IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF CONNECTICUT and STATE OF TEXAS, *Plaintiffs,* v. CINGULAR WIRELESS CORPORATION, SBC COMMUNICATIONS INC., BELLSOUTH CORPORATION and AT&T WIRELESS SERVICES, INC., *Defendants.*	Civil No. 1:04CV01850 (RBW) Filed: October 29, 2004

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. Nature and Purpose of the Proceeding

Defendants Cingular Wireless Corporation ("Cingular"), SBC Communications Inc. ("SBC"), BellSouth Corporation ("BellSouth"), and AT&T Wireless Services, Inc. ("AT&T Wireless Services") entered into an Agreement and Plan of Merger dated February 17, 2004, pursuant to which Cingular will acquire AT&T Wireless. Plaintiff United States and the states of Connecticut and Texas ("plaintiff states") filed a civil antitrust Complaint on October 25, 2004, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of

this acquisition would be to lessen competition substantially for mobile wireless telecommunications services and mobile wireless broadband services (collectively, "mobile wireless services") in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition would result in consumers facing higher prices, lower quality or quantity of mobile wireless services, or delayed launch of new mobile wireless services.

At the same time the Complaint was filed, plaintiff United States also filed a Preservation of Assets Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants are required to divest (1) AT&T Wireless's mobile wireless services business and related assets in five markets ("Wireless Business Divestiture Assets"); (2) Cingular's or AT&T Wireless's minority interests in other mobile wireless services providers in five markets ("Minority Interests"); and (3) 10 MHz of contiguous PCS wireless spectrum in three markets ("Spectrum Divestiture Assets"). Under the terms of the Preservation of Assets Stipulation and Order, defendants will take certain steps to ensure (a) that these assets are preserved and that the Wireless Business Divestiture Assets are operated as competitively independent, economically viable and ongoing businesses; (b) that they will remain independent and uninfluenced by defendants or the consummation of the transaction; and (c) that competition is maintained during the pendency of the ordered divestiture.

Plaintiffs and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof. Plaintiffs and

defendants have also stipulated that defendants will comply with the terms of the Preservation of Assets Stipulation and Order and the proposed Final Judgment from the date of signing of the Preservation of Assets Stipulation and Order, pending entry of the proposed Final Judgment by the Court and the required divestitures. Should the Court decline to enter the proposed Final Judgment, defendants have also committed to continue to abide by its requirements and those of the Preservation of Assets Stipulation and Order until the expiration of time for appeal.

II. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Cingular, with headquarters in Atlanta, Georgia, is a company organized and existing under the laws of the state of Delaware. Cingular was formed in 2000 by SBC and BellSouth, who own equity interests in it of 60 and 40 percent, respectively. SBC and BellSouth evenly share management control of Cingular. Cingular is the second-largest provider of mobile wireless voice and data services in the United States by number of subscribers; it serves more than 24 million customers. Cingular provides mobile wireless services in areas throughout the United States and is one of only six providers with a national presence. In 2003, Cingular earned revenues of approximately $15.5 billion.

SBC, with headquarters in San Antonio, Texas, is a corporation organized and existing under the laws of the state of Delaware. SBC is one of several regional Bell operating companies ("RBOCs") formed in 1984 as a result of the breakup of AT&T Corporation's local telephone business. SBC's wireline telecommunications businesses serve 54.7 million access lines in 13 states: Arkansas, California, Connecticut, Illinois, Indiana, Kansas, Michigan,

Missouri, Nevada, Ohio, Oklahoma, Texas, and Wisconsin. In 2003, SBC earned approximately $40.8 billion in revenues.

BellSouth, an RBOC with headquarters in Atlanta, Georgia, is a corporation organized and existing under the laws of the state of Georgia. BellSouth's wireline telecommunications businesses serve 23.7 million access lines in nine states: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Its total operating revenues for 2003 were approximately $22.6 billion.

AT&T Wireless, with headquarters in Redmond, Washington, is a corporation organized and existing under the laws of the state of Delaware. Spun off from AT&T Corporation in 2001, it had more than 22 million subscribers as of August 2004 and earned revenues of approximately $16.6 billion in 2003. AT&T Wireless is the third-largest U.S. mobile wireless services provider by number of subscribers, and, like Cingular, it provides mobile wireless services in areas throughout the United States and has a national presence.

Pursuant to an Agreement and Plan of Merger dated February 17, 2004, Cingular will pay AT&T Wireless shareholders $15 in cash per common share and thereby plans to acquire AT&T Wireless for approximately $41 billion. If this transaction is consummated, Cingular and AT&T Wireless combined would have more than 46 million subscribers, with over $32 billion in revenues, making it the largest mobile wireless services provider in the United States, with operations in 49 states covering 97 of the top 100 marketing areas.

The proposed transaction, as initially agreed to by defendants, would lessen competition substantially for mobile wireless telecommunications services in 10 markets and for mobile

wireless broadband services in three markets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by plaintiffs.

B. Mobile Wireless Services Industry

Mobile wireless services allow customers to make and receive telephone calls and use data services using radio transmissions without being confined to a small area during the call or data session, and without the need for unobstructed line-of-sight to the radio tower. This mobility is highly prized by customers, as demonstrated by the more than 160 million people in the United States who own mobile wireless telephones. In 2003, revenues for the sale of mobile wireless services in the United States were nearly $90 billion. To provide these services, mobile wireless services providers must acquire adequate and appropriate spectrum, deploy an extensive network of switches, radio transmitters, and receivers, and interconnect this network with those of local and long-distance wireline telecommunications providers and other mobile wireless services providers.

The first wireless voice systems were based on analog technology, now referred to as first-generation or "1G" technology. These analog systems were launched after the FCC issued the first licenses for mobile wireless telephone service: two cellular licenses (A-block and B-block) in each geographic area in the early to mid-1980s. The licenses are in the 800 MHz range of the radio spectrum, each license consists of 25 MHz of spectrum, and they are issued for each Metropolitan Statistical Area ("MSA") and Rural Service Area ("RSA") (collectively, "Cellular Marketing Areas" or "CMAs"), with a total of 734 CMAs covering the entire United States. In 1982, one of the licenses was issued to the incumbent local exchange carrier in the

market, and the other was issued by lottery to someone other than the incumbent. Cellular licensees must support analog service until February 2008.

In 1995, the FCC allocated and subsequently issued licenses for additional spectrum for the provision of Personal Communications Services ("PCS"), a category of services that includes mobile wireless telephone services comparable to those offered by cellular licensees. These licenses are in the 1.8 GHz range of the radio spectrum and are divided into six blocks: A, B, and C, which consist of 30 MHz each; and D, E, and F, which consist of 10 MHz each. Geographically, the A and B-block 30 MHz licenses are issued by Major Trading Areas ("MTAs"), and C, D, E, and F-block licenses are issued by Basic Trading Areas ("BTAs"), several of which comprise each MTA. MTAs and BTAs do not generally correspond to MSAs and RSAs. With the introduction of the PCS licenses, both cellular and PCS licensees began offering digital services, thereby increasing capacity, shrinking handsets, and extending battery life. Unlike the cellular licensees, PCS licensees are not required to provide support for analog or any other technology standard. In 1996, one provider, a specialized mobile radio ("SMR" or "dispatch") spectrum licensee, began to use its SMR spectrum to offer mobile wireless telephone services comparable to those offered by other mobile wireless services providers, in conjunction with its dispatch, or "push-to-talk," service.

Today, more than 90 percent of all mobile wireless services customers have digital service, and nearly all mobile wireless voice service has migrated to second-generation or "2G" digital technologies: TDMA (time division multiple access), GSM (Global Standard for Mobile, a type of TDMA standard used by all carriers in Europe), and CDMA (code division multiple access). Mobile wireless services providers have chosen to build their networks on these

incompatible technologies and most have chosen CDMA or GSM, with TDMA having been orphaned by equipment vendors. (The SMR providers use a fourth incompatible technological standard better suited to the spectrum they own, and, as SMR licensees, they have no obligation to support a specific technology standard.) Even more advanced technologies ("2.5G") have begun to be deployed for voice and data (e.g., 1xRTT (a/k/a CDMA 2000), GPRS (General Packet Radio Service), and EDGE (Enhanced Data for GSM Evolution)). The data transmission speeds of these technologies vary. For example, 1xRTT provides average user speeds of 70 kilobits per second ("kbps"), and GPRS and EDGE provide average user speeds of 20 to 40 kbps and 80 to 110 kbps, respectively.

Currently, the U.S. mobile wireless services industry is taking the next evolutionary step in wireless technology to third-generation or "3G" technologies (e.g., for GSM, UMTS (Universal Mobile Telecommunications System) and for CDMA, Ev-DO/DV (Evolution Data Only/Data Voice)) that provide for more capacity and higher data throughput. All of the national mobile wireless services providers and some of the regional providers are considering how and where they will deploy 3G services across their networks. Some providers have already deployed this service in some areas of the country.

C. The Competitive Effects of the Transaction on Mobile Wireless Telecommunications Services and Mobile Wireless Broadband Services

Cingular's proposed acquisition of AT&T Wireless will substantially lessen competition in mobile wireless telecommunications services and mobile wireless broadband services in the relevant geographic areas. Mobile wireless telecommunications services include both voice and data services provided over a radio network and allow customers to maintain their telephone calls or data sessions without wires, such as when traveling. Mobile wireless broadband services

offer data speeds four to six times faster than the 2G and 2.5G data offerings currently provided by the mobile wireless services providers. Mobile wireless broadband services, which are now being launched using various 3G technologies, offer average data speeds of 200 to 300 kbps, peaking at 2 megabits per second or higher. These speeds rival wireline broadband services at peak speeds. At average speeds, they are comparable to low-end wireline high-speed data offerings and can support bandwidth-intensive services including video conferencing, video streaming, downloading of music and video files, and voice over Internet protocol ("VoIP") calling, none of which can be used reliably at slower speeds. Fixed wireless services and other wireless services that have a limited range (e.g., Wi-Fi) do not offer a viable alternative to either mobile wireless telecommunications services or mobile wireless broadband services primarily because customers using these services cannot maintain a call or data session while moving from one location to another.

Most customers use mobile wireless services in close proximity to their workplaces and homes. Thus, customers purchasing mobile wireless telecommunications services and mobile wireless broadband services choose among mobile wireless services providers that offer services where they are located and travel on a regular basis: home, work, other areas they commonly visit, and areas in between. The number and identity of mobile wireless services providers varies from geographic area to geographic area, along with the quality of their services and the breadth of their geographic coverage, all of which are significant factors in customers' purchasing decisions. Mobile wireless services providers can and do offer different promotions, discounts, calling plans, and equipment subsidies in different geographic areas, effectively varying the actual price for customers by geographic area.

The relevant geographic markets for mobile wireless services are, therefore, local in nature and are generally centered around a metropolitan area or a population center and its environs. The FCC has licensed a limited number of mobile wireless services providers in these and other geographic areas based upon the availability of radio spectrum. These FCC spectrum licensing areas often represent the core of the business and social sphere where customers face the same competitive choices for mobile wireless services. Although not all FCC spectrum licensing areas are relevant geographic areas for the purpose of analyzing the antitrust impact of this transaction, the FCC spectrum licensing areas that encompass the 13 geographic areas of concern in this transaction are where consumers in these communities principally use their mobile wireless services. As described in the Complaint, the relevant geographic markets where the transaction will substantially lessen competition for mobile wireless telecommunications services are represented by the following FCC spectrum licensing areas: Oklahoma City, Oklahoma (CMA 045), Topeka, Kansas (CMA 179), Pittsfield, Massachusetts (CMA 213), Athens, Georgia (CMA 234), St. Joseph, Missouri (CMA 275), Connecticut RSA-1 (CMA 357), Kentucky RSA-1 (CMA 443), Oklahoma RSA-3 (CMA 598), Texas RSA-11 (CMA 662), and Shreveport, Louisiana (BTA 419). The relevant geographic markets where the transaction will substantially lessen competition for mobile wireless broadband services are represented by the following FCC spectrum licensing areas: Dallas-Fort Worth, Texas (CMA 009), Detroit, Michigan (BTA 112), and Knoxville, Tennessee (BTA 232).

The 10 geographic markets of concern for mobile wireless telecommunications services were identified by a fact-specific, market-by-market analysis that included consideration of, but was not limited to, the following factors: the number of mobile wireless services providers and

their competitive strengths and weaknesses, Cingular's and AT&T Wireless's market shares along with those of the other providers, whether additional spectrum is or is likely soon to be available, whether any providers are limited by insufficient spectrum or other factors in their ability to add new customers or launch additional services, the population of a market as it affects the need for spectrum to serve the population, the concentration of the market, and the breadth and depth of coverage by different providers in each market.

Cingular and AT&T Wireless both own all or part of businesses that offer mobile wireless telecommunications services in the 10 relevant geographic areas. In five of these areas (Athens, Georgia; Topeka, Kansas; Pittsfield, Massachusetts; St. Joseph, Missouri; and Shreveport, Louisiana), Cingular or AT&T Wireless also owns minority equity interests in another mobile wireless telecommunications services provider that would be a significant competitor to the merged firm for these services. The minority equity interests range from approximately 9 to 24 percent. Based upon these significant minority equity interests and the specific facts of the relationships, it was appropriate to attribute the shares and assets of the mobile wireless services businesses partially owned by Cingular or AT&T Wireless in these markets to either Cingular or AT&T Wireless, thus increasing the percentage of customers served by the merged firm.

The individual market shares of Cingular's and AT&T Wireless's mobile wireless telecommunications services businesses in the 10 relevant geographic markets as measured in terms of subscribers range from 9 to more than 71 percent, and their combined market shares range from 61 to nearly 90 percent. In each relevant geographic market, Cingular or AT&T Wireless has the largest market share, and, in all but one, the other is the second-largest mobile wireless telecommunications services provider. In all but one of the relevant geographic markets,

Cingular and AT&T Wireless are the original cellular licensees and, as a result, have the network infrastructures with the greatest depth and breadth of coverage. Cingular and AT&T Wireless are likely closer substitutes for each other than the other mobile wireless telecommunications services providers in the relevant geographic markets. Additionally in these markets, there will be insufficient remaining competitors post-merger with the ability to compete effectively to defeat a small, but significant price increase by the merged firm.

The relevant geographic markets for mobile wireless telecommunications services are highly concentrated. As measured by the Herfindahl-Hirschman Index ("HHI"), which is commonly employed in merger analysis and is defined and explained in Appendix A to the Complaint, concentration in these markets ranges from approximately 2600 to more than 5300, which is well above the 1800 threshold at which the Department considers a market to be highly concentrated. After Cingular's proposed acquisition of AT&T Wireless is consummated, the HHIs in the relevant geographic markets will range from approximately 4400 to more than 8000, with increases in the HHI as a result of the merger ranging from approximately 1100 to more than 3500.

Competition between Cingular and AT&T Wireless in the relevant geographic markets has resulted in lower prices and higher quality in mobile wireless telecommunications services than would otherwise have existed in these geographic markets. If Cingular's proposed acquisition of AT&T Wireless is consummated, the relevant geographic markets for mobile wireless telecommunications services will become substantially more concentrated, and the competition between Cingular and AT&T Wireless in mobile wireless telecommunications services will be eliminated in these markets. As a result, the loss of competition between

Cingular and AT&T Wireless increases the likelihood of unilateral actions by the merged firm in the relevant geographic markets to increase prices, diminish the quality or quantity of services provided, refrain from or delay making investments in network improvements, and refrain from or delay launching new services.

In the relevant geographic markets for mobile wireless broadband services, Cingular and AT&T Wireless have either launched or are likely soon to launch mobile wireless broadband services. Each has the spectrum necessary to offer mobile wireless broadband services and has business plans to offer these services in these markets. Not all mobile wireless services providers have sufficient spectrum to launch mobile wireless broadband services in these markets, nor do they all have business plans to do so in the near future. In the relevant geographic markets, the current number of mobile wireless services providers that are likely to launch mobile wireless broadband services in the foreseeable future is limited. Because mobile wireless broadband services are nascent, however, HHIs are uninformative.

The competition between Cingular and AT&T Wireless has motivated their efforts to develop and launch mobile wireless broadband services in the relevant geographic markets. If Cingular's proposed acquisition of AT&T Wireless is consummated, the relevant geographic markets will lose one of only a few existing and likely mobile wireless broadband services providers. As a result, the loss of competition between Cingular and AT&T Wireless increases the likelihood of unilateral actions by the merged firm in these relevant geographic markets to increase prices, diminish the quality or quantity of services provided, and refrain from or delay the launch of mobile wireless broadband services.

Entry by a new mobile wireless services provider in the relevant geographic markets would be difficult, time-consuming, and expensive, requiring the acquisition of spectrum licenses and the build-out of a network. Therefore, new entry in response to a small but significant price increase for mobile wireless telecommunications services or mobile wireless broadband services by the merged firm in the relevant geographic markets would not be timely, likely, or sufficient to thwart the competitive harm that would result from Cingular's proposed acquisition of AT&T Wireless.

For these reasons, plaintiffs concluded that Cingular's proposed acquisition of AT&T Wireless will likely substantially lessen competition, in violation of Section 7 of the Clayton Act, in the provision of mobile wireless telecommunications services and mobile wireless broadband services in the relevant geographic markets.

III. Explanation of the Proposed Final Judgment

The divestiture requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in mobile wireless telecommunications services and mobile wireless broadband services in the 13 geographic markets of concern. The proposed Final Judgment requires defendants, within 120 days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Wireless Business Divestiture Assets, the Minority Interests, and Spectrum Divestiture Assets (collectively, "Divestiture Assets"). The Wireless Business Divestiture Assets are essentially AT&T Wireless's entire mobile wireless business in the five markets where Cingular and AT&T Wireless both currently own and control providers of mobile wireless telecommunications services. These assets must be divested in such a way as to satisfy plaintiff United States in its sole discretion upon

consultation with any relevant plaintiff state that they will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

With respect to the Wireless Business Divestiture Assets, in some markets the merged firm may retain some of AT&T Wireless's wireless spectrum (Connecticut RSA-1, Kentucky RSA-1, and Texas RSA-11). The spectrum that must be divested is adequate to support the operation and expansion of the mobile wireless services business being divested, and allowing the merged firm to retain some of AT&T Wireless's spectrum may benefit consumers by allowing the merged firm to provide improved or new services.

In the five markets where either Cingular or AT&T Wireless owns a minority interest in another mobile wireless services provider, the proposed Final Judgment requires defendants to divest these Minority Interests. The proposed Final Judgment allows defendants to retain the Minority Interests in the Missouri, Kansas, and Louisiana areas with the approval of plaintiff United States in its sole discretion if they demonstrate that the retained minority interest will become irrevocably and entirely passive so long as the merged firm owns the interest and will not significantly diminish competition. The size of the minority interests and market concentrations in the Georgia and Massachusetts markets created concerns that allowing the merged firm to continue to hold even a passive interest would diminish competition, and defendants are required to divest fully their interests in those markets.

The Spectrum Divestiture Assets consist of 10 MHz of contiguous PCS spectrum in three markets and must be divested in such a way as to remedy the competitive harm from the transaction

in the relevant mobile wireless broadband services markets. The availability of this spectrum will make it more likely that another mobile wireless services provider could offer high-speed data services in these areas. In Knoxville, Tennessee, the merged firm can alternatively restructure its relationship with another spectrum licensee in the market so that the merged firm no longer has an effectively controlling interest in the licensee and that the licensee's spectrum will be used by it in a manner that resolves the competitive concerns identified in the Complaint, which is effectively the same as if the merged firm were to divest the required amount of spectrum.

A. Timing of Divestitures

In antitrust cases involving mergers or joint ventures in which plaintiff United States seeks a divestiture remedy, it requires completion of the divestitures within the shortest time period reasonable under the circumstances. The proposed Final Judgment in this case requires, in Section IV.A, divestiture of the Divestiture Assets, within 120 days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment by the Court, whichever is later. Plaintiff United States in its sole discretion upon consultation with any relevant plaintiff state may extend the date for divestiture of the Divestiture Assets by up to 60 days. Because the FCC's approval is required for the transfer of the wireless licenses to a purchaser, Section IV.A provides that if applications for transfer of a wireless license have been filed with the FCC, but the FCC has not acted dispositively before the end of the required divestiture period, the period for divestiture of those assets shall be extended until five days after the FCC has acted. This extension is to be applied only to the individual Divestiture Assets affected by the delay in approval of the license transfer and does not entitle defendants to delay the divestiture of any other Divestiture Assets for which license transfer approval has been granted.

The divestiture timing provisions of the proposed Final Judgment will ensure that the divestitures are carried out in a timely manner, and at the same time will permit defendants an adequate opportunity to accomplish the divestitures through a fair and orderly process. Even if all Divestiture Assets have not been divested upon consummation of the transaction, there should be no adverse impact on competition given the limited duration of the period of common ownership and the detailed requirements of the Preservation of Assets Stipulation and Order.

B. Use of a Management Trustee

The Preservation of Assets Stipulation and Order, entered by the Court on October 26, 2004, ensures, prior to divestiture, that the Divestiture Assets are maintained and the Wireless Business Divestiture Assets remain an ongoing business concern and that the other Divestiture Assets remain economically viable. The Divestiture Assets will remain preserved, independent and uninfluenced by defendants, so that competition is maintained during the pendency of the ordered divestiture.

The Preservation of Assets Stipulation and Order appoints a management trustee selected by plaintiff United States upon consultation with plaintiff states to oversee the Divestiture Assets in the relevant geographic markets. The appointment of a management trustee in this unique situation is required because the Divestiture Assets are not independent facilities that can be held separate and operated as standalone units by the merged firm. Rather, the Wireless Business Divestiture Assets are an integral part of a nationwide network, and to maintain their competitive viability and economic value, they should remain part of that network during the divestiture period. To insure that these assets are preserved and supported by defendants during this period, yet run independently, a management trustee is necessary to oversee the continuing relationship between defendants and these assets. The management trustee will have the power to operate the Wireless Business Divestiture

Assets in the ordinary course of business, so that they will remain preserved, independent, and uninfluenced by defendants, and an ongoing and economically viable competitor to defendants and to other mobile wireless services providers. The management trustee will preserve the confidentiality of competitively sensitive marketing, pricing, and sales information; insure defendants' compliance with the Preservation of Assets Stipulation and Order and the proposed Final Judgment; and maximize the value of the Divestiture Assets so as to permit expeditious divestiture in a manner consistent with the proposed Final Judgment.

The Preservation of Assets Stipulation and Order provides that defendants will pay all costs and expenses of the management trustee, including the cost of consultants, accountants, attorneys, and other representatives and assistants hired by the management trustee as are reasonably necessary to carry out his or her duties and responsibilities. After his or her appointment becomes effective, the management trustee will file monthly reports with plaintiffs setting forth the efforts to accomplish the goals of the Preservation of Assets Stipulation and Order and the proposed Final Judgment and the extent to which defendants are fulfilling their responsibilities. Finally, the management trustee may become the divestiture trustee, pursuant to the provisions of Section V of the proposed Final Judgment.

C. Use of a Divestiture Trustee

In the event that defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by plaintiff United States upon consultation with any relevant plaintiff state to effect the divestitures. As part of this divestiture, defendants must relinquish any direct or indirect financial ownership interests and any direct or indirect role in management or participation in control.

Pursuant to Section V of the proposed Final Judgment, the divestiture trustee will own and control the systems until they are sold to a final purchaser, subject to safeguards to prevent defendants from influencing their operation.

Section V details the requirements for the establishment of the divestiture trust, the selection and compensation of the divestiture trustee, the responsibilities of the divestiture trustee in connection with the divestiture and operation of the Divestiture Assets, and the termination of the divestiture trust. The divestiture trustee will have the obligation and the sole responsibility, under Section V.D, for the divestiture of any transferred Divestiture Assets. The divestiture trustee has the authority to accomplish divestitures at the earliest possible time and "at the best price then obtainable upon a reasonable effort by the trustee." In addition, to insure that the divestiture trustee can promptly locate and divest to an acceptable purchaser, plaintiff United States, in its sole discretion upon consultation with any relevant plaintiff state, may require defendants to include additional assets, or allow defendants to substitute substantially similar assets, which substantially relate to the Wireless Business Divestiture Assets to be divested by the divestiture trustee.

The divestiture trustee will not only have responsibility for sale of the Divestiture Assets, but will also be the authorized holder of the wireless licenses, with full responsibility for the operations, marketing, and sales of the wireless businesses to be divested, and will not be subject to any control or direction by defendants. Defendants will no longer have any role in the ownership, operation, or management of the Divestiture Assets following consummation of the transaction, as provided by Section V, other than the right to receive the proceeds of the sale, and certain obligations to provide support to the Divestiture Assets, and cooperate with the divestiture trustee in order to complete the divestiture, as indicated in Section VI.L and in the Preservation of Assets Stipulation and Order.

The proposed Final Judgment provides that defendants will pay all costs and expenses of the divestiture trustee. The divestiture trustee's commission will be structured, under Section V.G of the proposed Final Judgment, so as to provide an incentive for the divestiture trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the divestiture trustee will file monthly reports with the Court and plaintiffs setting forth his or her efforts to accomplish the divestitures. Section V.J requires the divestiture trustee to divest the Divestiture Assets to an acceptable purchaser or purchasers no later than six months after the assets are transferred to the divestiture trustee. At the end of six months, if all divestitures have not been accomplished, the trustee, plaintiff United States, and any relevant plaintiff state will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or term of the trustee's appointment.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the transaction in the provision of mobile wireless telecommunications services and mobile wireless broadband services. The divestitures of the Wireless Business Divestiture Assets and the Minority Interests will preserve competition in mobile wireless telecommunications services by maintaining an independent and economically viable competitor in the relevant geographic markets. The divestiture of the Spectrum Divestiture Assets will preserve competition in mobile wireless broadband services by making assets available to establish a new, independent, and economically viable competitor.

IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. Procedures Available for Modification of the Proposed Final Judgment

Plaintiffs and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that plaintiffs have not withdrawn their consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to plaintiff United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of plaintiff United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Nancy M. Goodman
Chief, Telecommunications and Media Enforcement Section
Antitrust Division, U.S. Department of Justice
1401 H Street, N.W., Suite 8000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. Alternatives to the Proposed Final Judgment

Plaintiff United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. Plaintiff United States could have continued the litigation and sought preliminary and permanent injunctions against Cingular's acquisition of AT&T Wireless. Plaintiff United States is satisfied, however, that the divestiture of assets and other relief described in the proposed Final Judgment will preserve competition for the provision of mobile wireless telecommunications services and mobile wireless broadband services in the relevant markets identified in the Complaint.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment

that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the consent judgment is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the consent judgment may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[1]

[1] *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538-39.

Rather:

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard

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[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); *see generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T Corp.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent judgment even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60.

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by plaintiff United States in formulating the proposed Final Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Competitive Impact Statement have been mailed, by U.S. mail, postage prepaid, to the attorneys listed below, the 29 day of October 2004.

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