepaid or "value" segment of the marketplace. In evaluating the potential competitive harm in this segment, we analyzed the role of Leap in competing against AT&T and other providers for customers in this market segment, including a review of Leap's device offerings and pricing plans as well as consumer preferences for qualities and services for prepaid products. In addition, we evaluated AT&T's pre-merger prepaid offerings on GoPhone and Aio Wireless, and how AT&T positioned these products both in its product portfolio and in the prepaid space. We also took into account the effect of this merger on market structure and the extent to which choices are eliminated and consumer welfare harmed. As a result, we have concerns about loss of Leap as a competitor in its footprint and with respect to the narrower prepaid or "value" segment of the marketplace, and we find that the potential for competitive harm is more likely in that segment. With respect to concerns generally at the national level, the record indicates that Leap's business model has been focused on providing

<sup>250</sup> See *2010 DOJ/FTC Horizontal Merger Guidelines*, at § 6.1, p. 21.

<sup>251</sup> See Carl Shapiro remarks as prepared for the American Bar Association Section of Antitrust Law Fall Forum, at 24 (Nov. 18, 2010), available at <http://www.justice.gov/atr/public/speeches/264295.pdf> (last visited Mar. 12, 2014).

<sup>252</sup> See Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 at 10-17, 23. Specifically, the Applicants calculate GUPPIs of between **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.

<sup>253</sup> The diversion ratio is a measure of buyer substitution that is closely related to the cross price elasticity. See Applications of AT&T Inc. And Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65, *Staff Analysis and Findings*, 26 FCC Rcd 16184, 16320, Appendix C ¶ 9 (WTB 2011); Gregory J. Werden, 1996, "A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products." *The Journal of Industrial Economics*, 44(4), p. 410; CRA Competition Memo, 2010, <http://www.crai.com/uploadedFiles/Publications/Commentary-on-the-GUPPI.pdf> (last visited Mar. 12, 2014).

<sup>254</sup> See Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1, at 28.

<sup>255</sup> See Jan. 3, 2014 AT&T Second Supplemental Response, Exhibit 4.1 in Response to Request 4, at 28. Changes in the recapture rate were not part of any sensitivity testing submitted by the Applicants to the Commission.

facilities-based wireless service in only selected metropolitan areas, and it provides nationwide coverage through other arrangements.<sup>256</sup>

73. *Spectrum Aggregation.* We address spectrum aggregation issues for specific markets subject to this transaction in our market-by-market analysis below. All other general spectrum aggregation concerns are not specific to this transaction.<sup>257</sup> As noted above, the Commission is reviewing its general spectrum holding policies and related competitive issues, in the ongoing mobile spectrum holdings rulemaking proceeding.<sup>258</sup>

74. *Interoperability.* We also decline to impose the interoperability conditions requested by Youghiogheny Communications or to mandate the use of the Chicago License requested by Jones. The proposed interoperability conditions are not narrowly tailored to remedy any purported harms arising out of this transaction.<sup>259</sup> The Commission recently took action to implement an industry solution to provide interoperable LTE service in the Lower 700 MHz band in an efficient and effective manner to improve choice and quality for consumers of mobile services.<sup>260</sup>

#### **b. Market-by-Market Analysis**

75. In our market-by-market analysis set out below, we examine the likelihood of competitive harm by assessing the potential competitive effects of any significant increases in market and spectrum concentration on the marketplace. In undertaking our market-by-market analysis,<sup>261</sup> we consider various competitive variables that help to predict the likelihood of competitive harm post-transaction. These competitive variables include, but are not limited to: the total number of rival service

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<sup>256</sup> See Public Interest Statement, Hutcheson Declaration at ¶ 3. According to Leap, it approached a significant number of other potential strategic acquirers and wireless providers throughout the past several years regarding business combination transactions, conversion to an MVNO model combined with an asset or spectrum sale, network sharing transactions, the sale of under-performing markets and the sale of all or substantially all of Leap's spectrum. Leap concluded that none of these approaches resulted in a meaningful interest by or negotiations with such potential acquirers. See Leap Wireless International, LLC, SEC Schedule 14A, at 36 (filed Sep. 17, 2013), available at <http://www.sec.gov/Archives/edgar/data/1065049/000119312513368430/d575780ddefm14a.htm> (last visited Mar. 11, 2014). See also Public Interest Statement, Hutcheson Declaration at ¶¶ 12-13.

<sup>257</sup> Concerning Public Knowledge's claim that post transaction AT&T will hold more than half of the PCS spectrum, we note that our analysis (and Applicants') records indicate that post transaction, AT&T will not hold that amount of the PCS spectrum in any market identified by Public Knowledge.

<sup>258</sup> See *Mobile Spectrum Holdings NPRM*, 27 FCC Rcd at 11725-28 ¶¶ 33-39.

<sup>259</sup> See *AT&T-ATN Order*, 28 FCC Rcd at 13704 ¶¶ 62-63 (rejecting request to place interoperability conditions on AT&T because alleged harms were not transaction-specific).

<sup>260</sup> See *Promoting Interoperability in the 700 MHz Commercial Spectrum, Requests for Waiver and Extension of Lower 700 MHz Band Interim Construction Benchmark Deadlines*, WT Docket Nos. 12-69, 12-332, *Report and Order and Order of Proposed Modification*, 28 FCC Rcd 15122 (2013). See also *Promoting Interoperability in the 700 MHz Commercial Spectrum, WT Docket No. 12-69, Order of Modification*, 29 FCC Rcd 281 (WTB 2014) (modifying AT&T's Lower 700 MHz B and C Block licenses consistent with the *Report and Order and Order of Proposed Modification*).

<sup>261</sup> We derive market shares and HHIs from our analysis of data compiled in our 2013 NRUF and LNP database. We derive network coverage from Mosaik January 2014 data and 2010 U.S. Census data, and we obtain spectrum holdings from our licensing databases and the Applications. In addition, we examine porting data from our 2013 LNP database, as well as from data submitted by the Applicants, which includes each instance of a customer porting a phone number from one mobile provider to another, and indicates both the origin and destination provider. We also utilized and analyzed the additional data as provided by the Applicants through our information requests.

providers; the number of rival firms that can offer competitive nationwide service plans; the coverage by technology of the firms' respective networks; the rival firms' market shares; the combined entity's post-transaction market share and how that share changes as a result of the transaction; the amount of spectrum suitable for the provision of mobile telephony/broadband services controlled by the combined entity; and the spectrum holdings of each of the rival service providers. Further, in the instant transaction, AT&T is acquiring AWS-1 spectrum in the majority of the CMAs, and consistent with Commission precedent, we also consider the potential competitive effect of the proposed transaction on those local markets where AT&T would hold a substantial amount of AWS-1 spectrum post-transaction.<sup>262</sup>

76. Concerning the markets that were identified by the initial HHI and the spectrum screens and other spectrum and competitive concerns, after careful evaluation of the competitive effects in each market, we find that the potential for competitive harm is unlikely in the majority of these markets. For the markets identified below, however, we undertake a further market-by market review to examine the competitive landscape and evaluate whether competitive harm is likely in any of these local markets.

(i) **San Diego and the California Central Valley**

77. *Record.* Greenlining asserts that it is concerned about the effect of the proposed transaction on competition in local markets where the Cricket band has a strong presence, particularly in San Diego and California's Central Valley because the markets are home to large minority populations.<sup>263</sup>

78. The Applicants claim that Greenlining does not provide an explanation or supporting evidence for their competitive concerns.<sup>264</sup> The Applicants contend that there will be no adverse local impact in California because four national carriers will continue to compete vigorously in those markets with sufficient spectrum to expand service.<sup>265</sup> The Applicants argue that Sprint has a significant share of subscribers in the markets at issue, and T-Mobile's estimated share is approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** percent or greater in San Diego, CA (CMA 18), Fresno, CA (CMA 74), Modesto, CA (CMA 142), and California 4 – Madera (CMA 339).<sup>266</sup> The Applicants assert that T-Mobile has also introduced MetroPCS service in San Diego and Fresno, thus intensifying competition in value-conscious offerings.<sup>267</sup> Further, according to the Applicants, MetroPCS has a strong presence in Modesto, has added at least 40 retail locations in the Central Valley, and has almost 100 retail locations in the San Diego market, an area it did not previously serve.<sup>268</sup>

79. AT&T states that it agreed to commitments with the California Public Utilities Commission that, for a period of 18 months after closing, Cricket will offer a \$40 per month (including all taxes and fees) feature phone prepaid plan featuring unlimited talk, text, and data and no roaming

<sup>262</sup> See, e.g., *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd 10698.

<sup>263</sup> See Greenlining Petition to Deny at 8-9 (noting concern in the California counties of San Joaquin, Stanislaus, Merced, Madera, Fresno, Kings, Tulare, and Kern within the Central Valley). These counties are encompassed by the following CMAs: Fresno, CA (CMA 74); Bakersfield, CA (CMA 97); Stockton, CA (CMA 107); Modesto, CA (CMA 142); Visalia-Tulare-Porterville, CA (CMA 150); California 4 – Madera (CMA 339); and California 12 – Kings (CMA 347). We note that no assets are being assigned as part of this transaction in Bakersfield or Stockton.

<sup>264</sup> See Joint Opposition at 38.

<sup>265</sup> See *id.* at ii, 38.

<sup>266</sup> See *id.* at 38.

<sup>267</sup> See *id.*

<sup>268</sup> See *id.*

charges to new and existing customers in California.<sup>269</sup> Further, AT&T states that it intends to offer the same \$40 per month prepaid plan wherever the Cricket brand is available nationwide during the same 18-month period.<sup>270</sup> In response, Greenlining states that, based on AT&T and Leap's assurances both in the documents submitted to the California Public Utilities Commission and as a result of discussions between the Parties, Greenlining is satisfied that the Applicants' commitments will help mitigate the proposed transaction's potential public interest harms.<sup>271</sup>

80. *Discussion.* We here conduct our market-specific review of six CMAs in California that are triggered by the initial screen. Four of these CMAs – San Diego, Fresno, Modesto, and California 12 – Kings (CMA 347) – are non-rural markets with populations ranging from 153,000 to 3.1 million and with population densities of 110 to 736 people per square mile. The other two CMAs – Visalia-Tulare-Porterville, CA (CMA 150) and California 4 – are rural markets with populations of approximately 442,000 and 462,000, respectively, and population densities of 92 and 85 people per square mile. All six CMAs trigger the HHI screen,<sup>272</sup> and Modesto and California 4 trigger the spectrum screen as well.<sup>273</sup>

81. Post-transaction, AT&T would hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent in these six California markets.<sup>274</sup> With the exceptions of San Diego and Modesto, Leap currently holds a significant market share in these CMAs.<sup>275</sup> In all of the CMAs except for Visalia-Tulare-Porterville, the other three nationwide providers have significant market share.<sup>276</sup> In these six markets, the share of

<sup>269</sup> See Joint Opposition at 6-7 (citing Letter from J. David Tate, General Attorney & Associate General Counsel, AT&T, to Ryan Dulin, Director, Communications Division, California Public Utilities Commission, re Notice by AT&T Inc. of Proposed Indirect Transfer of Control of Cricket Communications, Inc. (U-3076- C) at 6 (Oct. 8, 2013)).

<sup>270</sup> See Joint Opposition at 7.

<sup>271</sup> See Letter from Orson Aguilar, Executive Director, Greenlining Institute to Marlene H. Dortch, Secretary Federal Communications Commission, WT Docket 13-193 (filed Nov. 4, 2013).

<sup>272</sup> The post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in San Diego, Fresno, Visalia-Tulare-Porterville, and California 12, respectively and the change in the HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in these respective CMAs.

<sup>273</sup> The post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in Modesto and California 4, respectively and the change in the HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in these respective CMAs. Post-transaction, AT&T would hold 156 megahertz of spectrum in Modesto and 151-166 megahertz of spectrum in California 4.

<sup>274</sup> Post-transaction, AT&T would hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, in San Diego, Fresno, Modesto, Visalia-Tulare-Porterville, California 4, and California 12, respectively.

<sup>275</sup> Leap holds **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent in San Diego, Fresno, Modesto, Visalia-Tulare-Porterville, California 4, and California 12, respectively.

<sup>276</sup> In San Diego, CA, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively. In Fresno, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively. In Modesto, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** (continued....)

AT&T's customers porting to Leap generally tracks the average percentage of ports calculated by the Applicants.<sup>277</sup> However, the share of Leap's customers porting to AT&T in several of these markets is substantially higher than the average calculated by the Applicants.<sup>278</sup> In terms of population coverage, the transaction would result in a decrease from five to four providers with significant 3G coverage.<sup>279</sup> In terms of land area coverage, the number of providers with significant 3G land area coverage falls from four to three in Modesto and from three to two in Fresno and California 12.<sup>280</sup> There is no change in San Diego, Visalia-Tulare-Porterville, and California 4 because Leap does not have significant land area 3G coverage in those CMAs.<sup>281</sup> Because Leap has not deployed an LTE network in any of these markets, there is no change in the number of providers with significant LTE population or land area coverage.<sup>282</sup>

82. In San Diego, Fresno, Visalia-Tulare-Porterville, and California 12, AT&T would hold 140 to 148 megahertz of spectrum. Further in these CMAs, the other significant providers hold between 40 and 114 megahertz of spectrum.<sup>283</sup> In Modesto and California 4, AT&T would hold 156 megahertz

(Continued from previous page)

**INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.  
 In Visalia-Tulare-Porterville, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.  
 In California 4, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.  
 In California 12, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.

<sup>277</sup> In these six CMAs **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of AT&T's customers port to Leap. See 2013 LNP Data.

<sup>278</sup> In these six CMAs **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of subscribers port from Leap to AT&T. See 2013 LNP Data.

<sup>279</sup> The Commission has previously found coverage of 70% or more of the population and 50% or more of the land area as presumptively sufficient for a provider to have a competitive presence in the market. See *AT&T-ATN Order*, 28 FCC Rcd at 13704 ¶ 43; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2339 ¶ 50 n.119; *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8733 ¶ 65. In San Diego, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover more than 94% of the population. In Fresno, Modesto, and Visalia-Tulare-Porterville, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover more than 85% of the population. In California 4 and California 12, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover more than 75% of the population.

<sup>280</sup> In Fresno, AT&T, Leap, and Verizon Wireless have significant 3G land area coverage of 66%, 51%, and 72%, respectively. In Modesto, AT&T, Leap, Verizon Wireless, and T-Mobile have significant 3G land area coverage of 72%, 63%, 83%, and 61%, respectively. In California 12, AT&T, Leap, and Verizon Wireless have significant 3G land area coverage of approximately 99%, 85%, and 100%, respectively.

<sup>281</sup> In Visalia-Tulare-Porterville, AT&T and Verizon Wireless have significant 3G land area coverage of 50% and 64%, respectively. In California 4, AT&T and Verizon Wireless have significant 3G land area coverage of 69% and 83%, respectively. In San Diego, AT&T, Verizon Wireless, and T-Mobile all have significant 3G land area coverage of 83%, 82%, and 58%, respectively.

<sup>282</sup> In San Diego, AT&T, Verizon Wireless, Sprint, and T-Mobile have deployed LTE networks covering 97%, 99%, 96%, and 96% of the population, respectively, and 45%, 72%, 32%, and 41% of the land area, respectively. In Fresno, Modesto, Visalia-Tulare-Porterville, and California 4, AT&T, Verizon Wireless, and T-Mobile have deployed LTE networks covering 76 to 100%, 99 to 100%, 58 to 99%, and 74 to 99% of the population, respectively, and 16 to 64%, 65 to 83%, 19 to 51%, and 45 to 76% of the land area, respectively. In California 12, AT&T and Verizon Wireless have deployed LTE networks covering approximately 74% and 100% of the population, respectively, and approximately 75% and 100% of the land area, respectively.

<sup>283</sup> In San Diego, Fresno, Visalia-Tulare-Porterville, and California 12, Verizon Wireless holds 97 to 114 megahertz, Sprint holds 98.5 to 114 megahertz, and T-Mobile holds 40 to 65 megahertz of spectrum.

and 151 to 166 megahertz, respectively. In these two markets, the other significant providers hold between 40 and 109 megahertz of spectrum.<sup>284</sup>

83. Based on our analysis of the market-specific factors of these six CMAs, we find, first, that the potential for competitive harms in San Diego is unlikely because Leap is neither a significant provider nor does it cover a significant portion of the land area of the CMA. We also find there is not likely to be any substantial competitive harms in the Fresno, Modesto, California 4, and California 12 markets as a result of market concentration. Although Leap is a significant provider in three of these four markets, in all four CMAs post-transaction, there would be three additional providers besides the merged entity with significant market share and significant 3G population coverage, and one or two additional providers with significant LTE population coverage. In Visalia-Tulare-Porterville, the sixth CMA, we find on balance only a limited likelihood for competitive harms as a result of market concentration. Although the likelihood of competitive harms is greater than in the other markets because AT&T's post-transaction market share is greater and there are only two other providers with significant market share, we note that three additional providers will remain that cover a significant portion of the CMA population with 3G and two other providers have deployed LTE networks. Finally, after reviewing the two CMAs triggered by the spectrum screen, we conclude that spectrum divestitures here are not necessary to address the potential that AT&T's post-transaction spectrum aggregation would raise rivals' costs in Modesto or California 4.<sup>285</sup>

#### (ii) South Texas Markets

84. Youghioghny Communications claims that AT&T's acquisition of Leap in certain south Texas markets would harm competition and consumers in these markets.<sup>286</sup> Youghioghny Communications argues that in south Texas, post-transaction, AT&T would exceed the spectrum screen in certain markets.<sup>287</sup> Public Knowledge contends that post-transaction AT&T would hold 50 megahertz or 56 percent of AWS-1 spectrum in McAllen, Edinburg-Mission, TX (CMA 128).<sup>288</sup> Further, Youghioghny Communications claims that Leap has a large market share in many of the south Texas CMAs<sup>289</sup> and that the HHI screen is triggered in 11 out of 12 of the markets in and proximate to south

<sup>284</sup> In Modesto, Verizon Wireless, Sprint, and T-Mobile hold 89, 103.85, and 75 megahertz of spectrum, respectively and in California 4, they hold 89 to 109, 103.85 to 104, and 40 to 80 megahertz of spectrum, respectively. In both of these CMAs, the only paired spectrum remaining is 10 megahertz held by Aloha. An application has been filed assigning this spectrum from Aloha to AT&T. See ULS File No. 0006065982.

<sup>285</sup> We note, however, that AT&T currently has on file another application in which it is proposing to acquire additional spectrum in five of the CMAs analyzed above (the exception being San Diego). See ULS File No. 0006065982.

<sup>286</sup> See Youghioghny Communications Petition to Deny at 15-17; IAE Declaration at 22; IAE Feb. 28, 2014 *Ex Parte* at 4.

<sup>287</sup> See Youghioghny Communications Petition to Deny at 6.

<sup>288</sup> See Public Knowledge Petition to Deny at 6.

<sup>289</sup> See Youghioghny Communications Petition to Deny at 15. These markets include San Antonio, TX (CMA 33), Corpus Christi, TX (CMA 112), McAllen-Edinburg-Mission, TX (CMA 128), Brownsville-Harlingen, TX (CMA 162), and Laredo, TX (CMA 281), with Leap's market shares ranging from approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent in San Antonio to [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent in Laredo.

Texas.<sup>290</sup> Youghioghny Communications contends that the transaction would create a classic duopoly in south Texas between AT&T and Sprint,<sup>291</sup> and a duopoly of AT&T and Verizon Wireless in the provision of LTE services as a result of their substantial below 1 GHz spectrum holdings.<sup>292</sup> Other providers in these markets face barriers to entry because only AT&T and Verizon Wireless hold significant amounts of below 1 GHz spectrum.<sup>293</sup> Youghioghny Communications asserts that in the past, direct head-to-head competition in the south Texas markets resulted in lower prices for prepaid mobile services, as well as a more extensive network coverage area by Leap.<sup>294</sup>

85. The Applicants claim that there is no harm from spectrum aggregation in the south Texas markets based on total amount of spectrum held by the nationwide providers, other spectrum held by other licensees, and that the Commission will be auctioning the PCS H Block and 600 MHz spectrum in the coming year.<sup>295</sup> The Applicants argue that all four nationwide providers offer service in south Texas and competition will continue to be vibrant post-transaction.<sup>296</sup> In particular, the Applicants argue that Sprint is a strong competitor based on its market share.<sup>297</sup> In addition, the Applicants contend that Leap's

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<sup>290</sup> See Youghioghny Communications Petition to Deny at 15, 26-27; IAE Declaration at 19, Appendix B; Youghioghny Communications Reply at 2-3. The markets included in Youghioghny Communications' analysis are 11 Texas CMAs: San Antonio, Corpus Christi, McAllen-Edinburg-Mission, Brownsville-Harlingen, Galveston-Texas City, TX (CMA 170), Laredo, Victoria, TX (CMA 300), Texas 15 – Concho (CMA 666), Texas 18 – Edwards (CMA 669), Texas 19 – Atascosa (CMA 670), and Texas 20 – Wilson (CMA 671) as well as Lake Charles, LA (CMA 197). Further, the petitioner claims that Leap is the dominant pre-paid provider in south Texas. See Youghioghny Communications Petition to Deny at 15.

<sup>291</sup> See Youghioghny Communications Petition to Deny at 26; IAE Declaration at 21, Exhibit B; Youghioghny Communications Reply at 3, 10-11. Youghioghny Communications claims that AT&T's and Sprint's combined market shares would be as high as **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent of the market. See Youghioghny Communications Petition to Deny at 26.

<sup>292</sup> See IAE Declaration at 21

<sup>293</sup> See IAE Declaration at 20.

<sup>294</sup> See Youghioghny Communications Petition to Deny at 16. This competition was between Leap and Pocket Communications, LLC ("Pocket"), prior to Leap and Pocket, Punxsutawney Communications, LLC, Elitel, Inc. and certain of their affiliates forming a joint venture in 2010. See ULS file nos. 00041469410 and 00041694237. Leap holds an approximate 75.75% interest in the joint venture and Paul Posner holds approximately 24.25 % in the joint venture and holds a 100% interest in Youghioghny Communications, LLC. See Form 602, STX Wireless, filed May 16, 2012.

<sup>295</sup> See Joint Opposition at 15-17. The Applicants specifically analyze Corpus Christi, TX (CMA 112), McAllen-Edinburg-Mission, TX (CMA 128), and Brownsville-Harlingen, TX (CMA 162). See Joint Opposition at 15-16, n.53. The Applicants claim that this analysis would apply to a broader definition of south Texas that would include 11 Texas CMAs. See Joint Opposition at 37, n.136 (citing IAE Declaration at 31-32, Appendix B; Israel Reply Declaration at ¶ 61 n. 100).

<sup>296</sup> See Joint Opposition at 33-34; Israel Reply Declaration at 35. According to the Applicants, the market shares of the four nationwide competitors in the south Texas CMAs are never smaller than **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent in any of the five South Texas CMAs. See Israel Reply Declaration at 35 n.101.

<sup>297</sup> See Joint Opposition at 34-35; Israel Reply Declaration at 35. Sprint has approximately a **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent market share in the south Texas region. See Joint Opposition at 34; Israel Reply Declaration at 35.

market share has declined significantly in the south Texas CMAs,<sup>298</sup> and this decline implies that it would be an even less effective competitor as a standalone company in the future than it is today.<sup>299</sup> Further, the Applicants argue that T-Mobile has launched the MetroPCS brand in south Texas and is targeting Leap customers and will compete aggressively against AT&T post-transaction.<sup>300</sup>

86. Youghioghny Communications argues that the Applicants' analysis of the south Texas markets is misleading because they point to Sprint as a strong competitor and Leap as a competitor in decline, whereas the data shows that there was an equal or greater decline in Sprint's market share for the same time period.<sup>301</sup>

87. *Discussion.* As a result of our case-by-case analysis of the south Texas markets, including those markets discussed in the Youghioghny Communications petition,<sup>302</sup> we conclude that the instant transaction would likely result in competitive harm in certain markets in Texas. We analyze the twelve Texas CMAs in three groups. In four CMAs we conclude that there is the potential of harm from the loss of a strong facilities-based provider.<sup>303</sup> In an additional four CMAs we conclude that AT&T's post-transaction spectrum aggregation would result in an increased likelihood of foreclosure or of raising rivals' costs.<sup>304</sup> In the remaining four markets, we find that competitive harm is unlikely.<sup>305</sup> The following analyzes the market-specific facts leading to these conclusions.

88. The first four CMAs, Laredo, TX (CMA 281), Texas 18 – Edwards (CMA 669), Texas 19 – Atascosa (CMA 670), and Texas 20 – Wilson (CMA 671), raise the most significant concerns. They are rural markets with populations ranging from approximately 169,000 to 252,000, and population densities ranging from 14 to 74 people per square mile.<sup>306</sup> These four CMAs are located in South Texas and are contiguous. All four markets were identified by both the HHI screen<sup>307</sup> and the spectrum

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<sup>298</sup> According to the Applicants, between March 31, 2012 and June 30, 2012, Leap lost approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] of its subscribers in the five south Texas CMAs and [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] of its subscribers in the 11 Texas CMAs listed in Information Age Economics' Appendix B. *See* IAE Declaration at Exhibit B.

<sup>299</sup> *See* Israel Reply Declaration at 36.

<sup>300</sup> *See* Joint Opposition at 35-36; Israel Reply Declaration at 36. According to the Applicants, there is a notable increase in Leap's port outs to T-Mobile/MetroPCS in south Texas since MetroPCS's launch. *See* Joint Opposition at 36; Israel Reply Declaration at 36, Figure 2.

<sup>301</sup> *See* Youghioghny Communications Reply at 9-10.

<sup>302</sup> *See* Youghioghny Communications Petition to Deny at 6, 7, 14-18, Exhibit A. Lake Charles, LA (CMA 197) is analyzed below in the other market section.

<sup>303</sup> These four CMAs are Laredo, Texas 18, Texas 19, and Texas 20.

<sup>304</sup> These four CMAs are Beaumont-Port Arthur, TX (CMA 101), Corpus Christi, McAllen-Edinburg-Mission, TX, and Brownsville-Harlingen.

<sup>305</sup> These four CMAs are Galveston-Texas City, San Antonio, Victoria, and Texas 15.

<sup>306</sup> 2010 U.S. Census data. Rural is defined as 100 people or less per square mile.

<sup>307</sup> The post-merger HHI in Laredo would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], with a change of [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], in Texas 18 the post-merger HHI would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], with a change of [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], in Texas 19, the post-merger (continued....)

screen.<sup>308</sup> In terms of market share, post-transaction AT&T would have approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent to [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent of subscribers in these markets.<sup>309</sup> Indeed, in each of these CMAs, AT&T's market share would be approximately two to five times larger than the provider with the second largest market share.<sup>310</sup> In Laredo and Texas 19, the other three nationwide providers have significant market share,<sup>311</sup> while in Texas 18 and Texas 20, two of the other three nationwide providers have significant market share.<sup>312</sup> In each of these four CMAs, there are no additional facilities-based providers with significant share. Also, in these four CMAs, the percent of customers porting from AT&T to Leap range from approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent, which is higher than the average reported by the Applicants. The percentage of ports from Leap to AT&T is approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY

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HHI would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], with a change of [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], and in Texas 20, the post-merger HHI, would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] with a change of [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION].

<sup>308</sup> Post-transaction, AT&T would hold 156 megahertz of total spectrum, including 40 megahertz of AWS-1, in Laredo; in Texas 18, 138-168 total megahertz of spectrum, including 40-50 megahertz of AWS-1; in Texas 19, 126-156 total megahertz of spectrum, including 20-50 megahertz of AWS-1; and in Texas 20, 125-160 total megahertz of spectrum, including 20 to 30 megahertz of AWS-1.

<sup>309</sup> In Laredo, AT&T and Leap have [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] market shares, respectively; in Texas 18, AT&T and Leap have [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively; in Texas 19, AT&T and Leap have [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively and in Texas 20, AT&T and Leap hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] respectively.

<sup>310</sup> In Laredo, AT&T's share would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] times as large as the next largest provider; in Texas 18, AT&T's share would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] times as large, in Texas 19, AT&T's share would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] times as large and in Texas 20, AT&T's share would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] times as large.

<sup>311</sup> In Laredo, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively. In Texas 19, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively.

<sup>312</sup> In Texas 18, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively. In Texas 20, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively.

**CONFIDENTIAL INFORMATION]** percent, which is substantially higher than the average reported by the Applicants.<sup>313</sup>

89. The loss of consumer choice in available network services varies across these four CMAs. The number of providers with significant 3G population coverage would decrease from five to four in Laredo, from four to three in Texas 19 and Texas 20, and from three to two in Texas 18.<sup>314</sup> In terms of land area coverage, the number of 3G providers would be unchanged in Laredo, Texas 18 and Texas 19, and would decrease from three to two providers in Texas 20.<sup>315</sup> In terms of LTE coverage, the number of providers covering a significant portion of the population would decrease from five to four in Laredo; there would be no change in Texas 18, Texas 19, or Texas 20, with no provider having significant LTE population coverage in Texas 19.<sup>316</sup> In terms of LTE land area coverage, there would be no change in the number of providers with significant land area coverage in these CMAs, with no provider having significant land area coverage in three of the four CMAs.<sup>317</sup>

90. The spectrum screen is triggered in all four of these CMAs. In Laredo post-transaction, AT&T would be five megahertz over the screen. In Texas 18 post-transaction, AT&T would be over the screen by two to 17 megahertz on a county-by-county basis.<sup>318</sup> In Texas 20, AT&T would be over the screen by nine megahertz in three counties, one megahertz below the screen in two additional counties, and 26 megahertz below the screen in the remaining three counties.<sup>319</sup> In Texas 19 post-transaction, AT&T would be over the screen by five megahertz in two out of the 12 counties in the CMA, which account for approximately 33 percent of the CMA population and 14 percent of the CMA land area. In

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<sup>313</sup> Using LNP (Applicant) data provided by AT&T, ports from AT&T to Leap are **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** % for Laredo, Texas 18, Texas 19, and Texas 20, respectively. Using 2013 LNP data, ports from Leap to AT&T are **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** % for Laredo, Texas 18, Texas 19, and Texas 20, respectively. Further, using Applicant data, ports by AT&T's pre-paid customers to Leap were approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** % for Laredo, Texas 18, Texas 19, and Texas 20, respectively.

<sup>314</sup> In Laredo, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover more than 90% of the population with 3G. In Texas 19 and Texas 20, AT&T, Leap, Verizon Wireless, and Sprint all cover more than 70% of the population with 3G. In Texas 18, AT&T, Leap and Sprint cover more than 85% of the population with 3G.

<sup>315</sup> In Laredo, AT&T, Verizon Wireless, and Sprint all cover more than 75% of the land area with 3G. In Texas 18, AT&T covers approximately 90% of the land area with 3G. In Texas 19, AT&T and Verizon Wireless cover more than 70% of the land area with 3G. In Texas 20, AT&T, Leap, and Verizon Wireless cover 50% or more of the land area with 3G.

<sup>316</sup> In Laredo, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover more than 90% of the population with LTE, in Texas 18, Sprint covers more than 85%, and in Texas 20, Verizon Wireless and Sprint cover more than 80%. In Texas 19, Sprint has the most extensive LTE population coverage of approximately 58 percent.

<sup>317</sup> In Laredo, Verizon Wireless has the most extensive LTE land area coverage of approximately 22%. In Texas 18 - Edwards, Sprint has the most extensive LTE land area coverage of approximately 36%. In Texas 19, Verizon Wireless has the most extensive LTE land area coverage of approximately 26%. In Texas 20, Verizon Wireless and Sprint cover 60% or more of the land area.

<sup>318</sup> AT&T would be over the 151 megahertz screen by 2 megahertz in two counties, by 7 megahertz in five counties, by 12 megahertz in 3 counties and by 17 megahertz in 1 county, and over the 132 megahertz screen (BRS is not available in this county) by 6 megahertz in 1 county.

<sup>319</sup> The three counties where AT&T would be 26 megahertz below the screen reflect approximately 29% of the population and 40% of the land area, respectively.

the remaining 10 counties AT&T would be below the screen by 15 to 25 megahertz. The three other nationwide providers hold 30 to 131.5 megahertz in these four CMAs, and there are additional licensees in each of these CMAs that hold spectrum.<sup>320</sup>

91. In all four of these CMAs, an analysis of market-specific factors indicates that the acquisition of Leap by AT&T may result in competitive harms. In each of these CMAs, Leap has had significant market share, with substantially more share in some of these CMAs, AT&T's post-transaction market share would be large, and there is a reduction in the number of significant facilities-based providers. In the three rural CMAs, the number of providers with significant 3G population coverage, which now can be considered baseline wireless coverage, would decrease from four to three or, in Texas 18, from three to two. In Laredo, we note that Leap's share is not much lower than AT&T's share and Leap covers a significant portion of the CMA population with LTE. The loss of such a strong independent facilities-based provider in the Laredo market may result in potential competitive harm, particular to the value-conscious consumer.

92. In the second group of four CMAs in south Texas, we conclude that potential competitive harm is limited to AT&T's post-transaction spectrum aggregation, which would result in an increased likelihood of foreclosure or of raising rivals' costs. Beaumont-Port Arthur, TX (CMA 101), Corpus Christi, TX (CMA 112), McAllen-Edinburg-Mission, TX (CMA 128), and Brownsville-Harlingen, TX (CMA 162) are non-rural markets with populations ranging from approximately 390,000 to 775,000 and population densities ranging from 185 to 493 people per square mile. Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen were identified by both the HHI screen<sup>321</sup> and the spectrum screen.<sup>322</sup> Beaumont-Port Arthur was identified only by the spectrum screen. Post-transaction, AT&T would hold between **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** percent market share in these four CMAs.<sup>323</sup> In Corpus Christi,

<sup>320</sup> Verizon Wireless holds 52 to 104 megahertz of spectrum in these four CMAs, Sprint holds 75.5-131.5 megahertz, and T-Mobile holds 30-60 megahertz. AT&T also would hold 40 megahertz of AWS-1 spectrum in Laredo, 40 to 50 megahertz in Texas 18, 20 to 50 megahertz in Texas 19, and 20-30 megahertz in Texas 20. In these four CMAs, Verizon Wireless holds 0-30 megahertz of AWS-1 and T-Mobile holds 20-30 megahertz.

<sup>321</sup> The post-transaction HHI in Beaumont-Port Arthur would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, in Corpus Christi the post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, in McAllen-Edinburg-Mission the post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, and in Brownsville-Harlingen, the post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.

<sup>322</sup> Post-transaction, AT&T would hold 175 megahertz of total spectrum, including 30 megahertz of AWS-1 in Beaumont-Port Arthur, 170 megahertz of total spectrum, including 40 megahertz of AWS-1 in Corpus Christi, 180 megahertz of total spectrum, including 50 megahertz of AWS-1 in McAllen-Edinburg-Mission, and 180 megahertz of total spectrum, including 50 megahertz of AWS-1 in Brownsville-Harlingen.

<sup>323</sup> In Beaumont-Port Arthur, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; in Corpus Christi, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; in McAllen-Edinburg-Mission, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** (continued....)

McAllen-Edinburg-Mission, and Brownsville-Harlingen, the number of providers with significant market share would fall from five to four, and there is no change in Beaumont-Port Arthur. In each of these four CMAs, the other three nationwide providers have significant market share.<sup>324</sup> Also, in these four CMAs, the percent of customers porting from AT&T to Leap range from approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], which for some CMAs generally tracks the average percentage of ports calculated by the Applicants and is higher in other CMAs. Also, in these four CMAs, the percent of customers porting from Leap to AT&T range from approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] percent,<sup>325</sup> which generally tracks the average percentage of ports calculated by the Applicants.

93. In terms of coverage, the proposed transaction would result in a decrease from five to four in the number of providers with significant 3G population and land area coverage in Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen.<sup>326</sup> In terms of LTE population coverage in these three CMAs, this would decrease the number of providers from five to four in Corpus Christi and Brownsville-Harlingen, and from four to three in McAllen-Edinburg-Mission.<sup>327</sup> LTE land area coverage also would decline in these three CMAs from five to four providers in Brownsville-Harlingen, from four to three providers in Corpus Christi, and from three to two providers in McAllen-Edinburg-Mission.<sup>328</sup> In Beaumont-Port Arthur, there would be a reduction from five to four providers in terms of 3G population

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[BEGIN HIGHLY CONFIDENTIAL INFORMATION], respectively; and in Brownsville-Harlingen, AT&T and Leap hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively.

<sup>324</sup> In Beaumont-Port Arthur, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively; in Corpus Christi, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively; in McAllen-Edinburg-Mission, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively; and in Brownsville-Harlingen, Verizon Wireless, Sprint, and T-Mobile hold [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION], respectively.

<sup>325</sup> Using 2013 LNP (Applicant) data, ports from AT&T to Leap are [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] % for Beaumont-Port Arthur, Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen, respectively. Using 2013 LNP data, ports from Leap to AT&T are [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] % for Beaumont-Port Arthur, Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen, respectively. Further using Applicant data, ports by AT&T's pre-paid customers to Leap were approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] % for Beaumont-Port Arthur, Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen, respectively.

<sup>326</sup> In Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen, AT&T, Leap, Verizon Wireless, Sprint and T-Mobile cover at least 90 % of the population and 51 % of the land area with 3G.

<sup>327</sup> In Corpus Christi and Brownsville-Harlingen, AT&T, Leap, Verizon Wireless, Sprint and T-Mobile cover at least 75 % of the population with LTE. In McAllen-Edinburg-Mission, AT&T, Leap, Verizon Wireless and T-Mobile cover at least 84% of the population with LTE.

<sup>328</sup> In Brownsville-Harlingen, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile cover at least 55% of the land area with LTE; in Corpus Christi, AT&T, Leap, Verizon Wireless, and Sprint, cover at least 54%; and in McAllen-Edinburg-Mission, AT&T, Leap, and Verizon Wireless cover at least 53%.

coverage and no change in terms of either 3G land area or LTE population and land area coverage.<sup>329</sup>

94. The spectrum screen is triggered throughout Beaumont-Port Arthur and Corpus Christi and in parts of McAllen-Edinburg-Mission and Brownsville-Harlingen. Post-transaction, AT&T would hold 170 to 175 megahertz throughout Beaumont-Port Arthur and Corpus Christi. The other four nationwide providers also hold spectrum throughout these CMAs. Specifically, Verizon Wireless holds 77 to 92 megahertz in these four CMAs, Sprint holds 99 to 111.5 megahertz, and T-Mobile holds 45 to 70 megahertz. Therefore post-transaction, AT&T would hold 1.8 to 2.3 times as much spectrum in these CMAs as Verizon Wireless, 1.6 to 1.8 times as much as Sprint, and 2.6 to 3.9 times as much as T-Mobile. Although there are a few other licensees, the amount of spectrum not deployed for mobile wireless services is limited.<sup>330</sup> In three of these CMAs, AT&T would hold 40-50 megahertz of AWS-1 spectrum and the remaining 40-50 megahertz is held by Verizon Wireless and T-Mobile.<sup>331</sup>

95. In Beaumont-Port Arthur, Corpus Christi, McAllen-Edinburg-Mission, and Brownsville-Harlingen, a review of market factors indicates that this transaction is unlikely to result in significant competitive harm from a loss of a competitor, but that the transaction could potentially raise rivals costs in these markets due to AT&T's spectrum aggregation of 19 to 29 megahertz over the screen. AT&T's spectrum holdings in these markets are substantially higher than the spectrum holdings of the other significant market participants by a magnitude of at least 1.5. Further, the amount of spectrum held by other licensees in this market that have not deployed mobile wireless services is extremely limited. Therefore, the ability of the other significant providers to expand capacity or deploy new and innovative services would likely be harmed by the amount of spectrum held by the merged entity.

96. We find no likelihood of competitive harm in the final group of four CMAs in south Texas. Three of the CMAs trigger the HHI screen – San Antonio, TX (CMA 33), Victoria, TX (CMA 300), and Texas 15 – Concho (CMA 666), while Galveston-Texas City, TX (CMA 170) triggers both the HHI and spectrum screens.<sup>332</sup> Post-transaction, AT&T would hold between **[BEGIN HIGHLY**

<sup>329</sup> In Beaumont-Port Arthur, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile cover at least 88 percent of the population with 3G. Also in this CMA, AT&T, Verizon Wireless, Sprint, and T-Mobile cover at least 65 percent of the land area with 3G and at least 75 percent of the population with LTE. AT&T, Verizon Wireless and Sprint cover at least 74 percent of the land area with LTE.

<sup>330</sup> In all four CMAs, Cavalier Wireless holds the 700 MHz A block license, and Echostar holds six megahertz of unpaired 700 MHz spectrum. Further, Command Connect holds 20 megahertz of AWS-1 spectrum in Beaumont-Port Arthur.

<sup>331</sup> In Corpus Christi, AT&T would hold 40 megahertz of AWS-1 spectrum, Verizon Wireless 20 megahertz, and T-Mobile 30 megahertz. In McAllen-Edinburg-Mission, AT&T would hold 50 megahertz of AWS-1 spectrum and T-Mobile holds 40 megahertz. In Brownsville-Harlingen, AT&T would hold 50 megahertz of AWS-1 spectrum and T-Mobile holds 40 megahertz.

<sup>332</sup> The post-transaction HHI in San Antonio would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, in Victoria the post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, in Texas 15 the post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** with a change of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** and in Galveston-Texas City the post-transaction HHI would be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**.

**CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** percent market share in these four CMAs.<sup>333</sup> In San Antonio and Galveston-Texas City, the number of providers with significant market share would fall from five to four and would remain unchanged in Victoria and Texas 15.<sup>334</sup> Also, in these four CMAs, the percent of customers porting from AT&T to Leap range from approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** percent, which generally tracks the average percentage of ports calculated by the Applicants. The percent of customers porting from Leap to AT&T range from approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** percent,<sup>335</sup> which for some CMAs generally tracks the average percentage of ports calculated by the Applicants and is higher in other CMAs.

97. In terms of coverage, the proposed transaction would result in a decrease from five to four providers with significant 3G population and land area coverage in San Antonio as well as a decrease from five to four providers with, significant LTE population coverage.<sup>336</sup> The number of providers with significant LTE land area coverage in San Antonio would remain unchanged. In Galveston-Texas City, the transaction would result in a decrease from five to four of 3G population and land area coverage.<sup>337</sup> In Victoria, the transaction would result in a decrease from five to four and three to two of 3G population

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<sup>333</sup> In San Antonio, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; in Galveston-Texas City, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; in Victoria, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; and in Texas 15, AT&T and Leap hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.

<sup>334</sup> In San Antonio, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; in Galveston-Texas City, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; in Victoria, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively; and in Texas 15, Verizon Wireless, Sprint, T-Mobile, Central Texas Telephone Cooperative, and Five Star Wireless hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.

<sup>335</sup> Using 2013 LNP (Applicant) data, ports from AT&T to Leap are **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** % for San Antonio, Galveston-Texas City, Victoria, and Texas 15, respectively. Using 2013 LNP data, ports from Leap to AT&T are **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** % for San Antonio, Galveston-Texas City, Victoria, and Texas 15, respectively. Further using Applicant data, ports by AT&T's pre-paid customers to Leap were approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** % for San Antonio, Galveston-Texas City, Victoria, and Texas 15, respectively.

<sup>336</sup> In San Antonio, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile cover at least 97% of the population and 74% of the land area with 3G. In terms of LTE, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile cover at least 91 % of the population and AT&T, Verizon Wireless, Sprint, and T-Mobile cover at least 52% of the land area.

<sup>337</sup> In Galveston-Texas City, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile cover at least 98% of the population and 83% of the land area with 3G. In terms of LTE, Leap, Verizon Wireless, and Sprint cover at least 96% of the population and at least 77% of the land area.

and land area coverage, respectively.<sup>338</sup> In Texas 15, there is no change in the number of providers with significant 3G and LTE population and land area coverage.<sup>339</sup> Post-transaction, AT&T would hold 103 to 155 megahertz of spectrum in these four CMAs<sup>340</sup> and each of the significant providers hold 30 to 133.5 megahertz.<sup>341</sup>

98. In these final four markets, a review of market factors indicates that this transaction is unlikely to result in significant competitive harm from a loss of a competitor. In San Antonio, in addition to the merged entity three other significant providers will remain and each of these has significant 3G and LTE population and land area coverage. In Galveston-Texas City, in addition to the merged entity three other significant providers will remain and each of these has significant 3G population and land area coverage. In Victoria and Texas 15, Leap is not a significant provider and in Texas 15, Leap does not provide significant 3G coverage.

### (iii) Other Markets

99. In an additional five CMAs, we find that the proposed transaction is likely to result in competitive harm from AT&T's post-transaction spectrum aggregation. The five CMAs are: Spokane, WA (CMA 109), Reno, NV (CMA 171), Lake Charles, LA (CMA 197), Kansas 5 – Brown (CMA 432), and Nevada 3 – Storey (CMA 545). Spokane and Lake Charles are non-rural markets with populations of approximately 500,000 and 200,000, and population densities of 267 and 181 people per square mile, respectively. Reno, Kansas 5, and Nevada 3 are rural markets, with populations ranging from approximately 125,000 to 421,000, and population densities ranging from 50 to 67 people per square mile. These CMAs were identified by both the HHI screen<sup>342</sup> and the spectrum screen.<sup>343</sup>

<sup>338</sup> In Victoria, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile cover at least 88% of the population, and AT&T, Leap, and Verizon Wireless cover at least 92% of the land area with 3G. Sprint and T-Mobile cover slightly less than 50% of the land area with 3G. In terms of LTE, AT&T, Verizon Wireless, and Sprint cover at least 97% of the population and at least 76% of the land area.

<sup>339</sup> In Texas 15, AT&T, Verizon Wireless, and Sprint cover at least 80% of the population, and only AT&T has significant land area coverage with 3G. In terms of LTE, only Sprint has significant population coverage in this CMA, and no provider covers a significant portion of the land area of this CMA with LTE.

<sup>340</sup> AT&T would hold 140 megahertz in San Antonio, 155 megahertz in Galveston-Texas City, 150 megahertz in Victoria, and 103-143 megahertz in Texas 15.

<sup>341</sup> Verizon Wireless holds 84 megahertz in San Antonio, 109 megahertz in Galveston-Texas City, 104 megahertz in Victoria, and 52-109 megahertz in Texas 15. Sprint holds 112.75-113.75 megahertz in San Antonio, 103.875 megahertz in Galveston-Texas City, 103.25 megahertz in Victoria, and 77.25-133.5 megahertz in Texas 15. T-Mobile holds 70 megahertz in San Antonio, 60 megahertz in Galveston-Texas City, 70 megahertz in Victoria, and 30-50 megahertz in Texas 15.

<sup>342</sup> The post-transaction HHI would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] in Spokane, Reno, Lake Charles, Kansas 5, and Nevada 3, respectively. The change in the HHI would be [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] in these respective markets.

<sup>343</sup> Post-transaction in Spokane, AT&T would hold 165 megahertz of total spectrum, including 40 megahertz of AWS-1, in Reno, 165 megahertz of total spectrum, in Lake Charles, 180 megahertz of total spectrum, including 40 megahertz of AWS-1, in Kansas 5, 123-178 megahertz of total spectrum, in Nevada 3, 163 megahertz of total spectrum, including 40 megahertz of AWS-1.

100. Leap does not have a significant market share in these five CMAs, with the exception of Reno.<sup>344</sup> Post-transaction, AT&T would hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** percent of the market share in these CMAs.<sup>345</sup> The other three nationwide service providers have a significant market share in Spokane, Reno, Kansas 5, and Nevada 3.<sup>346</sup> In Lake Charles, two of the other nationwide service providers have a significant market share.<sup>347</sup> In terms of coverage, the transaction would result in a decrease in the number of providers with significant 3G population coverage in Spokane and Reno from five to four, and from four to three in Lake Charles.<sup>348</sup> There would be a decrease in the number of providers with significant 3G land area coverage from five to four in Spokane, four to three in Lake Charles, and no change in Reno.<sup>349</sup> In Kansas 5 and Nevada 3, Leap does not have significant 3G population or land area coverage,<sup>350</sup> so there is no decline in the number of providers with significant 3G coverage. Further, Leap does not have LTE population or land area coverage in any of these five CMAs, so there is no decrease in the number of providers with that coverage.

101. Post-transaction, AT&T would hold 165 megahertz of spectrum throughout Spokane and Reno and 163 megahertz throughout Nevada 3. The other three nationwide providers hold between 50 and 114 megahertz of spectrum in these CMAs,<sup>351</sup> and AT&T's post-transaction spectrum holdings would

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<sup>344</sup> Leap holds **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in Spokane, Lake Charles, Kansas 5, and Nevada 3, respectively. In Reno, Leap holds a **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** share. In Reno, according to 2013 LNP (Applicant) data, approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** % of AT&T's subscribers port to Leap and approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of Leap's subscribers port to AT&T.

<sup>345</sup> Post-transaction, AT&T would hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** in Spokane, Reno, Lake Charles, Kansas 5, and Nevada 3, respectively.

<sup>346</sup> In Spokane, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively. In Reno, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively. In Kansas 5, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively. In Nevada 3, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**, respectively.

<sup>347</sup> In Lake Charles, Verizon Wireless, Sprint, and T-Mobile hold **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** respectively.

<sup>348</sup> In Spokane, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover at least 95% of the population. In Reno, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover at least 86% of the population. In Lake Charles, AT&T, Leap, Verizon Wireless, and Sprint cover at least 95% of the population.

<sup>349</sup> In Spokane, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover at least 53% of the land area. In Reno, AT&T, Leap, Verizon Wireless, Sprint, and T-Mobile all cover less than approximately 40% of the land area. In Lake Charles, AT&T, Leap, Verizon Wireless, and Sprint cover at least 76% of the land area.

<sup>350</sup> Leap covers approximately 46% of the population and 6% of the land area in Kansas 5, and covers approximately 58% of the population and 7% of the land area in Nevada 3.

<sup>351</sup> In Spokane, Verizon Wireless, Sprint, and T-Mobile hold 87, 87.25, and 60 megahertz of spectrum, respectively. In Reno, Verizon Wireless, Sprint, and T-Mobile hold 77, 114, and 60 megahertz of spectrum, respectively. In (continued....)

be 1.4 to 3.3 times as great as the other significant providers. In Lake Charles, post-transaction AT&T would hold 180 megahertz throughout the CMA. The other three nationwide providers hold between 50 and 104 megahertz of spectrum,<sup>352</sup> and AT&T's post-transaction spectrum holdings would be 1.7 to 2.5 times as great as the other significant providers.<sup>353</sup> In Kansas 5, AT&T would hold 123 to 178 megahertz of spectrum. In this CMA, AT&T is above the screen in three out of five counties, which reflect approximately 81 percent of the population of the CMA. The other three nationwide providers hold between 40 and 119 megahertz of spectrum. In Spokane, Reno, Lake Charles, and Nevada 3, there is a small amount of paired spectrum that has not been deployed for a mobile wireless network.<sup>354</sup> In Kansas 5, there are several licensees that hold paired spectrum that has not been deployed for a mobile wireless network, but only one of these licensees holds spectrum throughout the CMA.<sup>355</sup>

102. Based on this analysis, we find that in these five CMAs AT&T's spectrum aggregation as a result of the instant transaction is likely to raise rivals' costs of providing mobile wireless services. Post-transaction, AT&T would hold significantly more spectrum than the other significant providers and in each of these markets there is little paired spectrum that has not been deployed for mobile wireless services. Therefore, in order to add capacity or offer new and innovative services, the other service providers in these markets would need to use alternative and likely more costly means to achieve these, than AT&T.

### 3. Roaming

103. *Background.* Roaming occurs when a subscriber of one mobile wireless provider travels beyond the service area of that provider and uses the facilities of another mobile wireless provider to place and receive calls, continue in-progress calls, and transmit and receive data.<sup>356</sup>

104. Several petitioners and commenters argue that despite Leap's limited geographic footprint, the loss of Leap as a roaming partner reduces competitive pressure on nationwide providers to

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Nevada 3, Verizon Wireless, Sprint, and T-Mobile hold 77, 97.5-114, and 50 megahertz of spectrum, respectively. Further, in Spokane and Nevada 3, Verizon Wireless holds 20 megahertz AWS-1, and T-Mobile holds 30 megahertz.

<sup>352</sup> In Lake Charles, Verizon Wireless and Sprint hold 72 and 104 megahertz of spectrum, respectively. Further, Verizon Wireless and T-Mobile each hold 20 megahertz of AWS-1, and Command Connect holds the remaining 10 megahertz.

<sup>353</sup> AT&T would hold approximately 3.6 times as much spectrum as T-Mobile, which covers over 60% of the CMA population with 3G and LTE and has a [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] market share.

<sup>354</sup> In Spokane, Cavalier Wireless holds 12 megahertz, in Reno, Triad holds 12 megahertz of spectrum, in Lake Charles, Command Connect holds 10 megahertz and CenturyTel holds 12 megahertz, and in Nevada 3, Cleartalk and Triad each hold 12 megahertz of spectrum.

<sup>355</sup> In Kansas 5, Gabelli holds 0-10 megahertz, Rainbow Communications 12 megahertz, Tri-County Telecommunications 0-10 megahertz, U.S. Cellular 0-22 megahertz, and Viaero Wireless 0-20 megahertz. Some of these licensees have a small amount of coverage in this CMA – U.S. Cellular covers 3.5% of the population and Viaero Wireless covers 1.4% of the population.

<sup>356</sup> See, e.g., *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10729 ¶ 81; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17612 ¶ 52; *AT&T-Verizon Wireless-ALLTEL Order*, 25 FCC Rcd at 8741 ¶ 87. See also Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Second Report and Order*, 26 FCC Rcd 5411 (2011), *aff'd sub nom. Cellco Partnership v. FCC*, 700 F.3d 534 (DC Cir. 2012) (“*Data Roaming Order*”).

maintain reasonable roaming rates and to compete fairly in the marketplace.<sup>357</sup> The commenters argue that loss of Leap as a roaming partner will increase roaming rates,<sup>358</sup> particularly those faced by small and rural providers,<sup>359</sup> and in the clusters identified by Youghiogheny Communications.<sup>360</sup> Several parties also assert that AT&T has refused to offer data roaming agreements to other providers at commercially reasonable terms and conditions, a problem that may be exacerbated by this transaction.<sup>361</sup> Some petitioners contend that the data roaming rule adopted by the Commission in 2011 does not address these concerns, because even under the rule providers have difficulty negotiating reasonable roaming arrangements with the top two nationwide providers.<sup>362</sup>

105. To remedy these alleged harms, the commenters request certain roaming-related conditions. Many of these requested conditions are based on the perceived inadequacy of the Commission's current roaming rules. NTCH and Youghiogheny Communications, for instance, request that similar rates as the current CDMA roaming rates be applied to the future GSM/LTE network, once the network is transitioned.<sup>363</sup> Youghiogheny Communications also requests that AT&T be required to continue or improve upon Leap's roaming terms for a period of at least five years.<sup>364</sup> Blue Wireless

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<sup>357</sup> See CCA Petition to Condition at 6-7, 15-17. See also CCA Reply at 6, 11-15; RWA Reply at 3-4; Youghiogheny Communications Petition to Deny at 11-14, 29; Youghiogheny Communications Jan. 8, 2014 *Ex Parte* at 2-3, 5-9; Youghiogheny Communications Feb. 3, 2014 *Ex Parte* at 2-3; NTCH, Inc. (NTCH) Petition to Deny or Condition at 3-4. See also NTCH Reply at 4; IAE Declaration at 12-14, 28; Youghiogheny Communications Reply at ii, 11-12; Letter from Donald J. Evans, Counsel for Buffalo-Lake Erie Wireless Systems, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 2-3 (filed Jan. 6, 2014) ("Blue Wireless Jan. 6, 2014 *Ex Parte*"); Letter from Michael Lazarus and Andrew Morentz of Telecommunications Law Professionals, PLLC, Counsel to Competitive Carriers Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 1-4 (filed Jan. 3, 2014) ("CCA Jan. 3, 2014 *Ex Parte*"); Letter from Michael Lazarus and Andrew Morentz of Telecommunications Law Professionals, PLLC, Counsel to Competitive Carriers Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 2-3 (filed Feb. 6, 2014) ("CCA Feb. 6, 2014 *Ex Parte*").

<sup>358</sup> See generally Smith Reply at 9. See also CCA Petition to Condition at 7, 15-17; RWA Comments at 5; Youghiogheny Communications Jan. 8, 2014 *Ex Parte* at 8-9; Youghiogheny Communications Jan. 29, 2014 *Ex Parte* at 1. See also NTCH Reply at 2-4. See also Youghiogheny Communications Jan. 8, 2014 *Ex Parte* at 2, 6.

<sup>359</sup> See CCA Petition to Condition at 6-7, 16. See also CCA Reply at 6-7; NTCH Petition to Deny or Condition at 2-5; NTCH Reply at 3-4; Youghiogheny Communications Petition to Deny at 11-16; IAE Declaration at 16-17; Youghiogheny Communications Feb. 6, 2014 *Ex Parte* at 5.

<sup>360</sup> See Youghiogheny Communications Petition to Deny at 32-33; IAE Declaration at 20. See also IAE Feb. 28, 2014 *Ex Parte* at 2-3.

<sup>361</sup> See CCA Petition to Condition at 15-17. See also CCA Reply at 6-7, 12; NTCH Petition to Deny or Condition at 2-4 (discussing AT&T and Verizon); NTCH Reply at 2-4; Youghiogheny Communications Petition to Deny at 11-14 (discussing AT&T and Verizon); IAE Declaration at 16; IAE Reply Declaration at 7, 16-17; CCA Jan. 3, 2014 *Ex Parte* at 2-3; CCA Feb. 6, 2014 *Ex Parte* at 2-4; Youghiogheny Communications Jan. 8, 2014 *Ex Parte* at 2, 8-14, 19; Youghiogheny Communications Feb. 3, 2014 *Ex Parte* at 2-4.

<sup>362</sup> See CCA Petition to Condition at 15-17. See also RWA Reply at 3; Flat Wireless, LLC, Jan. 6, 2014 *Ex Parte* at 3-4; Youghiogheny Communications Jan. 8, 2014 *Ex Parte* at 6-9, 15-16, 19; Letter from Martyn Roetter and Alan Pearce, Information Age Economics, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 1-3 (filed Feb. 5, 2014) ("IAE Feb. 5, 2014 *Ex Parte*").

<sup>363</sup> See NTCH Petition to Deny or Condition at 1, 4. See also Youghiogheny Communications Petition to Deny at 14, 33; Youghiogheny Communications Reply at 12-13.

<sup>364</sup> See Youghiogheny Communications Petition to Deny at 14, 33. See also Youghiogheny Communications Reply at 12-13.

contends that Leap has recently been offering inflated roaming rates in anticipation of these conditions, and that AT&T should be required to offer roaming rates that do not exceed those rates offered by Leap prior to its entry into the merger agreement.<sup>365</sup> Youghioghney Communications and IAE also describe several methods that could be used to determine voice and data roaming rates.<sup>366</sup> Flat Wireless requests unspecified protections for Leap's current roaming partners, to reduce the effects of this transaction on CDMA roaming.<sup>367</sup> Other requested conditions, discussed below, address transitional issues related to AT&T's plans to decommission Leap's CDMA network facilities.

106. Leap specifies that with a few exceptions, their roaming agreements are terminable by either party for convenience upon the requisite written notice to the other party. The exceptions include agreements with Sprint, MetroPCS, and Flat Wireless.<sup>368</sup> The Applicants respond that no roaming conditions should be imposed because Leap "is not a significant provider of roaming services," and "alternative roaming providers exist across virtually all of Leap's network footprint," therefore this transaction will not significantly affect options for CDMA roaming.<sup>369</sup> In response to Blue Wireless, Leap replies that Blue Wireless was not a roaming partner of Leap at the time the transaction was announced, and that they are using the pendency of the current transaction to extract concessions.<sup>370</sup> Leap does not provide any LTE roaming.<sup>371</sup>

107. *Discussion.* With regard to the arguments expressing concern about the availability of

<sup>365</sup> See Blue Wireless Jan. 6, 2014 *Ex Parte* at 3-4. See also Youghioghney Communications Feb. 3, 2014 *Ex Parte* at 2-4; Youghioghney Communications Jan. 29, 2014 *Ex Parte* at 1.

<sup>366</sup> See Youghioghney Communications Feb. 6, 2014 *Ex Parte* at 2-4, 5; Youghioghney Communications Jan. 8, 2014 *Ex Parte* at 8, 12-19. See also Letter from Donald J. Evans, Counsel for Youghioghney Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193 (filed Feb. 7, 2014) ("Youghioghney Communications Feb. 7, 2014 *Ex Parte*"); IAE Jan. 8, 2014 *Ex Parte* at 8, 12-19; IAE Feb. 28, 2014 *Ex Parte* at 3-5 (arguing for additional conditions including a requirement for AT&T to file with the Commission all roaming agreements with wireless providers in the United States and Canada, publish certain roaming rates, and sign roaming agreements with at least two small providers).

<sup>367</sup> See Flat Wireless Jan. 6, 2014 *Ex Parte* at 4.

<sup>368</sup> See Nov. 22, 2013 Leap Initial Response at 20-21, where Leaps states that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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<sup>369</sup> See Joint Opposition at 39, 41. See also Public Interest Statement, Declaration of Robert A. Strickland at 1.

<sup>370</sup> See Leap Jan. 16, 2014 *Ex Parte* at 3.

<sup>371</sup> See Nov. 22, 2013 AT&T Initial Response at 70.

roaming, we find that the Commission's general roaming policies and rules should ensure that entities can obtain roaming agreements on reasonable terms and conditions. In the event that a service provider, including Youghioghny Communications, NTCH, or any member of CCA, encounters difficulties in obtaining reasonable roaming services or roaming rates under our rules and policies, it can file complaints with the Commission pursuant to our established roaming rules.<sup>372</sup> We conclude that any roaming rate or term related conditions proposed by commenters are not narrowly tailored to remedy any purported harms arising out of this transaction.

108. The Commission has recognized, however, that the continued ability of wireless customers to roam is an important concern when wireless service providers intend to transition network technology as a result of a proposed transaction.<sup>373</sup> Thus, the Commission has previously conditioned consent of a proposed transaction on the ability of wireless service providers to have access, on behalf of their customers, to roaming services in the areas affected by the transaction for an orderly transition.<sup>374</sup> We address below issues relating to the provision of roaming services provided on Leap's CDMA network during its network transition while providers are making alternative roaming arrangements.

### C. Other Issues

109. *Customer Migration.* We also consider potential public interest harms associated with the transition of Leap customers, particularly given that, with the planned discontinuance of Leap's CDMA-based network, customers wishing to remain with the Cricket brand necessarily will be migrating from that network onto a GSM-based network. AT&T's original statements – in the Public Interest Statement – were limited only to general representations, e.g., that it expects to complete migration of Leap customers to AT&T's networks within 18 months of closing.<sup>375</sup> In a supplement filed on August 20, 2013, the Applicants asserted that, after merger close, it will honor the existing plan of each Leap customer, provided that the customer does not suspend or terminate his or her service for that plan, or choose to upgrade to a device or plan that is not comparable to his or her current device or plan.<sup>376</sup> AT&T contends that it plans to combine the nascent operations of Aio Wireless with Leap's existing operations under the Cricket brand name, claiming that this will allow Leap customers to migrate to AT&T's network organically.<sup>377</sup> Applicants estimate that **[BEGIN CONFIDENTIAL INFORMATION]** **[END CONFIDENTIAL INFORMATION]** percent of Leap's customers replace handsets every 18 months.<sup>378</sup> AT&T leaves open the possibility that it may formulate offers designed to encourage Leap customers to migrate to its network, as it learns more about Leap's customer base.<sup>379</sup> In

<sup>372</sup> See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15828 ¶ 27 (2007); Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Order on Reconsideration and Second Further Notice of Proposed Rulemaking*, 25 FCC Rcd 4181, 4192 ¶ 2 (2010); *Data Roaming Order*, 26 FCC Rcd at 5411.

<sup>373</sup> See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8746-8748 ¶¶ 95-101. See also *AT&T-ATN Order*, 28 FCC Rcd at 13702-13703 ¶ 59-60.

<sup>374</sup> See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8746-8748 ¶¶ 95-101. See also *AT&T-ATN Order*, 28 FCC Rcd at 13702-13703 ¶ 59-60.

<sup>375</sup> See Public Interest Statement at 16.

<sup>376</sup> See Aug. 20, 2013 Applicants Supplemental Response at 2.

<sup>377</sup> See Aug. 20, 2013 Applicants Supplemental Response at 2.

<sup>378</sup> Joint Opposition at n.26.

<sup>379</sup> See Aug. 20, 2013 Applicants Supplemental Response at 3.

addition, AT&T notes that migrating Leap customers will have the opportunity to “bring their own devices,” which will allow them to use any unlocked and technically compatible phone on AT&T’s network.<sup>380</sup>

110. In response to the assertions made by the Applicants in the Public Interest Statement and the August 20, 2013 Supplement, several parties in their Petitions to Deny argue that AT&T’s proposed customer transition plans are insufficient. Public Knowledge believes that AT&T has failed to explain whether it will honor the terms and conditions Leap provides to existing Leap customers, such as unlimited voice, text, and data.<sup>381</sup> Youghioghny Communications contends that the proposed transaction offers no benefit or certainty to existing Leap customers because AT&T has only promised that it *may* formulate offers designed to further encourage the migration of those Leap customers that do not migrate to the AT&T network on their own, and that if anything, former Leap customers, rather than gaining anything, will be losing Cricket’s unique “Muve” music service.<sup>382</sup> Youghioghny Communications argues that AT&T’s bring-your-own-device option is worthless because existing Leap CDMA devices are incompatible with AT&T’s network and unlocked devices are likely to be more expensive to obtain.<sup>383</sup> Youghioghny Communications argues that AT&T should be required to present a more concrete transition plan and suggests a condition to ensure that Cricket’s customers are not forced to buy new phones and pay higher prices if they migrate to the AT&T network.<sup>384</sup> Finally, Youghioghny Communications asserts that, because Leap’s customer base is exclusively prepaid, the transition problems that concerned the Commission in connection with the ATN deal are magnified here because any palliative used to soften the effects of the transaction on Leap’s customers may erase the cost-saving benefits claimed by the Applicants.<sup>385</sup>

111. On October 24, 2013, in its Joint Opposition, AT&T states that it has agreed that, for a period of 18 months after closing, Cricket will offer a \$40 per month (including all taxes and fees) prepaid plan featuring unlimited talk, text and data and no roaming charges to new and existing customers in California.<sup>386</sup> AT&T adds that it intends to offer the same \$40 per month prepaid plan wherever the Cricket brand is available nationwide during the same 18-month period.<sup>387</sup> AT&T claims, in fact, that its preliminary migration plans are substantially similar to those approved in the *T-Mobile-MetroPCS Order*.<sup>388</sup> AT&T has provided no new proposals regarding customer migration in its November 22, 2013, Initial Response to the Information and Discovery Request, its January 3, 2014, Second Supplemental Response, or its January 23, 2014, Third Supplemental Response, apart from noting that examples of possible incentive offers under discussion included **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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<sup>380</sup> Aug. 20, 2013 Applicants Supplemental Response at 2-3.

<sup>381</sup> See Public Knowledge Petition to Deny at 17-18.

<sup>382</sup> See Youghioghny Communications Petition to Deny at 22; Youghioghny Communications Reply at 15.

<sup>383</sup> See Youghioghny Communications Petition to Deny at 23.

<sup>384</sup> See Youghioghny Communications Petition to Deny at 24; Youghioghny Communications Reply at 13.

<sup>385</sup> See Youghioghny Communications Petition to Deny at 23.

<sup>386</sup> See Joint Opposition at 7; Letter from J. David Tate, General Attorney & Associate General Counsel, AT&T, to Ryan Dulin, Director, Communications Division, California Public Utilities Commission, re Notice by AT&T Inc. of Proposed Indirect Transfer of Control of Cricket Communications, Inc. (U-3076-C) at 6 (filed Oct. 8, 2013).

<sup>387</sup> See Joint Opposition at 7.

<sup>388</sup> See *id.* at 7-8.

[END HIGHLY CONFIDENTIAL INFORMATION].<sup>389</sup>

112. With respect to the similarities between this transaction's customer migration plans and those in T-Mobile/MetroPCS, Public Knowledge responds that the plans are actually quite different from those approved in the *T-Mobile-MetroPCS Order*. According to Public Knowledge, AT&T conditions upgrades on giving up existing Leap plans, while T-Mobile's customers do not have to choose between an updated device and abandoning MetroPCS's rates, terms, and conditions.<sup>390</sup> Mr. Smith argues that Applicants will honor the flexible, no-commitment plans Leap customers have already chosen only if those customers accept what amounts to a contract not to change the terms of their service arrangement, which is exactly the type of fixed agreement that Mr. Smith and other Leap customers consciously sought to avoid in the first place.<sup>391</sup> Mr. Smith also argues that this transaction will force Cricket's existing customers to purchase new equipment that is compatible with AT&T's network.<sup>392</sup>

113. In its February 5, 2014, Fourth Supplemental Response, AT&T added that the New Cricket will offer [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION].<sup>393</sup> It is also considering offering certain discounts, credits, and incentives to some customers,<sup>394</sup> but makes no commitments in that respect. AT&T asserts that as of December 2013, more than [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] of Leap's subscribers upgraded their devices during the preceding 18-month period, and approximately [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] of Leap's subscribers upgraded their devices during the preceding 12-month period.<sup>395</sup> Based in part on the Applicants' churn estimates [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION].<sup>396</sup>

114. AT&T addresses the migration of existing Cricket Lifeline customers starting in its Second Supplemental Response of January 3, 2014. Through its ETC status in various states, Cricket provides Lifeline service by giving Lifeline customers a \$10 discount from Cricket's monthly plans,<sup>397</sup> which can run as low as \$35 per month.<sup>398</sup> [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION] AT&T had committed to the California PUC to maintain its ETC status and to

<sup>389</sup> See Jan. 23, 2014 AT&T Third Supplemental Response at 7.

<sup>390</sup> See Public Knowledge Reply at 12.

<sup>391</sup> See Smith Reply at 10.

<sup>392</sup> See Smith Reply at 10.

<sup>393</sup> See Feb. 5, 2014 AT&T Fourth Supplemental Response at 3-4.

<sup>394</sup> See Feb. 5, 2014 AT&T Fourth Supplemental Response at 4-5.

<sup>395</sup> See Feb. 5, 2014 AT&T Fourth Supplemental Response at 5.

<sup>396</sup> See Feb. 5, 2014 AT&T Fourth Supplemental Response at 9.

<sup>397</sup> See Cricket Lifeline Credit, <http://www.mycricket.com/support/cricket-lifeline-credit> (last visited Mar. 11, 2014).

<sup>398</sup> See Cricket Cell Phone Plans & Deals, available at <http://www.mycricket.com/cell-phone-plans#basic-plans> (last visited Mar. 11, 2014).

provide Lifeline service there for the duration of the 18 months post-merger close.<sup>399</sup> AT&T has also stated that it would honor the existing plan of each Leap customer as of merger close.<sup>400</sup>

115. In its February 5, 2014, Fourth Supplemental Response,<sup>401</sup> AT&T discussed **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY CONFIDENTIAL INFORMATION]**.<sup>402</sup> In a March 12, 2014 *Ex Parte* filing, AT&T indicates that “it would maintain Cricket’s ETC designations for some period of time. As such, Cricket will continue to fulfill its Lifeline ETC obligations and comply with relevant requirements. Should Cricket decide to cease participating in the Lifeline program, it would comply with applicable procedures to effectuate such a decision (including applicable relinquishment procedures).”<sup>403</sup>

116. As discussed above, the Applicants initially provided very little in the way of detailed description of their customer transition plans. In particular, AT&T represented that it has had experience transitioning customers in previous transactions, many of which involved similar migration plans (although we note that those were from 2G to 3G networks).<sup>404</sup> The Applicants assert that “AT&T has a history of successfully integrating networks, including the integration of CDMA-based networks and the migration of existing customers, including prepaid customers, from those networks.”<sup>405</sup> However, AT&T’s merger integration strategy largely relies on **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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<sup>399</sup> See Jan. 3, 2014 AT&T Second Supplemental Response at n.12. In the Jan. 3, 2014 Second Supplemental Response at 8, AT&T explicitly agreed to continue CDMA service to Lifeline customers “[a]s long as [the] Lifeline customer does not suspend or terminate his or her service for that Lifeline plan or choose to upgrade to a device or plan that is not comparable to his or her current Lifeline device or plan. . . until AT&T terminates consumer-based CDMA services,” which will happen within 18 months of merger close, and in some places, within **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of merger close. In its January 23, 2014, Third Supplemental Response, AT&T reiterated that “Lifeline customers will be permitted to terminate their CDMA service at any time and may move to alternative Lifeline service providers.” Jan. 23, 2014 AT&T Third Supplemental Response at 9.

<sup>400</sup> See Nov. 22, 2013 AT&T Initial Response at 45.

<sup>401</sup> See Feb. 5, 2014 AT&T Fourth Supplemental Response at 3.

<sup>402</sup> See Letter from Donald J. Evans, Counsel for Youghioghney Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 2 (Feb. 14, 2014) (“Youghioghney Communications Feb. 14, 2014 *Ex Parte*”). See also Letter from Donald J. Evans, Counsel for Youghioghney Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 3 (Mar. 10, 2014) (“Youghioghney Communications Mar. 10, 2014 Clyburn Office *Ex Parte*”).

<sup>403</sup> See Letter from Mary L. Henze, Assistant Vice President – Federal Regulatory, AT&T Services, Inc. to Ms. Marlene Dortch, Secretary, Federal Communications Commission, WT Docket 13-193 (filed Mar. 12, 2014) (“AT&T March 12, 2014 Lifeline *Ex Parte*”).

<sup>404</sup> See Joint Opposition at n.31.

<sup>405</sup> See *id.*

**[END HIGHLY**

**CONFIDENTIAL INFORMATION]**<sup>406</sup> Although AT&T has recently provided more information about the steps it plans to take to transition Leap’s customers, including Lifeline customers, we find the information on customer migration is still insufficient under our public interest review.

117. *Broadvox Access Charge Dispute.* Broadvox, a competitive local exchange carrier (“CLEC”),<sup>407</sup> accuses AT&T, through its long distance affiliates, of placing undue pressure on other long distance providers by failing to pay invoices without filing timely or good faith disputes.<sup>408</sup> Broadvox alleges that over a period of 20 months, it billed AT&T \$3,480,000, but AT&T paid only \$428,000 without identifying which charges it disputes.<sup>409</sup> It has filed a complaint in federal court to collect the monies it believes are due.<sup>410</sup>

118. Broadvox argues that AT&T will increase its penetration into the market for prepaid services by purchasing Leap and that prepaid wireless services compete directly with prepaid calling card services.<sup>411</sup> Broadvox argues that the transaction will increase the flow of traffic originated by its own wireless customers to Broadvox, which will allegedly result in more access charges that AT&T will not pay.<sup>412</sup> Broadvox asks the Commission to deny the applications because the transaction will allegedly “exacerbate what is already an untenable situation for Broadvox.”<sup>413</sup> In the alternative, Broadvox asks that the Commission place a series of conditions on the transaction that would require AT&T to make various filings and reports to the Commission, offer any settlement rates, terms, and conditions to any requesting carrier on a nondiscriminatory basis, and comply with the VoIP Symmetry Rule.<sup>414</sup>

119. The Applicants respond that the issues Broadvox raises have no relationship to the transaction and involve parties other than Broadvox and AT&T.<sup>415</sup> The Applicants also contend that the issues should be litigated in other proceedings before the Commission and in federal court where these issues have already been raised.<sup>416</sup>

120. We conclude that the issues raised by Broadvox and conditions proposed by Broadvox are not narrowly tailored to remedy any purported harms arising out of this transaction. Furthermore, we

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<sup>406</sup> See ATT-FCC-000036953.

<sup>407</sup> Broadvox provides interstate and intrastate exchange access services, as well as local, long distance and enhanced services on both a retail and wholesale basis to communication service providers. See Broadvox Petition to Deny at 4. Broadvox serves its own local and long distance customers, but provides service to a wide variety of customers, including prepaid calling card providers. See *id.*

<sup>408</sup> See Broadvox Petition to Deny at 6.

<sup>409</sup> See *id.*

<sup>410</sup> See Broadvox Petition to Deny at 8.

<sup>411</sup> See *id.* at 12-13.

<sup>412</sup> See *id.* at 15.

<sup>413</sup> See *id.* at 15.

<sup>414</sup> See *id.* at 17-18. See also Letter from James C. Falvey, Esq., Counsel for Broadvox-CLEC, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193, at 5 (filed Mar. 10, 2014).

<sup>415</sup> See Joint Opposition at 43.

<sup>416</sup> See *id.* at 43-44.

agree with the Applicants that the appropriate fora for resolving these issues are the proceedings before the Commission and in federal court where these issues have already been raised.

121. *Infrastructure Network Leases.* Infrastructure Networks, Inc. (Infrastructure) provides high speed data connectivity for users in critical infrastructure industries, including oil and natural gas exploration and production; water, oil and natural gas pipelines and wells; coal and ore mines; railroads, roads, inland waterways, vital bridges and tunnels; electric generation plants and distribution systems; and municipal traffic, utility and public service systems.<sup>417</sup> Infrastructure had entered into agreements with Cricket and STX to lease AWS-1 spectrum in Texas and Oklahoma.<sup>418</sup> The leases commenced July 22, 2013.<sup>419</sup> The leases contain provisions allowing the lease to be terminated upon six months' notice by either party.<sup>420</sup> Infrastructure asked for assurances that AT&T would honor the leases, but AT&T refused to provide such assurances.<sup>421</sup>

122. Infrastructure argues that if AT&T terminated the leases, "it would remove a competitor from this market and leave the critical infrastructure market dangerously underserved."<sup>422</sup> According to Infrastructure, allowing AT&T to acquire the spectrum would harm competition without any corresponding benefit.<sup>423</sup> The Applicants describe the issue as a private contractual issue that the Commission should leave to the parties or courts of competent jurisdiction.<sup>424</sup> Infrastructure responds that the energy industry has critical communications needs that implicate an important public interest.<sup>425</sup> Infrastructure asks "that the Commission condition any grant of consent in this proceeding by requiring AT&T to honor rather than terminate the Leases for the duration of their term."<sup>426</sup> TanMar Communications and Stallion Oilfield Services Ltd. ask the Commission to consider the need of critical infrastructure industries for virtual private radio networks in connection with this transaction.<sup>427</sup>

123. We decline to impose the condition requested by Infrastructure because it is inconsistent with Commission policy. Infrastructure freely negotiated a lease with Leap that allowed Leap to

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<sup>417</sup> See Infrastructure Petition to Condition at 3.

<sup>418</sup> See Lease Nos. L000010651 (10 megahertz of AWS-1 spectrum in Fayette County, Texas and Beckham, Ellis, and Roger Mills counties in Oklahoma); L000010652 (10 megahertz of AWS spectrum in DeWitt, Gonzales, Karnes, Lavaca, and Wilson counties in Texas).

<sup>419</sup> See Lease Nos. L000010651, L000010652.

<sup>420</sup> See Joint Opposition at 44; Infrastructure Reply at 5. There is a dispute between the parties as to whether the lease allows for termination if there is a transfer of control of Leap. Compare Infrastructure Petition to Condition at 3-4 and Joint Opposition at 44.

<sup>421</sup> See Infrastructure Petition to Condition at 4.

<sup>422</sup> *Id.* at 6.

<sup>423</sup> See *id.* at 6.

<sup>424</sup> See Joint Opposition at 45.

<sup>425</sup> See Infrastructure Reply at 5-6. See also Letter from Ronald W. Del Sesto, Jr., Esq., counsel for Infrastructure Networks, Inc. to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 3, 2014) at 2.

<sup>426</sup> Infrastructure Reply at 8.

<sup>427</sup> See Letter from Robert J. Ryan, Assistant Secretary, Stallion Oilfield Services Ltd. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193 (filed Feb. 18, 2014); Letter from Scott Leblanc, General Manager, TanMar Communications, L.L.C. to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193 (filed Feb. 6, 2014).

terminate the lease on six months' notice. In establishing its secondary markets rules and policies, the Commission recognized that parties would negotiate terms under which leases could be terminated, and held that so long as those terms complied with our rules and policies, "[w]e will not dictate the specific terms of such a provision."<sup>428</sup> Here, Infrastructure is asking us to unilaterally eliminate a lease termination provision to which it voluntarily agreed. We agree with Applicants that such an action would be an inappropriate interference with a private contractual agreement. Furthermore, while we agree with Infrastructure that the energy industry has important communications needs, those needs do not justify the extraordinary remedy Infrastructure seeks.

124. *Leap Use of Huawei Equipment.* Youghioghny Communications states that Cricket has installed equipment manufactured by Chinese equipment manufacturer Huawei in south Texas and Chicago.<sup>429</sup> It claims, "Congress has issued grave warnings about the security risks associated with using Huawei and ZTE equipment" and argues that AT&T must dismantle networks using Huawei equipment even before it transitions Cricket's customers off the CDMA network.<sup>430</sup> Youghioghny Communications suggests that if AT&T does not voluntarily agree to dismantle the existing networks, the Commission should impose a condition similar to the condition imposed in the *Softbank-Sprint Order*.<sup>431</sup> Youghioghny Communications provides a newspaper article alleging a security breach in Cricket's network node in San Antonio.<sup>432</sup> Applicants respond that the proposed transaction would eliminate any concern about Huawei equipment because AT&T will decommission the existing Leap network.<sup>433</sup> They also note that while Sprint was given two and a half years to replace Huawei and ZTE (another Chinese manufacturer) equipment, AT&T plans to decommission Leap's CDMA network in less time.<sup>434</sup> Youghioghny Communications responds that the Applicants' response is insufficient and that they should be required to remove the Huawei equipment prior to closing.<sup>435</sup>

125. We decline to impose the condition requested by Youghioghny Communications. The requested remedy is not narrowly tailored to remedy any purported harms arising out of the proposed transaction. Indeed, the proposed transaction could remedy any potential harm by resulting in the decommissioning of that equipment. Further, Youghioghny Communications mischaracterizes the *SoftBank-Sprint Order*. In that order, the Commission noted that Executive Branch agencies had entered into a National Security Agreement with SoftBank, Sprint, and Clearwire pursuant to the CFIUS process,<sup>436</sup> and that those agencies did not object to the grant of the FCC application. The Commission

<sup>428</sup> See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, WT Docket No. 00-230, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503, 17565 ¶ 131 (2004).

<sup>429</sup> See Youghioghny Communications Petition to Deny at 24.

<sup>430</sup> Youghioghny Communications Petition to Deny at 24.

<sup>431</sup> See Youghioghny Communications Petition to Deny at 24.

<sup>432</sup> See Youghioghny Communications Reply at Exhibit A.

<sup>433</sup> See Joint Opposition at n.150.

<sup>434</sup> See Joint Opposition at n.150 (citing *SoftBank-Sprint Order*, 28 FCC Rcd at 9694-95 ¶ 127).

<sup>435</sup> See Youghioghny Communications Reply at 5-7.

<sup>436</sup> "CFIUS" is the Committee on Foreign Investment in the United States. CFIUS conducts national security reviews of mergers, acquisitions, and takeovers by, or with, any foreign person that could result in foreign control of a U.S. business (a "covered transaction"). Where a covered transaction presents national security risks, the Foreign Investment and National Security Act of 2007 ("FINSAs") provides statutory authority for CFIUS to enter into mitigation agreements with parties to the transaction or to impose conditions on the transaction to address such risks. (continued....)

found that any national security issues had been adequately addressed based on the record in that proceeding, and did not place any conditions on the transaction related to national security.<sup>437</sup> Therefore, that case is not dispositive to the proposed transaction before us.

126. *Leap Patent Issue.* Youghioghney Communications raises concerns about AT&T's acquisition of a patent held by Leap for a business model patent on providing wireless communications services under an "all-you-can-eat" pricing scheme.<sup>438</sup> Leap reports that it has sold the patent in question.<sup>439</sup> In light of Leap's response, we consider Youghioghney Communications' concern moot because AT&T will not acquire the patent as a result of this transaction.

127. *Overcharging.* William Jay Fogal, an AT&T customer, argues that AT&T has been overcharging Go-Phone customers by charging customers for airtime that the customer was not in fact using.<sup>440</sup> He provides a series of pictures showing that while calls were shown to be a certain length on his phone, he was billed for additional time by AT&T.<sup>441</sup> In the context of a complaint Mr. Fogal filed with the State of California, AT&T explained that a customer is billed beginning when the call is connected to the network, and the time shown on the phone does not reflect the time billed.<sup>442</sup> We decline to consider his complaints in the context of this transaction because the harms he complains of are not caused by the proposed transaction. We also note that Mr. Fogal has filed complaints with the State of California and the Commission<sup>443</sup> raising the same issue, and we believe his issues were more appropriately considered in the context of those complaints.

128. *Flat Wireless Ownership Issue.* As described above, it appears that, for at least some time after closing, AT&T may hold an interest in Flat Wireless, another wireless telecommunications provider.<sup>444</sup> Flat argues that AT&T would hold post-closing a very significant interest in Flat, one of its current competitors.<sup>445</sup> AT&T responds that Leap's indirect ownership interest in Flat should have no effect on our review of the proposed transaction because the interest is a non-controlling, non-attributable minority interest.<sup>446</sup>

129. Based on our review of the Flat corporate documents, we are not convinced that the Applicants have sufficiently demonstrated that any interest AT&T may hold in Flat after closing should be disregarded for purposes of our competitive review. There appears to be at least a potential for AT&T

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*See Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons*, 73 Fed. Reg. 70702, 70703 (Nov. 21, 2008) (*Merger Regulations Summary*). *See also* Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees under Section 310(b)(4) of the Communications Act of 1934, as Amended, IB Docket No. 11-133, Second Report and Order, 28 FCC Rcd 5741, 5760-61 ¶ 33, n. 108-110 (2013).

<sup>437</sup> *See SoftBank-Sprint Order*, 28 FCC Rcd at 9694-96 ¶¶ 127-131.

<sup>438</sup> *See* Youghioghney Communications Dec. 16, 2013 *Ex Parte* at 3.

<sup>439</sup> *See* Leap Jan. 16, 2014 *Ex Parte* at 1-2.

<sup>440</sup> *See* Comments and Complaint of William Jay Fogal (filed Jan. 14 and 17, 2014).

<sup>441</sup> *See* Comments and Complaint of William Jay Fogal (filed Jan. 14 and 17, 2014).

<sup>442</sup> *See* Letter from D. Michael Rodriguez, Office of the President, AT&T to State of California, Department of Justice (filed Aug. 1, 2013).

<sup>443</sup> *See* File No. 13-C00464431.

<sup>444</sup> *See* ¶ 10 *supra*.

<sup>445</sup> *See* Flat Wireless, LLC, Jan. 6, 2014 *Ex Parte* at 2.

<sup>446</sup> *See* Mar. 6, 2014 AT&T Fifth Supplemental Response at 1-2.

to have the ability to influence Flat's affairs.

## VI. POTENTIAL PUBLIC INTEREST BENEFITS

130. After assessing the potential competitive harms of the proposed transaction, we next consider whether the proposed transaction is likely to generate verifiable, transaction-specific public interest benefits that outweigh any identified competitive harms.<sup>447</sup> As discussed below, we anticipate that the proposed transaction likely would facilitate certain transaction-specific public interest benefits, but not to the degree that we can conclude that these public interest benefits would likely outweigh the competitive concerns identified above. We reach our conclusion regarding public interest benefits recognizing that it is difficult for us to precisely quantify either the magnitude of or the time period in which these benefits would be realized.<sup>448</sup>

### A. Analytical Framework

131. The Commission has recognized that “[e]fficiencies generated through a merger can mitigate competitive harms if such efficiencies enhance the merged firm’s ability and incentive to compete and therefore result in lower prices, improved quality of service, enhanced service or new products.”<sup>449</sup> Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms.<sup>450</sup>

132. The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms.<sup>451</sup> First, the claimed benefit must be transaction-specific.<sup>452</sup> Second, the claimed benefit must be verifiable.<sup>453</sup> Because much of the information relating to the potential benefits of a transaction is in the sole possession of the applicants, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude. Third, the Commission has stated that it “will more likely find marginal cost

<sup>447</sup> See, e.g., Applications of AT&T Inc. and Cellular South, Inc. For Consent To Assign Licenses Covering Parts of Alabama, Georgia, and Tennessee, *Memorandum Opinion and Order*, 28 FCC Rcd 12328, 12335 ¶ 16 (WTB 2013) (“*AT&T-CellSouth Order*”); *Alaska Wireless Order*, 28 FCC Rcd at 10467 ¶ 85; *SoftBank-Sprint Order*, 28 FCC Rcd at 9677-78 ¶ 91; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2341 ¶ 56; *AT&T-WCS Order*, 27 FCC Rcd at 16474 ¶ 40; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10734 ¶ 95.

<sup>448</sup> See, e.g., *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 91; *AT&T-WCS Order*, 27 FCC Rcd at 16474 ¶ 40; *AT&T-Qualcomm Order*, 26 FCC Rcd at 17623 ¶ 82.

<sup>449</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 86; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 92; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 57; *AT&T-WCS Order*, 27 FCC Rcd at 16474-75 ¶ 41; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10734 ¶ 96.

<sup>450</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 86; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 92; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 57; *AT&T-WCS Order*, 27 FCC Rcd at 16474-75 ¶ 41; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10734 ¶ 96.

<sup>451</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 93; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 58; *AT&T-WCS Order*, 27 FCC Rcd at 16475 ¶ 42; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10734 ¶ 97.

<sup>452</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 93; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 58; *AT&T-WCS Order*, 27 FCC Rcd at 16475 ¶ 42.

<sup>453</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 93; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 58; *AT&T-WCS Order*, 27 FCC Rcd at 16475 ¶ 42; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 97.

reductions to be cognizable than reductions in fixed cost.”<sup>454</sup> The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.<sup>455</sup> In addition, “the magnitude of benefits must be calculated net of the cost of achieving them.”<sup>456</sup> Further, benefits expected to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the distant future are inherently more speculative than predictions that are expected to occur closer to the present.<sup>457</sup> Finally, the Commission applies a “sliding scale approach” to evaluating benefit claims.<sup>458</sup> Under this sliding scale approach, where potential harms appear “both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”<sup>459</sup>

## B. Potential Benefits

133. The Applicants claim that the proposed transaction would benefit the customers of both companies.<sup>460</sup> According to the Applicants, the proposed transaction will expand and improve the service offerings available under the Cricket brand and will enable the combined company to offer high-quality nationwide, facilities-based prepaid/no-contract services more effectively.<sup>461</sup> The Applicants assert that the proposed transaction would allow more efficient use of the Leap spectrum than was possible on the Leap network.<sup>462</sup> The Applicants claim that the proposed transaction will increase competition, improve customers’ network experience, improve spectral efficiency, reduce costs and increase savings, and help Leap customers migrate onto AT&T’s superior wireless network.

134. *Increased Competition.* The Applicants argue that the proposed transaction will expand and improve the service offerings available under the Cricket brand, which will put added competitive pressure on T-Mobile, Sprint and other providers.<sup>463</sup> AT&T intends to use the Cricket brand

<sup>454</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 97; *AT&T-Centennial Order*, 24 FCC Rcd at 13954 ¶ 90.

<sup>455</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 97; *AT&T-Centennial Order*, 24 FCC Rcd at 13954 ¶ 90.

<sup>456</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 93; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 58; *AT&T-WCS Order*, 27 FCC Rcd at 16475 ¶ 42; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 97.

<sup>457</sup> See, e.g., *AT&T-Centennial Order*, 24 FCC Rcd at 13954 ¶ 90.

<sup>458</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 88; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678 ¶ 93; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 59; *AT&T-WCS Order*, 27 FCC Rcd at 16475 ¶ 42; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 98.

<sup>459</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 88; *SoftBank-Sprint Order*, 28 FCC Rcd at 9678-79 ¶ 93; *T-Mobile-MetroPCS Order*, 28 FCC Rcd at 2342 ¶ 59; *AT&T-WCS Order*, 27 FCC Rcd at 16475 ¶ 42; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 98; cf. *2010 DOJ/FTC Horizontal Merger Guidelines* at § 10, p. 31 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

<sup>460</sup> See Public Interest Statement at 8.

<sup>461</sup> See Public Interest Statement at 7.

<sup>462</sup> See Public Interest Statement at 16.

<sup>463</sup> See Public Interest Statement at 7.

and expand the availability of the Cricket service offerings nationwide,<sup>464</sup> and it argues that the benefits of this transaction will be available to all consumers, including low-income and minority consumers.<sup>465</sup> The Applicants contend that AT&T's nationwide 4G LTE/HSPA+ network, its superior range of devices<sup>466</sup> and broader array of services, and its greater financial resources make it possible to compete more effectively against T-Mobile/MetroPCS, Sprint (including its Boost Mobile and Virgin Mobile USA brands), Verizon Wireless, and TracFone/Straight Talk, among others.<sup>467</sup> The Applicants argue that competition to attract value-conscious customers to prepaid/no-contract services is intensifying.<sup>468</sup> Specifically, they argue that T-Mobile has heightened its business focus on lower-cost, no-contract service and is expanding the MetroPCS brand;<sup>469</sup> while Sprint has bolstered its financial and operational position from its recent acquisition by SoftBank, and its acquisition of Clearwire spectrum will enable it to expand its successful Boost and Virgin Mobile brands.<sup>470</sup> Meanwhile, according to the Applicants, Leap faces significant challenges in competing effectively against the LTE service offerings of the nationwide wireless carriers.<sup>471</sup>

135. According to the Applicants, existing Leap customers will benefit from a more robust national network and a broader array of services.<sup>472</sup> AT&T asserts that, after merger close, it will honor the existing plan of each Leap customer, provided that the customer does not suspend or terminate his or her service for that plan, or choose to upgrade to a device or plan that is not comparable to his or her current device or plan.<sup>473</sup> AT&T also claims that the combined company will continue to offer competitive rate plans that appeal to value-conscious customers, including the option of choosing low-cost devices and services.<sup>474</sup> Leap has deployed LTE technology in only 11 metropolitan areas covering approximately 21 million people.<sup>475</sup>

136. The Applicants argue that by combining Leap's established Cricket brand with AT&T's nationwide 4G LTE/HSPA+ network, the combined company will bring consumers a higher quality, more robust, competitive prepaid offering.<sup>476</sup> AT&T recently launched a new standalone prepaid brand called "Aio Wireless," with a separate distribution network (which still needs to be built); this plan is aimed at customers seeking low-cost service options.<sup>477</sup> It is available in seven metropolitan areas in

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<sup>464</sup> See Public Interest Statement at 8; Joint Opposition at 4.

<sup>465</sup> See Joint Opposition at 5-6.

<sup>466</sup> AT&T claims that it will offer Leap customers the iPhone 5, the Samsung Galaxy Express, the Nokia Lumia 620, and other smartphones and feature phones from which they can choose. See Joint Opposition at 8.

<sup>467</sup> See Public Interest Statement at 8-9.

<sup>468</sup> See Public Interest Statement at 5.

<sup>469</sup> See Public Interest Statement at 6.

<sup>470</sup> See Public Interest Statement at 6-7.

<sup>471</sup> See Public Interest Statement at 7.

<sup>472</sup> See Public Interest Statement at 9; Joint Opposition at 4-5.

<sup>473</sup> See Aug. 20, 2013 Applicants Supplemental Response at 2.

<sup>474</sup> See Public Interest Statement at 9.

<sup>475</sup> See Public Interest Statement at 11; Joint Opposition at 19.

<sup>476</sup> See Public Interest Statement at 12-13; Joint Opposition at 11.

<sup>477</sup> Public Interest Statement at 12.

Florida and Texas.<sup>478</sup> It is also available nationwide through online ordering.<sup>479</sup>

137. *Improved Network Experience.* The Applicants argue that customers of both companies (particularly those of Leap) will benefit from an enhanced and expanded network.<sup>480</sup> According to the Applicants, Leap customers will enjoy access to AT&T's nationwide network, rather than relying on third-party networks,<sup>481</sup> and Leap customers will gain access to a broader and more robust LTE network.<sup>482</sup> Leap holds unused AWS-1 and PCS spectrum covering about 41 million people.<sup>483</sup> The Applicants argue that AT&T will use this spectrum, incorporating it into, and increasing the capacity of, its LTE network.<sup>484</sup> AT&T already is deploying AWS-1 spectrum in its LTE network and represents that it will begin deploying LTE service over PCS spectrum by the end of 2013.<sup>485</sup> In areas where AT&T currently anticipates it will already be utilizing AWS-1 spectrum for LTE service at the time of closing, AT&T preliminarily has determined that it will be able to deploy Leap's unused, contiguous AWS-1 spectrum in as little as 60 or 90 days (this includes approximately 50 CMAs).<sup>486</sup> It has twice revised that list based on "based on additional spectrum utilization information received from Leap, adjustments to AT&T's LTE deployment, and further analysis by AT&T's network integration team."<sup>487</sup> AT&T admits that the list is subject to change because its integration planning is still ongoing.<sup>488</sup> AT&T estimates that it will be able to deploy the unused, contiguous Leap spectrum in many additional areas with 12 months after the close of this transaction (this would include over 160 CMAs).<sup>489</sup> This list is still preliminary and is subject to change as it performs further integration planning.<sup>490</sup> AT&T also expresses its intention to ultimately deploy all of Leap's PCS spectrum for LTE, but the timing of that deployment is dependent on a variety of factors, including "the pace at which Leap customers transition to AT&T's network, the amount of spectrum available, whether that spectrum is contiguous to AT&T spectrum, the amount of future traffic on AT&T's and Leap's networks, and AT&T's plans for deploying additional spectrum in a CMA."<sup>491</sup> The Applicants also argue that Leap's south Texas customers will benefit from the transaction

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<sup>478</sup> See Public Interest Statement at 12.

<sup>479</sup> See Aio Wireless Online Goes Live, Also Expands Retail Presence with New Stores in Dallas, (Sep. 12, 2013), available at <http://www.att.com/gen/press-room?pid=24789&cdvn=news&newsarticleid=36988&mapcode=consumer|mk-retail> (last visited Feb. 20, 2014).

<sup>480</sup> See Public Interest Statement at 17.

<sup>481</sup> See Public Interest Statement at 17-18.

<sup>482</sup> See Public Interest Statement at 18.

<sup>483</sup> See Public Interest Statement at 14.

<sup>484</sup> See Public Interest Statement at 14.

<sup>485</sup> See Public Interest Statement at 14-15; Aug. 20, 2013 Applicants Supplemental Response at 5.

<sup>486</sup> See Public Interest Statement at 15; Aug. 20, 2013 Applicants Supplemental Response at 5; Nov. 22, 2013 AT&T Initial Response, Exhibit 11.b.1.

<sup>487</sup> AT&T February 7 Letter at 1. The original list of markets to be built out was filed with the Aug. 20, 2013 Applicants Supplemental Response. The first revision of that list was filed in the Nov. 22, 2013 AT&T Initial Response at Exhibit 11.b.1.

<sup>488</sup> AT&T February 7 Letter at 1.

<sup>489</sup> See Public Interest Statement at 15; Aug. 20, 2013 Applicants Supplemental Response at 5; Nov. 22, 2013 AT&T Initial Response, Exhibit 11.c.

<sup>490</sup> See Nov. 22, 2013 AT&T Initial Response at 25.

as well because Leap's limited LTE network is less spectrally efficient, supports lower throughput speeds and is deployed to far fewer areas than AT&T's 4G LTE network.<sup>492</sup>

138. Mr. Smith argues that, while it may be true that the proposed transaction would grant Leap customers access to AT&T's broader network, it would come at a higher price; the reason that regional carriers like Leap provide cheaper service without long-term contracts is because their networks are not as extensive or fast as the national carriers.<sup>493</sup> Mr. Smith argues that regional carriers provide a cheaper, albeit slower and less extensive, choice for consumers who either do not want or cannot afford the high costs and commitment demanded by large carriers with national networks.<sup>494</sup> Youghioghny Communications argues that Cricket already provides 4G LTE in south Texas, rendering an AT&T roll-out unnecessary, and that Cricket's voice, 3G, and 4G coverage area in south Texas is superior to those of AT&T and the larger carriers, so no benefit will be gained by Leap customers' access to AT&T's footprint.<sup>495</sup> Mr. Smith claims that if this transaction is allowed to proceed, he and other consumers who previously sought low-cost alternatives will be left in need of affordable and reliable wireless service.<sup>496</sup>

139. *Improved Spectral Efficiency.* The Applicants contend that Leap is currently using only about 42 percent of its spectrum in its facilities-based service markets (an area covering 96 million people).<sup>497</sup> The Applicants argue that the transaction will allow more efficient use of the Leap spectrum, which was primarily deployed to support CDMA EVDO technology. AT&T typically deploys spectrum to support LTE in 10x10 MHz blocks, with 5x5 configurations as a minimum.<sup>498</sup> Even where Leap has deployed LTE, it has done so in less spectrally efficient narrow-bandwidth deployments (mainly 3x3 MHz and no larger than 5x5 MHz).<sup>499</sup> AT&T claims that it will be able to refarm Leap spectrum even before the full customer migration, and the remaining spectrum will be available for redeployment after AT&T completes the migration of Leap customers to AT&T's networks, which is expected within 18 months of closing.<sup>500</sup> In many areas, the additional Leap spectrum will allow AT&T to deploy LTE services in larger contiguous 10x10 MHz (or greater) blocks where it currently has none or a current 5x5 deployment.<sup>501</sup>

140. AT&T claims that it will also be able to productively integrate a few thousand complementary Leap cell sites into its network.<sup>502</sup> The integration will create a denser network grid that will increase network capacity and improve network performance.<sup>503</sup>

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<sup>491</sup> Nov. 22, 2013 AT&T Initial Response at 27.

<sup>492</sup> See Joint Opposition at 8 n.29.

<sup>493</sup> See Smith Petition to Deny at 9.

<sup>494</sup> See Smith Petition to Deny at 9; Smith Reply at 10.

<sup>495</sup> See Youghioghny Communications Petition to Deny at 28.

<sup>496</sup> See Smith Petition to Deny at 9; Smith Reply at 9.

<sup>497</sup> See Public Interest Statement at 14.

<sup>498</sup> See Public Interest Statement at 16; Aug. 20, 2013 Applicants Supplemental Response at 5.

<sup>499</sup> See Public Interest Statement at 11.

<sup>500</sup> See Public Interest Statement at 16.

<sup>501</sup> See Public Interest Statement at 16-17.

<sup>502</sup> See Public Interest Statement at 17; Aug. 20, 2013 Applicants Supplemental Response at 4.

<sup>503</sup> See Public Interest Statement at 17.

141. Mr. Smith questions the Applicants' claims of improved efficiency, asserting that AT&T does not explain how eliminating a competitor would increase choices or efficiency because it is axiomatic that market concentration tends to decrease consumer choices and reduce incentives to put resources to efficient use.<sup>504</sup> Youghioghney Communications contends that AT&T already has "vast stores" of unused spectrum that it has not put to better use.<sup>505</sup>

142. *Additional Cost Savings.* The Applicants claim that as Leap's cell sites are integrated into AT&T's network and other sites decommissioned without affecting network performance, AT&T can eliminate lease, utility, maintenance, and other site-related expenses.<sup>506</sup> Additional savings will result from optimization of the distribution network and through efficiencies in advertising, marketing, customer support, equipment, and general and administrative costs (such as call center and billing operations). There will allegedly be additional cost savings from removing redundancy in corporate and overhead functions.<sup>507</sup> Roaming and resale expenses that Leap would have paid as a standalone company will be substantially reduced, which will lead to lower prices for consumers than would prevail absent such cost savings.<sup>508</sup> Additionally, backhaul costs are among the sources of marginal cost savings that will result from the transaction.<sup>509</sup>

143. Youghioghney Communications argues that AT&T's cost savings would be offset by additional expenses associated with dismantling Leap's CDMA network. Youghioghney Communications argues that if AT&T offers free phones to soften the hit that Leap's millions of customers are going to take, the cost-savings benefits touted by the Applicants may have to be offset against the enormous cost burden of providing free phones to millions of customers.<sup>510</sup> Youghioghney Communications also argues that the Applicants do not address the cost and serious complications of having to dismantle and replace entire regional CDMA networks in Chicago and south Texas due to national security concerns about Chinese manufacturer Huawei.<sup>511</sup> It contends that the loss of Cricket will limit roaming availability and increase roaming costs for customers.<sup>512</sup> Mr. Smith argues that this transaction will force Cricket's existing customers to purchase new equipment that is compatible with AT&T's network.<sup>513</sup>

### C. Discussion

144. We have reviewed the claims of the Applicants regarding the benefits they allege would result from the proposed transaction, as well as their responses to our requests for additional information and documents. The record provides general support for the Applicants' contentions that the proposed transaction would result in some public interest benefits, including for Leap and AT&T

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<sup>504</sup> See Smith Petition to Deny at 11.

<sup>505</sup> Youghioghney Communications Reply at 14.

<sup>506</sup> See Public Interest Statement at 19.

<sup>507</sup> See Public Interest Statement at 19.

<sup>508</sup> See Public Interest Statement at 19-20.

<sup>509</sup> See Public Interest Statement at 20.

<sup>510</sup> See Youghioghney Communications Petition to Deny at 23.

<sup>511</sup> See Youghioghney Communications Petition to Deny at 24; Youghioghney Communications Reply at 5. See also ¶¶ 124-25 *supra*.

<sup>512</sup> See Youghioghney Communications Reply at 11-12.

<sup>513</sup> See Smith Reply at 10.

customers. As discussed below, however, given the burden placed on the Applicants, particularly to make a verifiable showing of the likelihood and magnitude of the claimed benefits, we find that the current showings are not sufficient by themselves to outweigh the potential for competitive harms we have found with respect to the proposed transaction.

145. *Competition.* We place limited weight on the Applicants' claims that the proposed transaction would, overall, lead to increased competition. For the reasons discussed earlier, we have found potential for competitive harm. In particular, we note that, while AT&T asserts that it will use the Cricket brand to compete more aggressively for prepaid customers, AT&T's incentives to compete appear to be reduced with the elimination of Leap as an independent competitor. Furthermore, AT&T's efforts to compete for prepaid customers to date have been very recent and limited in scope. As a result, we can place only limited weight on AT&T's claims that it will aggressively compete for prepaid customers.

146. *Enhanced network experience.* Based on the current record, we are largely unable to verify AT&T's claims that the proposed transaction would lead to the enhancement of its provision of LTE services to consumers, in particular Leap customers. AT&T has discussed using Leap's spectrum to build out LTE service in various CMAs in 60-90 days and other CMAs within 12 months. AT&T's current showings do not allow us to place significant weight on such claims. For instance, while AT&T has attempted to identify specific markets for such buildout, AT&T has submitted three successive filings listing different CMAs that it plans to build out in 60-90 days, and it admits that even the most current list is subject to revision as it learns more about Leap's operations and continues its integration planning. Given the considerable uncertainty regarding AT&T's plans, it is difficult to verify their claims, and we therefore cannot place significant weight on this claimed benefit.

147. We also cannot place any weight on AT&T's suggestion that it will ultimately use all of Leap's PCS spectrum for LTE. AT&T admits that the timing of any such additional deployment is contingent on a number of factors, including the pace at which Leap customers transition to AT&T's network, the amount of spectrum available, and whether that spectrum is contiguous.<sup>514</sup> AT&T only states that it will "ultimately" use all of Leap's PCS spectrum for LTE.<sup>515</sup> In the absence of any specific time commitment from AT&T on that point, and given the contingencies that must be met before AT&T can deploy, we find that any claimed benefit is too speculative and distant in time to be credited.

148. Another issue with AT&T's claim of public interest benefits for Leap customers resulting from use of a superior AT&T network is that AT&T itself estimates that many Leap customers will not receive that benefit. AT&T has estimated that it will transition **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of Leap customers onto its network.<sup>516</sup> We cannot fully credit the Applicants with providing an improved network experience to Leap's customers if **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of Leap customers never transition to AT&T's network. The disruption to Leap customers who will lose their current service and be forced to arrange for alternative service will reduce any net benefit resulting from some Leap and AT&T customers receiving an enhanced network experience from AT&T.

149. *Improved spectral efficiency.* Based on the record before us, we find that AT&T's acquisition of Leap's spectrum would likely result in improved spectral efficiency in certain markets, and therefore should create some transaction-specific benefits. We find, however, that the benefits are not as substantial as claimed by the Applicants.

<sup>514</sup> See Nov. 22, 2013 AT&T Initial Response at 27.

<sup>515</sup> See Nov. 22, 2013 AT&T Initial Information Response Request at 27.

<sup>516</sup> ATT-FCC-000034583 at 9 (Oct. 2, 2013).

150. While the parties claim that Leap utilizes 42 percent of its spectrum, providing significant potential benefits from utilization of the unused Leap spectrum, it appears from the record that Leap uses considerably more than 42 percent of its spectrum. The 42 percent figure combines both PCS and AWS-1 spectrum and was derived by evaluating usage as a function of MHz-POPs on a market-by-market basis. We see at least two issues with the Applicants' study. First, in order to properly evaluate spectrum utilization, the PCS and AWS-1 bands should be evaluated separately. Our review of the available data shows that Leap uses its PCS spectrum more intensively than its AWS-1 spectrum. Second, the study offered by the Applicants fails to account for site-specific allocated bandwidth and the site's corresponding population coverage as a measure of frequency use. Leap's analysis<sup>517</sup> does not use a site-dependent approach that considers each site's utilized bandwidth and the site's covered population.<sup>518</sup> Instead the analysis aggregates unused bandwidth over the entire network, without any weighting of bandwidth by population, resulting in the Applicants underestimating spectrum utilization. It appears that, measured in terms of MHz-POPs, Leap's use of its PCS and AWS-1 spectrum considerably exceeds 42 percent. To the extent the Applicants argue that AT&T will use spectrum more intensively and efficiently than Leap, we conclude that the claimed benefit is not as great as claimed by the Applicants because they underestimate Leap's current spectrum utilization.

151. We also find that AT&T's claimed spectral efficiency benefits are of limited significance because, in the majority of the CMAs in question, the amount of Leap spectrum available will only allow AT&T to add a 5X5 megahertz channel, which is the minimum configuration used by AT&T for LTE. We do not find the addition of a 5X5 megahertz channel as a meaningful demonstration of spectral efficiency,<sup>519</sup> particularly when the Applicants themselves describe a 5X5 megahertz channel as relatively inefficient.<sup>519</sup>

152. *Additional cost savings.* Our analysis of the cost savings that the Applicants contend the proposed transaction would yield indicates that, although notable, they mostly are due to reductions in fixed costs.<sup>520</sup> We generally find that reductions in fixed cost are less cognizable than reductions in marginal costs because the former are less likely to result in lower prices for consumers,<sup>521</sup> making it difficult here to quantify the magnitude of these asserted benefits. We must also take into account additional costs AT&T will incur as it migrates customers and integrates Leap's spectrum into its network.

153. Our evaluation of the claimed public interest benefits gives limited weight to many of the benefits presented that would go to Leap's customers as a result of the proposed transaction, such as a higher-quality, more robust, and competitive prepaid offering, expanded network capacity, and savings in

<sup>517</sup> LEAP-FCCEXH-00006592.

<sup>518</sup> A site-dependent approach multiplies each site's used bandwidth by the site's covered population, thus weighting the different utilization characteristics commonly found between core sites and fringe area sites by population.

<sup>519</sup> See Public Interest Statement at iii ("AT&T's 4G deployments are far more efficient and offer customers higher throughput speeds than Leap's 3G EVDO and limited narrow-bandwidth LTE deployments."); Aug. 20, 2013 Applicants Supplemental Response at 4 (Leap's LTE deployments are no larger than 5x5 megahertz).

<sup>520</sup> ATT-FCC-000033728 (Jul. 11, 2013), [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION].

<sup>521</sup> See, e.g., *Alaska Wireless Order*, 28 FCC Rcd at 10468 ¶ 87; *Verizon Wireless-SpectrumCo Order*, 27 FCC Rcd at 10735 ¶ 97; *AT&T-Centennial Order*, 24 FCC Rcd at 13954 ¶ 90.

network and operating costs.<sup>522</sup> These asserted benefits are available to Leap customers in locations where AT&T is already offering these services as a competitor to Leap.

154. *Conclusion.* We find, based on the record before us and the Applicants' claims as discussed above, that certain public interest benefits may potentially result from the proposed transaction. Using the sliding-scale approach, however, we are unable on the basis of this record to conclude that these public interest benefits are sufficiently large enough to outweigh the potential public interest harms we have identified in certain individual markets.

## VII. REMEDIES

### A. Introduction

155. The review of a proposed transaction entails a thorough examination of the potential public interest harms and any verifiable, transaction-specific benefits, including any voluntary commitments made by the Applicants to further the public interest. As part of this process, we may impose additional remedial conditions to address potential harms likely to result from the proposed transaction or to help ensure the realization of any promised potential benefits.

156. As described above, under our sliding-scale approach we cannot conclude based on this record that the potential benefits are sufficiently large, specific, and imminent to outweigh these potential harms. We find that the transaction as proposed has the potential to cause some competitive and other public interest harms in several local markets, as well as to value-conscious consumers generally. Moreover, although we find some potential public interest benefits likely to arise from the transaction in terms of spectral efficiency, these potential benefits by themselves are insufficient to outweigh the potential harms.

157. In recent filings supplementing the record on some key issues, however, AT&T has made several voluntary commitments, which as explained below allow us to find that the proposed transaction overall would be in the public interest.<sup>523</sup> AT&T has agreed to file quarterly reports detailing its progress in complying with these voluntary commitments. Those commitments include spectrum divestitures in certain markets, where we have found the potential for spectrum aggregation to lead to anticompetitive harm. These divestitures will help ensure that AT&T's competitors have access to sufficient spectrum in those markets. AT&T also is committing to deploy LTE service using unused Leap spectrum within 90 days or 12 months of closing, including some markets in south Texas. This deployment will ensure that this spectrum will not lie fallow and will help to ensure that consumers in current Leap service areas will benefit from network improvements to AT&T's advanced 4G network technologies. AT&T also will build out LTE service on its network in 70 percent or 80 percent of the geographic area in specific markets in south Texas within 18 months of closing. This will ensure that consumers in those markets have access to advanced 4G LTE services.

158. In addition, AT&T will be offering certain rate plans targeted to help value-conscious and Lifeline customers, which will provide additional assurance that AT&T will compete vigorously for value-conscious customers and will be attractive to Leap customers who may wish to migrate to AT&T's network. To deal with issues affecting Leap prepaid customers wanting to migrate onto AT&T's GSM-based network, AT&T will be offering a device trade-in credit program and a feature phone device trade-in program to certain groups of Leap customers prior to discontinuing CDMA service in a particular area. These commitments will help ensure that Leap customers have future access to wireless service and will

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<sup>522</sup> See Joint Opposition at 2-3.

<sup>523</sup> See Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Roger C. Sherman, Acting Chief, Wireless Telecommunications Bureau, WT Docket No. 13-193 (filed Mar. 6, 2014) (“AT&T Commitment Letter”).

facilitate the migration of Leap's customers to the AT&T network. To address the CDMA roaming issues discussed above, AT&T is committing to honor the rates, terms and conditions of the CDMA roaming agreements that AT&T is assuming from Leap, and to offer CDMA voice and data roaming consistent with applicable Commission roaming rules for so long as AT&T operates Leap's CDMA network. This should facilitate the provision of roaming services during the network transition. Finally, on the Flat Wireless issues, AT&T is committing that, to the extent the AT&T/Leap transaction is consummated prior to Cricket's sale of its interest in Flat, it will use reasonable best efforts to cause Cricket to sell its interest in Flat as soon as practicable thereafter and will take certain steps detailed below in the meantime to ensure that AT&T does not participate in the affairs of a competitor.

159. As discussed in detail below, we find that in light of these commitments, which become conditions to our approval, the public interest benefits of the proposed transaction outweigh the likelihood of significant public interest harms, such that overall, the proposed transaction is in the public interest. For example, we note that the commitments providing for spectrum divestitures, the deployment of unused spectrum, the build out of LTE service, rate plans, and customer migration will all apply to the south Texas markets that are of particular concern. They will ameliorate the potential harms and ensure public interest benefits in those markets by, among other things, ensuring that AT&T has every incentive to provide higher quality service, and minimizing customer dislocations that might result from the proposed transaction.

160. We also find that each of the commitments AT&T has made is necessary in order to address potential harms from the proposed transaction.<sup>524</sup> Without these commitments, we would be unable to conclude that the benefits of the transaction outweigh the harms. We therefore impose each of the commitments made by AT&T as conditions of our consent to the proposed transaction.

#### **B. Spectrum Divestitures**

161. *Record.* We have found above that the proposed transaction would be likely to cause significant competitive harm as a result of spectrum aggregation in a number of geographic markets. Specifically, we have concluded that, in those markets, there is a significant potential that AT&T would have the ability to foreclose or significantly raise rivals' costs.

162. AT&T has made a commitment that, within 6 months of the transaction closing, AT&T will file applications with the Commission to assign or transfer control of the amounts of spectrum ("Divestiture Assets") in the geographic areas identified in Attachment B.<sup>525</sup> AT&T reserves the right, upon notice to the Bureau, to change the specific type of spectrum to be divested in any geographic area based on further analysis performed after the merger's close.<sup>526</sup> Upon application by the Applicants to the Bureau, the Bureau may grant one or more extensions not to exceed 60 days in the aggregate to allow the Applicants further time to dispose of the Divestiture Assets.<sup>527</sup> To the extent the Applications are not

<sup>524</sup> Regarding Youghioghny Communications' argument on procedural unfairness in considering AT&T's commitments, we note that we have fully analyzed the public interest harms associated with this transaction, including those alleged by Youghioghny Communications, and find that the conditions that we impose are sufficient to address the potential harms arising out of this transaction. See Letter from Donald J. Evans, Counsel for Youghioghny Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket 13-193, at 1-2 (Mar. 10, 2014) ("Youghioghny Communications Mar. 10, 2014 *Ex Parte*"); Youghioghny Communications Mar. 10, 2014 Clyburn Office *Ex Parte* at 1.

<sup>525</sup> See AT&T Commitment Letter, Attachment A (list of commitments) at 3, Attachment B (list of divestiture markets). A list of the markets where AT&T will make spectrum divestitures is also included in Appendix D.

<sup>526</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>527</sup> See AT&T Commitment Letter, Attachment A at 3.

filed by the relevant date, or by any extended date allowed by the Bureau, the Commission may require AT&T to surrender the designated spectrum.<sup>528</sup>

163. *Discussion.* We conclude generally that these spectrum divestitures will adequately prevent AT&T from foreclosing competing service providers in those markets based on undue spectrum aggregation. With respect to Youghioghny Communications' request to require divestiture in south Texas, we have carefully reviewed each of those markets and find that the spectrum divestitures offered by AT&T will mitigate competitive harm.

### C. Spectrum Deployment Commitments

164. *Record.* AT&T has agreed that within 30 days after it closes the transaction, it will provide the Commission with a list of the markets where it anticipates it will begin deploying Leap's unused contiguous AWS-1 spectrum for LTE service within 90 days of merger close, and where it anticipates it will begin deploying Leap's unused AWS-1 or PCS spectrum for LTE service within 12 months of closing.<sup>529</sup> AT&T commits to provide detailed quarterly reports outlining its progress toward completing these deployments.<sup>530</sup>

165. *Discussion.* We find that these commitments will lead to public interest benefits regarding access to advanced broadband technologies by consumers in these service areas, including customers of both AT&T and Leap, and ensuring the use of spectrum that is currently unused. AT&T's commitments outlined above will help to ensure that all consumers in the current Leap service areas will benefit from the deployment of advanced 4G network technologies.

### D. LTE Network Deployment in South Texas

166. *Record.* Within 12 months of the transaction's closing, AT&T will deploy LTE service sufficient to provide coverage to 90 percent of the geographic area in 2 CMAs in south Texas: Corpus Christi, TX (CMA 112), and McAllen-Edinburg-Mission, TX (CMA 128).<sup>531</sup> Within 12 months of the merger's closing, AT&T will deploy LTE service sufficient to provide coverage to 50 percent of the geographic area in: Laredo, TX (CMA 281), Texas 19 - Atascosa (CMA 670), and Texas 20 - Wilson (CMA 671), and to 40 percent of the geographic area in Texas 18 - Edwards (CMA 669).<sup>532</sup> Further, within 18 months of the transaction's closing, AT&T will deploy LTE service sufficient to provide coverage to 80 percent of the area in: Laredo, Texas 19, and Texas 20.<sup>533</sup> Finally, within 18 months of the transaction's closing, AT&T will deploy LTE service sufficient to provide coverage to 70 percent of the area in Texas 18.<sup>534</sup> These LTE deployment commitments are dependent upon AT&T's ability to secure zoning and permitting for new equipment and to acquire or supplement high speed backhaul transport as required for new sites as a predicate to deploying LTE in AT&T's network.<sup>535</sup>

167. We find that these commitments will lead to significant public interest benefits

<sup>528</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>529</sup> See AT&T Commitment Letter, Attachment A at 4.

<sup>530</sup> See AT&T Commitment Letter, Attachment A at 4. See also section VII.I. *infra*.

<sup>531</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>532</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>533</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>534</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>535</sup> See AT&T Commitment Letter, Attachment A at 3.

regarding access to advanced broadband technologies by consumers in these south Texas markets, including customers of both AT&T and Leap. We find these commitments to be particularly significant in light of the potential competitive harms we have identified in those markets. AT&T's commitments also will help ensure that all consumers in these south Texas markets will benefit from the deployment of advanced 4G network technologies.

#### E. Rate Plan Commitments

168. *Record.* Public Knowledge asks the Commission to require AT&T to: (1) continue offering the same prepaid service as Leap, with the same rates, terms and conditions, for a minimum of four years for existing Leap customers and two years for new prepaid customers; (2) allow existing Leap customers, for a minimum of four years, to upgrade their plans or devices without losing the terms and conditions currently available to them; (3) not throttle its prepaid customers when they are using their guaranteed "Full-Speed Data"; and (4) make the same handsets available to its prepaid customers that it does to its postpaid customers.<sup>536</sup> James Jones, a Cricket customer, argues that there should be no loss of service capacity for voice or data for Cricket CDMA only devices, and an equal or better level of service when Cricket's customers transitioned to AT&T's network.<sup>537</sup> He also asks that there be no increase in prices for Cricket's existing plans and that there be no loss of special pricing plans and discounts.<sup>538</sup> Finally, Mr. Jones argues that AT&T's activation fee be limited to the fees Cricket has customarily charged its customers and that AT&T unlock replacement devices.<sup>539</sup>

169. AT&T has committed, for all customers who maintain their existing Leap rate plan during the transition period (including Lifeline customers), that it will honor those existing rates (and for Lifeline customers, the corresponding discounts) until the earlier of such time as the customer voluntarily upgrades his or her device, chooses another rate plan, migrates to the New Cricket platform, or until sunset of the CDMA network, which AT&T anticipates will happen between 12 to 18 months from closing, depending on the market.<sup>540</sup> This commitment will remain in effect even where AT&T elects to relinquish Leap's ETC designation.<sup>541</sup>

170. There also are a series of rate plans that AT&T has committed to providing to new and transitioning customers upon merger close. For 18 months following the merger's close, AT&T will make available a nationwide pre-paid rate plan for feature phones that includes unlimited talk (local and long distance), text, and data, in accordance with published speed policies, and no roaming charges, at a rate that will not exceed \$40/month (including all taxes and fees).<sup>542</sup> AT&T currently plans that the \$40/month rate plan will include unlimited text/picture/video messaging, unlimited data with a 500 MB high-speed data allowance with lower speeds for additional usage, voicemail, call waiting, and call

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<sup>536</sup> See Public Knowledge Petition to Deny at 19.

<sup>537</sup> See Informal Comments of James Jones at 1 (filed Feb. 4, 2014) (Jones Comments).

<sup>538</sup> See Jones Comments at 2.

<sup>539</sup> See Jones Comments at 2.

<sup>540</sup> See Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193 at 1-2 (filed Mar. 12, 2014) ("AT&T March 12, 2014 Clyburn *Ex Parte*").

<sup>541</sup> See March 12, 2014 AT&T Clyburn *Ex Parte* at 2.

<sup>542</sup> See AT&T Commitment Letter, Attachment A at 3. See also Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193 at 1 (filed Mar. 11, 2014) ("March 11, 2014 AT&T *Ex Parte*"); Joint Opposition at 7.

forwarding.<sup>543</sup> In CMAs in which Leap currently has a facilities-based CDMA network, AT&T will, for a period of at least 12 months after the merger's closing, offer at least one prepaid rate plan priced below the \$40 rate plan referenced in AT&T's Commitment Letter.<sup>544</sup> That rate plan, which will include unlimited voice and text and a price that includes all taxes and fees, is specifically designed to appeal to value-conscious and Lifeline-eligible consumers.<sup>545</sup> Exhibit 15.32 compares the existing Cricket rate plans and rate plans that AT&T currently proposes that the New Cricket will offer at launch, including the plan described below.<sup>546</sup> **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY CONFIDENTIAL INFORMATION].**<sup>547</sup>

171. *Discussion.* We conclude that these rate plan commitments will provide public interest benefits to both AT&T and Leap customers, including Lifeline customers. As noted above, we expressed concern that the elimination of Leap as a competitor would mean AT&T would have a reduced incentive to compete. AT&T's commitment to honor the existing rate plans of Leap customers (including, importantly, the discounts that Leap Lifeline customers receive) so long as Leap's CDMA network is running and the customer does not make voluntary changes to their service will help protect those customers during the network transition. AT&T's other rate plan commitments will provide additional assurance that AT&T will compete vigorously for value-conscious customers and will be attractive to Leap customers who may wish to migrate to AT&T's network. The **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** will compare favorably with any Lifeline plans from which Leap Lifeline customers may have to transition. We do not find the additional conditions requested by Public Knowledge and Mr. Jones to be necessary in order to remedy transaction-specific harms.<sup>548</sup>

**F. Feature Phone Trade-In Program, iPhone SIM Card Replacement Program, and Device Trade-In Credits Program**

172. *Record.* Mr. Jones asks that AT&T be required to replace customer devices at its expense, including devices that are only used on occasion, for as long as the device is functioning.<sup>549</sup>

173. AT&T has committed to implement a trade-in program that allows eligible customers to

<sup>543</sup> See AT&T March 11, 2014 *Ex Parte* at 1.

<sup>544</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 4.

<sup>545</sup> See March 12, 2014 AT&T Clyburn *Ex Parte* at 1.

<sup>546</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 4.

<sup>547</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 5.

<sup>548</sup> As described above, see ¶ 115, *supra*, AT&T has indicated that it will maintain Cricket's ETC designations for some period of time and will continue to fulfill its Lifeline ETC obligations and comply with relevant requirements. We conclude that it serves the public interest for Leap/Cricket to continue to operate as a Lifeline only ETC following consummation of the proposed transfer of control. We emphasize that nothing in this *Memorandum Opinion and Order* should be construed as authorizing Leap to relinquish its ETC designation. To relinquish Leap's (including Cricket's) ETC designation, Leap (which will become a subsidiary of AT&T after consummation of the proposed transaction) must comply separately with any state or federal relinquishment rules and requirements. Until both Leap and AT&T comply with the federal and state relinquishment rules and requirements, Leap's obligation to provide discounted services to its Lifeline customers will remain unaffected.

<sup>549</sup> See Jones Comments at 2.

trade in their Leap prepaid feature phone for a Cricket prepaid feature phone without charge, subject to certain conditions. AT&T will advise Leap CDMA customers of this trade-in program and its terms when it becomes available.<sup>550</sup>

174. AT&T also has made the following commitment regarding Leap customers who own iPhone models 4s, 5, 5c, and 5s. Specifically, AT&T will establish a process by which Leap customers with legacy Leap iPhone models 4s, 5, 5c, and 5s can visit a New Cricket store and receive a replacement SIM card that will allow the customer to migrate to AT&T's network without having to replace his or her device.<sup>551</sup>

175. AT&T also has committed to provide customers with Leap smartphones that are not compatible with the AT&T network significant credits to be used for the purchase of a new Cricket smartphone, subject to certain conditions. AT&T will advise Leap CDMA customers of this trade-in credit program and its terms when it becomes available.<sup>552</sup>

176. AT&T has clarified its device trade-in credit program commitment by stating that any customer who receives a device trade-in credit pursuant to that program will be able to acquire a low-cost smartphone with that credit at no or minimal additional cost to the customer.<sup>553</sup> For example, AT&T

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<sup>550</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 6-7. Specifically, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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<sup>551</sup> See Letter from Joan Marsh, Vice President – Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 13-193 (filed Mar. 12, 2014) (“AT&T March 12, 2014 *Ex Parte*”).

<sup>552</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 5-6. Specifically, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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<sup>553</sup> See March 12, 2014 AT&T Clyburn *Ex Parte* at 2.

represents that its Aio Wireless subsidiary currently offers smartphones at price levels less than \$50 and additional smartphones at price levels less than \$100.<sup>554</sup> Consequently, AT&T anticipates that the device credits to which AT&T has committed to provide to qualifying Leap smartphone customers will permit those customers to acquire a New Cricket smartphone with no or minimal out-of-pocket expense.<sup>555</sup>

177. *Discussion.* We find that these commitments will ensure that Leap customers have future access to wireless service and will facilitate the migration of Leap's customers to the AT&T network. Those public interest benefits are responsive to our concerns regarding the competitive impact of the transaction on consumers and AT&T's efforts to migrate Leap's customers to the AT&T network. In particular, we believe the feature phone trade-in program, iPhone SIM card replacement program, and device credits will help ensure that Leap customers, including Lifeline customers who purchased phones, will have competitive wireless service options available once AT&T discontinues Leap's CDMA service.

### G. Roaming Commitments

178. *Record.* We have concluded that questions remain whether AT&T will continue to honor roaming agreements of providers with Leap during its network transition while providers are making alternative roaming arrangements.<sup>556</sup> Commenters request certain conditions relating to roaming during the transition. NTCH requests that AT&T maintain Leap's CDMA network for a reasonable period of time, and honor all existing roaming contracts on that network.<sup>557</sup> CCA requests that the Commission require AT&T to "honor existing Leap roaming agreements for the full term of the agreement or four years from the date of this Transaction's closing (whichever is longer) . . ."<sup>558</sup> CCA also maintains that AT&T should be restricted from cancelling any roaming contracts.<sup>559</sup> Flat Wireless requests unspecified protections for Leap's current roaming partners, to reduce the impact of this transaction on competition in the nationwide CDMA roaming market.<sup>560</sup>

179. AT&T has committed to honor the rates, terms and conditions of the CDMA roaming agreements that AT&T is assuming from Leap, and to offer CDMA voice and data roaming consistent with applicable Commission roaming rules for so long as AT&T operates Leap's CDMA network.<sup>561</sup> Nothing in this commitment will require AT&T to modify the rates, terms and conditions of any CDMA roaming agreement it assumes from Leap.<sup>562</sup>

180. *Discussion.* We impose the commitment made by AT&T to honor existing CDMA voice and data roaming services over Leap's network, so long as that network continues to operate. The Commission has recognized that the continued ability of wireless customers to roam is an important concern when wireless service providers intend to transition network technology as a result of a proposed

<sup>554</sup> See March 12, 2014 AT&T Clyburn *Ex Parte* at 2.

<sup>555</sup> See March 12, 2014 AT&T Clyburn *Ex Parte* at 2.

<sup>556</sup> See ¶ 108 *supra*.

<sup>557</sup> See NTCH Petition to Deny or Condition at 1, 3-4.

<sup>558</sup> See CCA Reply at 11. See also CCA Petition to Condition at 3, 7, 16-17; CCA Jan. 3, 2014 *Ex Parte* at 1, 6; CCA Feb 6, 2014 *Ex Parte* at 3.

<sup>559</sup> See CCA Petition to Condition at 17.

<sup>560</sup> See Jan. 6, 2014 Flat Wireless *Ex Parte* at 3-4.

<sup>561</sup> See AT&T Commitment Letter, Attachment A at 3.

<sup>562</sup> See AT&T Commitment Letter, Attachment A at 3.

transaction.<sup>563</sup> AT&T's commitment is responsive to our concern about the ability of wireless providers to roam on Leap's CDMA network while that network continues to operate. As a result of this commitment, wireless service providers will retain the ability for their customers to roam pursuant to the Commission's roaming rules on the existing Leap CDMA network. These same providers will have additional time subsequent to the closing of the proposed transaction to take the necessary steps to obtain alternative CDMA roaming arrangements in the current Leap service areas, if that is what they choose to do. We find that AT&T's voluntary commitment to honor existing roaming agreements is in the public interest.

181. Nothing in this commitment will be construed as limiting the rights of any carrier to pursue roaming arrangements pursuant to Commission rules and the remedies they afford. We find that this commitment is sufficient to provide continuity of CDMA roaming services in the markets subject to this transaction. We do not find the specific facts of the situation warrant a condition imposing an obligation on AT&T to enter into a roaming agreement with other carriers that replicates the same rates, terms, and conditions as in the AT&T/Leap breakup roaming agreement, or any existing Leap roaming agreement.

182. Further, we decline to adopt the roaming condition that AT&T be required to maintain the CDMA network for a certain number of years post-transaction in order to support new roaming contracts. It has not been shown why the duty of carriers to provide automatic roaming would not be adequately addressed by the data roaming rule adopted by the Commission in 2011. In addition, there are other CDMA roaming partners throughout Leap's footprint.

#### **H. Flat Wireless Commitments**

183. We noted above that there appears to be at least a potential for AT&T to have the ability to influence Flat's affairs.<sup>564</sup> AT&T states that Cricket has negotiated a definitive agreement to sell its interests in Flat and is prepared to move forward with the sale, but that Cricket and Flat currently are in arbitration and the arbitrator has stayed the disposition of Cricket's interests in Flat pending resolution of the arbitration.<sup>565</sup> Leap now anticipates that Cricket will consummate the sale of its interests in Flat in April 2014.<sup>566</sup>

184. With regard to Flat Wireless, AT&T commits as follows: In the event that Cricket Communications, Inc. still holds any interest in Flat at the consummation of the AT&T/Leap transaction, AT&T will immediately deliver written notice to Flat notifying it, its Board of Managers and its Members that, for so long as Leap, Cricket, or any of its affiliates remains a Member of Flat (hereinafter "Cricket Members"), neither AT&T nor any Cricket Member shall exercise any right that it may have under Article 6, Article 12, or Article 13 of the Amended and Restated Company Agreement of Flat Wireless, LLC or elsewhere to: (1) acquire any additional interest in Flat, by call under Section 13.07 of the Flat Wireless LLC Agreement or otherwise, except in connection with one or more transactions subject to review and approval by the Federal Communications Commission pursuant to the processes outlined in 47 C.F.R. §§ 1.948 and 63.24; (2) choose and determine a Manager of Flat or place or cause to be placed any AT&T employee, representative or agent on Flat's Board of Managers; (3) receive or review any

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<sup>563</sup> See *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8746-88748 ¶¶ 95-101. See also *AT&T-ATN Order*, 28 FCC Rcd at 13704 ¶ 59-60.

<sup>564</sup> See ¶ 129 *supra*. As discussed above, on March 3, 2014, AT&T has waived the condition requiring the disposition of all Flat interests prior to the consummation of the AT&T/Leap transaction. See ¶ 10 *supra*.

<sup>565</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 2.

<sup>566</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 2.

confidential and or competitively sensitive information pertaining to Flat; provided however, that AT&T shall be entitled to receive such information as is necessary for accounting and tax purposes and for Cricket to sell its interest in Flat, including a statement of its allocated share of income, gains, losses, deductions, and credits for each taxable year, on the condition that such information is used solely for those purposes.<sup>567</sup> Finally, to the extent that the AT&T/Leap transaction is consummated prior to Cricket's sale of its interest in Flat, AT&T commits to use reasonable best efforts to cause Cricket to sell its interest in Flat as soon as practicable thereafter.<sup>568</sup>

185. We conclude that AT&T's commitments address our concerns that its ownership interest in Flat will give it the ability to influence Flat's affairs or to reduce Flat's incentive to act as a competitor to AT&T. Accordingly, we need not give further consideration to the interests of Flat Wireless in reviewing the transaction.

### **I. Progress Reports**

186. For two years following the date of merger close, AT&T will file with the Commission a quarterly detailed report on the status of the implementation of these commitments and the migration of Leap's customers.<sup>569</sup> If the network deployment commitments are not met within the two year reporting period, this reporting requirement will be extended with respect to those deployment commitments until such time as both deployment commitments are fully met or waived by the FCC.<sup>570</sup> Each such report will be due 30 days following the end of the calendar quarter covered by the report, and the first such report will cover the period from the merger closing thru the end of the first full quarter thereafter.<sup>571</sup>

187. We will condition consent to the proposed transaction on AT&T complying with this quarterly reporting obligation. AT&T's submission of these reports will allow Commission staff to monitor the progress of AT&T's efforts.

## **VIII. BALANCING THE PUBLIC INTEREST BENEFITS AND THE HARMS**

188. In sum, we find that the transaction as proposed has the potential to cause some competitive and other public interest harms in several local markets, as well as to value-conscious consumers generally. Moreover, although we find some potential public interest benefits likely to arise from the transaction in terms of spectral efficiency, these potential benefits by themselves are insufficient to outweigh the potential harms.

189. However, we find that considering AT&T's various commitments, involving spectrum divestitures, the offering of certain rate plans, LTE network deployment, roaming, and device trade-in and trade-in credits for certain groups of current Leap customers, all of which we impose as conditions to our approval, in conjunction with the public interest benefits we find will likely arise from the transaction, there is sufficient evidence on this record for us to conclude that Applicants have met their burden of demonstrating that the likely public interest benefits outweigh the likely public interest harms, such that we are able to approve the proposed transaction.

## **IX. ORDERING CLAUSES**

190. ACCORDINGLY, having reviewed the Applications and the record in these matters, IT

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<sup>567</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 2-3.

<sup>568</sup> See Mar. 6, 2014 AT&T Fifth Supplemental Response at 3.

<sup>569</sup> See AT&T Commitment Letter, Attachment A at 4.

<sup>570</sup> See AT&T Commitment Letter, Attachment A at 4.

<sup>571</sup> See AT&T Commitment Letter, Attachment A at 4.

IS ORDERED that, pursuant to sections 4(i) and (j), 214, 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214, 303(r), 309, 310(d), the applications for transfer of control of Cricket License Company, LLC, Leap Wireless International, Inc., and STX Wireless License, LLC to AT&T, Inc. and the application to assign Lower 700 MHz Band A Block license WQJQ707 from Cricket License Company, LLC to Leap Licenseco Inc. are GRANTED to the extent specified in this Memorandum Opinion and Order and subject to the conditions specified herein.

191. IT IS FURTHER ORDERED that the above grant shall include authority for the transfer or assignment of any applications regarding the Leap assets that are pending at the time of consummation as well as any licenses or authorizations that may have inadvertently been omitted from the application forms filed by the Applicants.

192. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), 309, 310(d), the Petitions to Deny filed by Broadvox-CLEC, LLC; David K. Smith; The Greenlining Institute; NTCH, Inc.; Public Knowledge, Consumer Action, and the Writers Guild of America, West; and Youghioghny Communications, LLC are DENIED for the reasons stated herein.

193. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 303(r), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 303(r), 309, and 310(d), the request for conditions in the Petitions or Comments filed by the Broadvox-CLEC, LLC; Competitive Carriers Association; David K. Smith; The Greenlining Institute; Infrastructure Networks, Inc.; NTCH, Inc.; Public Knowledge, Consumer Action, and the Writers Guild of America, West; The Rural Wireless Association, Inc.; and Youghioghny Communications, LLC are DENIED for the reasons stated herein.

194. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of release of this Memorandum Opinion and Order.

195. This action is taken under delegated authority pursuant to sections 0.51, 0.131, 0.261, and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.51, 0.131, 0.261, and 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger C. Sherman  
Acting Chief  
Wireless Telecommunications Bureau

Mindel De La Torre  
Chief  
International Bureau

## APPENDIX A

## List of Applications

Applications for consent to the transfer of control of AWS-1, PCS, and Common Carrier Fixed Point to Point licenses:

<u>File No.</u>	<u>Licensee/Lessee</u>	<u>Transferee</u>	<u>Lead Call Sign</u>
0005860676 (Lead Application)	Cricket License Company, LLC	AT&T Inc.	KNLF367
0005860985	STX Wireless License, LLC	AT&T Inc.	KNLF914
0005861153	Cricket License Company, LLC	AT&T Inc.	WQDS850

Application for consent to assignment of a 700 MHz A Block license:

<u>File No.</u>	<u>Assignor</u>	<u>Assignee</u>	<u>Call Sign</u>
0005879272	Cricket License Company, LLC	Leap Licenseco Inc.	WQJQ707

Applications for consent to the transfer of control of international section 214 authorizations:

<u>File No.</u>	<u>Authorization Holder</u>	<u>Transferee</u>	<u>Authorization Number</u>
ITC-T/C-20130801-00207	Leap Wireless International, Inc.	AT&T Inc.	ITC-214-20011011-00527
ITC-T/C-20130801-00208	STX Wireless License, LLC	AT&T Inc.	ITC-214- 20100604-00227

**APPENDIX B**

**List of Filings**

**Petitions and Comments**

Broadvox-CLEC, LLC  
Competitive Carriers Association  
David K. Smith  
The Greenlining Institute  
Infrastructure Networks, Inc.  
NTCH, Inc.  
Public Knowledge, Consumer Action, and the Writers Guild of America, West  
The Rural Wireless Association, Inc.  
Youghioghenny Communications, LLC

**Opposition**

AT&T, Inc. and Leap Wireless International, Inc.

**Replies**

Broadvox-CLEC, LLC  
Competitive Carriers Association  
David K. Smith  
Infrastructure Networks, Inc.  
NTCH, Inc.  
Public Knowledge, Consumer Action, and the Writers Guild of America, West  
The Rural Wireless Association, Inc.  
Youghioghenny Communications, LLC

## APPENDIX C

## Markets Identified by the Initial Screen

## CMAs Identified by the HHI Screen:

<b>Market</b>	<b>Market Name</b>
CMA 8	Washington, DC-MD-VA *
CMA 10	Houston, TX*
CMA 11	St. Louis, MO-IL*
CMA 13	Pittsburgh, PA*
CMA 14	Baltimore, MD*
CMA 18	San Diego, CA*
CMA 19	Denver-Boulder, CO*
CMA 25	Buffalo, NY*
CMA 26	Phoenix, AZ*
CMA 30	Portland, OR-WA*
CMA 33	San Antonio, TX*
CMA 36	Memphis, TN-AR-MS*
CMA 37	Louisville, KY-IN*
CMA 40	Dayton, OH*
CMA 45	Oklahoma City, OK*
CMA 46	Nashville-Davidson, TN*
CMA 47	Greensboro-Winston-Salem-High Point, NC*
CMA 53	Syracuse, NY*
CMA 57	Tulsa, OK*
CMA 61	Charlotte-Gastonia, NC*
CMA 65	Omaha, NE-IA*
CMA 71	Raleigh-Durham, NC*
CMA 74	Fresno, CA*
CMA 75	Austin, TX*
CMA 77	Tucson, AZ*
CMA 81	El Paso, TX*
CMA 86	Albuquerque, NM*
CMA 88	Chattanooga, TN-GA
CMA 89	Wichita, KS*
CMA 90	Charleston-North Charleston, SC*
CMA 92	Little Rock-North Little Rock, AR*
CMA 93	Las Vegas, NV*
CMA 109	Spokane, WA

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\* An asterisk (\*) denotes a Top 100 market (as ranked by U.S. 2010 Census data).

CMA 112	Corpus Christi, TX
CMA 116	Lexington-Fayette, KY
CMA 117	Colorado Springs, CO*
CMA 128	McAllen-Edinburg-Mission, TX*
CMA 134	Atlantic City, NJ
CMA 135	Eugene-Springfield, OR
CMA 138	Macon-Warner Robins, GA
CMA 142	Modesto, CA
CMA 145	Hamilton-Middletown, OH
CMA 148	Salem, OR
CMA 150	Visalia-Tulare-Porterville, CA
CMA 155	Savannah, GA
CMA 160	Killeen-Temple, TX
CMA 162	Brownsville-Harlingen, TX
CMA 165	Fort Smith AR-OK
CMA 170	Galveston-Texas City, TX
CMA 171	Reno, NV
CMA 180	Springfield, OH
CMA 182	Fayetteville-Springdale, AR
CMA 190	Boise City, ID
CMA 197	Lake Charles, LA
CMA 209	Clarksville-Hopkinsville, TN/KY
CMA 210	Fort Collins-Loveland, CO
CMA 216	Janesville-Beloit, WI
CMA 241	Pueblo, CO
CMA 243	Greeley, CO
CMA 273	Kankakee, IL
CMA 281	Laredo, TX
CMA 285	Las Cruces, NM
CMA 287	Bryan-College Station, TX
CMA 291	Pine Bluff, AR
CMA 300	Victoria, TX
CMA 322	Arizona 5 – Gila
CMA 327	Arkansas 4 – Clay
CMA 333	Arkansas 10 - Garland
CMA 339	California 4 - Madera
CMA 347	California 12 - Kings
CMA 432	Kansas 5 – Brown
CMA 449	Kentucky 7 - Trimble
CMA 545	Nevada 3 – Storey
CMA 592	Ohio 8 – Clinton
CMA 601	Oklahoma 6 - Seminole

CMA 606	Oregon 1 - Clatsop
CMA 620	Pennsylvania 9 - Greene
CMA 632	South Carolina 8 - Hampton
CMA 651	Tennessee 9 - Maury
CMA 666	Texas 15 – Concho
CMA 667	Texas 16 - Burleson
CMA 669	Texas 18 - Edwards
CMA 670	Texas 19 - Atascosa
CMA 671	Texas 20 – Wilson

**CMA's Identified by the Spectrum Screen:**

<b>Market</b>	<b>Market Name</b>
CMA 101	Beaumont-Port Arthur, TX
CMA 109	Spokane, WA
CMA 112	Corpus Christi, TX
CMA 128	McAllen-Edinburg-Mission, TX*
CMA 142	Modesto, CA
CMA 162	Brownsville-Harlingen, TX
CMA 170	Galveston-Texas City, TX
CMA 171	Reno, NV
CMA 197	Lake Charles, LA
CMA 281	Laredo, TX
CMA 322	Arizona 5 – Gila
CMA 338	California 3 - Alpine
CMA 339	California 4 - Madera
CMA 341	California 6 - Mono
CMA 378	Georgia 8 - Warren
CMA 388	Idaho 1 - Boundary
CMA 419	Iowa 8 – Monona
CMA 432	Kansas 5 – Brown
CMA 458	Louisiana 5 - Beauregard
CMA 468	Maryland 2 - Kent
CMA 523	Montana 1 - Lincoln
CMA 545	Nevada 3 - Storey
CMA 561	New York 3 - Chautauqua
CMA 620	Pennsylvania 9 - Greene
CMA 625	South Carolina 1 - Oconee
CMA 667	Texas 16 - Burleson
CMA 668	Texas 17 - Newton
CMA 669	Texas 18 - Edwards
CMA 670	Texas 19 - Atascosa
CMA 671	Texas 20 - Wilson

CMA 673	Utah 1 - Box Elder
CMA 675	Utah 3 – Juab
CMA 677	Utah 5 – Carbon
CMA 678	Utah 6 – Piute
CMA 691	Virginia 11 - Madison
CMA 692	Virginia 12 - Caroline
CMA 695	Washington 3 - Ferry
CMA 703	West Virginia 3 - Monongalia

**CMAAs Identified by the HHI and Spectrum Screens:**

<b>Market</b>	<b>Market Name</b>
CMA 109	Spokane, WA
CMA 112	Corpus Christi, TX
CMA 128	McAllen-Edinburg-Mission, TX*
CMA 142	Modesto, CA
CMA 162	Brownsville-Harlingen, TX
CMA 170	Galveston-Texas City, TX
CMA 171	Reno, NV
CMA 197	Lake Charles, LA
CMA 281	Laredo, TX
CMA 322	Arizona 5 - Gila
CMA 339	California 4 - Madera
CMA 432	Kansas 5 - Brown
CMA 545	Nevada 3 - Storey
CMA 620	Pennsylvania 9 - Greene
CMA 667	Texas 16 - Burleson
CMA 669	Texas 18 - Edwards
CMA 670	Texas 19 - Atascosa
CMA 671	Texas 20 - Wilson

## APPENDIX D

## Spectrum Divestitures by AT&amp;T

<b>Market</b>	<b>Market Name</b>	<b>Amount and Type of Spectrum</b>
CMA 101	Beaumont-Port Arthur, TX	20 megahertz AWS-1
CMA 109	Spokane, WA	10 megahertz AWS-1
CMA 112	Corpus Christi, TX	10 megahertz AWS-1
CMA 128	McAllen-Edinburg-Mission, TX	10 megahertz AWS-1
CMA 162	Brownsville-Harlingen, TX	10 megahertz AWS-1
CMA 171	Reno, NV	10 megahertz AWS-1
CMA 197	Lake Charles, LA	20 megahertz AWS-1
CMA 281	Laredo, TX	10 megahertz AWS-1
		10 megahertz AWS-1 (Atchison, Doniphan and Leavenworth counties)
CMA 432	Kansas 5 – Brown	10 megahertz PCS (Brown and Jackson counties)
CMA 545	Nevada 3 - Storey	10 megahertz AWS-1
CMA 669	Texas 18 - Edwards	10 megahertz AWS-1
		10 megahertz AWS-1 (Aransas, Bee and Refugio counties)
CMA 671	Texas 20 – Wilson (Aransas, Bee, Refugio, Karnes and Wilson counties only)	10 megahertz PCS (Karnes and Wilson counties)