Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
AT&T Wireless Services, Inc., Transferor, and Cingular Wireless LLC, Transferee,	)	WT Docket No. 04-70
Applications for Transfer of Control of Licenses and Authorizations	)	

REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS

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TABLE OF CONTENTS

Page

I. INTRODUCTION 2

II. APPLICANTS' PUBLIC INTEREST STATEMENT AND JOINT OPPOSITION FAIL TO ARTICULATE WITH ANY SUBSTANCE A PUBLIC INTEREST BENEFIT FROM THE ACQUISITION OF AT&T WIRELESS 2

- A. The Public Interest Standard Requires Applicants To Demonstrate That The Public – Not Only Private Parties – Would Benefit From The Acquisition 3
- B. Applicants' Suggested Reasoning For Approval Of The Acquisition Fails To Satisfy The Public Interest Standard 7
  - 1. Earlier Resolution of Cingular's Service Issues Are Not A Significant Public Benefit 8
  - 2. "Economies of Scale" Do Not Show A Public Interest In The Acquisition 10
  - 3. The Acquisition Does Not Increase Homeland Security 10

III. OBJECTIVE DATA REVEALS THAT THE MERGER WILL HARM COMPETITION 11

- A. The Merger Guidelines Raise a "Red Flag." 12
- B. Analysis Shows Substantial Anticompetitive Risk 13
  - 1. Bundling of Services 13
  - 2. Control Of An Important Wireless And Voice Input: Special Access 15
- C. Where Opportunities For Exercise of Market Power Exist, SBC Has Taken Advantage 16

IV. TCI HAS STANDING IN THIS APPLICATION PROCEEDING. 16

- A. TCI Has Standing As A Potential Competitor 17
- B. TCI Has Standing Because It Has Alleged Facts Which Constitute Past And Potentially Recurring Antitrust Injury 21

V. CONCLUSION 23

SUMMARY

In order to meet the public interest standard for approval of the proposed acquisition of AT&T Wireless by Cingular Wireless, the Applicants must demonstrate on the record that the *public* benefits of the transfer outweigh the public detriments. While the Applicants have shown several *private* benefits that might result from the acquisition, they have failed to put in the record convincing evidence that the serious public harm that will result to competition is counterbalanced by *public* gains.

The harm to competition which will be caused by the merging of the second and third largest wireless carriers is beyond question. Just the numbers themselves are intimidating: nearly 40 percent market share, one-third larger than the second largest wireless carrier and three and four times larger than each of the other three national wireless competitors. In fact, the "new" Cingular would be larger than all three of those carriers – Sprint, T-Mobile and Nextel – combined. The HHI measure of market concentration reflects the troublesome nature of this proposal as well, as demonstrated by the attached *Supplemental Report* from economic experts.

The competitive threat does not stop with mere market share and concentration, however. Two other aspects of the post-acquisition marketplace must be considered as well. First, this behemoth wireless carrier will be owned by SBC and BellSouth, companies that are dominant ILECs in 22 states containing over half the U.S. population. In those areas, these companies currently have a dominant position in local wireline services, control the vast majority of wireline local loops, hold a large share of long distance customers, and a large share of broadband customers. The fact that SBC and BellSouth control the vast majority of wireline facilities and customers in 22 states today shows that expanding their control of wireless facilities as well threatens competitive harm in several telecommunications markets. The

opportunities for the bundling of services across all these categories, resulting in undetectable cross-subsidization, controlling vital inputs of their competitors (e.g., special access), and forcing their competitors to rely on resale of SBC and BellSouth products, jeopardizes competition in each of these markets.

Second, this threat is compounded by the fact that the second largest carrier post-merger will be Verizon Wireless. Verizon will have the same abilities and opportunities for bundling and cross-subsidy, for control of resale viability and special access pricing as will SBC and BellSouth. As a group, these three will represent six of the seven original Regional Bell Operating Companies, plus GTE, SNET and Continental Telephone. They will dominate all facilities-based telecommunications activity in the U.S. other than interexchange services, including both wireless and wireline. The concept of intermodal local competition between wireless and wireline services will be dead. And the ability to control facilities pricing and bundle all services in a way unavailable to any competitor will assist them in further capturing all the submarkets.

These are the public harms that the Applicants must show are outweighed by the public benefits of the acquisition. Three of the five public benefits cited by the Applicants are service related. Allegedly, by granting Cingular 80 MHz of spectrum they could improve the quality of the services they provide, deploy new 3G services and expand their coverage areas. But Applicants fail to demonstrate how they cannot meet service challenges in the same manner they claim competitors can – through future FCC auctions. Further, Applicants have only demonstrated that purported "economies of scale" will flow to Cingular and its two shareholders and not the public. Nor can Applicants rely on homeland security claims that are unsupported.

The Commission, therefore, should deny the Application.

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REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS

Pursuant to sections 214 and 309(d) of the Communications Act of 1934, as amended ("Communications Act"),[1] and section 1.939 of the Commissions rules,[2] Thrifty Call, Inc. ("TCI"), by and through counsel, hereby replies to the Joint Opposition to Petitions to Deny and Comments[3] filed in reference to the above-captioned applications to transfer control of licenses presently held by AT&T Wireless Services, Inc. ("AT&T Wireless") to Cingular Wireless Corporation ("Cingular"), a company owned privately in combination by SBC Communications, Inc. ("SBC") and BellSouth Corporation ("BellSouth") (together, "Applicants").

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1 47 U.S.C. §§ 214, 309(d).

2 47 C.F.R. § 1.939.

3 AT&T Wireless Services, Inc., Transferor, and Cingular Wireless LLC, Transferee, Applications for Transfer of Control of Licenses and Authorizations, WT Docket No. 04-70, Joint Opposition to Petitions to Deny and Comments (submitted May 13, 2004) ("*Joint Opposition*").

I. INTRODUCTION

As demonstrated below, Applicants' *Joint Opposition* has failed to refute evidence presented in TCI's *Petition to Deny* which demonstrates that the acquisition of AT&T Wireless by Cingular is not in the public interest. Although Applicants have raised and defended significant *private* benefits, they fail to show any *public* benefit sufficient to outweigh the public harm which the acquisition would inflict on competition in telecommunications markets. TCI also submits, in support of its arguments, a supplemental economist report describing concerns not addressed by Applicants or Applicants' experts.[4] Finally, TCI submits further evidence showing legal standing to participate in this proceeding.

II. APPLICANTS' *PUBLIC INTEREST STATEMENT* AND *JOINT OPPOSITION* FAIL TO ARTICULATE WITH ANY SUBSTANCE A PUBLIC INTEREST BENEFIT FROM THE ACQUISITION OF AT&T WIRELESS

Applicants still fail to articulate any significant public *benefit* from the purchase of AT&T Wireless by Cingular, the wireless joint venture of SBC and BellSouth. Some of Applicants' statements suggest that their notion of the public interest is completely different than the Commission's precedent. For example, even though five basic points in support of the acquisition are advanced,[5] there is no data to suggest any of them provide a real *public* benefit. The first three points identify company-specific service issues the acquisition would allegedly help to resolve; the fourth point – regarding intra-company economies of scale – is an issue resolved in any number of ways short of altering competitive landscapes; and, finally, there simply is no homeland security benefit in AT&T Wireless being acquired by Cingular. Thus,

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4 Richard Dinely, M.B.A., C.P.A. and Scott Atkinson, Ph.D., *Response to "Joint Opposition toPetitions to Deny and Comments" Filing by AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, DELTAVECTORS (May 2004) ("*Supplemental Report*") at Tab A.

5 *See, e.g.*, *Joint Opposition* at 2 (again stating five bullet-point reasons for the AT&T Wireless acquisition).

while Applicants' *Public Interest Statement* and *Joint Opposition* make a convincing case that approval of the acquisition would be in their *private* interest, the filings make no real mention of how the *public's* interest would be favored in a manner consistent with sections 214, 309 and 310 of the Act.[6]

A. The Public Interest Standard Requires Applicants To Demonstrate That The Public – Not Only Private Parties – Would Benefit From The Acquisition

The acquisition of AT&T Wireless is certainly in the interest of Cingular's two shareholders, but sections 214, 309 and 310 of the Act require a greater showing of the public's interest to warrant approval.[7] The Commission has a long history of acknowledging private benefits of various applications made before it under the Act. Each time, however, the Commission has required that the applicants' private interest coincide with the public's interest. Applications falling short of demonstrating real public interest are denied.

For example, in the broadcast context, the Commission has made clear that private interests are very different than public interests.[8] In one instance, the Commission refused to permit a company to acquire a station as an upgrade because "this [was] merely a private benefit to the Joint Parties which d[id] not address the public interest benefit…."[9] The Commission also, for example, principally avoids resolving contractual disputes between parties, even if each party in the dispute claims public benefits under the Act.[10] Indeed, courts and the Commission

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6 *See* 47 U.S.C. §§ 214, 309, 310.

7 *See id.*

8 *See, e.g.*, Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, *Memorandum Opinion and Order*, 18 FCC Rcd 6390, para. 5 (2003).

9 *Id.*

10 *See, e.g.*, *Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (holding that the Commission is not the proper forum to litigate contractual disputes between licensees and others); *In re* Applications of Arecibo Radio Corporation, *Memorandum Opinion and Order*, 101 F.C.C. 2d 545, para. 8 (1985) (because the Commission does not possess the resources, expertise or jurisdiction to adjudicate breach

have long-recognized that, in some instances, what might be bad for private purposes may actually be acceptable for public purposes.[11] For example, the Commission has stated repeatedly that its role is to encourage marketplace forces, which are the best way to spur innovation and efficiency among telecommunications carriers.[12] The Commission and courts have also repeatedly emphasized that this policy is "intended to protect competition, not competitors."[13]

It thus is the Applicant's burden here to demonstrate a *public* benefit – not the private benefits it cites – to outweigh serious competitive harms which the acquisition threatens. In

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of contract questions fully, the Commission normally defers to judicial decisions regarding the interpretation of contracts); *see also* Global Crossing Ltd. (Debtor-in-Possession), Transferor and GC Acquisition Limited, Transferee, Applications for Consent to Transfer Control of Submarine Cable Landing Licenses, International and Domestic Section 214 Authorizations, and Common Carrier and Non-Common Carrier Radio Licenses, and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, DA 03-3121, IB Docket No. 02-286, *Order and Authorization*, 30 CR 798, para. 54 n.211 (Oct. 8, 2003) (finding that the record raises issues over "private rights between two parties that do not give rise to more general public interest concerns under the Act.").

11 *See, e.g., ACC Long Distance Corp. v. Yankee Microwave, Inc., Memorandum Opinion and Order*, 10 FCC Rcd 654, paras. 17-18 (1995) (declining to reform contract, because the complainant "allege[d] only private injury, an injury that resulted solely from [its] improvident bargain"); *IDB Mobile Communications, Inc. v. COMSAT Corp., Memorandum Opinion and Order*, 16 FCC Rcd 11474, para. 15 (2001); *see also Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-55 (1956) (explaining that a contract that may be "unreasonable" from a contracting party's perspective may nevertheless not contravene the public interest); *PEPCO v. FERC*, 210 F.3d 403, 407- 09 (D.C. Cir. 2000) (explaining that "the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest").

12 *See, e.g.*, 2000 Biennial Regulatory Review: Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668, para. 13 (2001) ("The Commission analyzed potential market concentration and again found that a 45 MHz spectrum cap was sufficient 'to avoid excessive concentration of licenses and promote and preserve competition' while 'maintaining incentives for innovation and efficiency.'") (quoting Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, *Report and Order*, 11 FCC Rcd 7824, para. 94 (1996) (often referred to as "*CMRS Spectrum Cap Report and Order*"), *aff'd*, 12 FCC Rcd 14031 (1997), *aff'd sub nom. BellSouth Corp. v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999)).

13 *See, e.g., Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996).

balancing the private effects against public benefits, the Commission and reviewing courts have long "emphasized that in administrative proceedings, the paramount interest is that of the public and therefore, the 'interests of private litigants must give way to the realization of public purposes.'"[14] As the Commission has explained, "The ultimate test of industry structure in the communications common carrier field must be the public interest, not the private financial interests of those who have until now enjoyed the fruits of *de facto* monopoly."[15]

Instead of citing real public benefit, Applicants contend that if the acquisition succeeds and the combined companies gain market share, then the transaction is in the public's interest. For example, Applicants state that "[i]f the deal struck is uneconomic and the public interest/consumer benefits are not realized, the combined company will rapidly lose market share."[16] Applicants then cite to lost AT&T Wireless market share and conclude that "[t]he public interest benefits asserted by Applicants must be realized if the combined company is to succeed in the market."[17]

The Commission should not rely solely on whether "the combined company is to succeed in the market" as the only support for a "public interest" in the combination.[18] In fact, TCI agrees that the combined wireline and wireless companies might be hugely successful – for the

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14 Annual 1985 Access Tariff Filings, *Order*, 3 FCC Rcd 7230, para. 2 (1988) (quoting *Virginia Petroleum Jobbers*, 259 F.2d 921, 925 (1958); *see also AT&T Corp., et al. v. Ameritech Corp.*, *Memorandum Opinion and Order*, 13 FCC Rcd 14508, para. 22 (1998) (finding that "'in litigation involving the administration of regulatory statutes designed to promote the public interest . . . [t]he interests of private litigants must give way to the realization of public purposes.'") (quoting *Virginia Petroleum Jobbers*, 259 F.2d at 925); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844-45 (1977)).

15 *The Lincoln Telephone and Telegraph Comp. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (quoting *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 380 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S. Ct. 780, 98 S. Ct. 781, 54 L. Ed. 2d 790 (1978) (commonly referred to as "*Execunet I*")).

16 *Joint Opposition* at 4.

17 *Joint Opposition* at 4.

18 *Joint Opposition* at 4.

wrong reasons. Such statements support TCI's argument that combining the largest wireless carrier with two incumbent local exchange carriers will be successful from the Applicants' perspective, giving the Applicants the ability to gain market share in both the wireless and wireline markets.

Key to the Commission's analysis has been and remains the obligation to consider the competitive effects of the proposed transfers and whether such transfers raise significant anti-competitive issues across *any* market or submarket affected by the acquisition.[19] Here, the proposed acquirors are dominant incumbent local exchange carriers ("ILECs") in 22 states representing over half the nation's population. Those ILECs have been involved in continuous litigation with the FCC and their competitors to restrict the ability of others to compete; they have been repeatedly fined, entered consent decrees, and been found in "willful and repeated" violation of FCC requirements.[20] Both SBC and BellSouth have Petitions pending which, if granted, will enable them to restrain their competitors even further.[21] It is within this context of litigation, non-compliance and continuing efforts to restrict competition – especially the ability of competitors equal to them in the ability to bundle services – that the Commission must analyze the "public interest" in the proposed acquisition. The Applicants bear the burden of

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19 General Motors Corporation and The News Corporation Limited General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order*, 313 CR 795, para. 16, FCC 03-330, MB Docket No. 03-124 (Jan. 2004) ("*DirecTV Order*").

20 *TCI Petition to Deny* at 25-29.

21 *FCC Public Notice*, DA 03-3991, WC Docket No. 03-251, Pleading Cycle Established For Comment On BellSouth's Request For Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth To Provide Such Services to CLEC Voice Customers (Dec. 16, 2003); *FCC Public Notice*, WC Docket No. 04-29, Pleading Cycle Established For Comments On Petition of SBC Communications Inc. For Forbearance Under Section 10 Of The Communications Act from Application of Title II Common Carrier Regulation To "IP Platform Services" (Feb.12, 2004).

proving that the transaction, on balance, serves the *public* interest – not Cingular's investors' interest.[22] On the record in this proceeding, they have failed to do so.

B. Applicants' Suggested Reasoning For Approval Of The Acquisition Fails To Satisfy The Public Interest Standard

Applicants do not respond to the variety of ways their *Public Interest Statement* fails to demonstrate a real public interest in the acquisition. Applicants' five point rationale to support the claim that the market-altering combination is in the public interest and could offer "benefits faster and more broadly "than either company could realize on a stand-alone basis" are, in essence, three reasons:

(1) *service issues*: "significantly improv[ing] the quality of existing" services (Applicants' first bullet point); deploying 3G on a nationwide scale (Applicants' second bullet point); and "substantially expanding the coverage of each of the companies" (Applicants' third bullet point);

(2) "*economies of scale*" that will "enhance" the ability of the proposed largest wireless carrier in the nation to compete (Applicants' fourth bullet point); and

(3) *homeland security* issues (Applicants' fifth bullet point).[23]

None of these points are convincing and none outweigh the anti-competitive effects of the acquisition. In the weighing of the benefits and detriments of the acquisition, Applicants seek to include many "benefits" which can be obtained equally effectively without the acquisition. Such "benefits" cannot be part of the rationale to support the merger because they are not a result of the merger.[24]

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22 *DirecTV Order* at para. 15.

23 *Joint Opposition* at 2-3.

24 Cingular erroneously claims that TCI's Petition misconstrues Section 310(d) by considering whether a transfer *to another party* would better serve the public interest. This is untrue. Rather, TCI states only that the Commission should not give credit for

1. Earlier Resolution of Cingular's Service Issues Are Not A Significant Public Benefit

The *Joint Opposition* claims that the acquisition will establish the following service related benefits for consumers "faster and more broadly" than if each Company must accomplish these things individually:

- Significantly improve the quality of existing voice and basic data services;
- Deploy the kinds of advanced, 3G services in the U.S. that are now being enjoyed in other nations, without customer disruption, through the acquisition of necessary spectrum; [and]
- Create more value for consumers and a more viable nationwide competitor by substantially expanding coverage.[25]

Each of these three claims essentially involve service issues that Applicants contend (1) will be cured through the AT&T Wireless acquisition and (2) "will produce significant public interest benefits without countervailing risks to competition . . . ."[26] For example, in markets that would result with 80MHz to Cingular, Applicants submit as public benefits that the acquisition "will allow even more customers to be served within that 50MHz . . . [i]n short, by combining the two companies' current networks, Cingular will be able to remedy the 'overloaded circuits,' ...while freeing up 30 MHz of spectrum for more advanced services."[27]

Curing Cingular "overloaded circuits" and creating "technical efficiencies" are private and not public interests, however, and do not satisfy the public interest requirements of the Commission. Reviewing courts and the Commission have "emphasized that in administrative proceedings, the paramount interest is that of the public and therefore, the 'interests of private

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"public benefits" which can be accomplished *without a transfer to anyone*. Such consequences cannot properly be attributed to the merger.

25 *Joint Opposition* at 2-3.

26 *Joint Opposition* at 2.

27 *Joint Opposition* at 7.

litigants must give way to the realization of public purposes.'"[28] While curing Cingular's private interests is a worthy goal, it is not consistent with the public's goal. Any member of the public can be free of Cingular service issues by switching carriers. Further, Applicants do not submit for the record how much "faster" or "more broadly" the acquisition will permit these alleged benefits to occur.

Most importantly, Applicants have not explained why the only way to cure their private issues is through an acquisition that has the potential of substantially reducing existing competition. Applicants state that "new entrants and Cingular's existing competitors have ample opportunity to obtain any additional spectrum they might need or want."[29] Applicants make no attempt to show why this alternative, which they say is perfectly fine for their competitors, is not sufficient for them as well. In truth, it *is* sufficient for Cingular and AT&T Wireless, at a cost far less than $41 billion. Thus, the acquisition does not resolve service issues in a manner that "promises to yield affirmative public interest benefits," but instead "would interfere with the objectives of the Communications Act and other statutes."[30] The Applicants have failed to meet their burden to demonstrate that the *public* benefits outweigh the *public* harms because the acquisition is not necessary to their obtaining more spectrum and thereby resolving their service related problems.

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28 Annual 1985 Access Tariff Filings, *Order*, 3 FCC Rcd 7230, (1988) (quoting *Virginia Petroleum Jobbers*, 259 F.2d 921, 925 (1958)); *see also AT&T Corp., et al. v. Ameritech Corp.*, *Memorandum Opinion and Order*, 13 FCC Rcd 14508, para. 22 (1998).

29 *Joint Opposition* at 13.

30 Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T, *Memorandum Opinion and Order*, 15 FCC Rcd 9816, para. 9 (2000) ("*MediaOne/AT&T Order*").

2. "Economies of Scale" Do Not Show A Public Interest In The Acquisition

Applicants' also claim that the acquisition will "[a]chieve economies of scope and scale that will enhance the ability of the combined company to compete more effectively."[31] TCI submits that the economies of scale suggested here are a private interest that will "interfere with the objectives of the Communications Act and other statutes," while failing to "promise[] to yield affirmative public interest benefits."[32]

Similar to another recent application which made such claims, TCI believes that "Applicants have not provided sufficient supporting evidence for [the Commission] to verify and quantify the claimed savings resulting from increased operating efficiency."[33] Specifically, Applicants fail to demonstrate why Cingular, by itself or through other means that pose fewer competitive risks than its acquisition of AT&T Wireless, could not also realize economies of scale. For example, just as Applicants claim that increased spectrum "capabilities will inure to the benefits of consumers" Applicants have, so far, failed to demonstrate why Applicants cannot achieve economies of scale in the manner they suggest competitors achieve the same goal – through future FCC auctions. Applicants also fail to submit expected reductions in long-run marginal costs or prices due to the proposed merger.[34]

3. The Acquisition Does Not Increase Homeland Security

Although TCI agrees that enhanced homeland security is, of course, in the public's interest, the acquisition of AT&T Wireless will not make the country safer than if there were no such acquisition. In its *Joint Opposition*, Applicants failed to substantiate their public interest

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31 *Joint Opposition* at 3.

32 *MediaOne/AT&T Order* at para. 9.

33 *DirecTV Order* at para. 337.

34 *Supplemental Report* at 6.

claim.[35] With one bare paragraph, Applicants claim that the acquisition of AT&T Wireless "will provide immeasurable benefits" to the Wireless Priority Service ("WPS"), but fail to present any justification for this assertion.[36]

Applicants explain that "on March 9, 2004, Cingular entered into an agreement to provide WPS to emergency personnel."[37] Assuming the agreement was entered into with federal, state or local law enforcement entities, Applicants fail to explain how Cingular is unable to meet the requirements under the agreement, nor did they provide any support from a law enforcement entity explaining how the acquisition of AT&T Wireless by Cingular will enhance homeland security. Presumably, the agreement Cingular references is not contingent upon the completion of its purchase of AT&T Wireless. Moreover, the Applicants make no attempt to describe why the alleged benefits cannot be achieved without regard to the merger, through contract or otherwise. Without further explanation, the Commission has no basis to find that the proposed acquisition will have any beneficial effect on homeland security.

III. OBJECTIVE DATA REVEALS THAT THE MERGER WILL HARM COMPETITION

The *Joint Opposition* attempts to refute the economic analysis submitted by TCI with its *Petition to Deny*. That analysis, prepared by the economic consulting of deltaVectors, is further supported by the attached *Supplemental Report*. The *Supplemental Report* demonstrates that the proposed acquisition poses a severe anti-competitive threat.

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35 *Joint Opposition* at 19-20.

36 *Id.*

37 *Joint Opposition* at 19.

A. The Merger Guidelines Raise a "Red Flag"

The *Supplemental Report* demonstrates that the Herfindahl-Hirschman Index ("HHI") is properly applied based on the total number of subscribers, which is a far more meaningful measurement than revenue. The Applicant's attempt to rely on the more favorable – but entirely inappropriate – "flow share" method is unsupportable. As the *Supplemental Report* discusses in detail, it is obvious that a "flow share" analysis is inappropriate in this context in the manner it reflects market realities. The "flow share" analysis usefulness is limited to an analysis of small, but growing, entities – not an entity that would be the largest wireless carrier in the nation, owned by SBC and BellSouth.[38]

The *Supplemental Report* also explains how Applicants have still not refuted the significant antitrust concerns raised by the *Petition to Deny*. Regardless whether the national or local market is considered, the HHI analysis still predicts high concentration – exceeding the 100 point threshold – and should automatically trigger concern at the Commission and Department of Justice.[39] For example, even calculating HHIs at the national level, based on the largest 25 carriers, there is a HHI of 1886 and an increase in the HHI of 508.[40] Thus, HHIs examined either under Applicants' national scope or the correct county scope demonstrates that the acquisition of AT&T Wireless will create dominant market power in a manner to facilitate monopolistic behavior.[41] It should be noted, however, that the Commission's own review of mobile services

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38 *Supplemental Report* at 13. Based on actual subscribers, the post-merge Cingular will be larger than Sprint PCS, T-Mobile and Nextel *combined*. Cingular's advocacy of the flow share methodology, which treats Nextel as twice the size of Cingular, does not even pass the laugh test.

39 *Id.* at 16.

40 *Id.*

41 *Id.* at 11-17.

competition stated that the "county-by-county analysis reflects a significant improvement in accuracy."[42]

B. Analysis Shows Substantial Anticompetitive Risk

The HHI is not the end of the analysis of any acquisition, but serves as the basis for heightened scrutiny. Here, that scrutiny must focus not solely on increased wireless prices, as Applicants contend, but on the merged entity's increased ability to cross-subsidize and cost-shift between wireless, local and long distance wireline voice, broadband and enhanced submarkets.[43] The merged entity will be a facilities-based provider – the *only* facilities-based provider – of all these services in 22 states serving more than 50 percent of the U.S. population.

1. Bundling of Services

It is widely believed that the key to future success is the ability to package services across several telecom offerings.[44] In half of the U.S., only Cingular will have the ability to do this on a facilities basis. Every other competitor will either be unable to offer some part of the service, or will be required to do so as a reseller only. As the *Joint Opposition* points out, resale limits features available and denies quality control.[45] Chairman Powell has explained, "there's a million ways to Sunday to get beaten up by an incumbent that's not particularly interested in helping you … [s]o I think the more facilities that you can bring to the party, the more long-term viability you have as a competitor; it's better for consumers and less dependent on the incumbent

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42 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Seventh Report, 17 F.C.C. Record 12985, 13008 (2002).

43 *Id.* at 5-9.

44 "Customers who subscribe to bundles are less likely to cancel service than those who subscribe to any single telecommunications service, and a bigger bundle means bigger money for the telecommunications providers. 'It's the battle of the bundles, and you can't compete without a bundle of service,' [Blair] Levin [analyst with Legg Mason Wood Walker] said." Yuki Noguchi, *AT&T Back in Wireless Business*, WASH. POST, May 19, 2004 at E5; *Supplemental Report* at 6-9.

45 *Joint Opposition* at 48-49.

to sort of help mitigate their ability to frustrate the objective."[46] Further, the Commission itself has said "resale and MVNO carriers are likely to be less effective than facilities-based competitors in disciplining the market and encouraging innovation because they are dependent on the underlying carrier's wholesale price and service platform."[47] Moreover, the Commission also has recognized that "there remains relatively little potential for additional entry into urban markets in the near term...."

SBC and BellSouth clearly know that control of the underlying facilities – wireless and particularly wireline – is the key element to successful bundling efforts. With facilities, both SBC and BellSouth are already actively seeking to restrict the ability of their competitors to have access to the full array of services.[48] For example, BellSouth's Petition wants to mandate voice and broadband bundling.[49] SBC's Petition seeks to restrict broadband facilities for competitors.[50] And both have actively litigated to restrict local voice service facility usage by competitors.[51]

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46 Fred Dawson & Kim Sunderland, *Interview, FCC Chairman Michael Powell*, PHONE+, posted 04/2002 at http://www.phoneplusmag.com/articles/241interview.html.

47 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Radio Services, *Report and Order*, 16 FCC Rcd 22668, 22691 (2001) ("*Biennial Review*").

48 *See, e.g.*, *Supplemental Report* at 7.

49 "BellSouth says it is disappointed in the states' DSL unbundling ruling and has petitioned the FCC to halt the states' requirement that it unbundle DSL. BellSouth competitor MCI says the RBOC is engaging in monopolistic practices by requiring customers to subscribe to voice as a prerequisite for DSL." Jim Duffy, *More VoIP Variables*, NETWORK WORLD, posted 2/06/04, www.nwfusion.com/edge/columnists/2004/0202edgecol2.html. *FCC Public Notice*, DA 03-3991, WC Docket No. 03-251, Pleading Cycle Established For Comment On BellSouth's Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Such Services to CLEC Voice Customers (Dec. 16, 2003).

50 *FCC Public Notice*, WC Docket No. 04-29, Pleading Cycle Established For Comments On Petition Of SBC Communications Inc. For Forbearance Under Section 10 Of The Communications Act from Application Of Title II Common Carrier Regulation To "IP Platform Services" (Feb.12, 2004).

51 *See, e.g.*, *United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

SBC, BellSouth and Cingular will be in a perfect position to maximize bundling in an anticompetitive manner if the acquisition is approved. The merged entity will not only be able to capture efficiencies that no other market competitor has, in light of unmatched facilities, it will also be able to bundle wireless products below marginal costs.[52] Any single bundled element, e.g., wireless service, can be offered at below marginal costs subsidized by inflating prices in other bundled elements, e.g., local wireline service, where CLECs have only a negligible market penetration. Thus, Cingular, SBC and BellSouth will be able to further increase their wireless position by inflating the local service element to subsidize a wireless offering to a price point that other wireless carriers will not be able to match, without an ILEC partner or parent.[53] And they will be able to accomplish all this without detection through service bundling.

2. Control Of An Important Wireless And Voice Input: Special Access

Although Applicants do not find it necessary to specifically address special access concerns raised in the *TCI Petition to Deny* the Commission's pubic interest evaluation requires all potential anticompetitive issues to be addressed, including special access concerns. With this transaction, SBC and BellSouth will not only own the largest wireless carrier in the nation, but also own the backbone of the wireless market – the wireline network – in two ILEC regions serving more than half of the nation's wireline subscribers throughout 22 states. Interconnection to the landline telephone network, including special access, therefore, is key to competition in nearly all sectors of the market, including the wireless sector.

Competitors have no other option than to interconnect with SBC and BellSouth and to purchase special access services from them. Both SBC and BellSouth are already the dominant

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52 *Supplemental Report* at 3-6.

53 *Id.* at 3-9.

suppliers of special access throughout their relevant territories. Any further concentration will provide an effective means with which to control any potential competitor, including wireless competitors, that do not submit to a price increase initiated by the Applicants. In the end, consumers suffer from lack of choices, in light of the dominant position of SBC and BellSouth, and higher prices, which are passed through to consumers after a competitive carriers pay SBC and BellSouth for access.[54]

C. Where Opportunities For Exercise of Market Power Exist, SBC Has Taken Advantage

The FCC cannot minimize the risks of anticompetitive conduct where a repeat offender is involved. SBC has demonstrated numerous times that it is willing to violate competitive safeguards.[55] This acquisition presents SBC, particularly, the potential to monopolize the wireline and wireless markets within its ILEC region. Further, as the *Supplemental Report* explains, Applicants incorrectly gauge potential unilateral anti-competitive conduct available to SBC and BellSouth.[56]

IV. TCI HAS STANDING IN THIS APPLICATION PROCEEDING

Applicants' argue that TCI lacks standing in this proceeding and complain that TCI "provides no affidavit or declaration concerning how it will be affected by the merger...."[57] TCI submits the attached Declaration of Harold E. Lovelady ("*Lovelady Declaration*")[58] and below explains how it does have standing in this proceeding as a potential competitor of Cingular,

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54 *Id.* at 9-12.

55 *See, e.g.,* SBC Communications, Inc., *Forfeiture Order*; 17 FCC Rcd 19928 (2002) ("*SBC Forfeiture Order*"); *TCI Petition to Deny* at 25-29.

56 *Supplemental Report* at 10. The Commission has already recognized that "facit collusion becomes more likely as the number of competitors is reduced." *Biennial Review* at 22692.

57 *Id.*

58 *Declaration of Harold E. Lovelady* at Tab B.

AT&T Wireless, SBC and BellSouth. TCI also submits that it has standing in this proceeding because it has suffered from the knowing and willing anticompetitive acts of SBC and may not be foreclosed from participation here if those acts have served as a deterrent to TCI from re-entering the telecommunications market.

A. TCI Has Standing As A Potential Competitor

Applicants ignore that "[a] potential competitor may be treated as an equivalent to an existing competitor."[59] In fact, the FCC has stated that in the CMRS market "potential competition can be as important as actual competition in promoting desirable outcomes."[60] Consistent with relevant antitrust law as applied through the Commission merger review process,[61] TCI clearly fits within the "limit[ed] universe of potential antitrust plaintiffs" and has standing as a party in this proceeding.[62] While courts do not all agree on the precise formulations of the controlling standards, "it is common ground that the aim of the antitrust standing inquiry is to determine whether Congress intended to extend the statute's protection to the type of plaintiff before the court."[63]

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59 *Santa Cruz Medical Clinic v. Dominican Santa Cruz Hosp.*, 1994 WL 619288, *10 (N.D. Cal. 1994) (citing *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985)).

60 *Biennial Review* at 22680.

61 "The public interest standard of Sections 214(a) and 310(d) is a flexible one that encompasses the 'broad aims of the Communications Act.' These broad aims include, among other things, the implementation of Congress' 'pro-competitive, de-regulatory national policy framework' for telecommunications, promotion of the competition policies of the Sherman and Clayton Acts, and "'enhancing access to advanced telecommunications and information services . . . in all regions of the Nation.'" Teleport Communications Group, Inc. and AT&T Corp., For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services, *Memorandum Opinion and Order*, 13 FCC Rcd 15236, para. 11 (1998) (internal citations omitted).

62 *Amtrol, Inc. v. Vent-Rite Valve Corp.*, 646 F.Supp. 1168, 1176 (D. Mass. 1996).

63 *Id.* at 1176 (citing *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-36, 103 S.Ct. 897, 907, 74 L.Ed.2d 723 (1983)).

The standard "most frequently used to determine whether a potential market entrant has standing is the four part test of *Waldron v. British Petroleum Co.*, 231 F.Supp. 72 (S.D.N.Y.1964)."[64] Under this test,

> the court looks for 'varying combinations of the following typical elements: 1. The background and experience of plaintiff in his prospective business ... 2. Affirmative action on the part of plaintiff to engage in the proposed business ... 3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business ... 4. The consummation of contracts by plaintiff ...'[65]

Most courts "have reduced the four *Waldron* questions to two, asking only whether the plaintiff 'intended' to enter the market and was 'prepared to do so' in a reasonable amount of time."[66] Although not as common, "other courts, perhaps wary of trying to develop a single rule to cover an infinite variety of claims, couch their decisions in the more generalized requirement that the plaintiff demonstrate something 'beyond a hope or expectation' of entering the allegedly monopolized market."[67]

Discreet distinctions among the various formulations are irrelevant to determine TCI's standing. "Despite their linguistic differences, the formulations are but separate attempts to draw the very same line. At the core of the inquiry is the question whether the litigant is a serious potential competitor, distinguishable from the great horde of opportunists who 'would've, could've, or might've.'"[68] "[M]ost courts have held that

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64 *Id.*

65 *Id.* at 81-82 (citing accord *Parks v. Watson*, 716 F.2d 646, 660 (9th Cir.1983); *Curtis v. Campbell Taggert, Inc.*, 687 F.2d 336, 338 (10th Cir.), *cert. denied*, 495 U.S. 1090, 103 S.Ct. 576, 74 L.Ed.2d 937 (1982); P. Areeda and D. Turner, *Antitrust Law*, 335c (1978)).

66 *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir.1982), *cert. denied*, 461 U.S. 958, 103 S.Ct. 2340, 77 L.Ed.2d 1317 (1983); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987 (D.C.Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978).

67 *Amtrol*, 646 F.Supp. at 1177; *Image and Sound Serv. v. Altec Serv. Corp.*, 148 F.Supp. 237, 239 (D.Mass. 1956).

68 *Amtrol,* 646 F.Supp. at 1177.

injury to an enterprise in the planning stage is actionable, provided that plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so."[69] From this perspective, TCI's facts lead only to the conclusion that TCI has standing as a petitioner to deny Cingular's application.

To begin with, TCI remains a company engaged in the telecommunications industry. TCI's Chief Executive Officer and principal owner, Harold E. Lovelady, has owned, operated or been an executive officer of competitive telecommunications companies since 1981.[70] Since then, Mr. Lovelady has established the ability to finance and operate telecommunications businesses in both up and down telecommunications markets.[71]

Mr. Lovelady recently directed the sale of assets of TCI to Grande Communications in 2002.[72] Since then, Mr. Lovelady has headed the operation of telecommunications carriers, such as Vanion, Inc., a Colorado-based CLEC .[73] All the while, Mr. Lovelady has often examined the assets of bankrupt or soon-bankrupt CLEC facilities to determine whether they might fit within his business intentions. For example, Mr. Lovelady pursued the assets of e.spire Communications and Adelphi Communications during their bankruptcy sale of assets.[74]

Mr. Lovelady has the ability to finance and operate a new competitive carrier in the BellSouth and SBC regions as well as Cingular wireless regions. Further, Mr.

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69 ABA Section of Antitrust Law, *Antitrust Law Developments* 842 & n.38 (5th Ed. 2002).

70 *Lovelady Declaration* at 1.

71 *Id* at 2.

72 *Id.*

73 *Id.*

74 *Id* at 2-3.

Lovelady has secured professional and legal advice regarding the competitive telecommunications market and opportunities in SBC and BellSouth regions,[75] including advice regarding opportunities that exist for interconnection agreements to provide competitive local exchange service in SBC and Bellsouth regions. In addition, Mr. Lovelady, through TCI, is engaged in this proceeding as an attempt to secure a competitive landscape in which to compete against SBC, BellSouth, AT&T Wireless and Cingular in the future. Mr. Lovelady has learned from economists secured for this merger review that the merger will likely effect any potential investment in a negative manner if the merger is approved.[76] Thus, if the acquisition of AT&T Wireless is approved and if SBC continues to knowingly and willingly violate competitive safeguards put in place to protect carriers such as TCI, Mr. Lovelady may not re-enter the competitive local exchange market.[77]

TCI, therefore, has standing to participate in this proceeding because Mr. Lovelady, presently through TCI, has demonstrated: (1) that he possesses the background and experience necessary to compete against Applicants; [78] (2) affirmative acts to engage in the proposed business; [79] (3) the ability to finance the business facilities necessary to

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75 *Id.*

76 *Id.*

77 *Id.*

78 It is highly relevant that TCI and its principal owner, Mr. Lovelady, "is a successful and experienced competitor" in the telecommunications industry. Further, TCI's and Mr. Lovelady's "background in the industry, together with the access to customers and distribution chains that such background implies, certainly is relevant to an inquiry designed to find out if a party was 'prepared' to enter a market." *See Amtrol,* 646 F.Supp. at 1177.

79 Even if TCI has only taken steps that could best be described as "preparatory" a reviewing court will acknowledge jurisdiction. For example, in *Amtrol*, the defendant argued that plaintiff's acts were "merely preparatory," and further argued that standing should be denied because plaintiff "ha[d] not sold a single [product] is dispositive of the issue." The Court disagreed and explained, "Such argument misconceives the scope of the injuries the antitrust laws are designed to prevent. It is 'as unlawful to prevent a

operate as a competitive carrier;[80] and (4) an engagement in the competitive telecommunications business.[81]

B. TCI Has Standing Because It Has Alleged Facts Which Constitute Past And Potentially Recurring Antitrust Injury

TCI would still possess standing even if the Commission found that it lacks sufficient intention to continue in the telecommunications market. Precedent does not permit a dominant parent company to knowingly and willingly violate laws in an effort to force competitors out of business and then lock the same potential competitors out of subsequent proceedings that are relevant to the competitor's re-entry into the market. TCI, therefore, has standing here in light of suffering past injury from SBC's anticompetitive behavior and the likelihood that further anticompetitive behavior will recur.

Similar to many competitive local exchange carriers, TCI suffered injury as a competitive local exchange carrier in the local exchange market dominated SBC. TCI has demonstrated here, among other facts, that the Commission fined SBC $6 million for "SBC's willful and repeated failure to comply with the *SBC/Ameritech Merger Order*" during the time period which TCI was operating as a competitive carrier in the SBC region.[82] The $6 million FCC forfeiture, as well as the myriad of other fines, judgments, "voluntary contributions," and settlements – most of which Applicants do not even

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person from engaging in a business as it is to drive him from it.'" *Amtrol,* 646 F.Supp. at 1177.

80 *Lovelady Declaration* at 2-3.

81 It is not necessary for a company to presently compete to have standing. Indeed, "most courts have not required a plaintiff to actually be engaged in an ongoing business in order to have standing under anti-trust laws." *Ashley Creek Phosphate Comp. v. Chevron USA, Inc.*, 315 F.3d 1245, 1255 (citing *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982)).

82 *SBC Forfeiture Order*, at para. 22; *TCI Petition to Deny* at 25-29.

attempt to refute in the *Joint Opposition* – is proof of prior anticompetitive behavior and evidence that it is likely to recur.[83] Thus, in its *Petition to Deny*, TCI has "alleged facts which, if true, constitute an antitrust injury, and hence has standing to bring this action."[84]

It is not necessary for TCI "to show a present loss of income or other legally cognizable damages in order to have standing as a plaintiff in this action."[85] As the Sixth Circuit, for example, has explained, "a plaintiff may obtain injunctive relief simply by demonstrating a 'significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.'"[86] Thus, in view of these purposes, the threatened injury TCI has submitted in its *Petition to Deny* need not rise to some judicially perceived level in order to confer standing. TCI's alleged exclusion by the Applicants from competing in the combined local and wireless markets in the SBC region is sufficient to demonstrate an "antitrust injury" and to confer standing on TCI in this application proceeding pursuant to the Act. TCI, therefore, has standing in this proceeding because it has suffered from the knowing and willing anticompetitive acts of SBC and may not be foreclosed from participation here if those acts have served as a deterrent to TCI from re-entering the telecommunications market.

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83 *See TCI Petition to Deny* at 25-29.

84 *Stone v. William Beaumont Hosp.*, 782 F.2d 609, 615-16 (6th Cir. 1986) (Holschuh, District Judge, concurring in the judgment); *see also Riverview Investments v. Ottawa Community Improvement Corp.*, 769 F.2d at 329; *TCI Petition to Deny* at 25-29. One example of the hostile market conditions imposed on CLECs by SBC was mentioned in Cingular's Opposition. Although TCI sold its assets to Grande Communications over two years ago, SBC continues to pursue specious litigation against TCI. *Joint Opposition* at n.179.

85 *See id.*

86 *Id.* (quoting *Bender v. Southland Corp.*, 749 F.2d 1205, 1214 (6th Cir. 1984) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969)).

V. CONCLUSION

For all the foregoing reasons, the acquisition of AT&T Wireless by Cingular is not in the public interest. TCI has demonstrated in its *Petition to Deny* that the acquisition creates the prospect of monopolistic behavior. Applicants, in their *Joint Opposition* have failed to refute TCI's allegations and otherwise describe how the acquisition furthers the public's interest instead of merely their own. By statute, the Commission may not also ignore the obvious anticompetitive effects of the proposed acquisition and, therefore, should deny its approval.

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May 20, 2004

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Attachment A

Supplemental Report

Response to "JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS" Filing by AT&T Wireless Services, Inc. and Cingular Wireless Corporation

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May, 2004

Response to "JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS" Filing by AT&T Wireless Services, Inc. and Cingular Wireless Corporation

TABLE OF CONTENTS

1.0 Executive Summary 1

2.0 Anti-Competitive Effects of Bundling and Cross-Subsidization 3

2.1 Sub-Additive Cost Functions in Bundling 5
2.2 Effect of Product Stickiness in Bundling 6
2.3 Product Cross-Subsidization in Bundling 7

3.0 Unilateral and Coordinated Anti-Competitive Conduct 9

3.1 Gilbert's Inappropriate Reference to Cartel Model 9
3.2 Unilateral Anti-Competitive Conduct 10
3.3 Game Theory: Unilateral Anti-Competitive Conduct in a Non-Cooperative Setting 10

4.0 Appropriate Measure of Market Concentration 11

4.1 Appropriate Test for the Geographic and Product Markets 12
4.2 Appropriateness of Flow vs. Stock Measures 12
4.3 Appropriateness of Using Total Subscribers Rather Than Revenue 13
4.4 Relevant Product Market 14
4.5 Relevant Geographic Market 14
4.6 HHI Results Under Multiple Approaches 16

5.0 Conclusions and Findings 17

6.0 Appendix 1: HHI Calculations 19

7.0 Appendix 2: The Research Team 21

1.0 Executive Summary

In its *JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS*, AT&T Wireless Services and Cingular Wireless Corporation attempt to respond to the legitimate concerns of those opposed to the merger. Their response, however, offers inconsistent and diametrically opposed reasoning as to why the merger should be approved.

As an example, they observe that "no wireless carrier....has opposed the merger."[1] Simultaneously they argue that "it would be very difficult to reach terms of coordination[2]" amongst the various wireless carriers. The mere fact that there has been no opposition from a single wireless carrier speaks volumes about the unspoken coordination that exists in the industry. It is generally accepted that market consolidation in the wireless service industry is inevitable and the silence of the competing wireless carriers is directly attributable to their condoning of this merger in hopes that SBC, BellSouth, and Cingular will return the favor with silence when future consolidations of competing players are under scrutiny.

The applicants argue that the "merger will allow Cingular and AWS to become *better* competitors while preserving the full range of incentives and opportunities in today's market for existing and new entrants[3]". This statement is ludicrous and oxymoronic at the same time. The whole purpose of the merger is to a gain competitive advantage that will reduce competition and allow the merged company to assert more control in the

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[1] *JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS*, AT&T Wireless Services, Inc. and Cingular Wireless Corporation, May 13, 2004, at iii
[2] *Ibid* at 25
[3] *Ibid* at iv

marketplace. Even the cost structure benefits that result from the merging of the infrastructure will work to better position the price competitiveness of the merged companies

The applicants also state that the merger is required if they are to roll out advanced communications services for the consumers benefit. The truth is both Cingular and AT&T Wireless have claimed these 3G services would be offered and these claims were made well before the proposed merger was even conceived. Additionally, the applicants suggest that the merger is the only way they can access the necessary spectrum in order to provide these advanced communications services. The truth is that with $41Billion, Cingular could easily acquire additional spectrum, invest in incremental infrastructure, and still have money left over.

Lest we be fooled, this merger is about one thing and one thing only, market domination. Even Gilbert attempts to distract us with spurious arguments about market share being measured on flow rather than stock and measured by revenue not subscribers. In section 4.0 and the following subsections, this argument is dissected and destroyed. The legitimacy of subscribers as the proper measure of market share is reestablished and the anti-competitive nature of the merger, as measured by the Herfindahl – Hirschman Index (HHI) is reasserted as the market power indices virtually explode as a reflection of the impact of the proposed merger, which should be denied.

2.0 Anti-Competitive Effects of Bundling and Cross-Subsidization

Bundling allows the Regional Bell Operating Companies (RBOCs) to capture certain efficiencies, and capitalize on economies of scale and scope resulting in cost savings created by removing the need for duplicative personnel for administration, sales, marketing, etc. Bundling also provides a fertile field for predatory pricing of a single bundled element, e.g. wireless services, with the below marginal cost pricing subsidized by artificially inflated prices in bundled elements that are delivered in a less competitive environment, e.g., local access.

Bundled pricing strategies have already been adopted by SBC where, in their 2003 Analyst Conference, Mr. Ray Wilkins, Group President – Marketing & Sales declared "Nobody beats our bundles" and cited specific bundled pricing examples that included unlimited long distance for $20 and discounts of 20% on Cingular Wireless services. The RBOCs incentive for bundling was made even more clear in SBC's Investor Update on April 21, 2004 where the company announced that "73% of consumers purchase a bundle of one or more key services, that include long distance, DSL, satellite, and Cingular Wireless" and that "average revenue per user (ARPU) for bundled customers was more than double that of unbundled customers"[4].

The other parent of Cingular Wireless, BellSouth, is equally enthusiastic about bundling.

> BellSouth Answers℠ is the company's signature communications package. The package combines, on one bill, local calling plans with long distance, Internet and -- benefiting from BellSouth's ownership in Cingular -- wireless services. In early April, BellSouth began adding DIRECTV digital satellite television service to the BellSouth Answers bundles through our web channel. This summer, we will

[4] Investor Update, SBC 2004 Q1 Earnings Conference Call, April 21, 2004, Slide 16

> broadly roll out DIRECTV, selling the new service through our call centers. The addition of video, makes BellSouth Answers the most comprehensive bundle in the marketplace today.
>
> The number of BellSouth Answers customers increasing their affiliate services – such as long distance, wireless, DSL or dial-up Internet – increased over 30 percent sequentially – and totals nearly one-quarter of all BellSouth Answers customers. Increasing the number of services in a customer's bundle helps reduce competitive churn of high value customers. In addition, these customers have an ARPU of over $63, over 50 percent higher than non-Answers customers.[5]

The attractiveness to the RBOCs of providing bundled service offerings is completely understandable. But the effects of bundling are not always equally advantageous to both the RBOC and the consumer.

In fact, Verizon asserts in a February 13, 2004 ex parte filing with the Federal Communications Commission (FCC), that "below-cost pricing for only one of multiple dimensions of service" is justified and "what matters is whether services overall cover aggregate costs.[6]"

Clearly, for the aggregate price of bundled services to cover the aggregate cost, where one or more bundled elements are sold below-cost, the remaining elements must be sold above marginal cost, with the excess profit being used to subsidize the negative margin of the below-cost product(s). As stated below, prices in a competitive environment tend to fall to the level of long-run marginal cost and only in a monopolistic environment is a firm capable of sustaining price levels above long-run marginal cost. That the RBOCs would so plainly state their acceptance of leveraging their monopoly power to subsidize below-cost pricing for products they offer in a

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[5] BellSouth Investor News, April 22, 2004, Page 4

[6] Letter dated February 13, 2004 to Marlene H. Dortch, Secretary, FCC from Dee May, Verizon, re: WC Docket No. 02-112, Page 14

competitive market speaks volumes about the potential for abuse should this merger be approved.

Fortunately, the FCC has already recognized that "as long as the BOCs retain control of local bottleneck facilities, they could potentially engage in improper cost allocation, discrimination, and other anticompetitive conduct to favor their affiliates"[7] Even AT&T recognizes that "BOC ownership of the two leading nationwide wireless carriers – and the proposed acquisition of AT&T Wireless by Cingular – greatly limits their role in providing any effective constraints on the exercise of BOC market power."[8]

Given that the stated strategy of both BellSouth and SBC is to promote bundled services as a way of increasing ARPU while reducing customer churn, there is a clear opportunity for this merger to spawn significant product cross-subsidization. We also believe that below-cost, predatory pricing will be the probable near-term result with the long-term effect being the elimination of competitors who are unable to compete with a full portfolio of bundled elements, all to the obvious detriment of the consumer.

2.1 Sub-Additive Cost Functions in Bundling

The DOJ Merger Guidelines recognize that one justification for a merger could be the cost efficiencies resulting from that merger. These cost efficiencies will occur to the

[7] *Regulatory Treatment of LEC Provision of Interexchange Services Operating in the LEC's Local Exchange Area,* 12 FCC Rcd. 15756, ¶ 134 (1997)
[8] Letter dated March 22, 2004 to Marlene H. Dortch, Secretary, FCC from Frank S. Simone, AT&T, re: WC Docket No. 02-112, Page 2

extent that the goods produced by the merged firms exhibit economies of scope; that is, have a sub-additive cost function. A sub-additive cost function occurs when the total cost of producing **a set of related products** is less than the sum of the costs of producing each product individually. There is no doubt that wireline, wireless, and DSL exhibit economies of scope and, as a set, display characteristics consistent with a sub-additive cost function. Further, we believe the RBOCs have demonstrated their sharing of this view by aggressive adoption of service bundling as a core market strategy[9].

In paragraph 75 of the Gilbert Declaration, he alludes to "marginal efficiencies that cause the merged firm to choose a lower post-merger price". However, the key question is whether such efficiencies are fully reflected in price or whether the difference between price and long-run marginal costs increases or decreases after the merger.

In a competitive environment, prices tend to fall to the level of the newly reduced long-run marginal cost. However, if the gap between price and long-run marginal cost has increased, the monopoly power of the firms in the merger industry has increased. This will cause a reduction in social welfare which may be substantial. Gilbert has provided no analytical or empirical evidence on the expected reductions in long-run marginal costs or prices due to the proposed merger. This is too important of an issue to be decided without such data.

[9] Investor Update, SBC 2004 Q1 Earnings Conference Call, April 21, 2004, Slide 6

2.2 Effect of Product Stickiness in Bundling

In its April 22, 2004 issue of *Investor News*, BellSouth notes that

> "Increasing the number of services in a customer's bundle helps **reduce competitive churn of high value customers** *(emphasis added)*. In addition, these customers have an ARPU of over $63, over 50 percent higher than non-Answers customers."[10]

The RBOCs have found that offering discounts on non-core services, such as DSL, long distance, and wireless, reduces consumer churn on their "bread and butter" product, local line services. From a consumers' perspective, this makes sense as once the consumer has established and disseminated their email address, the non-financial cost of changing service Internet Service Providers is too high lacking some catastrophic event. By tying these discounted services to the provisioning of local line services, the RBOCs reduce churn across the service spectrum. The resulting "stickiness" lessens a competitor's ability to penetrate the consumer base with a single product offering and will, we believe, lead to a significant reduction in competition over the long run.

2.3 Product Cross-Subsidization in Bundling

The Horizontal Merger Guidelines acknowledge that "Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a 'small but significant and nontransitory' price increase"[11]. The Guidelines go on to say "If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not

[10] BellSouth Investor News, April 22, 2004, Page 4

[11] Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, April 8, 1997, §1.12

defeat the targeted price increase by substituting ....then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers".[12] We believe it is highly likely that BellSouth and Cingular will leverage their position as near monopolistic providers of local access services by maintaining irrationally high prices for local access and using the garnered profits to subsidize predatory pricing through their wireless affiliate, Cingular.

This belief is substantiated by the 20% price reduction offered by SBC when Cingular Wireless services are taken as a bundled component with local access[13]. Interestingly, this same presentation offers bundled discounts on long-distance and DSL services as well, but tellingly omits discounts on the provisioning of local lines[14].

The fact the BOCs tie their wireline strategies to the actions of their wireless affiliates is conceded even by Verizon who asserts that "there is no merit to AT&T's assertion that BOCs are not providing local, long distance, and wireless bundles out of region and are unlikely to do so. All distance wireless calling plans are local/long distance wireless bundles, and Verizon Wireless offers such plans in every state except Alaska[15]. The obvious conclusion is that the BOCs do approach the wireline and wireless markets with an integrated strategy, that they use bundled offerings to attract new customers and retain existing customers, that the bundles target discounts at the more competitive services (long distance, DSL, wireless), and subsidize the offered discounts by maintaining an inflated pricing structure for local line services that are provided to a

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[12] *Ibid*
[13] SBC 2003 Analyst Conference, *Marketplace Execution*, Presentation by Ray Wilkins, Group President – Marketing & Sales
[14] *Ibid*
[15] Letter dated February 13, 2004 to Marlene H. Dortch, Secretary, FCC from Dee May, Verizon, re: WC Docket No. 02-112, Footnote 12

largely captive audience. Clearly, any wireless competitor that does not have a similar captive consumer base is at a strategic disadvantage and is likely to eventually be driven from the marketplace.

3.0 Unilateral and Coordinated Anti-Competitive Conduct

This section addresses three issues. First, the inappropriateness of Professor Gilbert's reference to the cartel model of coordinated behavior is identified and explained. Second, the validity of Professor Gilbert's contention that unilateral anti-competitive conduct is unlikely is examined and shown that Gilbert's model is ad hoc and without empirical justification. Finally, a discussion of a Cournot model, which predicts that a reduction in the number of firms in a non-cooperative setting will lead to a reduction in output and an increase in price, is provided.

3.1 Gilbert's Inappropriate Reference to Cartel Model

Professor Gilbert is correct as he opines in his original declaration that "Coordinated effects are unlikely in the market for mobile wireless services"[16] However, the criteria he references, and which are again referred to in the Joint Opposition to Petitions to Deny and Comments[17], as being the defining elements of coordinated interaction stem from economic theory that defines the actions of a cartel. No one has alleged that the wireless

[16] Declaration of Richard J. Gilbert, March 17, 2004, Page 27
[17] *JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS*, AT&T Wireless Services, Inc. and Cingular Wireless Corporation, May 13, 2004, Page 24

services industry acts as a cartel and it is unlikely that they will do so in the future. Hence, these comments are completely irrelevant.

3.2 Unilateral Anti-Competitive Conduct

In paragraph 74 of Gilbert's Declaration, he states 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." In the Industrial Organization literature, this is called a Bertrand-type model of non-cooperative oligopoly. Gilbert adds that "this usually occurs when the merger eliminates a product or service that many consumers consider to [be] the next-best substitute for the product or service sold by one of the merging firms." This last supposition is inconsistent with the assumptions of the Bertrand model that assumes a single homogeneous product with capacity constraints. Gilbert has apparently mixed together two economic models of price determination and he presents no evidence to support his statements. As a result, his ad hoc theoretical model is suspect in both formulation and conclusion.

3.3 Game Theory: Unilateral Anti-Competitive Conduct in a Non-Cooperative Setting

Two important models have been widely accepted by economists studying industries with a small number of firms: the Bertrand model and the Cournot model. The latter model attempts to answer the question of what happens to firm output levels and total industry

output when one firm optimally adjusts its output, assuming that the other firms will keep their outputs constant. This model has predicted behavior with a great deal of accuracy in empirical and experimental economic settings. The Bertrand model attempts to answer the same question by replacing "output" in the Cournot model with "price".

The basic conclusion of the Cournot model is that the total industry output level lies between that of the competitive industry and the monopoly or cartelized industry. As the number of major firms falls from 6 to 5 (as in the proposed Cingular/AWE merger) the industry output will move closer to the monopoly level. Eventually, if two firms were to merge into one firm, the industry would produce the monopoly output. The corresponding output price will rise toward the monopoly price as the number of firms in the industry declines. The exact effect of the merger will depend on the demand curve for wireless services and their marginal cost. Of course, if marginal costs are declining due to the merger, this could be factored into the calculation. Thus, the FCC should require the merging companies to supply data on proposed prices and marginal costs so it can determine the predicted and anticipated effects of this merger.

4.0 Appropriate Measure of Market Concentration

In his supplemental declaration[18], Richard Gilbert takes exception to the methodology employed in calculating and evaluating the effect of the proposed merger on concentration of market power as measured by the Herfindahl-Hirschman Index (HHI).

[18] Supplemental Declaration of Richard J. Gilbert, May 12, 2004, attached to *JOINT OPPOSITION TO PETITIONS TO DENY AND COMMENTS*, AT&T Wireless Services, Inc. and Cingular Wireless Corporation, re: WT Docket No. 01-70, May 13, 2004

After evaluating his comments there are substantive reasons as to why Gilbert's approach is flawed. Interestingly, however, using Gilbert's flawed methodology still leads to the obvious conclusion that the merger further concentrates market power in an already highly concentrated market and that the resultant HHIs still indicate that the merger raises significant anticompetitive concerns. Clearly Gilbert did not develop his own HHI calculations because they do not prove his flawed assertions.

4.1 Appropriate Test for the Geographic and Product Markets

In paragraph 33 of the Gilbert Declaration, he correctly describes the DOJ guidelines for determining product and geographic market. A relevant product market is a product or set of products for which a sole provider of the product in a given geographic area would be able to impose a small but significant and non-transitory increase in price (SSNIP). If a large enough percentage of customers turn to a substitute then the price increase will reduce profits. Hence, the assumed product market is too small and the substitute products that consumers would have turned to must be included in a revised definition of the relevant product market.

4.2 Appropriateness of Flow vs. Stock Measures

In paragraphs 1 and 2 of his Supplemental Declaration, Gilbert argues that a flow measure of revenues is more valid than a stock measure. As novel as the notion may be

that one should use flow data to compute market share, there is no language in the DOJ Horizontal Merger Guidelines justifying such usage. Clearly, a small but rapidly growing Company would have a large flow-based share but a small stock-based share and hence little market power. Conversely, a dominant but stable company would produce a minimal flow-based market share and a significantly large stock-based share. The appropriateness of using market share based on data measurements at a specific point in time, versus a change in those measurements between two different points in time, is obvious.

4.3 Appropriateness of Using Total Subscribers Rather Than Revenue

In paragraphs 1 and 2 of his Supplemental Declaration, Gilbert mistakenly argues that revenues should be used to measure market share. To the contrary, the total number of subscribers is a more valid and far more meaningful measure. Subscribership is, and always has been, the basic yardstick by which a "last mile" or "consumer-oriented" communications enterprises has been measured. Furthermore, the number of subscribers is an essential element in determining the acquisition value of a wireless company.

4.4 Relevant Product Market

Paragraph 43 of the Gilbert Declaration states that the hypothetical monopolist test supports the conclusion that mobile wireless voice service interconnected with the public switched telephone network is a relevant product market for antitrust analysis. This market is defined to exclude wireline service and mobile wireless data services on the basis that consumer substitution in response to the SSNIP would not be substantial enough to make the price increase unprofitable. Consumers will probably not turn to wireline services in response to a hypothetical increase in wireless prices.

4.5 Relevant Geographic Market

In paragraph 42 of the Gilbert Declaration, he states that the hypothetical monopolist test applied to determine the relevant geographic market (in a similar manner to the determination of the relevant product market) would not support a conclusion that this market can be defined to encompass only one or a few mobile wireless service providers. He asserts that "switching between alternative mobile wireless providers is relatively easy" and therefore, as indicated in paragraphs 49-61, the relevant geographic market is national. It is wrong to claim that any substantial number of consumers "purchase wireless service plans at locations that are remote from where they use the service", as claimed by Gilbert. Not only is it counter-intuitive that this practice is widespread, but Gilbert also offers no empirical evidence to back up his assertion.

According to paragraph 84 of the FCC's *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, July 14, 2003 (FCC, 2003), 5% of the U.S. population have 2 or fewer wireless providers in the counties where they live, 17% have 4 or fewer wireless providers, and 75% have 6 or fewer wireless providers. Thus, a national market comprised of the 25 largest wireless providers is a market that has more suppliers than are available to the vast majority of consumers in the U.S. That is, defining the relevant geographic market to comprise more than six firms does not accurately represent 75% of the population. These consumers will not be able to switch to alternative suppliers (who do not serve these customers) in response to the hypothetical SSNIP and hence these suppliers should not be included in the relevant geographic market.

Gilbert again argues in paragraphs 49-61 of the Gilbert Declaration that the relevant geographic market should be defined as national. The reason he provides is that consumers are purchasing national calling plans. However, this does not change the fact that 75% of consumers have 6 or fewer wireless suppliers to which they can turn and these consumers cannot shop in a national market comprised of 25 or more wireless carriers.

The appropriate and relevant geographic market, which includes all wireless providers to whom a customer could switch in response to a hypothetical price increase, is the county of residence. In fact this is similar to the Cellular Marketing Area (CMA) at which level Gilbert presents data on wireless prices in the Appendix of his Declaration.

4.6 HHI Results Under Multiple Approaches

Whether Gilbert's preferred definition of the geographic market as a national market and revenue as his measure of the product market is used, or the preferred methodology of county level subscribers is used, the general qualitative result of the HHI analysis is still not affected. In either case, the post-merger HHI is greater than 1,800 and, hence, is in the highly concentrated region, and the change in the HHI exceeds the 100 point threshold and should trigger concentration concerns by both the Department of Justice (DOJ) and the FCC.

Gilbert's Table 3 on page 25 of his Declaration indicates that the post-merger HHI based on national revenue stock data is 2,023 with an increase of 450 points due to the merger. In Table 4, based on national revenue flow data, the post-merger HHI is 2,210 with an increase in the HHI of 128 points. Measured either way, according to the DOJ Merger Guidelines, the proposed merger is likely to create or enhance market power or facilitate its exercise. Therefore, Gilbert's conclusion in Paragraph 68 of his Declaration that "the structural analysis alone "does not raise significant antitrust concerns" is inaccurate.

The correct calculation of HHIs at the national level (most favorable to Cingular/AWS merger) based on the largest 25 carriers is barely mentioned by Gilbert. The computed HHI performed by deltaVectors is based on the largest 25 firms and uses the stock of wireless customers. It computed a post-merger HHI of 1886 and an increase in the HHI of 508. While still not accepting that this is the relevant geographic market, the analysis is included here to demonstrate that even under the most favorable conditions to Gilbert's

position, the post-merger HHI and its change are objectionable and thus favor rejection of the combination.

The preferable approach is to use a county-wide definition of the geographic market and a stock measure of customers served by the largest 6 wireless suppliers (Verizon, Cingular, AT&T, Sprint, Nextel, and T-Mobile), because the FCC (2003) indicated that 75% of wireless customers have 6 or fewer wireless providers in their counties of residence. By considering the 6 largest wireless providers in this calculation of the HHI, we provide a measure of the HHI that is more applicable to the vast majority of subscribers in county geographic markets. However, even this measure of the HHI will understate the extent of the problem because of the number of communities that are served by fewer than 6 subscribers. That is, in some counties, the true HHI will be larger than what is calculated using this methodology, so that the true anti-competitiveness of the proposed merger is much larger than calculated in many parts of the country. The computed post-merger HHI index is 2712 and the change in the pre versus post-merger HHI index is 748, which substantially exceeds the 100-point threshold by 648 points. This is powerful evidence that the proposed merger will create and/or enhance market power in county-wide markets.

5.0 Conclusions and Findings

1. The proposed combination of Cingular and AT&T Wireless, if approved, will dramatically increase market power to the detriment of both competition and the general public.

2. The Declarations by Professor Gilbert on behalf of Cingular and AT&T Wireless are, on the whole, seriously flawed, wrong, and/or irrelevant to the analysis of this proposed merger of the second and third largest wireless services providers in the United States. Gilbert's unilateral anti-competitive conduct model is suspect in both formulation and conclusion; his definitions of market concentration, geographic and product markets, along with the appropriateness of flow vs. stock measures, are wrong; and his understanding of the HHIs is flawed. Finally, his assertion that the combination will "enhance" competition is oxymoronic!

3. Sound and proved economic theory, combined with the hard and reliable data contained in this and a previous report, clearly and unequivocally demonstrate that the merged entity (Cingular and AT&T Wireless), along with the parent companies, SBC and BellSouth, will have more than adequate market power, and the incentives, to not only bundle a wide array of telecommunications-information services, but also to assert their ability to cross subsidize "competitive" service offerings while at the same time making up for those "losses" by overcharging for near monopoly, non-competitive services.

6.0 Appendix 1: HHI Calculations

Table 1-Herfindahl-Hirschman Index Calculation for U.S. Domestic Wireless Service Providers--Proposed Cingular/AT&T Wireless (Widest Geographic Market Definition)

Col. 1 Wireless Service Provider	Col. 2 Number of Subscribers, in Millions, Year End 2002*	Col.3 Market Share	Col.4 Pre-Merger Market Share Squared	Col.5 Post-Merger Market Share Squared	Col.6 Change in HHI
Verizon	32.5	24.2%	585.6	585.6	
Cingular	21.9	16.3%	265.9	1015.6	
AT&T	20.9	15.6%	242.2		
Sprint	14.8	11.0%	121.4	121.4	
Nextel	10.6	7.9%	62.3	62.3	
T-Mobile	9.9	7.4%	54.3	54.3	
Alltel	7.6	5.7%	32.0	32.0	
US Cellular	4.1	3.1%	9.3	9.3	
Leap Wireless	1.5	1.1%	1.2	1.2	
Western Wireless	1.2	0.9%	0.8	0.8	
Qwest	1	0.7%	0.6	0.6	
Centennial	0.9	0.7%	0.4	0.4	
Nextel Partners	0.9	0.7%	0.4	0.4	
Triton PCS	0.8	0.6%	0.4	0.4	
Dobson Comm.	0.8	0.6%	0.4	0.4	
Rural Cellular	0.7	0.5%	0.3	0.3	
American Cellular	0.7	0.5%	0.3	0.3	
Alamosa PCS	0.6	0.4%	0.2	0.2	
AirGate	0.6	0.4%	0.2	0.2	
US Unwired	0.6	0.4%	0.2	0.2	
Broadwing	0.5	0.4%	0.1	0.1	
Midwestern Wireless	0.3	0.2%	0.0	0.0	
Horizon PCS	0.3	0.2%	0.0	0.0	
Ntelos	0.3	0.2%	0.0	0.0	
Southern LINC	0.3	0.2%	0.0	0.0	
Total	134.3	100.0%			
HHI			1378.8	1886.4	
PRE TO POST-MERGER CHANGE IN HHI			507.5		

*Source: Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Services, FCC, July, 2003.

Table 2-Herfindahl-Hirschman Index for U.S. Domestic Wireless Service Providers--Proposed Cingular/AT&T Wireless Merger (Narrower Geographic Market Definition)

Col. 1	Col. 2	Col.3	Col.4	Col.5	Col.6
Wireless Service Provider	Number of Subscribers, in Millions, Year End 2002*	Market Share	Pre-Merger Market Share Squared	Post-Merger Market Share Squared	Change in HHI
Verizon	32.5	29.4%	863.5	863.5	
Cingular	21.9	19.8%	392.1	1497.5	
AT&T	20.9	18.9%	357.1		
Sprint	14.8	13.4%	179.1	179.1	
Nextel	10.6	9.6%	91.9	91.9	
T-Mobile	9.9	9.0%	80.1	80.1	
Total	110.6	100.0%			
HHI			1963.8	2712.1	
Change in HHI			748.3		

*Source: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, FCC, July, 2003.

7.0 APPENDIX 2: The Research Team

Richard L. Dineley founded deltaVectors in 1993 to focus on telecommunications product and service strategy. With deltaVectors, he has consulted to major telecommunications companies in the United States, Europe, and Asia. Prior to founding deltaVectors, Mr. Dineley led the Strategic Marketing efforts of Syncordia, the British Telecom global data network outsourcing subsidiary that evolved into the BT/AT&T joint venture, Concert. Earlier, he served as a Corporate Officer at Sprint Corporation, filling the role of Vice President, Business Product Marketing. Prior to his term at Sprint Corporation, Mr. Dineley served in a variety of officer-level Finance and Administration positions for COMSAT Corporation, including Corporate Controller and Vice President, Finance and Administration. He began his telecom career with Rockwell Collins, leading the business support team on a project to build the national telecommunications infrastructure for Saudi Arabia. Mr. Dineley received both his Bachelor of Science degree with High Honors and his M.B.A. degree, with concentrations in Finance and International Business from the Robert H. Smith School of Business at the University of Maryland in College Park, Maryland. Dineley was awarded his C.P.A. by the State of Virginia in 1987 and completed a course of study in Modern Standard and Egyptian Dialect Arabic through the Defense Language Institute in 1971.

Scott E. Atkinson is a Professor of Economics at the University of Georgia, teaching Econometrics, Industrial Organization, Resource Economics, and Micro Economics. He earned a Ph.D. in Economics from the University of Colorado in 1972. His numerous published articles on econometric methods of measuring technical change, firm efficiency, and market power have appeared in the top economics journals, such as *the Rand Journal*, the *Review of Economics and Statistics*, the *Journal of Political Economy*, the *Journal of Econometrics*, the *International Economic Review*, and the *Journal of Productivity Analysis* among others. Econometric research has appeared in the *Review of Economics and Statistics, Econometric Theory*, and *the Journal of Econometrics* among others. Research on environmental economics topics has appeared in *Resources and Energy* and the *Journal of Economics and Environmental Management*. Based on total number of citations to his published articles, Prof. Atkinson is listed *Who's Who in Economics, 2003*

Attachment B

Harold E. Lovelady Declaration

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
AT&T Wireless Services, Inc., Transferor, and Cingular Wireless LLC, Transferee,	)	WT Docket No. 04-70
Applications for Transfer of Control of Licenses and Authorizations	)	

DECLARATION OF HAROLD E. LOVELADY

I, Harold E. Lovelady, of legal age, declare as follows:

1. This Declaration is made in support of the Petition to Deny and Reply to the Joint Opposition to Petitions to Deny and Comments filed on behalf of Thrifty Call, Inc. ("TCI"), in reference to the above-captioned applications to transfer control of licenses presently held by AT&T Wireless Services, Inc. ("AT&T Wireless" or "AWS") to Cingular Wireless Corporation ("Cingular"), a company owned privately in combination by SBC Communications, Inc. ("SBC") and BellSouth Corporation ("BellSouth") (together, "Applicants").

2. I have owned, operated or been an executive officer of several competitive telecommunications companies since 1981.

3. I currently am an officer and majority owner of TCI.

4. TCI is a past and potentially future competitive local exchange carrier ("CLEC") that is concerned about the likely effects which would be a direct result of the proposed acquisition.

5. As a CLEC, TCI has competed (and may compete again in the future) with SBC and BellSouth in their incumbent local exchange ("ILEC") regions.

6. I also have been the majority owner and executive officer of Vanion, Inc. ("Vanion"), a Colorado-based CLEC, although Vanion does not presently serve customers.

7. I have also examined the assets of bankrupt or soon-bankrupt CLECs to determine whether they might fit within my future business plans. For example, in 2002, I pursued the assets of e.spire Communications and Adelphi Communications during its bankruptcy sale of assets.

8. With TCI and Vanion, and in combination with my 23 years experience in the industry, I have demonstrated the ability to finance a competitive carrier in the BellSouth and SBC regions as well as Cingular wireless territories.

9. I believe that the anticompetitive bundling opportunities, incentives for interconnection restrictions and potential for special access discrimination presented by Cingular's proposed acquisition of AT&T Wireless -- thus putting SBC and BellSouth in control of the largest wireless carrier and Verizon in control of the second largest -- constitutes a very real threat to present and future CLECs and wireless carriers.

10. In recent years I have sold the assets of TCI and withdrawn Vanion from service due to the deteriorating market conditions for competitive carriers. The principal causes of these hostile conditions are the litigations and anticompetitive actions of ILECs, principally SBC and BellSouth.

11. I have recently and periodically secure(d) professional and legal advice regarding the competitive telecommunications market and opportunities in SBC and BellSouth regions.

12. The impact on market conditions of the proposed AWS acquisition may well prevent reentry into the telecommunications market by TCI or an affiliated company that I may acquire. Thus, I have a very real and direct interest in the outcome of this proceeding.

I declare under penalty of perjury that the statements presented herein are true and correct.

Harold E. Lovelady

Harold E. Lovelady

Dated: May 20, 2004