

**STATEMENT OF FCC COMMISSIONER
MICHAEL J. COPPS
Approving in part, dissenting in part**

*RE: Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation
For Consent to Transfer of Control of Licenses and Authorizations
(Memorandum Opinion & Order).*

Among the FCC's many responsibilities under the public interest merger review standard, two stand out for purposes of analyzing this particular transaction. First, we must examine whether the combination results in a level of competition adequate to protect consumers as of this moment in time and as illuminated by our retrospective data. In this Order the FCC confines that analysis to an examination of intramodal wireless competition. Second, we must examine whether the merger will make changes to the communications marketplace that endanger Congress's public interest goals more generally. For purposes of this merger, that analysis largely concerns damage to intermodal competition and the relationship between the merged entity and its wireline parents. I support the Order as it relates to intramodal competition within the wireless market. With the divestitures achieved in this order, I believe that an acceptable level of competition will continue to characterize the wireless market. I must dissent to those parts of the Order relating to the intermodal aspects of the merger, however, because of the increased potential for discrimination by the merged entities' wireline parent companies and also because I find the lack of rigorous competitive analysis troubling.

Intramodal Competition

I have closely examined the data that the FCC staff has presented to me. My conclusion is that after the merger, an acceptable level of intramodal competition will remain in place in the wireless market in most geographic areas. While U.S. wireless telecommunications are characterized by effective competition in most markets, the market shares of various carriers are not equally distributed. In many markets the merged entity will have a nearly 50 percent market share. In some smaller markets the entity's market share will be significantly higher. In most of these markets, however, four or more able competitors will continue to compete post-merger. Even where the market shares of these competitors are substantially below that of the merged entity, under current market conditions they retain the ability to constrain excessive pricing. These competitors stand ready to snatch away Cingular/AWE customers who would become dissatisfied if the merged entity were to raise prices too high. Today, in fact, even in markets where the pre-merger Cingular has a very high market share, it has been unable to raise prices, presumably due to this competition.

In some markets, however, the proposed merger would have created unacceptable competitive harms. The Order therefore imposes competitive remedies where markets would become dangerously concentrated post-merger. The Order concludes that even where a market contains four or more able competitors to the merged entity, if the merged entity's market share is too high, competitors would not be able to discipline

behavior. In one market, for example, the merged entity's post-transaction market share would be close to 60 percent. Other substantial national carriers compete in this market; one with 18 percent, a second with 17 percent, and a third with 4 percent. In this market, despite the presence of competing carriers, the order concludes that competitors would not be able to discipline the merged entity's behavior.¹

In other cases, even though another substantial carrier is competing, the Order concludes that "the merger would lead to an effective duopoly ... [and that] [w]e have previously been highly skeptical of mergers that would lead to a duopoly, and the courts have found that mergers to duopoly are generally unacceptable." The Order also finds that there are markets where the merged entity would control such a large amount of spectrum that competitors would not have the spectral resources to discipline its behavior. In many of these markets, the Order requires a spectrum divestiture. In other markets it imposes a condition that the merged entity cannot participate in the upcoming Auction 58. This latter enhancement of the Order will prevent the merged entity from denying new spectrum resources to potential competitors.

In the interest of improving and quickening the review of future mergers, I must note that the data that we relied upon in making these decisions were not what they could have been. The item relies almost exclusively on the NRUF database of telephone numbers to determine market shares. I am not convinced that this database alone is adequate for this important determination. Recognizing this possibility, the Commission requested data from wireless firms about actual customers, so it would not have to rely so heavily on potentially faulty NRUF database. But today the Commission largely ignores the valuable data that we collected from carriers. Limited analysis of this data demonstrated that it might produce significantly different results than the NRUF database. Unfortunately, these important data were not made available to Commissioners. Going forward, now that we know of the potential for inconsistency in the data, we must insist upon the provision of these data and the opportunity to compare them to the NRUF database before rendering a decision. This option was unavailable to me in this case.

I also want to note that the Order includes an analysis of Cingular's efforts to provide communications technologies to the disabilities community. I have been very favorably impressed with Cingular's efforts and the expansion of these efforts through the merger contributes significantly in Cingular's favor in the public interest analysis. I look forward to this work continuing in the merged entity. It is vitally important to the disability community and, indeed, to the nation.

Overall, I believe that the merger will not reduce intramodal competition in most markets to dangerous levels. It will, however, reduce this competition to some extent. The number of national carriers will shrink to five. A major competitor will disappear in hundreds of markets. The FCC has always been proud of the level of competition in the

¹ I have not identified the market in this example in order not to reveal proprietary information. Those with access to the unredacted version of the Order can reference the "Individual Market Analysis" to identify this market.

wireless market and of the fact that it has continuously grown. Here we create the potential for wireless competition to shrink, so we must now be far more vigilant to protect consumers. We are drawing down on the storehouse of intramodal competition that industry investment and wise FCC policy throughout the 1990's created. With less competition left in the storehouse by today's order, we need to be constantly monitoring, analyzing and preparing ourselves to deal with any competitive threats arising in the aftermath of this transaction.

Intermodal Competition

Turning now to our second responsibility, the Commission must examine whether the merger will make changes to the communications marketplace that endanger public interest goals more generally. In today's Order, this analysis largely concerns damage to intermodal competition and the relationship between the merged entity and its wireline parents.

This proceeding was harmed by the absence of rigorous analysis of the implications of this merger for intermodal competition. Again and again over the past few years the FCC has undermined competition to wireline incumbents. As a result, competitors have become far less effective. AT&T, the nation's largest long distance competitor to the Bells, has announced huge layoffs. Indeed, the company has said that it will, amazingly, exit the residential long distance market. Nonetheless, we are told not to be alarmed or to fear that phone rates will rise—because intermodal competition will save the day. In other words, even if there is inadequate wireline-to-wireline competition to the incumbent carriers, other competitors using non-wireline technologies will fight the Bell operating companies for customers, thereby keeping prices low.

But who will these intermodal competitors be? Someday broadband over powerline may offer real competition. But today there are less than 10,000 BPL customers in the whole country. Maybe VoIP? I have high hopes here. But we need always to remember that as end-users of facilities-based carriers, VoIP competitors are beholden to the Bell and cable companies. We can cross our fingers and hope that growing duopoly does not discriminate so as to snuff out growing competition—but absent any commitment on the part of this Commission to insist on non-discrimination rules, I remain concerned for independent VoIP providers. Additionally, all customers desiring VoIP for their voice service must subscribe to expensive broadband services. As the U.S. continues its free-fall broadband descent—we are now Number 13 in the world in penetration—and with broadband prices still out of the reach of many Americans, there is much to be done if VoIP is to fulfill its potential.

So that leaves wireless. My colleagues often point to wireless as a strong intermodal competitor. After this merger, however, the chance that wireless will compete effectively with wireline incumbents is diminished. AT&T Wireless was the largest non-Bell-affiliated wireless company in the country. Cingular and Verizon, both affiliates of BOCs, will now be the number one and two wireless carriers. Together the Bell-affiliated companies will now be more than 5 times larger than the next largest

competitor.² Once Cingular acquires AT&T Wireless, more than half of all wireless customers will be controlled by the Bell companies for the first time ever. In many markets BOC control of wireless customers will be even higher.

Can we expect that Bell owned wireless carriers will compete tooth-and-nail against their wireline parents? I don't think so. Even the Order agrees: "The acquisition will also affect intermodal competition through the likelihood that Cingular will not pursue AT&T Wireless's extensive plans for wireline replacement offerings." It also notes that rather than developing products designed to compete with wireline services, "Cingular has developed and marketed many of its wireless products and services to complement – and specifically not to replace – residential wireline voice services. Cingular developed this strategy largely because SBC and BellSouth play a significant role in Cingular's business decisions." The Order continues, "it appears that Cingular is unlikely to initiate its own wireless substitute offering post-acquisition in the SBC and BellSouth regions." In other words, Bell-controlled wireless carriers will likely not be in-region intermodal competitors. Because Cingular and Verizon Wireless are the largest wireless carriers in their respective parents' wireline regions, this means that many Americans can expect intermodal competition by wireless carriers to suffer from this merger.

Despite these concerns, the Order devotes a mere 13 paragraphs of a more than 100 page order to the intermodal competition that stands at the center of so much of this Commission's competition philosophy. In the end the Order dismisses the problem posed by the merger by asserting that wireless was never really an intermodal competitor after all because "most wireline customers do not now consider wireless service to be a close substitute in the antitrust sense for their primary line obtained from a wireline carrier," and because "there remain qualitative differences between wireless and wireline services." I guess this means we won't be hearing so much rhetoric in the future about the power of wireless as an intermodal competitor.

I also believe that the FCC should have followed the precedent of past mergers by including a non-discrimination condition. Specifically, the Commission should have prohibited SBC and BellSouth, in regions where they are the wireline incumbent, from discriminating against Cingular's wireless competitors. Today's Order allows Cingular to combine with AT&T Wireless in many markets where the merged entity will have a very large market share compared to its nearest wireless competitor. In theory, such a market still will be characterized by adequate competition. This is because if the merged entity raises prices above a certain level, its customers will be able to leave and sign up with a competitor. In order for competitors to be able to discipline the merged entity's behavior in this way, however, competitors must have the ability to absorb customers who want to leave because of the higher prices.

In order for wireless competitors to ramp up to compete with the merged entity in such a situation, competitors will need to purchase inputs from a wireline carrier in the

² Securities and Exchange Commission, "Carrier Subscribers and Capital Expenditures," Second Quarter 2004.

market at issue, unless they have excess capacity currently laying fallow. Even if they have excess capacity, they must rely on a wireline carrier to maintain their current service without raising prices. In particular, if special access or interconnection is offered to an independent wireless carrier at higher rates or with less favorable terms or conditions compared with a Bell-affiliated wireless carrier, the independent carrier will find it extremely difficult to provide a competitive check on the affiliated carrier. If the incumbent wireline carrier controls the largest wireless carrier in a region, it has an incentive to provide superior special access and interconnection rates, terms, and conditions to its affiliate. That is because by crippling potential competitors it will enhance its affiliate's profits and thereby enhance its own profits. We could have made it clear that such behavior is unacceptable by including a non-discrimination condition in this merger. I welcome my colleagues' assertion that Section 202 already prohibits such behavior. The test will come when we are asked to use Section 202 to combat discrimination. The history here is not encouraging and I would have much preferred to be explicit so we would have a more powerful tool if and when we are presented with such a challenge.

To conclude, despite inadequate analysis and too dismissive an attitude toward the danger to intermodal competition posed by this merger, I welcome the Commission's strong warning about the future. "We caution, however, that we may take a different view with regard to any future transactions that would diminish significantly the ability of independent wireless carriers to offer intermodal alternatives to wireline service. At this time, we recognize that there are benefits to consumers from both wireline replacement offerings and complement offerings. We intend to monitor carefully further developments in this marketplace that may affect intermodal competition, and to consider carefully future transactions that may impede our efforts in that regard. The Commission has worked hard to create the regulatory conditions for robust intermodal competition, and it remains strongly committed to achieving that important policy goal." I agree.