

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

In the Matter of )  
 )  
Applications for the Assignment of License ) WT Docket No. 06-114  
from Denali PCS, L.L.C. to Alaska DigiTel, )  
L.L.C. and the Transfer of Control of Interests )  
in Alaska DigiTel, L.L.C. to General )  
Communication, Inc. )  
 )  
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**MEMORANDUM OPINION AND ORDER**

**Adopted: December 21, 2006  
22, 2006**

**Released: December**

By the Commission: Commissioners Copps and Adelstein concurring and issuing separate statements.

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## I. INTRODUCTION

1. In this Order, we consider applications filed by Alaska DigiTel, L.L.C. (“Alaska DigiTel”), Denali PCS, L.L.C. (“Denali”), and General Communication, Inc. (“GCI”) for consent to: (1) the assignment of a license held by Denali to Alaska DigiTel, and (2) the transfer of control of a 78 percent non-controlling interest in Alaska DigiTel to GCI.<sup>1</sup> The applications pertain to licenses in the Part 22 Cellular Radiotelephone Service (“cellular”), the Part 24 Personal Communications Service (“PCS”), and the Part 101 Common Carrier Fixed Point-to-Point Microwave Service. Pursuant to section 310(d) of the Communications Act of 1934, as amended (“Communications Act”),<sup>2</sup> we must determine whether Alaska DigiTel, Denali, and GCI (collectively, the “Applicants”) have demonstrated that the applications would serve the public interest, convenience, and necessity. Based on the record before us, we find that the Applicants have met that burden and grant their applications subject to the conditions set out below.<sup>3</sup> We deny the petition to deny the applications or designate the applications for an evidentiary hearing filed by Matanuska-Kenai, Inc., d/b/a/ Matanuska Wireless (“MTA Wireless”).<sup>4</sup> Finally, since we are denying the petition for an evidentiary hearing, we also

<sup>1</sup> Application to Assign Licenses Held by Denali PCS, L.L.C. to Alaska DigiTel, L.L.C., File No. 0002453582 (filed Jan. 27, 2006) (“Assignment Application”); Application to Transfer Control of Licenses Held by Alaska DigiTel, L.L.C., File No. 0002453706 (filed Jan. 27, 2006) (“Transfer of Control Application”). Both applications contain the identical Exhibit 1, “Description of Transaction and Public Interest Statement” (including Attachments A and B), referenced herein as “Application Exhibit 1.”

<sup>2</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>3</sup> See para. [47] and Appendix A.

<sup>4</sup> Petition to Deny Applications filed by Matanuska-Kenai, d/b/a/ Matanuska Wireless (“MTA Wireless Petition to Deny”) at 2, 7, 15-16. MTA Wireless filed an erratum to update its name to MTA Communications, Inc., d/b/a MTA Wireless. See Letter from Stefan M. Lopatkiewicz, Dorsey & Whitney (continued....)

dismiss as moot the petition to intervene in the evidentiary hearing filed by ACS Wireless, Inc. (“ACS Wireless”).<sup>5</sup>

## II. BACKGROUND

### A. Description of the Applicants

#### 1. Alaska DigiTel, LLC

2. Alaska DigiTel is a limited liability company organized under the laws of the state of Alaska.<sup>6</sup> The company holds 15 megahertz of the A-block broadband PCS license (KNLF297), with a coverage area over the entire State of Alaska, a 20 megahertz cellular license (WPON879) with a coverage area over St. Paul Island, Alaska,<sup>7</sup> and three microwave licenses (WQAP303, WQAP304, and WQPA305).<sup>8</sup> Alaska DigiTel provides wireless services to approximately 24,000 subscribers in and around Anchorage, Mat-Su, Girdwood, Homer, Seward, Soldotna, Fairbanks and Juneau,<sup>9</sup> using its all-digital Code Division Multiple Access (“CDMA”) network.<sup>10</sup> It has roaming relationships with “the major U.S. CDMA wireless carriers.”<sup>11</sup> Alaska DigiTel also offers a data services bundle to its wireless telephone subscribers, which includes web browsing and access to downloadable content.<sup>12</sup>

#### 2. Denali PCS, LLC

3. Denali is a limited liability company organized under the laws of the state of Alaska.<sup>13</sup> Denali holds 15 megahertz of the A-block broadband PCS license (WPVZ815) with a coverage area over the entire State of Alaska.<sup>14</sup> Based on the record before us, Denali does not

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LLC, Counsel for MTA Wireless, to Catherine W. Seidel, Acting Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Mar. 24, 2006).

<sup>5</sup> Comments/*Ex Parte* Filing and Petition to Intervene filed by ACS Wireless, Inc. (“ACS Wireless July 21, 2006 Comments/Petition”) at 5, 19-20.

<sup>6</sup> See <https://myalaska.state.ak.us/business/soskb/Corp.asp?259680> (last visited Dec. 15, 2006).

<sup>7</sup> See Application Exhibit 1; [www.alaskadigitel.com](http://www.alaskadigitel.com) (last visited Dec. 15, 2006) (“Alaska DigiTel Website”). St. Paul Island is one of four Pribilof Islands lying in the Bering Sea, and has a population of less than 600 people and is approximately 40 square miles. See [http://en.wikipedia.org/wiki/Saint\\_Paul\\_Island%2C\\_Alaska](http://en.wikipedia.org/wiki/Saint_Paul_Island%2C_Alaska) (last visited Dec. 15, 2006).

<sup>8</sup> See Application Exhibit 1 at 2.

<sup>9</sup> See [www.gci.com](http://www.gci.com), News Release of Dec. 7, 2005 (“GCI Announces \$29.5 Million Investment in Alaska DigiTel, LLC”) (“GCI-Alaska DigiTel News Release”).

<sup>10</sup> Alaska DigiTel Website.

<sup>11</sup> See GCI-Alaska DigiTel News Release.

<sup>12</sup> Alaska DigiTel Website.

<sup>13</sup> See <https://myalaska.state.ak.us/business/soskb/Corp.asp?270943> (last visited Dec. 15, 2006).

<sup>14</sup> See Application Exhibit 1 at 1.

appear currently to provide wireless service to the public.<sup>15</sup> Denali and Alaska DigiTel are commonly controlled affiliates under the control of William Yandell.<sup>16</sup>

### 3. General Communication, Inc.

4. GCI is a publicly traded corporation incorporated under the laws of the state of Alaska and headquartered in Anchorage.<sup>17</sup> Through various subsidiaries, GCI holds the 30 megahertz B-block broadband PCS license,<sup>18</sup> with a coverage area over the entire State of Alaska, a B-block Local Multipoint Distribution System (“LMDS”) license<sup>19</sup> that serves Anchorage, a Specialized Mobile Radio (“SMR”) license,<sup>20</sup> as well as several Industrial Industrial/Business Pool Service,<sup>21</sup> and Common Carrier Fixed Point-to-Point Microwave licenses.<sup>22</sup> With regard to wireless services, GCI offers mobile telephony services by reselling the services of Dobson Cellular Systems, Inc. (“Dobson”) pursuant to a 10-year distribution agreement implemented in 2004.<sup>23</sup> Currently GCI provides local access services over its own facilities, operating on its PCS license and its other licenses.<sup>24</sup> In addition, through various subsidiaries, GCI provides wireless service, local and long distance wireline telephone service, as well as Internet and data communication services in Alaska.<sup>25</sup> It also owns and operates cable

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<sup>15</sup> MTA Wireless asserts that Denali “has never offered a commercial PCS service to the public.” MTA Wireless Petition to Deny at 3. There is no contrary evidence before us.

<sup>16</sup> See Pro Forma Application to Partially Assign a License Held by Alaska DigiTel, L.L.C. to Denali PCS, L.L.C., File No. 0001034967 at Exhibit 1 (filed Sept. 20, 2002) (disaggregating 15 MHz from KNLF297) (“Pro Forma Application”).

<sup>17</sup> GCI 2005 Annual Report on Form 10-K at 1 (filed Mar. 14, 2006) (“GCI 10-K”), available at [http://www.sec.gov/Archives/edgar/data/808461/000110465906017334/a06-6639\\_110k.htm](http://www.sec.gov/Archives/edgar/data/808461/000110465906017334/a06-6639_110k.htm).

<sup>18</sup> Call Sign: KNLF298.

<sup>19</sup> Call Sign: WPLM396.

<sup>20</sup> Call Sign: KNCD389.

<sup>21</sup> Call Signs: KNHN226, KNJA855, KNNT594, KTJ272, WNAP874, WNJY380, WNPU406, WNPU410, WNRG645, WPOY279, WPQG371.

<sup>22</sup> Call Signs: WHA559, WHA560, WHA629, WHA646, WLC631, WLC632, WLR 379, WLT719, WLT720, WLT721, WLU551, WLV263, WLV267, WMT650.

<sup>23</sup> GCI 10-K at 15, 40, 53. As discussed below, GCI has leased a total of 12 megahertz of its PCS spectrum to Dobson pursuant to long term *de facto* transfer spectrum leasing arrangements. See note 147, *infra*.

<sup>24</sup> The licenses are held by GCI’s subsidiary, GCI Communication Corp.

<sup>25</sup> See, e.g., GCI 10-K at 12, 15. GCI also “provide[s] (or join[s] in providing with other carriers) communications services to and from Alaska, Hawaii, the continental United States, and certain foreign nations and territories.” GCI 10-K at 20. GCI further reports that it “provided broadband, IP Data, Private Line and Private Network communications products and services, including SchoolAccess® and rural health Private Line facilities to 403 commercial and government customers at the end of 2005.” GCI 10-K at 25.

systems throughout Alaska,<sup>26</sup> and has ownership interests in submarine cables used for wholesale transport of communications to the Lower 48 States.<sup>27</sup>

## B. Description of Transaction

5. As described in the applications, the proposed transaction would occur in a series of contemporaneous steps. First, GCI would acquire all of the membership interests in Denali. Then, Alaska DigiTel would be reorganized, and its new membership interests would be distributed to its current members and GCI. GCI would receive 78 percent of Alaska DigiTel's membership interests and, in return, GCI would contribute cash and its membership interests in Denali to Alaska DigiTel.<sup>28</sup> Additionally, as part of this reorganization, Alaska DigiTel would be governed by a Board of Managers. The Board of Managers would have between four to eight members, with GCI having the power to appoint only one of these members while the original owners of Alaska DigiTel would appoint the remainder of the Board of Managers. GCI would, however, receive "non-controlling investor protection rights" that would prevent Alaska DigiTel from taking certain major actions without the consent of GCI.<sup>29</sup>

6. After the step reorganizing Alaska DigiTel, Denali would either be merged into Alaska DigiTel or the Denali license would be assigned to Alaska DigiTel, so that, post-transaction, the Denali license would be held by Alaska DigiTel. In the last step of the transaction, GCI would place its interests in Alaska DigiTel in a wholly-owned subsidiary, GCI Holdings, Inc ("GCI Holdings").<sup>30</sup> Post transaction, Alaska DigiTel would directly hold 30 megahertz of PCS spectrum consisting of the two 15 megahertz A-block PCS licenses currently held by Alaska DigiTel and Denali. GCI, in turn, would have an indirect 78 percent interest, through GCI Holdings, in Alaska DigiTel and its two PCS licenses.<sup>31</sup>

7. The Applicants contend that control of Alaska DigiTel would not change because "GCI will have the power to appoint only one of the members of [Alaska DigiTel's] Board of Managers, leaving the power to appoint a majority of the Board of Managers with the original owner of [Alaska DigiTel]."<sup>32</sup> The Applicants nonetheless seek prior approval of the

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<sup>26</sup> GCI 10-K at 29-30.

<sup>27</sup> General Communication, Inc., Application for a License to Land and Operate in the United States a Digital Submarine Cable System Extending Between the Pacific Northwest United States and Alaska, File No. SCL-LIC-19980602-00008, *Cable Landing License*, 12 FCC Rcd 18292, 18293 ¶ 4, 18303 ¶ 40 (1997) (IB 1997) ("*Alaska United East Order*"), *Order on Review*, 16 FCC Rcd 4314 (2001).

<sup>28</sup> Application Exhibit 1 at 2.

<sup>29</sup> Application Exhibit 1 at 3-5, n.9.

<sup>30</sup> Application Exhibit 1 at 2-3.

<sup>31</sup> *See id.* The Applicants also note that the applications do not seek approval of GCI's option to acquire all of the issued and outstanding ownership interests in Alaska DigiTel, and that any such approval would have to be sought in a separate application. *Id.* at 2-3 n.6.

<sup>32</sup> Application Exhibit 1 at 3.

applications,<sup>33</sup> asserting that approval of the proposed transaction is in the public interest. They state that it would result in an infusion of capital into Alaska DigiTel and that increased resources would allow Alaska DigiTel “to improve its services to the public and to compete more effectively against other large competitors in the market.” Further, the Applicants state that this proposed transaction would have no adverse effect on competition in the relevant market. Thus, they conclude that approval of this proposed transaction would serve the public interest.<sup>34</sup>

### C. Application Review Process

8. On January 27, 2006, pursuant to section 310(d) of the Communications Act,<sup>35</sup> Alaska DigiTel, Denali, and GCI filed an application seeking consent to the assignment of a license held by Denali to Alaska DigiTel,<sup>36</sup> and an application seeking consent to the transfer of control of a 78 percent “non-controlling” interest in Alaska DigiTel to GCI.<sup>37</sup> On February 1, 2006, the Wireless Telecommunications Bureau (“Bureau”) sought comment on these applications via public notice.<sup>38</sup> On February 15, 2006, MTA Wireless, which holds a cellular license in south central Alaska (Matanuska Valley) just outside of Anchorage and provides mobile telephony service, filed a petition to deny the applications or designate the applications for an evidentiary hearing,<sup>39</sup> to which the Applicants responded with a joint opposition.<sup>40</sup> MTA Wireless countered with a reply to the joint opposition, and supplemental filings.<sup>41</sup>

9. On June 9, 2006, the Bureau adopted a protective order, pursuant to which third parties would be allowed to review confidential or proprietary documents submitted by the

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<sup>33</sup> Application Exhibit 1 at 1 n.2 (stating that they seek approval “out of an abundance of caution”).

<sup>34</sup> Application Exhibit 1 at 4.

<sup>35</sup> 47 U.S.C. § 310(d).

<sup>36</sup> Assignment Application.

<sup>37</sup> Transfer of Control Application.

<sup>38</sup> Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, and *De Facto* Transfer Lease Application Accepted for Filing, *Public Notice*, Report No. 2383, at 2, 6 (rel. Feb. 1, 2006) (“Comment Public Notice”). The Comment Public Notice set the Petition to Deny deadline at 14 days after the release of the Public Notice. *See id.* at 1. Pleadings and comments are available on the Commission’s Universal Licensing System (“ULS”) by searching the application file numbers and Electronic Comment Filing System (“ECFS”) website at [www.fcc.gov/cgb/ecfs/](http://www.fcc.gov/cgb/ecfs/) by searching under the docket number.

<sup>39</sup> *See* MTA Wireless Petition to Deny.

<sup>40</sup> Applicants Joint Opposition to Petition to Deny Applications, filed by General Communication, Inc., Alaska DigiTel, LLC, Denali PCS, LLC (Mar. 1, 2006) (“Applicants March 1, 2006 Joint Opposition”).

<sup>41</sup> Reply to Applicants Joint Opposition to Deny Applications, filed by Matanuska-Kenai, Inc., d/b/a Matanuska Wireless (Mar. 13, 2006) (“MTA Wireless March 13, 2006 Reply”); Letter from Stefan M. Lopatkiewicz, Dorsey & Whitney LLC, Counsel for MTA Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 9, 2006).

Applicants.<sup>42</sup> The Bureau also released a public notice changing the *ex parte* status of the proceeding from restricted to permit-but-disclose.<sup>43</sup> Contemporaneously with these releases, Bureau staff requested additional information from the Applicants (“Information Request”).<sup>44</sup> The Applicants their response to the Information Request on June 16, 2006.<sup>45</sup> The Applicants voluntarily provided additional information on July 17, 2006, including: (1) the Reorganization Agreement among GCI, Alaska DigiTel, and Denali dated as of June 16, 2006 which contains exhibits of proposed agreements including the proposed operating agreement that would govern the post-transaction relationship between GCI, Alaska DigiTel, and Denali (“*Operating Agreement*”), a proposed management agreement (“*Management Agreement*”), and a proposed non-compete agreement; (2) the 2004 distribution agreement by which GCI resells Dobson’s mobile telephony services in Alaska (“*Resale Agreement*”); and (3) the agreements whereby GCI is leasing portions of its PCS spectrum to Dobson (“*Lease Agreements*”).<sup>46</sup>

10. Also on June 9, 2006, the Bureau announced by public notice that information contained in the Numbering Resource Utilization and Forecast (“NRUF”) and disaggregated, carrier-specific local number portability (“LNP”) data related to wireless telecommunications carriers would be placed into the record, subject to a separate protective order (“NRUF Protective Order”).<sup>47</sup> GCI, MTA Wireless, and ACS Wireless requested access to this data.<sup>48</sup>

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<sup>42</sup> Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc., Protective Order, WT Docket No. 06-114, *Protective Order*, DA 06-1246 (rel. June 9, 2006).

<sup>43</sup> *Ex Parte* Status of Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc., WT Docket No. 06-114, *Public Notice*, DA 06-1247 (rel. June 9, 2006).

<sup>44</sup> Letter from James D. Schlichting, Deputy Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to Thomas Gutierrez, Lukas, Nace, Gutierrez & Sachs, and Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP (June 9, 2006).

<sup>45</sup> Letter from Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (confidential version filed June 16, 2006; redacted version filed June 14, 2006) (“Applicants’ June 16, 2006 Response to Information Request”). Subsequently, Applicants submitted a revised redacted version of the Noncompetition Agreement requested by Bureau staff because portions of this document were later publicly filed with the U.S. Securities and Exchange Commission and are no longer confidential. *See* Letter from Michael Lazarus, Paul, Hastings, Janofsky & Walker, LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 29, 2006).

<sup>46</sup> Letter from Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (July 17, 2006). The Applicants also submitted an Agreement for WAP Deck Access and an Agreement for Temporary Access to Dobson’s Billing and Activation Systems, effective September 29, 2004 (“Billing Access Agreement”).

<sup>47</sup> Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.; Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports Placed into the Record, Subject to Protective Order, WT Docket No. 06-114, *Public Notice*, DA 06-1249 (continued....)

The Bureau placed the NRUF and LNP reports into the record, pursuant to a protective order, and provided the NRUF and LNP reports to the Applicants on July 21, 2006.

11. On July 21, 2006, ACS Wireless, which holds cellular licenses in Alaska's major communities and broadband PCS licenses across the State of Alaska and which provides mobile telephony services, submitted comments and a petition to intervene in support of the MTA Wireless Petition to Deny.<sup>49</sup> In its comments, ACS Wireless argues that the Commission should deny the applications or designate the applications for an evidentiary hearing. If the Commission determines to designate a hearing, ACS Wireless asks the Commission to grant its petition to intervene in the hearing. ACS Wireless also argues that if the Commission grants the applications, it should impose conditions on GCI such as ordering GCI to divest spectrum and ordering Alaska DigiTel to remain an independent facilities-based provider.<sup>50</sup> Subsequently, the Applicants, MTA Wireless, and ACS Wireless made a number of filings regarding ACS Wireless's intervention,<sup>51</sup> access to confidential information,<sup>52</sup> and the pending applications.<sup>53</sup>

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(rel. June 9, 2006); Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc., Protective Order, WT Docket No. 06-114, *Protective Order*, DA 06-1248 (rel. June 9, 2006).

<sup>48</sup> See Letter from Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 19, 2006); Letter from Thomas Gutierrez, Lukas, Nace, Gutierrez & Sachs, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 23, 2006); Letter from Stefan M. Lopatkiewicz, Dorsey & Whitney, Counsel for MTA Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 20, 2006); Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 21, 2006).

<sup>49</sup> ACS Wireless July 21, 2006 Comments/Petition. ACS Wireless also requested that its counsel be able to review confidential information covered by both protective orders adopted by the Bureau on June 9, 2006. Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (July 21, 2006).

<sup>50</sup> ACS Wireless July 21, 2006 Comments/Petition at 5.

<sup>51</sup> Letter from Russell D. Lukas, Lukas, Nace, Gutierrez & Sachs, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 4, 2006) ("Applicants August 4, 2006 Joint Reply"); Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 9, 2006). ACS Wireless supplemented this letter with additional arguments in an August 14, 2006 letter. See Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, PC, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 14, 2006) ("ACS Wireless August 14, 2006 Comments").

<sup>52</sup> See Applicants Joint Opposition to ACS Wireless, Inc.'s Acknowledgement of Confidentiality, filed by GCI and Alaska DigiTel (July 26, 2006); Reply to Applicants Joint Opposition to Confidentiality Acknowledgements, filed by ACS Wireless (July 28, 2006); Comments on Filing of ACS Wireless, Inc., filed by MTA Wireless (Aug. 2, 2006) ("MTA Wireless August 2, 2006 Comments"); Letter from Carl W. Northrop, Paul, Hastings, Janofsky, & Walker, LLP and Thomas Gutierrez, Lukas, Nace Gutierrez & Sachs to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 23, 2006); Letter (continued....)



On August 24, 2006, the Applicants submitted a letter outlining the procedural agreement reached on August 23, 2006, by GCI, Denali, Alaska DigiTel, ACS Wireless, and MTA Wireless.<sup>54</sup> In this agreement, the Applicants agreed to provide MTA Wireless and ACS Wireless certain redacted copies of the roaming and service agreements that Alaska DigiTel had entered with SprintCom (respectively, *Roaming Agreement* and *Service Agreement*). These documents were also provided to Bureau staff on September 14, 2006.<sup>55</sup> The agreement between the Applicants, MTA Wireless, and ACS Wireless, and the submission of the Sprint Agreements, resulted in the filing of additional pleadings and *ex parte* letters.<sup>56</sup>

12. On September 15, 2006, Applicants submitted a redacted version of a letter of intent that had been executed by GCI and Dobson in 2004 (“*Letter of Intent*”) that related to their *Resale Agreement*.<sup>57</sup> On September 25 and 28, 2006, respectively, MTA Wireless and ACS Wireless submitted redacted letters addressing their concerns relating to the *Letter of Intent*.<sup>58</sup>

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from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 23, 2006); Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 28, 2006).

<sup>53</sup> See Supplementary Comments in Support of Petition to Deny Applications, filed by MTA Communications, Inc., d/b/a MTA Wireless (July 24, 2006) (“MTA Wireless July 24, 2006 Comments”); Applicants Joint Opposition to MTA Wireless Supplemental Comments, filed by GCI and Alaska DigiTel, (Aug. 8, 2006) (“Applicants August 8, 2006 Joint Opposition”).

<sup>54</sup> Letter from Michael L. Lazarus, Paul, Hastings, Janofsky & Walker, LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 24, 2006) (“Agreement Between Applicants, MTA Wireless, and ACS Wireless”).

<sup>55</sup> Letter from Thomas Gutierrez, Lukas, Nace, Gutierrez & Sachs to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 10, 2006) (memorializing the document delivery for the record) (“Sprint Agreements Letter”). Also included in this document delivery is a letter from Sprint Nextel providing notice of terminating the Service Agreement between SprintCom and Alaska DigiTel. Letter from Wes Coffindaffer, Sprint Nextel to Stephen Roberts, Alaska DigiTel (June 9, 2006) (“Notice of Service Agreement Termination Letter”).

<sup>56</sup> Request that the Commission Ask for a Limited, Supplemental Production of Documents for Purposes of its Public Interest and Competitive Effects Analyses, filed by ACS Wireless (Sept. 6, 2006) (“ACS Wireless September 6, 2006 Request for Supplemental Documents”); Reply to Applicants Filings, filed by MTA Wireless (confidential version filed Sept. 6, 2006; redacted version filed Sept. 7, 2006) (“MTA Wireless September 6, 2006 Comments”); Supplemental Comments, filed by ACS Wireless (confidential version filed Sept. 6, 2006; redacted version filed Sept. 7, 2006) (“ACS Wireless September 6, 2006 Comments”); Applicants Joint Response to September 6, 2006 Submissions of MTA Wireless and ACS Wireless, filed by GCI and Alaska DigiTel (confidential version filed Sept. 13, 2006; redacted version filed Sept. 14, 2006) (“Applicants September 13, 2006 Joint Response”).

<sup>57</sup> Letter from Carl W. Northrop, Paul Hastings, Janofsky & Walker LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 15, 2006). This document had not been identified in response to the Commission’s General Information Request of June 9, 2006.

<sup>58</sup> Letter from Stefan M. Lopatkiewicz, Dorsey & Whitney LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 25, 2006) (“MTA Wireless September 25, 2006 Comments”); (continued....)

13. On October 27, 2006, the Bureau released a public notice to inform all interested parties of the Commission's intent to utilize in its analyses and to place in the record of this proceeding updated NRUF and LNP data, subject to the provisions of the protective order adopted on June 9, 2006.<sup>59</sup> On November 17, 2006, the Bureau placed these NRUF and LNP reports into the record.

14. On November 21, 2006, Applicants submitted proposed conditions to address potential harms from coordinated interaction.<sup>60</sup> On December 4, 2006, ACS Wireless and MTA Wireless submitted letters addressing their concerns on the proposed conditions.<sup>61</sup> On December 6, 2006, the Applicants submitted a letter responding to MTA Wireless's and ACS Wireless's concerns on the proposed conditions,<sup>62</sup> and on December 19, submitted a letter outlining additional proposed conditions.<sup>63</sup>

### III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

15. Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the proposed assignment of a license held by Denali to Alaska DigiTel and the transfer of control of a 78-percent indirect ownership interest in Alaska DigiTel to GCI would serve the public interest,

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Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (confidential version filed Sept. 27, 2006; redacted version filed Sept. 28, 2006) ("ACS Wireless September 27, 2006 Comments").

<sup>59</sup> Applications for the Assignment of Licenses from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communication, Inc.; Numbering Resource Utilization and Forecast (NRUF) Reports and Local Number Portability Reports Placed into the Record, Subject to Protective Order, WT Docket No. 06-114, *Public Notice*, DA 06-2230 (rel. Oct. 27, 2006).

<sup>60</sup> Letter from Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP to Marlene Dortch, Secretary, Federal Communications Commission (Nov. 21, 2006) ("Applicants Proposed Conditions").

<sup>61</sup> Letter from Elisabeth H. Ross, Birch, Horton, Bittner and Cherot, P.C. to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 4, 2006) ("ACS Wireless December 4, 2006 Comments"); Letter from Stefan M. Lopatkiewicz, Dorsey & Whitney LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 4, 2006) ("MTA Wireless December 4, 2006 Comments"). On December 5, 2006, the Alaska Telephone Association submitted a letter addressing their concerns with this transaction. Letter from James Rowe, Alaska Telephone Association to Marlene H. Dortch, Secretary Federal Communications Commission (Dec. 5, 2006) ("Alaska Telephone Association Comments").

<sup>62</sup> Letter from Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 6, 2006) ("Applicants December 6, 2006 Joint Response"). On December 14, 2006, Applicants submitted a letter addressing GCI's and Dobson's relationship. Letter from Carl W. Northrop, Paul Hastings Janofsky & Walker, LLP to Marlene Dortch, Secretary, Federal Communications Commission (Dec. 14, 2006)

<sup>63</sup> Letter from Michael Lazarus, Paul Hastings Janofsky & Walker, LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 19, 2006) ("Applicants December 19 Joint Comments").

convenience, and necessity.<sup>64</sup> In applying our public interest test, we must assess whether the proposed transaction complies with the specific provisions of the Communications Act, the Commission's rules, and federal communications policy.<sup>65</sup> If a proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction would serve the public interest. The applicants involved with each transaction bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.<sup>66</sup> If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.<sup>67</sup>

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<sup>64</sup> 47 U.S.C. §§ 214(a), 310(d).

<sup>65</sup> Section 310(d), 47 U.S.C. § 310(d), requires that the Commission consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act, 47 U.S.C. § 308. *See, e.g.*, Applications of Guam Cellular and Paging, Inc. and DoCoMo Guam Holdings, Inc., WT Docket No. 06-96, *Memorandum Opinion and Order*, FCC 06-167, at 9-10 ¶ 13 (rel. Nov. 13, 2006) (“*DoCoMo-Guam Cellular Order*”). Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., WT Docket No. 05-339, *Memorandum Opinion and Order*, FCC 06-146, at 10 ¶ 16 (rel. Oct. 2, 2006) (“*ALLTEL-Midwest Wireless Order*”); Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, *Memorandum Opinion and Order*, 21 FCC Rcd 7358, 7360 ¶ 7 (2006) (“*Sprint Nextel-Nextel Partners Order*”); SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, *Memorandum Opinion and Order*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) (“*SBC-AT&T Order*”); Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control, WC Docket No. 05-75, *Memorandum Opinion and Order*, 20 FCC Rcd 18433, 18442-43 ¶ 16 (2005) (“*Verizon-MCI Order*”); Applications of Nextel Communications, Inc. and Sprint Corporation, WT Docket No. 05-63, *Memorandum Opinion and Order*, 20 FCC Rcd 13967, 13976 ¶ 20 (2005) (“*Sprint-Nextel Order*”); Applications of Western Wireless Corporation and ALLTEL Corporation, WT Docket No. 05-50, *Memorandum Opinion and Order*, 20 FCC Rcd 13053, 13062 ¶ 17 (2005) (“*ALLTEL-Western Wireless Order*”); Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, *Memorandum Opinion and Order*, 19 FCC Rcd 21522, 21542-43 ¶ 40 (2004) (“*Cingular-AT&T Wireless Order*”).

<sup>66</sup> *See, e.g.*, *DoCoMo-Guam Cellular Order*, FCC 06-167 at 10 ¶ 13; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 10 ¶ 16; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7360 ¶ 7; *Sprint-Nextel Order*, 20 FCC Rcd at 13976-77 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21543 ¶ 40.

<sup>67</sup> 47 U.S.C. § 309(e). *See also DoCoMo-Guam Cellular Order*, FCC 06-167 at 11 ¶ 14; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 10 ¶ 16; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 20; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 17; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21542-43 ¶ 40. Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. The Commission is not required to designate for hearing (continued....)

16. Among the factors the Commission considers in its public interest review is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”<sup>68</sup> Therefore, as a threshold matter, the Commission must determine whether the applicants to the proposed transaction meet the requisite qualifications to hold and transfer licenses under section 310(d) of the Act and the Commission’s rules.<sup>69</sup> In making this determination, the Commission does not, as a general rule, re-evaluate the qualifications of transferors and/or assignors unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant designation for hearing.<sup>70</sup> Conversely, section 310(d) obligates the Commission to consider whether the proposed transferee and/or assignee is qualified to hold Commission licenses.<sup>71</sup> When evaluating the qualifications of a potential licensee, the Commission previously has stated that it will review allegations of misconduct directly before it,<sup>72</sup> as well as conduct that takes place outside of the Commission.<sup>73</sup>

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applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, *see ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 901 (2d Cir. 1979), but of course may do so if we find that a hearing would be in the public interest.

<sup>68</sup> See 47 U.S.C. §§ 308, 310(d); *see also ALLTEL-Midwest Wireless Order*, FCC 06-146 at 11 ¶ 17; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

<sup>69</sup> See 47 U.S.C. § 310(d); 47 C.F.R. § 1.948; *see also DoCoMo-Guam Cellular Order*, FCC 06-167 at 11 ¶ 14; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 11 ¶ 17; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 10; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

<sup>70</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 11 ¶ 14; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 11 ¶ 17; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7362 ¶ 10; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 24; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13063-64 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44. See also Stephen F. Sewell, Assignment and Transfers of Control of FCC Authorizations under Section 310(d) of the Communications Act of 1934, 43 FED. COMM. L. J. 277, 339-40 (1991). The policy of not approving assignments or transfers when issues regarding the licensee’s basic qualifications remain unresolved is designed to prevent licensees from evading responsibility for misdeeds committed during the license period. *See id.*

<sup>71</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 11 ¶ 14; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 11 ¶ 17; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7362 ¶ 10; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 44.

<sup>72</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 11 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission will consider any violation of any provision of the Act, or of the Commission’s rules or policies, as predictive of an applicant’s future truthfulness and reliability and, thus, as having a bearing on an applicant’s character qualifications. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47; Policy Regarding Character Qualifications In Broadcast Licensing Amendment of Rules of Broadcast Practice and Procedure Relating to Written (continued....)

17. Our public interest evaluation necessarily encompasses the “broad aims of the Communications Act,” which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, ensuring a diversity of license holdings, and generally managing the spectrum in the public interest. Our public interest analysis may also entail assessing whether the proposed transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers. In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.<sup>74</sup>

18. In determining the competitive effects of the proposed transaction, our analysis is informed by, but not limited to, traditional antitrust principles.<sup>75</sup> Because the Commission is charged with determining whether the transfer and assignment of licenses serves the broader public interest, we take into account factors beyond those considered under a traditional antitrust analysis. In the communications industry, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players. In addition to

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Responses to Commission Inquiries and the Making of Misrepresentations to the Commission by Permittees and Licensees, Gen. Docket No. 81-500, *Report and Order and Policy Statement*, 100 F.C.C. 2d 1179, 1209-10 ¶ 57 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992).

<sup>73</sup> See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 11 ¶ 17; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 ¶ 18; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47. The Commission previously has determined that in its review of character issues, it will consider forms of adjudicated, non-Commission related misconduct that include: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. See, e.g., *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13064 n.86; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21548 ¶ 47.

<sup>74</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 12 ¶ 15; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 12 ¶ 18; *Sprint-Nextel Order*, 20 FCC Rcd at 13977 ¶ 21; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 19; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 41.

<sup>75</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 12 ¶ 16; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 12 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13977-78 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42. See also *Satellite Business Systems, Memorandum, Opinion, Order, Authorization and Certification*, 62 F.C.C.2d 997, 1088 (1977), *aff'd sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1<sup>st</sup> Cir. 1993) (stating that public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”). The Commission and the Department of Justice (“DOJ”) each have independent authority to examine telecommunications mergers, but the standards governing the Commission’s review differ from those of DOJ. See, e.g., *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 12 ¶ 19; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 22; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21544 ¶ 42. DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce. 15 U.S.C. § 18.

considering whether a transaction or merger will reduce existing competition, therefore, the Commission also must focus on whether the transaction or merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition. We also recognize that the same consequences of a proposed transaction or merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow a merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.<sup>76</sup>

19. Our public interest authority also enables us to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.<sup>77</sup> Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.<sup>78</sup> Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."<sup>79</sup> Indeed, unlike the role of antitrust enforcement agencies, our public

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<sup>76</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 13 ¶ 16; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 13 ¶ 19; *SBC-AT&T Order*, 20 FCC Rcd at 18302 ¶ 18; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 20; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 42.

<sup>77</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167, at 13 ¶ 17; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 13 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *Sprint-Nextel Order*, 20 FCC Rcd at 13978 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13065 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43 (conditioning approval on the divestiture of operating units in select markets). See also *Application of Worldcom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to Worldcom, Inc.*, CC Docket No. 97-211, *Memorandum Opinion and Order*, 13 FCC Rcd 18025, 18032 ¶ 10 (1998) (conditioning approval on the divestiture of MCI's Internet assets); *Applications of VoiceStream Wireless Corporation, PowerTel, Inc., Transferors, and Deutsche Telekom AG, Transferee*, IB Docket No. 00-187, *Memorandum Opinion and Order*, 16 FCC Rcd. 9779 (2001) ("*Deutsche Telekom-VoiceStream Wireless Order*") (conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

<sup>78</sup> 47 U.S.C. § 303(r). See also *DoCoMo-Guam Cellular Order*, FCC 06-167 at 13 ¶ 17; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 13 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *Sprint-Nextel Order*, 20 FCC Rcd at 13978-79 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

<sup>79</sup> 47 U.S.C. § 214(c). See also *DoCoMo-Guam Cellular Order*, FCC 06-167 at 13-14 ¶ 17; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 13-14 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43.

interest authority enables us to impose and enforce conditions to ensure that the transaction will, overall, serve the public interest.<sup>80</sup> Despite broad authority, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes.<sup>81</sup> Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.

#### IV. PUBLIC INTEREST ANALYSIS

##### A. Qualifications of Applicants

20. In this proceeding, no issues have been raised with respect to the basic qualifications of Alaska DigiTel, GCI, and Denali. Thus, we find that there is no reason at this time to reevaluate the qualifications of these entities.

##### B. Competitive Analysis

21. In our analysis of the proposed GCI-Alaska DigiTel-Denali transaction, we consider the potential competitive effects that might result from increased concentration within the mobile telephony market. Horizontal transactions may lead to a loss of a competitor, and such loss could also result in reduced competition. Horizontal transactions, including mergers, raise competitive concerns when they reduce the availability of choices to the point that the resulting firm has the incentive and the ability, either by itself or in coordination with other firms, to raise prices. The ability to raise prices above competitive levels is generally referred to as "market power." Market power may also enable sellers to reduce competition on dimensions other than price, including innovation and service quality. A fundamental tenet of the Commission's public interest review is that, absent significant offsetting efficiencies or other public interest benefits, a transaction that creates or enhances significant market power or facilitates its use is unlikely to serve the public interest.<sup>82</sup>

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<sup>80</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 14 ¶ 17; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 14 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 21; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43. See also *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7<sup>th</sup> Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

<sup>81</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 14 ¶ 17; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 14 ¶ 20; *Sprint Nextel-Nextel Partners Order*, 21 FCC Rcd at 7361 ¶ 9; *Sprint-Nextel Order*, 20 FCC Rcd at 13979 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21546 ¶ 43.

<sup>82</sup> See, e.g., *ALLTEL-Midwest Order*, FCC 06-146 at 14 ¶ 22; *Sprint-Nextel Order*, 20 FCC Rcd at 13981 ¶ 30; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13066 ¶ 22; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 68; Horizontal Merger Guidelines, issued by the U.S. Department of Justice and the Federal Trade Commission, at § 0.1, n.6. (Apr. 2, 1992, revised Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*").

22. A horizontal transaction or merger is unlikely to create or enhance market power or facilitate its exercise unless the transaction significantly increases concentration and results in a concentrated market, properly defined and measured. Transactions that do not significantly increase concentration or do not result in a concentrated market ordinarily require no further competitive analysis. Market concentration is generally measured by the Herfindahl-Hirschman Index (“HHI”), and changes in concentration are measured by the change in the HHI. However, HHI data provide only the beginning of the analysis. The Commission then examines other market factors that pertain to competitive effects, including the incentive and ability of other firms to react and of new firms to enter the market. Ultimately, the Commission must assess whether it is likely that the combined firm could exercise market power in any particular market.<sup>83</sup>

23. As the Commission has discussed, transactions such as mergers can diminish competition and firms can exercise market power in a number of ways. A transaction may create market power in a single firm and allow that firm to act on its own in raising prices, lowering quality, reducing innovation, or restricting deployment of new technologies or services. A transaction also may diminish competition if it makes the firms selling in the market more likely to engage in a coordinated manner that harms consumers, such as tacit or express collusion. The effects of such coordinated behavior may include increased prices, reduced number of minutes in a given price plan, degraded output quality, or some combination of these effects. It may also include adverse effects such as reduced innovation and restricted deployment of new technologies and services.<sup>84</sup>

24. We begin our competitive analysis by determining the appropriate market definitions to employ with respect to the proposed transaction, as well as identifying the relevant market participants. We then examine possible post-transaction concentration concerns, applying our initial screens pertaining to spectrum aggregation and to subscriber-based concentration measures. Next, we consider the possible horizontal competitive harms that could occur due to a significant increase in market concentration or market power<sup>85</sup> or due to the circumstances and structure of a particular transaction.<sup>86</sup> Finally, we examine other concerns that have been raised by MTA Wireless and ACS Wireless.

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<sup>83</sup> See, e.g., *ALLTEL-Midwest Order*, FCC 06-146 at 15 ¶ 23; *Sprint-Nextel Order*, 20 FCC Rcd at 13981 ¶ 31; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21556 ¶ 69; *DOJ/FTC Merger Guidelines* at § 1.0.

<sup>84</sup> See, e.g., *ALLTEL-Midwest Order*, FCC 06-146 at 15 ¶ 24; *Sprint-Nextel Order*, 20 FCC Rcd at 13982 ¶ 32; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 24; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21557 ¶ 70.

<sup>85</sup> See, e.g., *ALLTEL-Midwest Order*, FCC 06-146 at 16 ¶ 25; *Sprint-Nextel Order*, 20 FCC Rcd at 13981 ¶ 32; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 24; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21557 ¶ 70.

<sup>86</sup> See Section IV.B.3(b), *infra*.



## 1. Market Definition

### a. Product Market

25. For purposes of analyzing this transaction, we adopt the same product market definition as applied by the Commission in its recent wireless merger orders – the *ALLTEL-Midwest Order*, *Sprint-Nextel Order*, *ALLTEL-Western Wireless Order*, and *Cingular-AT&T Wireless Order*. In these orders, the Commission found that there are separate relevant product markets for interconnected mobile voice services and mobile data services, and also for residential services and enterprise services. Nevertheless, it analyzed all of these product markets under the combined market for mobile telephony service. Based on consideration of various factors, including the nature of these services and their relationship with each other, the Commission found that this approach provided a reasonable assessment of any potential competitive harm resulting from the transactions under review.<sup>87</sup> The Applicants, MTA Wireless, and ACS Wireless do not challenge this product market definition in their submissions.

### b. Geographic Market

26. We find that the relevant geographic market for analyzing the competitive effect of the GCI-Alaska DigiTel-Denali transaction on mobile telephony is local. As discussed below, this finding is based on the observation that consumers obtain their wireless service in a local area, not on a state-wide basis.

27. In prior orders, the Commission has found that the relevant geographic markets are local, are larger than counties, may encompass multiple counties and, depending on the consumer's location, may even include parts of more than one state.<sup>88</sup> In these orders, the Commission has identified two sets of geographic areas that may be used to define local markets – Component Economic Areas (“CEAs”) and Cellular Market Areas (“CMAs”).<sup>89</sup> MTA Wireless argues that the relevant market is the Anchorage Basic Trading Area (“BTA”)<sup>90</sup> and

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<sup>87</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 15 ¶ 19; *ALLTEL-Midwest Order*, FCC 06-146 at 16 ¶ 26; *Sprint-Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 28; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

<sup>88</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 15-16 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13990 ¶ 56; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 35; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21562-63 ¶¶ 89-90. This finding is primarily rooted in the premise that consumers obtain their wireless service in a local area, not on a national basis. See, e.g., *Sprint-Nextel Order*, 20 FCC Rcd at 13989 ¶ 51.

<sup>89</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 16 ¶ 20; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 57; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072-73 ¶¶ 44-45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567-68 ¶¶ 104-105.

<sup>90</sup> BTAs and Major Trading Areas (“MTAs”) are Material Copyright © 1992 Rand McNally & Company. Rights granted pursuant to a license from Rand McNally & Company through an agreement with the Federal Communications Commission. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect (continued....)

secondarily the state-wide mobile telephony market.<sup>91</sup> MTA Wireless does not provide any evidence that the relevant market is either the Anchorage BTA or state-wide for purposes of analyzing this transaction. Therefore, we are not persuaded by MTA Wireless's argument for a state-wide geographic market, and therefore for purposes of analyzing the competitive effects of this transaction, we find that the relevant geographic market is local, and continue to analyze the local markets using CEAs and CMAs, consistent with Commission precedent.

**c. Input Market for Spectrum**

28. Since wireless carriers need access to spectrum in order to compete in the provision of service, we analyze potential competitive effects of spectrum aggregation that may result from this transaction.<sup>92</sup> The Commission has previously evaluated whether spectrum should be included within the input market for mobile telephony service by examining its suitability for mobile voice service: its physical properties; the state of equipment technology; whether the spectrum is licensed with a mobile allocation and corresponding service rules; and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony.<sup>93</sup> Consistent with previous Commission determinations, we find that the input market currently includes cellular, PCS, and SMR spectrum<sup>94</sup> and currently totals approximately 200 MHz of spectrum.<sup>95</sup>

29. The Applicants argue that additional spectrum is scheduled to become available in the near term, including 90 MHz in the Advanced Wireless Services ("AWS") auction and 60 MHz of 700 MHz spectrum that has been scheduled for auction, and that this additional spectrum

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to Commercial Mobile Services, WT Docket No. 06-17, *Eleventh Report*, FCC 06-142, at 10, n.26 (rel. Sept. 29, 2006) ("*Eleventh Competition Report*").

<sup>91</sup> MTA Wireless September 6, 2006 Comments at 33.

<sup>92</sup> *Cingular-AT&T Wireless Order*, 20 FCC Rcd at 21568 ¶ 109; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49.

<sup>93</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 15-16 ¶ 21; *ALLTEL-Midwest Order*, FCC 06-146 at 18 ¶ 31; *Sprint-Nextel Order*, 20 FCC Rcd at 13992 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 41; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21560-61 ¶ 81.

<sup>94</sup> Under these decisions, Broadband Radio Service/Educational Broadband Service ("BRS/EBS") 2.5 GHz spectrum is not considered part of the input market for mobile telephony service. Currently, this spectrum is committed to uses other than mobile telephony. See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 15-16 ¶ 21, n.102; *ALLTEL-Midwest Order*, FCC 06-146 at 18 ¶ 31 n.129; *Sprint-Nextel Order*, 20 FCC Rcd at 13992-93 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 10371 n.127; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21561 n.283.

<sup>95</sup> The approximately 200 MHz of spectrum includes 50 MHz for cellular services, 120 MHz for Broadband PCS, and additional spectrum for SMR. See *Eleventh Competition Report* at ¶¶ 62-64. See also *DoCoMo-Guam Cellular Order*, FCC 06-167 at 15-16 ¶ 21, n. 103; *ALLTEL-Midwest Order*, FCC 06-146 at 18 ¶ 31 n.130; *Sprint-Nextel Order*, 20 FCC Rcd at 13992 n.155; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 41; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21561 ¶ 81.

should be included in analyzing this transaction.<sup>96</sup> Also, the Applicants argue that both MTA Wireless and ACS Wireless were participants and qualified bidders in the AWS Auction, and therefore both carriers have an actual and immediate capability to acquire spectrum in Alaska in order to provide additional facilities-based service.<sup>97</sup> In contrast, MTA Wireless and ACS Wireless argue that the AWS spectrum should not be included in the spectrum input market because this spectrum is encumbered and will not provide immediate capacity for auction winners.<sup>98</sup> In addition, MTA Wireless argues that although some of the 700 MHz spectrum has been auctioned, this spectrum band is encumbered by broadcast users.<sup>99</sup> Further, MTA Wireless notes that mobile telephony equipment is not currently being produced for either the AWS or 700 MHz spectrum bands.<sup>100</sup> Finally, MTA Wireless asserts that in recent orders that the Commission has limited the input market for spectrum to cellular, PCS, and SMR spectrum, and that this transaction should be considered on the basis of this spectrum only.<sup>101</sup>

30. For purposes of analyzing this transaction, we do not find it necessary to include either AWS or 700 MHz spectrum in the input market for spectrum as suitable for the provision of mobile telephony service. We note that time is still required to relocate existing government users of the AWS spectrum recently auctioned<sup>102</sup> and for licensees to build systems that operate

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<sup>96</sup> Applicants March 1, 2006 Joint Opposition at 14-15; Applicants August 8, 2006 Joint Opposition at 3.

<sup>97</sup> Applicants August 8, 2006 Joint Opposition at 3. We note that MTA Wireless had the winning bid in Auction No. 66 for CMA187-A Anchorage Alaska (20 MHz), CMA316-A Alaska 2-Bethel (20 MHz), and REA007-F Alaska (20 MHz), and the Bureau granted MTA Wireless the licenses on December 18, 2006. ACS Wireless was not one of the winning bidders in any of the Alaska markets. *See* Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66, *Public Notice*, Report No. AUC-06-66-F (Auction No. 66), DA 06-1882 (rel. Sept. 20, 2006) at Attachment A. *See also* Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, *Public Notice*, DA 06-2536 (rel. Dec. 18, 2006) at Attachment A.

<sup>98</sup> MTA Wireless March 13, 2006 Reply at 9-10; Declaration of Richard Kenshalo on behalf of Matanuska-Kenai, Inc., d/b/a Matanuska Wireless (Mar. 13, 2006) (“Kenshalo March 13, 2006 Declaration”) at 4-5 ¶ 8; MTA Wireless September 6, 2006 Comments at 28; Declaration of Richard Kenshalo on behalf of MTA Communications, Inc., d/b/a MTA Wireless (confidential version filed Sept. 6, 2006; redacted version filed Sept. 7, 2006) at 1-2; ACS Wireless September 6, 2006 Comments at 20 n.62.

<sup>99</sup> MTA Wireless March 13, 2006 Reply at 10; Kenshalo March 13, 2006 Reply Declaration at 5 ¶ 9.

<sup>100</sup> MTA Wireless March 13, 2006 Reply at 10; Kenshalo March 13, 2006 Reply Declaration at 5-6 ¶ 10.

<sup>101</sup> MTA Wireless March 13, 2006 Reply at 10; MTA Wireless September 6, 2006 Comments at 29 citing *ALLTEL-Western Wireless Order*, 20 FCC Rcd. at 13071 n.127.

<sup>102</sup> *See* “FCC’s Advanced Wireless Services (AWS) Spectrum Auction Concludes”, News Release (rel. Sept. 18, 2006) available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-267467A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267467A1.doc) (last visited Dec. 15, 2006).

in this spectrum.<sup>103</sup> We similarly note that in the 700 MHz band more time is required to relocate existing analog broadcast users, to auction spectrum and issue new licenses, and for licensees to build systems that operate in this spectrum.<sup>104</sup> We do, however, anticipate that sometime in the near future, as this spectrum becomes available for more immediate use, as technological developments lead to performance and equipment advances, and as spectrum allocations are revised, the Commission will need to re-evaluate whether additional spectrum should be viewed as suitable for the provision of mobile telephony services.<sup>105</sup>

#### d. Market Participants

31. The Commission has previously found that mobile telephony services offered by cellular, PCS, and SMR licensees employing various technologies provide the same basic voice and data functionality and are indistinguishable to the consumer.<sup>106</sup> Generally, when computing initial measures of market concentration, the Commission has limited its analysis of market participants to facilities-based carriers, excluding mobile virtual network operators (“MVNOs”) and resellers<sup>107</sup> as well as satellite carriers and wireless Voice over Internet Protocol (“VoIP”) providers from consideration.<sup>108</sup>

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<sup>103</sup> See *ALLTEL-Midwest*, FCC 06-146 at 18 ¶ 31 n.129; *Sprint-Nextel Order*, 20 FCC Rcd at 13992-93 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 10371 n.127; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21561 n.283.

<sup>104</sup> With respect to the 700 MHz Band, the Digital Television and Public Safety Act of 2005 (“DTV Act”), amends Section 309(j)(14) of the Communications Act, 47 U.S.C. § 309(j)(14), to establish February 17, 2009 as a firm deadline for the end of the digital television (DTV) transition period, and requires the Commission to commence the auction of recovered analog broadcast spectrum no later than January 28, 2008. See Deficit Reduction Act of 2005, Pub.L. No. 109-171, 120 Stat. 4 (2006) (Title III constituting the DTV Act). Before the DTV Act, the Commission had been required to extend the end of the DTV transition at the request of individual broadcast licensees on a market-by-market basis if one or more of the four largest network stations or affiliates were not broadcasting in digital, digital-to-analog converter technology was not generally available, or 15 percent or more of television households were not receiving a digital signal. See 47 U.S.C. § 309(j)(14)(B)(i)-(iii) (2005). Despite the certainty afforded by the DTV Act in providing a date certain for the end of the DTV transition period, until the transition is complete the 700 MHz Band remains occupied by television broadcasters.

<sup>105</sup> See *ALLTEL-Midwest*, FCC 06-146 at 18 ¶ 31 n.129; *Sprint-Nextel Order*, 20 FCC Rcd at 13992-93 ¶ 61; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 10371 n.127; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21561 n.283.

<sup>106</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 19 ¶ 32; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶ 38; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92.

<sup>107</sup> MVNOs are one kind of reseller, distinguished from “traditional” resellers by a variety of factors including brand appeal, distribution channels, bundling wireless and non-wireless products, and value added services. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Ninth Report*, 19 FCC Rcd 20597 (2005) at 20614 n.71 (“*Ninth Competition Report*”). (continued....)

32. MTA Wireless and ACS Wireless argue that because the Commission has acknowledged that, in some instances, MVNOs and resellers may have an impact on the market, it should find that GCI through its resale relationship with Dobson would have a significant effect on competition in this market.<sup>109</sup> As a result, MTA Wireless argues that GCI should be considered a potential competitor and the transaction would result in the loss of two potential competitors (GCI and Denali) and one actual competitor (GCI).<sup>110</sup> According to MTA Wireless, (Continued from previous page) \_\_\_\_\_  
The resale sector accounts for approximately 5 percent of all mobile telephony subscribers. *See Ninth Competition Report*, 19 FCC Rcd at 20613 ¶ 38.

<sup>108</sup> *See DoCoMo-Guam Cellular Order*, FCC 06-167 at 15-16 ¶ 22; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶ 38; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92. Although satellite providers offer facilities-based mobile voice and data services, the price of these services is currently significantly higher than for services offered by cellular, PCS, or SMR carriers. Therefore, most consumers would not view satellite phones as substitutes for mobile telephony. *See* Global Com, Iridium Satellite Phone Service Plans, at [http://www.globalcomsatphone.com/satellite/services/iridium\\_service\\_plans.html](http://www.globalcomsatphone.com/satellite/services/iridium_service_plans.html) (last visited Dec. 15, 2006); GlobalStar, Airtime Pricing, Voice Pricing, at <http://www.globalcomsatphone.com/satellite/services/globalstar.html/> (last visited Dec. 15, 2006). *See also DoCoMo-Guam Cellular Order*, FCC 06-167 at 17 n.104; *ALLTEL-Midwest Order*, FCC 06-146 at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070 ¶ 8. We also do not consider wireless VoIP carriers in our initial market analysis, in part because they currently provide nomadic service, as opposed to the mobile service provided by the mobile telephony providers. *Id.* By nomadic, we mean that customers are able to use wireless VoIP services from a number of different locations (for example, by using a laptop at different internet cafes all over a town). *DoCoMo-Guam Cellular Order*, FCC 06-167 at 17 n.104; *ALLTEL-Midwest Order*, FCC 06-146 at 19 ¶ 33 n.134; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 n.151.

<sup>109</sup> MTA Wireless March 13, 2006 Reply at 10-11; ACS Wireless July 21, 2006 Comments/Petition at 9.

<sup>110</sup> MTA Wireless Petition to Deny at 6. In their Joint Opposition, the Applicants argue that MTA Wireless lacks standing to challenge the instant applications because it has not demonstrated that it is a “party in interest” as required by 47 U.S.C. § 309(d)(1). Applicants March 1, 2006 Joint Opposition at ii, 3-6. MTA Wireless states that it is a competitor “in the Alaska MTA” (MTA Wireless March 1, 2006 Reply at 2) and “seeks to expand its coverage area into Anchorage and other parts of Alaska and to increase its available operating capacity . . .” (MTA Wireless Petition to Deny at 2). MTA Wireless does not claim to compete directly with any of the Applicants for wireless telephone customers in its specific service area, which it describes as the Matanuska Valley, “immediately to the north and west of Anchorage.” MTA Wireless Petition to Deny at 2. Even if MTA Wireless lacks standing, however, we have discretion to consider the Petition as an informal objection. *See, e.g., Sprint-Nextel Order*, 20 FCC Rcd at 14021 n.335 (citing Nextel License Holdings 4, Inc., *Order*, 17 FCC Rcd 7028, 7033 (WTB 2002) (noting “there is no standing requirement to file an informal objection pursuant to [47 C.F.R. § 1.41.]”)); Application of Tabback Broadcasting Company for Renewal of License of Station KAZM(AM), Sedona, Arizona, *Memorandum Opinion and Order*, 15 FCC Rcd 11899, 11900 (2000) (denying standing but treating petition to deny as informal objection). Accordingly, in the interest of having a full and complete record on which to evaluate the proposed transaction, we consider the merits of MTA Wireless’s arguments herein. For the reasons discussed below in this Order, however, we do not find persuasive MTA Wireless’s arguments for denial of the applications. *See, e.g., Sprint-Nextel Order*, 20 FCC Rcd at 14021 n.335 (citing *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21547 n.196).

GCI and Denali would be lost as potential competitors because both hold PCS licenses but do not currently provide service using this spectrum. Because GCI resells Dobson mobile telephony services, it also allegedly would be lost as an actual competitor because, post-transaction, it would no longer act independently of Alaska DigiTel.<sup>111</sup>

33. The Applicants argue that in the *ALLTEL-Western Wireless Order* the Commission concluded that the relevant market participants were facilities-based cellular, PCS, and SMR carriers.<sup>112</sup> Further, they assert that a reseller is unable to develop new or innovative services and its ability to price competitively is based on the rate it pays to the underlying facilities-based carrier.<sup>113</sup> They also argue that, if the Commission counted resold spectrum against an applicant, it would undermine a reseller's ability to become a facilities-based mobile telephony provider.<sup>114</sup> Thus, the Applicants contend that spectrum on which a carrier has resale rights should not be considered attributable for purposes of a competitive analysis.<sup>115</sup> Under Commission precedent, we generally limit our competitive analysis to facilities-based carriers, either nationwide or regional, excluding MVNOs and resellers from consideration when computing initial concentration measures. The Commission has acknowledged, however, that non-facilities based service options have an impact in the marketplace and in some instances may provide additional constraints against anti-competitive behavior.<sup>116</sup>

34. Our review of the *Resale Agreement* between GCI and Dobson indicates that GCI is limited in its ability to set price and to offer innovative and new products and services and does not have the ability to constrain anti-competitive behavior in the relevant markets.<sup>117</sup> Specifically, the *Resale Agreement* prohibits GCI from: [REDACTED]<sup>118</sup> [REDACTED]<sup>119</sup> [REDACTED].<sup>120</sup> There is also no difference in either GCI's or Dobson's network coverage

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<sup>111</sup> MTA Wireless Petition to Deny at 6.

<sup>112</sup> Applicants March 1, 2006 Joint Opposition at 12; *see also ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071 ¶ 39.

<sup>113</sup> Applicants March 1, 2006 Joint Opposition at 12-13; Applicants September 13, 2006 Joint Response at 15, 17-18.

<sup>114</sup> Applicants August 8, 2006 Joint Opposition at 16.

<sup>115</sup> Applicants March 1, 2006 Joint Opposition at 13; Applicants August 8, 2006 Joint Opposition at 15-16; Applicants September 13, 2006 Joint Response at 17.

<sup>116</sup> *See DoCoMo-Guam Cellular Order*, FCC 06-167 at 17 ¶ 22; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶¶ 38-39; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92. To date, in evaluating mergers among wireless carriers, the Commission has not included resellers or MVNOs in its initial screen.

<sup>117</sup> *See generally Resale Agreement*.

<sup>118</sup> *Resale Agreement* at Art. I, 3(b)(iv), 3(c).

<sup>119</sup> *Resale Agreement* at Art. I, 2(a).

<sup>120</sup> [REDACTED] *Resale Agreement* at Art. I, 3(b)(iii).

footprint which is often an important differentiation between mobile telephony carriers.<sup>121</sup> Finally, even though the *Resale Agreement* allows for non-price product differentiation by GCI through [REDACTED], we find that this limited amount of non-price product differentiation does not allow GCI to significantly impact the market.<sup>122</sup> MTA Wireless and ACS Wireless, after reviewing the *Resale Agreement*, also acknowledge that GCI will not compete with Dobson on [REDACTED].<sup>123</sup>

35. In sum, after review of the *Resale Agreement*, we do not find that GCI should be considered the competitive equivalent of a facilities-based carrier. For purposes of this transaction, consistent with Commission precedent, we exclude GCI's subscribers from the combined entity's total when computing initial measures of market concentration. Nevertheless, because non-facilities based service options such as those offered by GCI throughout its *Resale Agreement* with Dobson may have some impact in the marketplace,<sup>124</sup> we consider the role of MVNOs and resellers in our analysis of the likely competitive effects of this transaction.<sup>125</sup>

## 2. Initial Screening

36. In evaluating this transaction, we apply the same screening criteria that the Commission has used in prior wireless industry merger orders to identify whether particular markets in any proposed transaction potentially are adversely affected.<sup>126</sup> This initial analysis is designed to eliminate from further review those markets in which there is no competitive harm relative to today's generally competitive mobile telephony market.<sup>127</sup>

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<sup>121</sup> *Resale Agreement* at Art. I, 2(a). See also *Eleventh Competition Report*, FCC 06-142 at ¶¶ 130-135; *Sprint-Nextel Order*, 20 FCC Rcd at 14002 ¶ 95; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13077 ¶ 59; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21573 ¶ 125.

<sup>122</sup> *Resale Agreement* at Art. I, 2(a)(iii), 3(c), 3(d), 3(e). [REDACTED] *Resale Agreement* at Art. I, 3(d). GCI awards a bonus number of miles for signing a contract as well as awards one mile for every dollar spent on mobile telephony service. See <http://www.gci.com/forhome/cellular/gsmfactsbenefitsfaqs.htm> (last visited Dec. 15, 2006).

<sup>123</sup> MTA Wireless July 24, 2006 Comments at 11, 17 [REDACTED]. ACS Wireless September 6, 2006 Comments at 10 [REDACTED].

<sup>124</sup> *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶ 38; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 92.

<sup>125</sup> See Section IV.B.3, *infra*.

<sup>126</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 17 ¶ 23; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 20 ¶ 34; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶¶ 63-65; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13071-74 ¶¶ 40-49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106-109.

<sup>127</sup> *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073-74 ¶ 48; *Alltel-Western Wireless Order* 20 FCC Rcd at 10373-74 ¶ 48; *Sprint-Nextel Order*, 20 FCC Rcd at 13993 ¶ 62; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 108.

37. First, because spectrum is a necessary resource for carriers to compete effectively, we have examined the impact of the proposed GCI-Alaska DigiTel-Denali transaction on the concentration of spectrum holdings, or spectrum aggregation that would occur in each geographic market.<sup>128</sup> Consistent with the approach the Commission has taken when examining previous transactions involving aggregation of PCS and other spectrum used in the provision of mobile telephony services, we give further review to geographic markets where, post-transaction, the merged entity would have a 10 percent or greater interest in 70 MHz or more of cellular, PCS, and SMR spectrum.<sup>129</sup> In our analysis of GCI's spectrum holdings, we found have only one geographic area, St. Paul Island, where GCI would have a 10 percent or greater interest in 70 MHz or more of spectrum, and our analysis of the competitive effects of this spectrum aggregation is discussed below.<sup>130</sup>

38. Second, we have estimated subscriber-based market concentration measures for various geographic markets in order to examine potential market concentration concerns that might arise from the proposed transaction. A horizontal transaction is unlikely to create or enhance market power or facilitate its exercise unless the transaction significantly increases concentration and results in a concentrated market.<sup>131</sup> Specifically for each geographic market, we have calculated the HHI and the change in the HHI for various geographic markets.<sup>132</sup> Our market concentration analysis of the GCI-Alaska DigiTel transaction applies the same thresholds as the Commission used in previous merger orders: an HHI of 2800 with a change of 100 or greater or a change in the HHI of 250 regardless of the level of the HHI.<sup>133</sup> These thresholds are based on our current evaluation of the mobile telephony market.<sup>134</sup> As discussed above, we

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<sup>128</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 17 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49.

<sup>129</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-16, at 17-18 ¶ 23; *ALLTEL-Midwest Order*, FCC 06-146 at 22 ¶ 39; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶¶ 63, 65; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106, 109. 70 megahertz represents a little more than one third of the total bandwidth available for mobile telephony today, leaving approximately 130 megahertz of capacity available for a competitive response by other carriers in a local market. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49.

<sup>130</sup> See discussion below in Section IV.B.2(a).

<sup>131</sup> *DoCoMo-Guam Cellular Order*, FCC 06-16 at 17 ¶ 23; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13067 ¶ 23; see also DOJ/FTC Merger Guidelines § 0.1, n.6.

<sup>132</sup> *DoCoMo-Guam Cellular Order*, FCC 06-16 at 17 ¶ 23; *ALLTEL-Midwest Order*, FCC 06-146 at 22 ¶ 38; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶ 63; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 50; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 106.

<sup>133</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-16 at 17 ¶ 23; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 21 ¶ 36; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 46; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 106.

<sup>134</sup> The Commission previously concluded that a market in which a transaction causes a change of less than 100 in the HHI need not be examined further because, even if the post-transaction HHI for such a market would be greater than 2800, the loss of a competitor with such a small market share is not likely to (continued....)



conclude that GCI, as a reseller, is not an independent competitor,<sup>135</sup> and therefore the change in the HHI for all relevant geographic markets is zero because GCI's subscribers are excluded from the combined entity's total subscriber count.<sup>136</sup> Accordingly, we find no need for a further, in depth analysis of any relevant geographic market. We do go on to examine other horizontal effects that arise from the structure of the particular transaction.<sup>137</sup>

39. In the discussion that follows, we explain in more detail our evaluation of the spectrum aggregation and subscriber-based market concentration that would result from the proposed GCI-Alaska DigiTel-Denali transaction.

**a. Spectrum Aggregation**

40. To apply the initial screen examining spectrum aggregation for our competitive review, we must first determine the amount of spectrum that should be attributed to GCI. In the filings before us, there is significant disagreement between the MTA Wireless, ACS Wireless, and Applicants on this issue.

41. MTA Wireless contends that the Commission should attribute 125 MHz of spectrum to GCI. This would include: (1) all 30 MHz of GCI's B-block PCS license; (2) Alaska DigiTel's 30 MHz of spectrum holdings post-transaction (the 15 MHz A-block PCS license and Denali's 15 MHz A-block PCS license that Alaska DigiTel would acquire from Denali); (3) Dobson's 55 megahertz of spectrum (both its 25 MHz cellular license and its 30 MHz C-block PCS license in Anchorage);<sup>138</sup> and (4) 10 MHz of PCS spectrum in Anchorage held by SprintCom, a Sprint Nextel subsidiary.<sup>139</sup> In particular, MTA Wireless argues that Dobson's spectrum should be attributed to GCI because the GCI-Dobson resale agreement essentially makes GCI and Dobson technical and operational partners,<sup>140</sup> and contends that the SprintCom spectrum should be attributed because of roaming and service agreements that SprintCom currently has with Alaska DigiTel to serve Sprint Nextel customers.<sup>141</sup> ACS Wireless, meanwhile, contends that the Commission should attribute 115 MHz of spectrum to GCI, generally agreeing with MTA Wireless's contentions with respect to attributing GCI's 30 MHz, Alaska DigiTel's 30 MHz, and Dobson's 55 MHz of spectrum to GCI.<sup>142</sup> MTA Wireless and  
(Continued from previous page) \_\_\_\_\_  
cause significant transaction-specific harm. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 47; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 107.

<sup>135</sup> See Section IV.B.1(d), *supra*.

<sup>136</sup> See para. 65, *infra*.

<sup>137</sup> See Section IV.B.3(b), *infra*.

<sup>138</sup> MTA Wireless Petition to Deny at 9-11; MTA Wireless July 24, 2006 Comments at 19; MTA Wireless September 6, 2006 Comments at 22.

<sup>139</sup> MTA Wireless August 2, 2006 Comments at 4; MTA Wireless September 6, 2006 Comments at 27.

<sup>140</sup> MTA Wireless July 24, 2006 Comments at 12-14.

<sup>141</sup> MTA Wireless August 2, 2006 Comments at 4; MTA Wireless September 6, 2006 Comments at 27.

ACS Wireless ask the Commission to deny the applications or designate the applications for an evidentiary hearing.<sup>143</sup> ACS Wireless and MTA Wireless further contend that, if the Commission grants the applications, it should order GCI to divest spectrum.<sup>144</sup>

42. In their application, the Applicants assert that no more than 50 MHz of spectrum should be attributed to GCI – which would include only 20 MHz of GCI’s 30 MHz broadband PCS license (because GCI currently is leasing 10 MHz of that spectrum to Dobson) plus Alaska DigiTel’s 30 MHz of PCS spectrum – except with regard to St. Paul Island, where Alaska DigiTel holds an additional 20 MHz of cellular spectrum.<sup>145</sup> In later pleadings, the Applicants argue that the Commission should not even attribute any of Alaska DigiTel’s spectrum holdings to GCI.<sup>146</sup>

43. After reviewing the record and the various arguments made by the parties, we find that a total of 60 MHz of spectrum should be attributed to GCI throughout the state of Alaska except with regard to St. Paul Island, where a total of 80 MHz of spectrum should be attributed to GCI. Because we conclude that it is unlikely that GCI’s attributable interest would result in competitive harms, even with regard to St. Paul Island, we do not impose conditions requiring the GCI to divest any of the spectrum holdings associated with the proposed transaction. Below, we address in more detail the various claims that the parties make with regard to spectrum aggregation.

44. *GCI’s 30 MHz of PCS spectrum.* The Applicants contend that, for purposes of the Commission’s review of spectrum aggregation, only 20 of the 30 MHz of the spectrum that GCI currently holds under its PCS license should be attributed to GCI because it is leasing 10 MHz of its PCS spectrum to Dobson pursuant to a long-term *de facto* transfer spectrum leasing

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<sup>142</sup> ACS Wireless July 21, 2006 Comments/Petition at 6, 8-9; ACS Wireless September 6, 2006 Comments at 15-17; MTA Wireless August 2, 2006 Comments at 4-5.

<sup>143</sup> MTA Wireless Petition to Deny at 2, 7, 15; MTA Wireless December 4, 2006 Comments at 1; ACS Wireless July 21, 2006 Comments/Petition at 5, 20.

<sup>144</sup> ACS Wireless July 21, 2006 Comments/Petition at 5, 20; MTA Wireless August 2, 2006 Comments at 10-11. MTA Wireless argues that this capacity should be made available for lease or acquisition. MTA Wireless December 4, 2006 Comments at 5.

<sup>145</sup> Application Exhibit 1 at 4; Applicants March 1, 2006 Joint Opposition at 10-14; Applicants August 8, 2006 Joint Opposition at 3-4, 22; Applicants September 13, 2006 Joint Response at 6; Applicants December 6, 2006 Joint Response at 3. The Applicants also argue that the spectrum being acquired is PCS and not cellular spectrum and that the Commission has previously recognized that cellular carriers have certain advantages, particularly in rural areas, including first-mover advantages and superior propagation characteristics of cellular frequencies to PCS frequencies. According to the Applicants, as this transaction involves PCS spectrum in markets that are dominated by cellular carriers, it would not result in competitive harms to the market. See Applicants March 1, 2006 Joint Opposition at 11-12.

<sup>146</sup> Applicants September 13, 2006 Joint Response at 6-7.

arrangement.<sup>147</sup> MTA Wireless and ACS Wireless disagree, arguing that the Commission should attribute all 30 MHz of GCI's B-block PCS license to GCI.<sup>148</sup>

45. Because GCI holds the PCS license, and as licensee ultimately controls use of its spectrum, we will continue to attribute to GCI all 30 MHz of spectrum associated with its license. This approach is consistent with the Commission's conservative approach when performing a competitive analysis in the context of a proposed merger, where all spectrum in which the merged entity would have a 10 percent or greater interest is attributed to that entity.<sup>149</sup>

46. *Alaska DigiTel's 30 MHz of PCS spectrum and its 20 MHz of cellular spectrum on St. Paul Island.* MTA Wireless and ACS Wireless assert that the Commission should attribute to GCI all 30 MHz of Alaska DigiTel's post-transaction spectrum holdings (in Alaska DigiTel's 15 MHz PCS license and Denali's 15 MHz PCS license) because GCI would be obtaining a 78 percent ownership interest in Alaska DigiTel as well as board membership and super-majority rights. According to MTA Wireless and ACS Wireless, GCI's equity interest and single seat on Alaska DigiTel's board would provide GCI with control of the Alaska DigiTel/Denali spectrum.<sup>150</sup> In several of their pleadings, the Applicants assert that GCI would not control Alaska DigiTel, and that those spectrum holdings should not be attributed to GCI.<sup>151</sup>

47. The parties have submitted extensive pleadings in support of their respective contentions. Specifically, MTA Wireless contends that GCI would be obtaining both *de jure* and

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<sup>147</sup> Application Exhibit 1 at 4; Applicants March 1, 2006 Joint Opposition at 10-11; Applicants August 8, 2006 Joint Opposition at 22-23. The Applicants argue that the 10 MHz of spectrum leased to Dobson should not be attributed to GCI. This spectrum was first leased pursuant to a spectrum manager lease. *See* Notification of Spectrum Manager Lease between Dobson and GCI, File No. 0001825292 (filed July 30, 2004); Application Exhibit 1 at 4. We note, however, that GCI subsequently filed a long-term *de facto* transfer lease application and is currently leasing this spectrum along with an additional 2 MHz of spectrum to Dobson pursuant to a long-term *de facto* transfer leasing arrangement. *See* Application for Dobson to *De Facto* Transfer Lease Spectrum held by GCI, File No. 0002134968 (filed April 22, 2005).

<sup>148</sup> MTA Wireless Petition to Deny at 10; ACS Wireless July 21, 2006 Comments/Petition at 6 n.21. Among other things, MTA Wireless argues that the current GCI/Dobson spectrum leasing arrangement is limited to three years, and expires in approximately 30 months, and thus the Commission should continue to attribute it to GCI. MTA Wireless Petition to Deny at 10. [REDACTED]. GCI will have access to the spectrum it leases to Dobson in the long run. ACS Wireless July 21, 2006 Comments/Petition at 6 n.21.

<sup>149</sup> *See DoCoMo-Guam Cellular Order*, FCC 06-167 at 17-18 ¶ 23; *ALLTEL-Midwest Order*, FCC 06-146 at 22 ¶ 39; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶¶ 63, 65; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶¶ 106, 109.

<sup>150</sup> MTA Wireless Petition to Deny at 9-10; MTA Wireless March 13, 2006 Reply at 4-9; ACS Wireless July 21, 2006 Comments/Petition at 6-7; ACS Wireless December 4, 2006 Comments at 1-2

<sup>151</sup> Applicants March 1, 2006 Joint Opposition at 8-9; Applicants August 8, 2006 Joint Opposition at 5-14; Applicants September 13, 2006 Joint Response at 7-14; Applicants December 6, 2006 Joint Response at 2

*de facto* control of Alaska DigiTel and thus should be attributed with its 30 MHz of spectrum.<sup>152</sup> MTA Wireless cites to provisions in the *Operating Agreement* to support its claim that GCI would have *de facto* control of Alaska DigiTel – including GCI’s majority equity position, GCI’s veto rights over major managerial decisions, GCI’s veto power over the adoption of Alaska DigiTel’s annual budget, and GCI’s right to acquire the remaining minority ownership interest in Alaska DigiTel.<sup>153</sup> ACS Wireless agrees with MTA Wireless’s arguments about attributing Alaska DigiTel spectrum to GCI because of the degree of interest it would be acquiring in Alaska DigiTel.<sup>154</sup> In addition, ACS Wireless contends that GCI’s investor presentation at its 2006 annual stockholder meeting suggested that it planned to manage and/or develop Alaska DigiTel as part of GCI’s own business strategy.<sup>155</sup> ACS Wireless and MTA Wireless recommend that the Commission adopt conditions that would prevent GCI from exercising control over Alaska DigiTel.<sup>156</sup>

48. The Applicants claim that the Commission should apply its “designated entity” control standards and conclude that GCI will not have *de facto* control of Alaska DigiTel.<sup>157</sup> The Applicants further contend that they will not have day-to-day control of Alaska

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<sup>152</sup> MTA Wireless March 13, 2006 Reply at 4-9; MTA Wireless July 24, 2006 Comments at 3-9, 18; MTA Wireless September 6, 2006 Comments at 3-20; MTA Wireless December 4, 2006 Comments at 2. For instance, MTA Wireless argues that the Commission should apply its traditional rules governing *de jure* and *de facto* control of the post-transaction licenses and conclude that GCI will have both. MTA Wireless July 24, 2006 Comments at 5-9, 18 (discussing various control analyses, including Application of Baker Creek Communications, L.P., DA 98-1921, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (1998)).

<sup>153</sup> MTA Wireless July 24, 2006 Comments at 3-9, 18; MTA Wireless September 6, 2006 Comments at 12-18. MTA Wireless argues that by exercising control over Alaska DigiTel’s budget, GCI will effectively be able to control the identification and funding of all the operational aspects of Alaska DigiTel. Further, MTA Wireless contends that GCI, through its unconditional right to acquire the remaining minority interest in Alaska DigiTel, will be able to exercise control because if the Board of Managers chooses to defy GCI, GCI will be able to buy them out. MTA Wireless July 24, 2006 Comments at 7, 10-11.

<sup>154</sup> ACS Wireless July 21, 2006 Comments/Petition at 4, 6-8; ACS Wireless September 6, 2006 Comments at 2, 4, 24 -28; ACS Wireless December 4, 2006 Comments at 3.

<sup>155</sup> ACS Wireless July 21, 2006 Comments/Petition at 8, Exhibit B (noting that, at the presentation, GCI included Alaska DigiTel’s subscribers in its wireless subscriber count and presented the wireless sector, including Alaska DigiTel, as a major growth area).

<sup>156</sup> These conditions include eliminating GCI’s ability to veto certain Alaska DigiTel managerial decisions, eliminating GCI’s right to requiring the remaining interest in Alaska DigiTel, and prohibiting GCI from consolidating Alaska DigiTel’s financial statements with its own. ACS Wireless September 6, 2006 Comments at 36-37; ACS Wireless December 4, 2006 Comments at 4-5; MTA Wireless December 4, 2006 Comments at 3.

<sup>157</sup> Applicants August 8, 2006 Joint Opposition at 11; Applicants March 1, 2006 Joint Opposition at 8 n.18.

DigiTel/Denali.<sup>158</sup> In response to MTA Wireless's contentions regarding GCI's veto power over Alaska DigiTel's annual budget, the Applicants agree to amend the *Operating Agreement* to remove any veto rights of GCI with regards to Alaska DigiTel's budget.<sup>159</sup> We therefore condition this Order on the Applicants' amendment of the Alaska DigiTel *Operating Agreement* to remove GCI's veto rights with regard to Alaska DigiTel's budget.<sup>160</sup>

49. In determining whether to attribute Alaska DigiTel's spectrum to GCI for purposes of applying the Commission's initial screen for spectrum aggregation, we do not need to reach or address the various arguments about control presented by MTA Wireless, ACS Wireless, or the Applicants.<sup>161</sup> In attributing spectrum where ownership issues are raised, the Commission generally follows a conservative approach. Specifically, the Commission's practice has been to include in its screen all cellular, PCS, and SMR spectrum in which the merged or resulting entity would have a 10 percent or greater interest.<sup>162</sup> Because GCI would be obtaining a 78 percent equity interest in Alaska DigiTel/Denali's spectrum, we will attribute to GCI the following: Alaska DigiTel/Denali's 30 MHz of A-block PCS spectrum across the State of Alaska and, in addition, Alaska DigiTel's 20 MHz of cellular spectrum on St. Paul Island.

50. *Dobson's 55 MHz of PCS and cellular spectrum.* Both MTA Wireless and ACS Wireless argue that the Commission should attribute all 55 MHz of Dobson's spectrum in the Anchorage market to GCI because it resells Dobson's mobile services and leases spectrum to Dobson. The Applicants contend that, consistent with previous orders and Commission practice, in which the Commission has not attributed spectrum associated with a resale arrangement to the reseller, the Commission should not attribute Dobson's spectrum to GCI.

51. Specifically, MTA Wireless and ACS Wireless contend that all of Dobson's spectrum holdings should be attributed to GCI due to the 2004 *Resale Agreement*, its companion *Letter of Intent*, and the *Lease Agreements*. MTA Wireless and ACS Wireless argue that these

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<sup>158</sup> Applicants August 8, 2006 Joint Opposition at 2, 4, 8. For instance, the Applicants assert that GCI will only have the power to appoint one out of four to eight board members, and will not have control of the Board of Managers.

<sup>159</sup> Applicants December 19 Joint Comments at 1; *See also* Applicants August 8, 2006 Joint Opposition at 13-14; Applicants December 6, 2006 Joint Response at 2-3 (offering to amend the *Operating Agreement* to provide that the consent of the GCI Board Member to the Alaska DigiTel budget "shall not be unreasonably withheld").

<sup>160</sup> See list of conditions in Appendix A.

<sup>161</sup> As discussed above, the Applicants contend that the 78 percent ownership interest that GCI would be acquiring would in fact be "non-controlling," while MTA Wireless and ACS Wireless assert that GCI would be obtaining *de facto* control of Alaska DigiTel. Applicants acknowledge that were GCI to determine to exercise its option to acquire more than what they would deem to be a non-controlling interest, they would have to file new applications. Application Exhibit 1 at 2 n.6; Applicants December 6, 2006 Joint Response at 3. *See supra* note 31.

<sup>162</sup> *See DoCoMo-Guam Cellular Order*, FCC 06-167 at 17-18 ¶ 23; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21597 ¶ 196.

agreements reveal a collaborative relationship that encompasses Dobson's access to GCI's spectrum through leasing and GCI's reliance on Dobson's platform and reselling of Dobson's wireless services without the need to build its own infrastructure. They also allege that the *Resale Agreement* establishes close and strategic cooperation with regard to [REDACTED], and thus shows that GCI and Dobson are not acting as competitors but instead as partners. MTA Wireless and ACS Wireless assert that the *Letter of Intent* further substantiates the alleged collaborative relationship evidenced by the *Resale Agreement*.<sup>163</sup> The *Letter of Intent*, executed at the same time as the *Resale Agreement*, sets forth an additional agreement between GCI and Dobson to engage in further discussions and good faith negotiations on possible future cooperative arrangements, including [REDACTED].<sup>164</sup> Finally, MTA Wireless and ACS Wireless contend that the close relationship has been constructed with the express prospect of GCI ultimately acquiring Dobson's wireless assets in Alaska.<sup>165</sup> MTA Wireless and ACS Wireless request that the Commission broaden its previous general information request to require Applicants to produce all other documents that might exist between GCI and Dobson relating to possible cooperation.<sup>166</sup> Further, ACS Wireless requests that the Commission require GCI to end any further negotiations with Dobson regarding matters (discussed above) referenced in the *Letter of Intent*.<sup>167</sup> Finally, MTA Wireless requests that the Commission condition approval of this transaction on elimination of several elements in the *Resale Agreement*.<sup>168</sup>

52. The Applicants present several arguments as to why Dobson's spectrum should not be attributed to GCI. The Applicants contend that there is no legal precedent for MTA Wireless's and ACS Wireless's position and that the Commission has never considered resale agreements when assessing spectrum aggregation, stating that the Commission's focus generally is on assessing facilities-based competition in the market. They assert that, as a reseller of Dobson's services, GCI neither owns nor controls any of Dobson's network facilities, and is beholden to Dobson for all critical aspects of service deployment, including [REDACTED]. They state that if an applicant acting as a reseller is attributed with the spectrum associated with a resale of mobile telephony services, then the Commission would be undermining the ability of

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<sup>163</sup> MTA Wireless July 24, 2006 Comments at 9-18; MTA Wireless September 6, 2006 Comments at 21-25; MTA Wireless September 25, 2006 Comments 1-5; MTA Wireless December 4, 2006 Comments at 3; ACS Wireless July 21, 2006 Comments/Petition at 9; ACS Wireless September 6, 2006 Comments at 8-12, 16-18; ACS Wireless September 27, 2006 Comments at 1-6; ACS Wireless December 4, 2006 Comments at 2-3.

<sup>164</sup> See generally *Letter of Intent*.

<sup>165</sup> MTA Wireless September 6, 2006 Comments at 24-25; ACS Wireless September 6, 2006 Comments at 11-12.

<sup>166</sup> MTA Wireless September 25, 2006 Comments at 4-5; ACS Wireless September 6, 2006 Request for Supplemental Documents at 1-3; ACS Wireless September 27, 2006 Comments at 5.

<sup>167</sup> ACS Wireless September 27, 2006 Comments at 6-7; MTA Wireless December 4, 2006 Comments at 4.

<sup>168</sup> These elements include [REDACTED] and the "other cooperative arrangements" that are parts of the *Resale Agreement*. MTA Wireless December 4, 2006 Comments at 4.

the reseller to become a facilities-based provider in its own right. As for collaboration, the Applicants state that the general cooperation procedures are necessary features of a reseller agreement and are appropriately designed to give the reseller notice of network changes and input on certain operational issues.<sup>169</sup> As regards the good faith negotiations discussed in the *Letter of Intent*, GCI states that there has been no progress on any of these topics and argues that this verifies that GCI and Dobson are acting independently and on an arms-length basis.<sup>170</sup> Finally, the Applicants point out that any later effort by GCI to acquire Dobson's Alaska properties would have to be approved by the Commission.<sup>171</sup>

53. We are not persuaded that Dobson's spectrum should be attributed to GCI for purposes of our competitive analysis. Such a decision would depart from Commission practice not to attribute spectrum associated with a resale of mobile telephony services to the reseller.<sup>172</sup> As discussed above, as a general matter the Commission has not considered resellers to be competitors for purposes of conducting the initial screen. A reseller generally does not have the ability to control price, service, coverage, or contract terms, and our examination of the *Resale Agreement* and the *Letter of Intent* establishes [REDACTED].<sup>173</sup> Further, in contrast to its ownership interest in Alaska DigiTel (where we attribute Alaska DigiTel's spectrum, as discussed above), GCI holds no ownership interest in Dobson, and thus does not have any of the influence over Dobson that would be associated with ownership interests. Consistent with our determination above that GCI not be considered the competitive equivalent of a facilities-based carrier, we would not expect that GCI in its role as reseller would act as a full competitor with Dobson.

54. After examining these agreements, we find that nothing in them changes the fact that GCI, a reseller, does not have control over Dobson's spectrum or its business decisions related to use of that spectrum. As Applicants suggest, significant cooperation and communication between Dobson and its reseller is appropriate, and does not mean here that Dobson's spectrum should be attributed to GCI. Even though the *Resale Agreement* provides GCI with [REDACTED], this is consistent with the general practice associated with resale arrangements to provide a reseller with the ability to accommodate technical and operational changes to the network and does not provide GCI with the ability to control these changes.<sup>174</sup> In

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<sup>169</sup> Applicants March 1, 2006 Joint Opposition at 12-14; Applicants August 8, 2006 Joint Opposition at 15-22; Applicants September 13, 2006 Joint Response at 15-20.

<sup>170</sup> *Letter of Intent* at 1-2.

<sup>171</sup> Applicants September 13, 2006 Joint Response at 19.

<sup>172</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 17 ¶ 22; *ALLTEL-Midwest Order*, FCC 06-146 at 19 ¶ 33; *Sprint-Nextel Order*, 20 FCC Rcd at 13991 ¶ 58; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13070-71 ¶ 38; *Cingular-AT&T Wireless Order*, 20 FCC Rcd at 21563 ¶ 92.

<sup>173</sup> See Section IV.B.1(d), *supra*.

<sup>174</sup> *Resale Agreement* at Art. I, 3(b)(v). To the extent that this [REDACTED] raises the potential for coordinated interaction, we address that issue below. See Section IV.B.3(b), *infra*.

the *Resale Agreement*, Dobson agrees [REDACTED].<sup>175</sup> This provision does not give GCI any control over Dobson's decisions with regard to the use of its spectrum or the development of its network, and thus does not give rise to any potential competitive harm. The *Letter of Intent*, which by its own terms is merely an agreement to negotiate in good faith, likewise does not give GCI any control over Dobson's business decisions. Indeed, the fact that GCI and Dobson have reached no agreement on any of the topics in the *Letter of Intent* in almost two and a half years demonstrates that GCI does not have the ability to influence Dobson's network decisions. Finally, we observe that even were Dobson ultimately to implement the network and service enhancements suggested as possibilities in the *Letter of Intent*, GCI still would not have any control over Dobson, and the network improvements could result in public interest benefits in providing additional services to the public. Having requested and reviewed the documents most relevant to our examination of the GCI-Dobson relationship, we do not believe additional information is necessary at this time, and we deny the requests of MTA Wireless and ACS Wireless that the Commission seek additional information on this matter<sup>176</sup> as well as their requests for additional conditions on the *Resale Agreement* and *Letter of Intent*.<sup>177</sup>

55. *SprintCom's 10 MHz of PCS spectrum in Anchorage.* MTA Wireless asserts that 10 MHz of PCS spectrum in the Anchorage market held by SprintCom, a subsidiary of Sprint Nextel, should be attributed to GCI when the Commission considers spectrum aggregation.<sup>178</sup> MTA Wireless bases its argument on its and ACS Wireless's joint contention that GCI will be acquiring control of Alaska DigiTel under the proposed transaction, and that Alaska DigiTel currently is providing roaming and other services to Sprint Nextel.<sup>179</sup> Both argue that GCI's

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<sup>175</sup> *Resale Agreement* at Art. I, 9 (b). See also [REDACTED], Art. III, 18 [REDACTED].

<sup>176</sup> Of course, we note that were GCI ultimately to seek to acquire Dobson, which is not before us, we would attribute Dobson's spectrum to GCI when evaluating potential competitive concerns.

<sup>177</sup> This includes any condition relating to the spectrum leasing arrangements that, as we discuss elsewhere, are consistent with Commission policies. See Section IV.B.4(a), *infra*. Also, we have already taken GCI's leased spectrum into account in evaluating the spectrum aggregation issues related to this proposed transaction when we attributed all of the leased spectrum to GCI. See paras. 44-45, *supra*.

<sup>178</sup> MTA Wireless August 2, 2006 Comments at 4. SprintCom holds the 10 MHz D-block PCS license in BTA014 Anchorage, Alaska.

<sup>179</sup> ACS Wireless July 21, 2006 Comments/Petition at 6; ACS Wireless December 4, 2006 Comments at 2. ACS Wireless and MTA Wireless argue that the Commission should request the Applicants to submit any agreements it has with Sprint Nextel concerning the use by Sprint Nextel of Alaska DigiTel's facilities in Alaska as well as any other cooperative arrangements between or among the parties for the provision of mobile telephony services. See *id.* at 14; MTA Wireless August 2, 2006 Comments at 4. In the *Agreement Between Applicants, MTA Wireless, and ACS Wireless* Alaska DigiTel agreed to [REDACTED]. See *Agreement Between Applicants, MTA Wireless, and ACS Wireless* at 2. Alaska DigiTel provided the *Roaming Agreement* and the *Service Agreement* to MTA Wireless and ACS Wireless. See MTA Wireless September 6, 2006 Comments at 25; ACS Wireless September 6, 2006 Comments at 17-18 n.58. On October 10, 2006, Alaska DigiTel filed a letter stating that they had provided Wireless Telecommunications Bureau staff with copies of the Sprint-Alaska DigiTel Roaming Agreement and Service Agreement. See Sprint Agreement Letter.



interests will be able to competitively align itself with SprintCom, increasing its market power.<sup>180</sup> Further, MTA Wireless and ACS Wireless argue that, even though both the Alaska DigiTel-Sprint Nextel *Service Agreement* will terminate in December 2006, the future status of the joint network<sup>181</sup> is unknown, and therefore there may be an ongoing relationship between Sprint Nextel and Alaska DigiTel.<sup>182</sup> MTA Wireless claims the post-termination status of the joint network may be relevant to the Commission's analysis of this transaction.<sup>183</sup>

56. The Applicants argue that the Commission should reject MTA Wireless's and ACS Wireless's arguments that are based upon the *Roaming Agreement* and the *Service Agreement* between Sprint Nextel and Alaska DigiTel. The Applicants contend that MTA Wireless even concedes that the *Service Agreement* expires in December 2006 and that notice has been given that this agreement will not be renewed. Therefore, the Applicants reason that MTA Wireless's and ACS Wireless's contentions amount to unsupported speculation that these agreements would be harmful to competition.<sup>184</sup>

57. After review of the record, including the *Roaming Agreement* and the *Service Agreement*, we do not find evidence that there will be an ongoing relationship between Sprint Nextel and Alaska DigiTel that would result in competitive harm. Furthermore, the provisions of the *Roaming Agreement* do not provide Alaska DigiTel with control or influence over Sprint Nextel spectrum in Anchorage, and therefore we conclude that, post-transaction, GCI will not have either control or influence over the Sprint Nextel spectrum. Lastly, on [REDACTED], Sprint Nextel provided notice to Alaska DigiTel that it was terminating the *Service Agreement*, and therefore the *Service Agreement* would expire on December 15, 2006.<sup>185</sup> Further, the *Service Agreement* provides specific termination provisions that require: [REDACTED].<sup>186</sup> Therefore, [REDACTED], the joint network would no longer exist since Sprint Nextel and Alaska DigiTel would regain sole possession of their respective facilities/sites.<sup>187</sup>

58. *Conclusion.* In sum, for purposes of analyzing spectrum aggregation in this transaction, we will attribute 60 MHz of spectrum to GCI throughout the state of Alaska, except for St. Paul Island where we will attribute 80 MHz of spectrum to GCI.<sup>188</sup> Accordingly,

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<sup>180</sup> ACS Wireless July 21, 2006 Comments/Petition at 6; MTA Wireless August 2, 2006 Comments at 4.

<sup>181</sup> [REDACTED] See [REDACTED] at 2. [REDACTED].

<sup>182</sup> MTA Wireless September 6, 2006 Comments at 27; ACS Wireless September 6, 2006 Comments at 17-18 n.58.

<sup>183</sup> MTA Wireless September 6, 2006 Comments at 27-28.

<sup>184</sup> Applicants September 13, 2006 Joint Response at 26-27.

<sup>185</sup> See Notice of Service Agreement Termination Letter.

<sup>186</sup> See *Service Agreement* at 5.

<sup>187</sup> [REDACTED] Since the *Letter of Intent* does not demonstrate that GCI would have access to Sprint Nextel's spectrum, it similarly does not persuade us that we should attribute Sprint Nextel's spectrum to GCI.

<sup>188</sup> Application Exhibit 1 at 5.

consistent with Commission precedent relating to the initial screen pertaining to spectrum aggregation, we conclude that further analysis is only necessary with regard to St. Paul Island, where GCI would be attributed with more than 70 MHz of spectrum,<sup>189</sup> and no further analysis is necessary where less than 70 MHz of spectrum is attributed to the entity that would result from the proposed transaction.<sup>190</sup> In a subsequent subsection, we go on to examine other horizontal effects that arise from the structure of the particular transaction.<sup>191</sup>

59. As for St. Paul Island, after further analysis we do not find that the aggregation of 80 MHz of spectrum by GCI will result in undue competitive harm. First, we note that post-transaction, there would be sufficient spectrum available for rival carriers to deploy mobile telephony service on St. Paul Island. Currently, Bristol Bay Cellular holds the 25 MHz B-block cellular license, Jasper Wireless, Inc., holds 5 MHz of the A-block cellular license, Dobson holds 30 MHz of PCS spectrum, ACS Wireless and Lewis and Clark each hold 10 MHz of PCS spectrum, and Sprint Nextel holds approximately 14 MHz of PCS and SMR spectrum. Therefore, we find that there is sufficient spectrum for other carriers to provide facilities-based service on St. Paul Island.

60. In conclusion, after examining the potential concerns that might arise from the spectrum aggregation that would result from this proposed transaction, we determine not to impose any conditions requiring the GCI to divest any of its spectrum holdings throughout Alaska or on St. Paul Island.

#### **b. Market Concentration**

61. For purposes of examining subscriber-based market concentration for the relevant geographic markets that are affected by the proposed GCI-Alaska DigiTel-Denali transaction, we calculated the HHI and the change in HHI that would result from the proposed transaction, consistent with the Commission's practice in its recent orders.<sup>192</sup> In calculating HHIs and the change in the HHIs, we analyzed NRUF data<sup>193</sup> using two sets of geographic areas, Component

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<sup>189</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 17-18 ¶¶ 23-24; *ALLTEL-Midwest Order*, FCC 06-146 at 22 ¶ 39; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49; *Cingular-AT&T Wireless Order*, 20 FCC Rcd at 21568-69 ¶ 109.

<sup>190</sup> See, e.g., *Sprint-Nextel Order*, 20 FCC Rcd at 13994 ¶ 65 (although 70 MHz represents a little more than one-third of the total bandwidth available for mobile telephony today, a market may contain more than three viable competitors even where one entity controls this amount of spectrum because many carriers are competing successfully with less bandwidth); *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13074 ¶ 49; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568-69 ¶ 109.

<sup>191</sup> See Section IV.B.3(b), *infra*.

<sup>192</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167, at 18 ¶ 24; *ALLTEL-Midwest Order*, FCC 06-146 at 21 ¶ 36; *Sprint-Nextel Order*, 20 FCC Rcd at 13993-94 ¶ 63; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 46; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 106.

<sup>193</sup> These data indicate the number of assigned phone numbers that a wireless carrier has in a particular wireline rate center. Rate centers are geographic areas used by local exchange carriers for a variety of reasons, including the determination of toll rates. See HARRY NEWTON, NEWTON'S TELECOM (continued...)

Economic Areas (“CEAs”)<sup>194</sup> and Cellular Market Areas (“CMAs”).<sup>195</sup> As discussed in the *ALLTEL-Western Wireless Order* and *Cingular-AT&T Wireless Order*, both geographic areas are consistent with the local market definition the Commission has applied in these recent orders and each brings a different perspective to the analysis.<sup>196</sup> We conclude from our analysis that GCI,

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DICTIONARY: 19<sup>TH</sup> EXPANDED & UPDATED EDITION 660 (July 2003). All mobile wireless carriers must report to the FCC the quantity of their phone numbers that have been assigned to end users, thereby permitting the Commission to calculate the total number of mobile subscribers. For purposes of geographical analysis, the rate center data can be associated with a geographic point, and all of those points that fall within a county boundary can be aggregated together and associated with much larger geographic areas based on counties.

<sup>194</sup> CEAs are defined by the Bureau of Economic Analysis (“BEA”), and are composed of a single economic node and surrounding counties that are economically related to the node. There are 348 CEAs in the 50 states and the District of Columbia. Of the 3,141 U.S. counties, 2,267 are non-nodal counties that are assigned to a CEA based first on county-to-county commuting flows from the 1990 Census and second on locations of the most widely read regional newspapers. Three quarters of non-nodal counties were assigned based on commuting patterns. See Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURV. OF CURRENT BUS., Feb. 1995, at 75-81. In November 2004, the Bureau of Economic Analysis updated definitions for CEAs. The total number of CEAs decreased from 348 to 344. Non-nodal county assignment continued to be based on county-to-county commuting flows and locations of the most widely read regional newspapers. See Kenneth P. Johnson & John R. Kort, *2004 Redefinition of the BEA Economic Areas*, SURV. OF CURRENT BUS., Nov. 2004 at 68-71. For purposes of this transaction, we did not adopt the new CEA definitions.

<sup>195</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 18 ¶ 24, n.110; *ALLTEL-Midwest Order*, FCC 06-146 at 21 ¶ 35; *Sprint-Nextel Order*, 20 FCC Rcd at 13993 ¶ 63; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072 ¶ 44; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567 ¶ 104. CMAs are the regions originally used by the Commission for issuing cellular licenses. There are 734 CMAs, made up of 305 Metropolitan Statistical Areas, 428 Rural Service Areas, and a market for the Gulf of Mexico. See *Eleventh Competition Report*, FCC 06-142 at 28 ¶ 62. RSAs are regions defined by the Commission for the purpose of issuing spectrum licenses. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, WT Docket No. 05-71, *Tenth Competition Report*, 20 FCC Rcd 15908, 15935 ¶ 70 n.145.

<sup>196</sup> *ALLTEL-Midwest Order*, FCC 06-146 at 21 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567 ¶ 105. CEAs were designed to represent consumers’ patterns of normal travel for personal and employment reasons and should replicate areas within which groups of consumers would be expected to shop for wireless service. In addition, CEAs generally constitute areas within which any service providers present would have an incentive to provide relatively ubiquitous service. See Kenneth P. Johnson, *Redefinition of the BEA Economic Areas*, SURV. OF CURRENT BUS., Feb. 1995, at 75; *ALLTEL-Midwest Order*, FCC 06-146 at 21 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13072 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21567 ¶ 105. CMAs, in turn, are the areas in which the Commission initially granted licenses for cellular service. Although license partitioning has altered this initial licensing structure in many areas, CMAs continue to serve as reasonable areas for determining the number of competitors from which consumers may choose, because the Commission’s licensing programs, to a large extent, have shaped the mobile telephony services market by defining the initial areas where carriers were able to provide facilities-based (continued....)

as a reseller, is not an independent competitor, and therefore the change in the HHI for all relevant geographic markets would be zero.<sup>197</sup>

62. MTA Wireless and ACS Wireless both argue that there currently are four competitors in the Anchorage market – ACS Wireless, Alaska DigiTel, Dobson, and GCI (as a reseller) – and that this transaction would result in a reduction of actual competitors from four to three, resulting in competitive harm.<sup>198</sup> MTA Wireless and ACS Wireless also argue that because of the Alaska DigiTel-Sprint Nextel and the GCI-Dobson relationships, respectively, the Commission should conclude that, post-transaction, there would only be two competing groups of mobile telephony carriers in the Anchorage market – the GCI-Alaska DigiTel-Dobson-Sprint Nextel group and the ACS Wireless group.<sup>199</sup>

63. ACS Wireless analyzes the impact of this proposed transaction on market concentration based on the assumption that GCI is a fully independent competitor in the market. In particular, using the subscriber totals submitted by GCI and Alaska DigiTel plus its own subscriber data for itself and Dobson, ACS Wireless calculates the HHI and the change in HHI that would result from the transaction in three Boroughs – Anchorage, Juneau, and Matanuska-Susitna. ACS Wireless argues that the HHI increases and the overall HHI totals far exceed the levels found acceptable in prior proceedings. More specifically, the estimates reveal a post-transaction HHI [REDACTED] in all three markets, and a change in HHI [REDACTED]. ACS Wireless concludes that these estimates demonstrate a significant potential for anticompetitive effects.<sup>200</sup>

64. The Applicants argue that, both pre- and post-transaction, there will be four primary providers of mobile telephony service – ACS Wireless, Alaska DigiTel, Dobson, and GCI reselling over Dobson's network – and that Alaska DigiTel will continue to compete on all aspects of providing mobile telephony service, including price. Also, the Applicants argue that

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service. See 47 C.F.R. § 22.909; *ALLTEL-Midwest Order*, FCC 06-146 at 21 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 105. As CEAs are derived from factors related to consumer demand for mobile telephony services and CMAs reflect to some extent the initial supply of mobile telephony services, we have found that they are useful cross-checks on each other and together help ensure that our analysis identifies all local areas that require more detailed analysis. See *ALLTEL-Midwest Order*, FCC 06-146 at 21 ¶ 35; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13073 ¶ 45; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 105.

<sup>197</sup> See Section IV.B.1(d), *supra*.

<sup>198</sup> MTA Wireless Petition to Deny at 5-6; MTA Wireless December 4, 2006 Comments at 4.

<sup>199</sup> MTA Wireless August 2, 2006 Comments at 4; MTA Wireless December 4, 2006 Comments at 4; ACS Wireless December 4, 2006 Comments at 2. For discussion of GCI-Dobson relationship, see paras. 50-54, *supra*. For discussion of the Alaska DigiTel and Sprint Nextel relationship, see paras. 55-57, *supra*.

<sup>200</sup> ACS Wireless September 6, 2006 Comments at 20-21, Exhibit B; Declaration of Robert Doucette filed on behalf of ACS Wireless, Inc. (Sept. 6, 2006).

ACS Wireless fails to show any significant potential for anticompetitive effects based on the HHI measure of market concentration. The Applicants reject ACS Wireless's contention that the estimated HHI increases and overall post-transaction HHI totals far exceed the levels found acceptable in prior proceedings. The Applicants further argue that none of the data put forth by ACS Wireless supports either of the two alternative theories of possible competitive harm recognized by the Commission – namely, unilateral effects or coordinated interaction – in any of the three local geographic markets analyzed. The Applicants also stress that the combined GCI-Alaska DigiTel would have [REDACTED] in Anchorage. Similarly, the Applicants note that the combined GCI-Alaska DigiTel market share in Matanuska-Susitna [REDACTED].<sup>201</sup>

65. As discussed above, for purposes of calculating our initial subscriber-based market concentration measures, we have already concluded that we do not consider GCI to be a facilities-based market participant.<sup>202</sup> Accordingly, we do not find that there is a loss of an actual, independent competitor in the market as a result of this transaction, and we conclude that the number of actual, independent competitors in the Anchorage market, both pre- and post-transaction, is three. Because we do not consider GCI to be an independent competitor in the market prior to the transaction, we do not accept ACS Wireless's estimates of the HHI and change in HHI that would result from this transaction, and therefore we are not persuaded by ACS Wireless's conclusion that these estimates demonstrate a significant potential for anticompetitive effects. Instead, we find that there is no change in the HHI in any local market for mobile telephony services as a result of this transaction.

66. Although the various contractual arrangements between GCI and Dobson do not result in spectrum concentration or HHI change figures that exceed our thresholds, MTA Wireless and ACS Wireless have raised questions about the totality of the horizontal relationships that would exist in the relevant Alaskan markets if this transaction was completed. To address the concerns, we conduct additional, in-depth analysis of the likely horizontal effects of the proposed transaction in the analysis below.

### 3. Horizontal Effects

67. In their various pleadings (discussed above), MTA Wireless and ACS Wireless generally assert that the GCI-Alaska DigiTel-Denali transaction is likely to have adverse effects on competition in Alaska. Therefore, this section examines in more detail how the transaction could affect competitive behavior in markets in Alaska. As discussed in previous orders, competition may be harmed either through unilateral actions by the combined entity or through coordinated interaction among firms competing in the relevant market.<sup>203</sup>

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<sup>201</sup> Applicants September 13, 2006 Joint Response at 20-22.

<sup>202</sup> See Section IV.B.1(d), *supra*.

<sup>203</sup> DOJ/FTC Merger Guidelines § 2.

68. Unilateral effects occur when the combined firm finds that, as a result of the transaction, it is now profitable to alter its behavior in an anticompetitive manner.<sup>204</sup> Examples of unilateral effects include the ability of the combined firm to raise its price or reduce the features it includes in a given service plan it supplies. Coordinated effects occur when the remaining firms in the market, recognizing their interdependence, take actions “that are profitable for each of them only as a result of the accommodating reactions of others.”<sup>205</sup> Examples of coordinated effects include explicit collusion, tacit collusion, and price leadership. Because coordinated effects may be more likely if there are fewer firms in a market, horizontal transactions may significantly increase the likelihood of coordinated effects by reducing the number of firms in the market. In previous merger orders, we discussed our analysis for potential unilateral effects and coordinated interaction in the mobile telephony services market extensively,<sup>206</sup> and we do not find it necessary to repeat those discussions here. We limit our

<sup>204</sup> *DOJ/FTC Merger Guidelines* § 2.2. The term “unilateral” refers to the method used by firms to determine strategy, not to the fact that the merged entity would be the only firm to change its strategy. The term unilateral is used to indicate that strategies are determined unilaterally by each of the firms in the market and not by explicit or tacit collusion. Other firms in the market may find it profitable to alter their behavior as a result of the merger-induced change in market structure by, for example, repositioning their products, changing capacity, or changing their own prices. These reactions can alter the total effect on the market and must be taken into account when evaluating potential unilateral effects. *See Sprint-Nextel Order*, 20 FCC Rcd at 14001 n.199; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13076 n.155; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570 n.341.

<sup>205</sup> *DOJ/FTC Merger Guidelines* § 2.1. *See also* W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON, JR., *ECONOMICS OF REGULATION AND ANTITRUST* 107 (2000); DOUGLAS GREER, *INDUSTRIAL ORGANIZATION AND PUBLIC POLICY* 269 (1992).

<sup>206</sup> For unilateral effects, our analyses have included the following aspects: (1) product differentiation and substitutability (*see Sprint-Nextel Order*, 20 FCC Rcd at 14002-07 ¶¶ 94-107; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13077-79 ¶¶ 59-64; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21571-75 ¶¶ 119-133); (2) network effects (*see ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13082-83 ¶¶ 75-77; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21578 ¶¶ 142-145); (3) marginal cost reductions (*see Sprint-Nextel Order*, 20 FCC Rcd at 14009 ¶ 115). *Sprint-Nextel Order*, 20 FCC Rcd at 13087 ¶¶ 91-92; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21584-85 ¶¶ 160-162); (4) competitive response by rivals (*see ALLTEL-Midwest Order*, FCC 06-146 at 26-27 ¶¶ 50-52; *Sprint-Nextel Order*, 20 FCC Rcd at 14007-09 ¶¶ 108-114; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13079-81 ¶¶ 65-72; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21575-76 ¶¶ 134-137); (5) spectrum and advanced wireless services (*see ALLTEL-Midwest Order*, FCC 06-146 at 27 ¶¶ 53-54; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13819-21 ¶¶ 73-74; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21577-78 ¶¶ 138-141); (6) market share (*see ALLTEL-Midwest Order*, FCC 06-146 at 27-28 ¶¶ 55-57; *Sprint-Nextel Order*, 20 FCC Rcd at 14001 ¶ 92; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13076-77 ¶ 58; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570-71 ¶¶ 117-118); and (7) penetration (*see ALLTEL-Midwest Order*, FCC 06-146 at 28-29 ¶¶ 58-59; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13083-85 ¶¶ 78-83; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21578-80 ¶¶ 146-149); . For coordinated interaction, our analyses have included: (1) firm and product homogeneity (*see Sprint-Nextel Order*, 20 FCC Rcd at 13997 ¶¶ 75-78; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13087 ¶ 90; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21582-84 ¶¶ 156-159); (2) existing cooperative ventures (*see Cingular-AT&T* (continued....))

discussion of potential unilateral and coordinated interaction effects to those that appear to be raised by the transaction before us.

**a. Unilateral Effects**

69. Both MTA Wireless and ACS Wireless contend that the proposed transaction would create the potential for unilateral effects. As the Commission has previously discussed, unilateral effects arise when the merged firm finds it profitable to alter its behavior following the transaction by “elevating price and suppressing output.”<sup>207</sup> As explained in previous Commission orders, in the case of mobile telephony, this might take the form of delaying improvements in service quality or adversely adjusting plan features without changing the plan price.<sup>208</sup> Incentives for such unilateral competitive actions vary with the nature of competition in the relevant markets. After reviewing the record, we conclude that this transaction is unlikely to result in adverse unilateral effects.

70. MTA Wireless argues that this transaction should be evaluated for potential unilateral effects.<sup>209</sup> Further, MTA Wireless claims that the *Resale Agreement* may indicate that post-transaction, GCI would have the ability to engage in unilateral anti-competitive actions.<sup>210</sup> Also, ACS Wireless argues that, post-transaction, GCI would have the ability and incentive to engage in anticompetitive actions, such as raising prices or reducing output due to its cooperative arrangements with other carriers in Alaska. Further, ACS Wireless claims that Alaska DigiTel today prevents GCI from unilaterally raising prices, reducing service quality, or restricting output in an anticompetitive manner, and as a result of this transaction Alaska DigiTel would no longer be in a position to be a disciplining force in the market.<sup>211</sup>

71. MTA Wireless also claims that GCI should be considered a potential competitor in the Anchorage market because it holds PCS spectrum but does not provide facilities-based  
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*Wireless Order*, 19 FCC Rcd at 21585 ¶ 163); (3) number of firms (*see Sprint-Nextel Order*, 20 FCC Rcd at 13996 ¶¶ 71-72); (4) technology development (*see Sprint-Nextel Order*, 20 FCC Rcd at 13998-99 ¶¶ 81-83); (5) response of rivals (*see Sprint-Nextel Order*, 20 FCC Rcd at 13999-14000 ¶¶ 84-88); (6) transparency of information (*see Sprint-Nextel Order*, 20 FCC Rcd at 13996 ¶¶ 73-74; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13086 ¶ 89; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21581-82 ¶¶ 154-155); and (7) presence of mavericks (*see Sprint-Nextel Order*, 20 FCC Rcd at 13997-98 ¶¶ 79-80; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13087 ¶¶ 91-92; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21584-85 ¶¶ 160-162).

<sup>207</sup> See *ALLTEL-Midwest Order*, FCC 06-146 at 25 ¶ 47; *Sprint-Nextel Order*, 20 FCC Rcd at 14001 ¶ 91; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13075 ¶ 54; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570 ¶ 115; *DOJ/FTC Merger Guidelines* § 2.2.

<sup>208</sup> See *ALLTEL-Midwest Order*, FCC 06-146 at 25 ¶ 47; *Sprint-Nextel Order*, 20 FCC Rcd at 14001 n.199; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13075-76 ¶ 54; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21570 ¶ 115.

<sup>209</sup> MTA Wireless March 13, 2006 Reply at 11.

<sup>210</sup> MTA Wireless September 6, 2006 Comments at 24.

<sup>211</sup> ACS Wireless September 6, 2006 Comments at 13, 18.

mobile telephony service. Therefore, MTA Wireless argues that this transaction will result in a loss of two independent, potential competitors in the Anchorage market (GCI and Denali).<sup>212</sup> However, ACS Wireless argues that it is unlikely that a new facilities-based mobile telephony carrier will enter the Alaskan market to constrain GCI because of high infrastructure costs and population dispersion.<sup>213</sup>

72. The Applicants argue that unilateral effects are unlikely to occur as a result of this transaction. The Applicants contend that in Anchorage the combined GCI-Alaska DigiTel entity would have less than a 20 percent market share, and that in the Matanuska-Sustina market the combined share would be approximately 23 percent. The combined share in both of these markets is well below the DOJ threshold of 35 percent for unilateral effects. Further, the Applicants argue that the market share for the combined firm is low, in part, because the transaction does not involve cellular spectrum. The Applicants claim that cellular licensees in Alaska have a competitive advantage over PCS licensees in Alaska because cellular frequencies have superior propagation characteristics in areas with rugged terrain and sparse and dispersed population.<sup>214</sup>

73. Further, the Applicants argue that there is not a loss of two potential competitors as a result of this transaction. First, the Applicants claim that Denali and Alaska DigiTel today are commonly-controlled affiliates. The Applicants argue that Denali originally obtained its 15 MHz license as a result of a *pro forma* assignment disaggregating 15 MHz from Alaska DigiTel's 30 MHz A-block PCS license. However, the Applicants do not refute MTA Wireless's claim that GCI is a potential entrant, but argue that GCI will not be lost as a potential competitor because GCI will not control Alaska DigiTel.<sup>215</sup>

74. We find that it is unlikely that this transaction will result in unilateral effects in any local mobile telephony market in Alaska and that a loss of a potential competitor is unlikely to result in undue competitive harm. For purposes of our competitive review we find that Alaska DigiTel and Denali are under the common control of William Yandell,<sup>216</sup> and therefore we do not consider Denali a potential entrant. We do find that GCI is a potential facilities-based entrant into the Anchorage mobile telephony market as well as in other markets in the state of Alaska.

75. We conclude, however, that even the loss of GCI as a potential competitor would not result in competitive harms in the Anchorage market or in any other market in the state of Alaska. First, there are three facilities-based carriers in the Anchorage market, and post-transaction, there would be two remaining potential entrants in the market, Sprint Nextel and

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<sup>212</sup> MTA Wireless Petition to Deny at 6.

<sup>213</sup> ACS Wireless September 6, 2006 Comments at 19-20.

<sup>214</sup> Applicants September 13, 2006 Joint Response at 22-23. *See also DOJ/FTC Merger Guidelines* at Section 2.211.

<sup>215</sup> Applicants March 1, 2006 Joint Opposition at 7-9.

<sup>216</sup> Pro Forma Application at Exhibit 1.



Lewis and Clark Communications holding the PCS D and F blocks, respectively.<sup>217</sup> Further, Alaska Native Wireless, Sprint Nextel, and Lewis and Clark hold other PCS licenses that cover other local markets in Alaska. These licensees currently do not provide facilities-based service in Alaska and therefore are potential entrants. Second, the ability of a potential competitor in disciplining the market in the near term is limited. In order for a potential entrant to mitigate any anticompetitive effects entry needs to occur in a timely and sufficient manner.<sup>218</sup> In previous orders, the Commission has considered other licensed firms' abilities to reposition themselves if the merged entity exercises market power.<sup>219</sup> There is no evidence presented in the record that indicates that, absent this transaction, GCI has plans for the near-term future to enter the market as a facilities-based mobile telephony provider.

76. After reviewing the agreements submitted into the record, we conclude that GCI's and Alaska DigiTel's relationships with other carriers is unlikely, post-transaction, to provide either GCI or Alaska DigiTel with the incentive or ability to raise prices, reduce service quality, or restrict output in the mobile telephony market. Post-transaction, GCI will continue to resell Dobson mobile telephony services subject to the *Resale Agreement* which includes restrictions on the [REDACTED] for those services.<sup>220</sup> Therefore post-transaction, consumers will continue to choose from three independent actual competitors – Alaska DigiTel, ACS Wireless, and Dobson – as well as GCI as a reseller. Further, in each of the four CMAs in Alaska, [REDACTED].<sup>221</sup> Therefore, it is unlikely that, post-transaction, GCI or Alaska DigiTel would be able to successfully unilaterally raise price or reduce service in any relevant market in Alaska.

#### b. Coordinated Effects

77. We also examined the transaction for possible coordinated effects. As discussed in previous orders, in markets where only a few firms account for most of the sales of a product, those firms may be able to exercise market power by either explicitly or tacitly coordinating their

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<sup>217</sup> MTA Wireless Petition to Deny at 6; Declaration of Carolyn Hanson filed on behalf of Matanuska-Kenai, Inc., d/b/a MTA Wireless (Feb. 15, 2006) (“Hanson February 15, 2006 Declaration”) at 2 ¶ 6.

<sup>218</sup> *DOJ/FTC Merger Guidelines* at § 3.

<sup>219</sup> See *ALLTEL-Midwest Order*, FCC 06-146 at 26-27 ¶¶ 50-52; *Sprint-Nextel Order*, 20 FCC Rcd at 14007-10 ¶¶ 108-114, 118; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13079-81 ¶¶ 65-72, 13094-5 ¶¶ 112-113; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21575-6 ¶¶ 134-137, 21593-4 ¶¶ 185-186. Also, the *ALLTEL-Western Wireless Order* concluded that generally new entrants are unable to enter in a timely or sufficient manner to discipline the market. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13085 ¶ 84.

<sup>220</sup> See *Resale Agreement* Art. I, 2(a), 3(b)(iv).

<sup>221</sup> Using June 2006 NRUF data and excluding GCI's subscribers from market share calculations, [REDACTED].

actions.<sup>222</sup> Accordingly, one way in which a transaction or merger may create or enhance market power or facilitate its exercise is by making such coordinated interaction among firms more likely, more successful, or more complete.<sup>223</sup> Successful coordination depends on two key factors. The first is the ability to reach terms that are profitable for each of the firms involved, and the second is the ability to detect and punish deviations that would undermine the coordinated interaction.<sup>224</sup>

78. MTA Wireless argues that this transaction requires an analysis of potential coordinated interaction because there is a loss of a competitor in the Anchorage market<sup>225</sup> and the relationship between Dobson and GCI meets the Commission's test for explicit and tacit collusion.<sup>226</sup> Further, MTA Wireless and ACS Wireless contend that the *Lease Agreements* and the *Resale Agreement* reflect an extraordinary degree of cooperation between GCI and Dobson.<sup>227</sup> In particular, they argue that the recitals to the *Resale Agreement* reflect a larger cooperative agreement between GCI and Dobson that encompasses [REDACTED], and that the individual agreements are "of greater value when taken together than the sum of each arrangement separately."<sup>228</sup> MTA Wireless and ACS Wireless argue that the parties have agreed to [REDACTED].<sup>229</sup> [REDACTED].<sup>230</sup> [REDACTED].<sup>231</sup>

79. MTA Wireless also argues that the *Lease Agreements*, the *Resale Agreement*, and the *Letter of Intent* show the extent of cooperation between GCI and Dobson, and concludes that

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<sup>222</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 29 ¶ 60; *Sprint-Nextel Order*, 20 FCC Rcd at 13995 ¶ 69; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13085 ¶ 85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21580 ¶¶ 150; *DOJ/FTC Merger Guidelines* § 0.1.

<sup>223</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 29 ¶ 60; *Sprint-Nextel Order*, 20 FCC Rcd at 13995 ¶ 69; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13085 ¶ 85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21580 ¶ 150.

<sup>224</sup> See *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 29 ¶ 60; *Sprint-Nextel Order*, 20 FCC Rcd at 13995 ¶ 69; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13085 ¶ 85; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21580 ¶ 151; *DOJ/FTC Merger Guidelines* § 2.11.

<sup>225</sup> MTA Wireless Petition to Deny at 14; MTA Wireless March 13, 2006 Reply at 11.

<sup>226</sup> MTA Wireless July 24, 2006 Comments at 18-19.

<sup>227</sup> MTA Wireless July 24, 2006 Comments at 9-10, 17-18; ACS Wireless September 6, 2006 Comments at 8.

<sup>228</sup> MTA Wireless July 24, 2006 Comments at 10; ACS Wireless September 6, 2006 Comments at 9.

<sup>229</sup> MTA Wireless July 24, 2006 Comments at 17; MTA Wireless September 6, 2006 Comments at 24; ACS Wireless September 6, 2006 Comments at 9-11. The *Resale Agreement* provisions include: [REDACTED]. See *Resale Agreement*; MTA Wireless July 24, 2006 Comments at 11-14. Further, GCI uses the spectrum leasing agreements as a means to meet its construction deadlines. See MTA Wireless July 24, 2006 Comments at 15-16; see also paras.87-90, *infra*. ]

<sup>230</sup> MTA Wireless July 24, 2006 Comments at 17.

<sup>231</sup> ACS Wireless September 6, 2006 Comments at 11.

the strategic relationship between Dobson and GCI represents coordinated interaction of direct competitors.<sup>232</sup> MTA Wireless claims that Dobson [REDACTED].<sup>233</sup>

80. ACS Wireless argues that, post-transaction, GCI would have a significant incentive and ability to coordinate with other firms.<sup>234</sup> Further, ACS Wireless argues that, given the relationship between GCI and Dobson, any explicit or tacit collusive behavior would have a significant impact on the mobile telephony market in Alaska. ACS Wireless also argues that GCI would have strong financial incentives to coordinate its GCI-branded offering with Alaska DigiTel and would not treat Alaska DigiTel as a fully separate competitor.<sup>235</sup> ACS Wireless contends that GCI's 78 percent ownership interest in Alaska DigiTel gives GCI incentives to minimize direct product or service competition wherever possible. Further, ACS Wireless claims that it would not be in GCI's interest to cannibalize its own wireless service, especially its bundled service offerings, because GCI needs to offer its own wireless product in its bundled services to compete effectively. Therefore, according to ACS Wireless, if GCI, through its investment, does strengthen Alaska DigiTel, it is likely to do so in a coordinated manner.<sup>236</sup>

81. The Applicants argue that although there are areas where Dobson and GCI are coordinating, they do not have an adverse effect on the public, and that GCI can and does compete against Dobson for retail customers. Further, the Applicants assert that Dobson and GCI have entered into arms-length agreements with each other that cover a full range of products and services. However, the Applicants argue that MTA Wireless and ACS Wireless have failed to prove that these types of agreements are anticompetitive under the *DOJ/FTC Merger Guidelines*.<sup>237</sup> Also, the Applicants contend that, in Anchorage, neither GCI nor Alaska DigiTel would be one of the two leading carriers, and therefore the transaction would be unlikely to facilitate coordinated interaction. Finally, the Applicants argue that neither MTA Wireless nor ACS Wireless has provided any evidence that coordinated interaction has or would take place as a result of this transaction.<sup>238</sup>

82. As a result of our analysis, we do not find that there would be an increased likelihood of coordinated interaction due to a loss of an actual, facilities-based service provider

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<sup>232</sup> MTA Wireless July 24, 2006 Comments at 14, 17; MTA Wireless September 25, 2006 Comments at 1-5. MTA Wireless and ACS Wireless argue that the *Letter of Intent* further supports their claims of a close coordinated relationship between Dobson and GCI. See MTA Wireless September 25, 2006 Comments at 1-5; ACS Wireless September 27, 2006 Comments at 2-4. See also paras. 50-54, *supra*.

<sup>233</sup> MTA Wireless July 24, 2006 Comments at 14-15.

<sup>234</sup> ACS Wireless September 6, 2006 Comments at 13.

<sup>235</sup> ACS Wireless July 21, 2006 Comments/Petition at 8-9; ACS Wireless September 6, 2006 Comments at 35.

<sup>236</sup> ACS Wireless July 21, 2006 Comments/Petition at 8-9.

<sup>237</sup> Applicants September 13, 2006 Joint Response at 16-18.

<sup>238</sup> Applicants September 13, 2006 Joint Response at 21-22 (citing the *Sprint-Nextel Order*, 20 FCC Rcd at 13999 ¶ 85).

as a result of this transaction.<sup>239</sup> Further, we find that the existing relationship between Dobson and GCI is not a result of this transaction, and that allegations raised by MTA Wireless and ACS Wireless are not transaction specific. However, we find that coordinated interaction would be more likely and more successful because of certain provisions of the *Resale Agreement* combined with GCI's seat on Alaska DigiTel's Board of Managers.

83. From our review of the *Resale Agreement*, certain provisions indicate that GCI's investment in Alaska DigiTel/Denali may provide the ability and incentive for coordinated interaction. In order to meet various *Resale Agreement* provisions, GCI has [REDACTED] may provide an opportunity for coordinated interaction between Dobson and Alaska DigiTel through GCI as a conduit of market-sensitive information.<sup>240</sup> GCI also receives other information about [REDACTED].<sup>241</sup> [REDACTED].<sup>242</sup> [REDACTED].<sup>243</sup>

84. Further, pursuant to the *Resale Agreement*, both Dobson and GCI have "relationship Officers" that provide for the easy exchange of information regarding [REDACTED].<sup>244</sup> In addition, the *Resale Agreement* [REDACTED].<sup>245</sup>

85. Whether coordinated interaction would be more likely or successful is directly affected by the proposed structure of GCI/Alaska DigiTel/Denali. We have reviewed the GCI/Alaska DigiTel/Denali *Operating Agreement* and *Management Agreement* to determine the extent of involvement by GCI in the proposed management of Alaska DigiTel and whether this involvement would provide a conduit for information concerning Dobson's future prices and service plans to be passed on to Alaska DigiTel. Our review indicates that this transaction would increase the potential for coordinated interaction. Due to the information that GCI receives about Dobson under the *Resale Agreement*, along with its position on Alaska DigiTel's Board of Managers, it is possible for market-sensitive information to be conveyed between Alaska DigiTel, GCI, and Dobson, which could result in coordinated interaction among these service providers. Thus, we impose conditions to eliminate concerns that this transaction could increase the potential for coordinated interaction.<sup>246</sup>

#### 4. Other Considerations

86. In this section, we consider the potential vertical or other non-horizontal harms of the proposed transaction. A vertical merger is one that occurs between firms at different but

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<sup>239</sup> See paras. 34-35, 65, *supra*..

<sup>240</sup> *Resale Agreement* at Art. I, 3(b)(v).

<sup>241</sup> *Resale Agreement* at Art. I, 4, 7, and 9.

<sup>242</sup> *Resale Agreement* at Art. I, 10(a)(ii).

<sup>243</sup> *Resale Agreement* at Art. I, 10(a)(iii); Billing Access Agreement.

<sup>244</sup> *Resale Agreement* at Art. I, 8(a)(i).

<sup>245</sup> *Resale Agreement* at Art. I 8(a)(ii).

<sup>246</sup> See discussion Part V, *supra*.

adjacent levels of production or distribution of a good or service.<sup>247</sup> Several potential non-horizontal harms were raised in the record. These potential non-horizontal harms include spectrum warehousing, roaming, tying of wholesale transport over GCI's submarine cables with roaming, and predatory pricing, and each is analyzed below.

**a. Spectrum Warehousing**

87. MTA Wireless and ACS Wireless contend that GCI is "warehousing" the spectrum associated with its broadband PCS license because GCI itself is only using that spectrum to provide fixed wireless service.<sup>248</sup> MTA Wireless contends that GCI instead should be using the PCS spectrum to provide mobile telephony service because of its particular suitability for that purpose, and because other spectrum not as well-suited for mobile services could be used to provide fixed wireless services.<sup>249</sup> MTA Wireless also claims that the spectrum leasing between GCI and Dobson further illustrates GCI's close ties to Dobson in that it ensured that GCI would meet its build-out requirement without investing in its own facilities-based network.<sup>250</sup> Although MTA Wireless acknowledges that GCI has not committed any "technical infractions" in its use of PCS spectrum, MTA Wireless nonetheless contends that GCI's action does not eliminate "the effect of warehousing this spectrum from its original and primary intended use – mobile telephony."<sup>251</sup> MTA Wireless requests that the Commission require GCI to divest 20 MHz of its PCS license as well as the 15 MHz of the Denali license because this spectrum is not currently being used to provide mobile telephony service.<sup>252</sup> ACS Wireless requests that the Commission require some divestiture of spectrum to reduce post-transaction spectrum concentration.<sup>253</sup>

88. In response, the Applicants assert that the Commission's rules do not require that a broadband PCS license be used to provide mobile telephony services, and expressly permit the use of that license to provide fixed wireless service.<sup>254</sup> As for MTA Wireless's claims about

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<sup>247</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) ("Economic arrangements between companies standing in a supplier-customer relationship are characterized as 'vertical.'").

<sup>248</sup> MTA Wireless Petition to Deny at 12-15; MTA Wireless March 13, 2006 Reply at 12; ACS Wireless September 6, 2006 Comments at 18-20. The Alaska Telephone Association alleges that GCI desires to "hoard statewide, wireless spectrum in Alaska by acquiring a 'non-controlling' 78% ownership of Alaska DigiTel." Alaska Telephone Association Comments at 2.

<sup>249</sup> See MTA Wireless Petition to Deny at 12.

<sup>250</sup> MTA Wireless July 24, 2006 Comments at 15; MTA Wireless December 4, 2006 Comments at 4.

<sup>251</sup> MTA Wireless March 13, 2006 Reply at 13.

<sup>252</sup> MTA Wireless August 2, 2006 Comments at 10-11; MTA Wireless December 4, 2006 Comments at 4. MTA Wireless argues that this capacity should be made available for lease or acquisition. MTA Wireless December 4, 2006 Comments at 5.

<sup>253</sup> ACS Wireless September 6, 2006 Comments at 37.

<sup>254</sup> Applicants March 13, 2006 Joint Opposition at 16.

spectrum leasing, the Applicants point out that Commission rules expressly allow it to rely on any build-out by its spectrum lessee to meet the licensee's construction requirements.<sup>255</sup>

89. We find that the record and the Commission's rules do not support the relief requested by MTA Wireless and ACS Wireless. With regard to allegations that GCI is warehousing its spectrum because it is providing fixed service, the Commission's broadband PCS service rules expressly permit the provision of fixed services on a co-primary basis with mobile services.<sup>256</sup> In 1996, the Commission found that Commercial Mobile Radio Services ("CMRS") carriers should have this flexibility in order to provide innovative wireless services and to stimulate wireless competition in the local exchange market.<sup>257</sup> The Commission also has determined that CMRS carriers could provide exclusively fixed services.<sup>258</sup>

90. The allegations regarding GCI's spectrum lease with Dobson similarly are not based on any violation of the Commission's buildout policies. The Commission's secondary markets rules expressly permit a licensee to rely on any buildout performed by its spectrum lessee in order to meet applicable construction requirements pertaining to the license.<sup>259</sup> Finally, Commission records show that GCI filed in a timely manner its five-year and ten-year

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<sup>255</sup> Applicants August 8, 2006 Joint Opposition at 23-24.

<sup>256</sup> Section 24.3 of the Commission's rules states: "PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided on a co-primary basis with mobile operations. Broadcasting as defined in the Communications Act is prohibited." 47 C.F.R. §24.3.

<sup>257</sup> See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *Second Report and Order and Order on Reconsideration*, 15 FCC Rcd 14680, 14681(2000) ("*CMRS Flex Second R&O*") (citing Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, 8977 ¶ 24 (1996)).

<sup>258</sup> In this regard, the Commission has stated that, "[b]y not having any thresholds or ceilings on the relative levels of fixed or mobile services associated with the term 'co-primary,' the Commission allowed providers to choose to provide exclusively fixed services, exclusively mobile services, or any combination of the two." *CMRS Flex Second R&O*, 15 FCC Rcd at 14681 n.4.

<sup>259</sup> See generally Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order*, 18 FCC Rcd 20604 (2003) ("*Secondary Markets First R&O*"), at 20653 ¶¶ 114-115 (spectrum manager leases), 20665 ¶ 146 (long-term *de facto* transfer leases); see also 47 CFR § 1.1920(d)(5)(i) (spectrum manager leases), 1.9030(d)(5)(i) (long-term *de facto* transfer leases). GCI and Dobson have entered into a long-term *de facto* transfer leasing arrangement. In establishing the spectrum leasing rules in 2003, the Commission expressly stated that "[w]e will allow licensees using [the long-term *de facto* transfer] leasing option to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization." *Secondary Market First R&O*, 18 FCC Rcd at 20665 ¶ 147; see also 47 C.F.R. § 1.9030(d)(i) (rules pertaining to *de facto* transfer leasing arrangements provides that "[t]he licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable build-out or performance requirement").

construction notifications, and that GCI has met the applicable construction requirements.<sup>260</sup> Based on the filings before us, we believe that GCI was relying on the buildout by its spectrum lessee Dobson to meet the ten-year construction requirement.<sup>261</sup>

**b. Roaming**

91. Roaming occurs when the subscriber of one CMRS provider travels beyond the service area of that provider and utilizes the facilities of another CMRS provider to place an outgoing call, to receive an incoming call, or to continue an in-progress call.<sup>262</sup> A subscriber may establish a roaming arrangement with a CMRS provider “manually” by personally entering into a contractual agreement with that provider for the right to roam on its network (e.g., giving the provider a credit card number to pay for roaming charges).<sup>263</sup> In contrast, “automatic” roaming involves an agreement between two carriers and allows all of the subscribers of a carrier to make calls on the network of the other without taking any action beyond the making of the call.<sup>264</sup> Thus, automatic roaming is more convenient for a subscriber than manual roaming and, as a practice, has become increasingly widespread.<sup>265</sup>

92. Section 20.12 of the Commission’s rules imposes on CMRS providers the obligation to provide manual roaming arrangements to the subscriber of another provider on request.<sup>266</sup> This rule does not impose any obligation to provide automatic roaming

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<sup>260</sup> For its five-year notification in June 2000, GCI reported that it had constructed a fixed wireless network in Anchorage, Alaska. *See* Notification of Construction of KNLF298 by GCI Communication Corporation, ULS File No. 0000175068 (filed June 23, 2000). This network consisted of three sites and covered over one-third of the population of MTA049-Alaska. For its ten-year construction notification in May 2005, GCI reported that it met its buildout obligations based on a constructed GSM network that covered over two-thirds of the population of MTA049-Alaska. *See* Notification of Construction of KNLF298 by GCI Communication Corporation ULS File No. 0002181339 (filed May 31, 2005). GCI’s ten-year notification does not specify whether it is providing a mobile or a fixed service, but its filing demonstrates a sufficient signal strength to serve two-thirds of the population in its licensed area regardless of whether the service is fixed or mobile.

<sup>261</sup> [REDACTED].

<sup>262</sup> *See DoCoMo-Guam Cellular Order*, FCC 06-167, at 22 ¶ 33; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13090 ¶ 101; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21586 ¶ 166; *see also* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Service, WT Docket No. 05-265, 00-193, *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 15047, 15048 ¶ 2 (2005) (“*Roaming Notice*”).

<sup>263</sup> *Roaming Notice*, 20 FCC Rcd at 15049 ¶ 3.

<sup>264</sup> *Id.*

<sup>265</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21588-89 ¶ 174.

<sup>266</sup> 47 C.F.R. § 20.12(c) provides: “Each carrier subject to this section must provide mobile radio service upon request to all subscribers in good standing to the services of any carrier subject to this section, including roamers, while such subscribers are located within any portion of the licensee’s licensed service (continued....)”

arrangements.<sup>267</sup> The Commission is currently reviewing whether roaming requirements applicable to CMRS providers should be modified given the current state of the CMRS market.<sup>268</sup>

93. MTA Wireless, which provides service using a CMDA air interface, argues that it is important for regional carriers to have access to an array of mobile telephony carriers in order to negotiate roaming agreements.<sup>269</sup> Further, MTA Wireless argues that carriers with state-wide licenses, such as GCI, can build out their networks to reduce roaming expenses and over time be in a position to refuse to negotiate roaming agreements with regional carriers.<sup>270</sup> MTA Wireless claims that it has had difficulty in securing roaming agreements within Alaska as well as in the Lower 48, and that post-transaction the collaboration between Alaska DigiTel, GCI, and Dobson will further limit its ability to secure neutral roaming terms.<sup>271</sup> MTA Wireless concurs with ACS Wireless's contention that approval of the applications should be conditioned in a manner that prevents GCI from aggregating an overwhelming amount of spectrum in the Anchorage market.<sup>272</sup> MTA Wireless further adds that it would be reasonable for the Commission to require GCI to divest itself of the 15 MHz of PCS capacity previously leased to Denali and of GCI's own unused 20 MHz of statewide PCS spectrum that it has not leased to Dobson or any other party.<sup>273</sup> Finally, MTA Wireless requests that the Commission condition its approval of this transaction on GCI-Alaska DigiTel providing data roaming services on request and on commercially reasonable, nondiscriminatory terms.<sup>274</sup>

(Continued from previous page) \_\_\_\_\_

area where facilities have been constructed and service to subscribers has commenced, if such subscribers are using mobile equipment that is technically compatible with the licensee's base stations."

<sup>267</sup> *Id.*

<sup>268</sup> *Roaming Notice*, 20 FCC Rcd at 15048 ¶ 2.

<sup>269</sup> Hanson February 15, 2006 Declaration at 3 ¶ 10; Kenshalo March 13, 2006 Declaration at 4 ¶ 7; MTA Wireless August 2, 2006 Comments at 2-3.

<sup>270</sup> Hanson February 15, 2006 Declaration at 3 ¶ 9; Kenshalo March 13, 2006 Declaration at 3-4 ¶¶ 5, 7;

<sup>271</sup> Declaration of Richard Kenshalo filed on behalf of MTA Communications, Inc., d/b/a MTA Wireless (Aug. 2, 2006) ("Kenshalo August 2, 2006 Declaration") at 3 ¶ 6; MTA Wireless July 24, 2006 Comments at 20.

<sup>272</sup> MTA Wireless August 2, 2006 Comments at 10; ACS Wireless July 21, 2006 Comments/Petition at 15.

<sup>273</sup> MTA Wireless August 2, 2006 Comments at 11; MTA Wireless December 4, 2006 Comments at 4. MTA Wireless argues that this capacity should be made available for lease or acquisition. MTA Wireless December 4, 2006 Comments at 5.

<sup>274</sup> MTA Wireless December 4, 2006 Comments at 5.



94. The Commission in previous orders found that existing rules address many of these concerns.<sup>275</sup> Our manual roaming rule requires other carriers to complete calls initiated by MTA Wireless's customers where MTA Wireless cannot because it has neither its own signal nor an automatic roaming agreement.<sup>276</sup> In addition, we adopt as a condition to our grant in this order a reciprocal duty, *i.e.*, that Alaska DigiTel may not prevent its customers from reaching another carrier and completing their calls in these circumstances, unless specifically requested to do so by a subscriber.<sup>277</sup> We decline to impose any additional roaming obligations upon the Applicants. We also note that if a roaming partner believes that Alaska DigiTel is charging unreasonable roaming rates, it can file a complaint with the Commission under section 208 of the Communications Act.<sup>278</sup>

**c. Submarine Cable**

95. Another issue raised by MTA Wireless and ACS Wireless concerns how GCI's ownership of two of the three submarine cables used for wholesale transport of communications to the Lower 48 States should affect review of the proposed transaction.

96. Specifically, GCI is the owner and submarine cable landing licensee for the Alaska United East and Alaska United West submarine cables.<sup>279</sup> The cables land at or near Seward, Whittier, Valdez and Juneau, Alaska, Warrenton, Oregon, and Seattle, Washington, and use long-term leased capacity to connect GCI's network in Anchorage with the Seward cable landing station and to connect GCI's network in Seattle with the Warrenton cable landing

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<sup>275</sup> *ALLTEL-Midwest Order*, FCC Rcd 06-146 at 38 ¶ 103; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 127; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13093 ¶ 108; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182.

<sup>276</sup> See 47 C.F.R. § 20.12; see also *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 127; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13093 ¶ 108; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182.

<sup>277</sup> See *ALLTEL-Midwest Order*, FCC Rcd 06-146 at 38 ¶ 103; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 127; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13093 ¶ 108; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182.

<sup>278</sup> 47 U.S.C. § 208. See also *ALLTEL-Midwest Order*, FCC Rcd 06-146 at 38 ¶ 103; *Sprint-Nextel Order*, 20 FCC Rcd at 14012-13 ¶ 127; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13093 ¶ 108; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21592 ¶ 182.

<sup>279</sup> See *Alaska United East Order*, 12 FCC Rcd 18292, *Order on Review*, 16 FCC Rcd 4314; General Communication, Inc., File No. SCL-97-003A, Landing Points Notification, *Public Notice*, Report No. TEL-161-B (IB June 12, 1998); Alaska United Fiber System Partnership, File No. SCL-LIC-20020522-00047, Submarine Cable Landing License, *Public Notice*, Actions Taken Under Cable Landing License Act, 17 FCC Rcd 14780 (IB 2002) ("*Alaska United West Public Notice*") (authorizing Alaska United West as a non-common carrier cable); Alaska United Fiber System Partnership, File No. SCL-LPN-20030912-00026, Landing Points Notification, *Public Notice*, Report No. TEL-00716NS (IB Sept. 26, 2003). The two GCI cables operate in a ring configuration. See *Alaska United West Public Notice*, 17 FCC Rcd at 14781.

station.<sup>280</sup> A third fiber optic cable, the Alaska Northstar submarine cable, competes with GCI for traffic on the Alaska-Pacific Northwest route.<sup>281</sup> All three cables operate on a non-common carrier basis.<sup>282</sup> Fixed-Satellite Service providers also offer transponder capacity that may be used for services to, from and within Alaska.<sup>283</sup>

97. ACS Wireless and MTA Wireless claim that this transaction would provide GCI with the ability and incentive to tie<sup>284</sup> its wholesale transport service between Alaska and the Lower 48 with roaming service in Alaska.<sup>285</sup> In order to ameliorate this potential harm, ACS Wireless and MTA Wireless propose that the Commission change the status of GCI's submarine

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<sup>280</sup> See GCI Form 10-K at 19.

<sup>281</sup> See GCI 10-K at 26. See also Alaska Telecom Ltd., LC, Application for a License to Land and Operate a Submarine Fiber Optic Cable between the Pacific Northwest United States and the State of Alaska, File No. SCL-94-004, *Cable Landing License*, 10 FCC Rcd 6072 (IB 1995) (“*Alaska Northstar Order*”); Alaska Northstar Communications, LLC, Application for a License to Land and Operate a Submarine Cable Fiber Optic Cable Extending between Two Cable Landing Points in South Central Alaska, *Cable Landing License*, 11 FCC Rcd 16842 (IB 1996) (“*Whittier-Valdez Order*”); Alaska Northstar Communications, LLC, Transferor, and WCI Cable, Inc., Transferee, Application for Modification of Submarine Cable Landing Licenses, File Nos. SCL-94-004-TC and SCL-96-002-TC, *Memorandum Opinion and Order*, 12 FCC Rcd 20330 (IB 1997); AMP Life Limited, Transferor, and Neptune Communications LLC, Transferee, File Nos. SCL-T/C-20020123-00002 and SCL-ASG-20020123-00003, Transfer of Control, *Public Notice*, Cable Landing Licenses Granted, 17 FCC Rcd 6053 (IB 2002); Northstar License Corporation, File No. SCL-T/C-20030130-00007, Transfer of Control, *Public Notice*, International Authorizations Granted, Report No. TEL-00646, 18 FCC Rcd 4524 (IB 2003). The cable lands at or near Whittier, Valdez, and Juneau, Alaska, and Nedonna Beach, Oregon.

<sup>282</sup> *Alaska United East Order*, 12 FCC Rcd at 18298 ¶ 21; *Alaska United West Public Notice*, 17 FCC Rcd at 14781; *Alaska Northstar Order*, 10 FCC Rcd at 6072-73 ¶ 6, *Whittier-Valdez Order*, 11 FCC Rcd at 16844-45 ¶ 9.

<sup>283</sup> See, e.g., Constellation, LLC, Carlyle PanAmSat I, LLC, Carlyle PanAmSat II, LLC, PEP PAS, LLC, and PEOP PAS, LLC, Transferors, and Intelsat Holdings, Ltd., Transferees, Consolidated Application for Authority to Transfer Control of PanAmSat Licensee Corp. and PanAmSat H-2 Licensee Corp., IB Docket No. 05-290, *Memorandum Opinion and Order*, FCC 06-85 (June 19, 2006), at ¶¶ 70 n.200, 71 n.203 (six Intelsat, eight PanAmSat, and ten SES Americom satellites serve, or soon will serve, Alaska for the provision of voice, data, broadband, and cable television services).

<sup>284</sup> Tying occurs when a customer can buy a product or service only if another product or service in which the seller has an economic interest is also purchased. See DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 247-51 (3<sup>rd</sup> ed. 1999) (“CARLTON & PERLOFF”); *Northern Pacific Railway Co. et al. v. United States*, 356 U.S. 1, 5-6 (1958). Even in the absence of an express requirement to buy both, tying may be found if the seller's pricing policy makes purchase of the two products together the only viable economic option. *United States v. Loew's Inc.*, 317 U.S. 38, 52 (1962).

<sup>285</sup> ACS Wireless July 21, 2006 Comments/Petition at 13-14; Declaration of Robert Doucette filed on behalf of ACS Wireless, Inc. (July 21, 2004) (“Doucette July 21, 2006 Declaration”) at 4-5 ¶ 18; ACS Wireless August 14, 2006 Comments at 1-2; ACS Wireless September 6, 2006 Comments at 3, 22; ACS Wireless December 4, 2006 Comments at 3, 6; MTA Wireless August 2, 2006 Comments at 2.

cables from private line to common carrier,<sup>286</sup> and prohibit GCI from tying wholesale transport and roaming services.<sup>287</sup>

98. ACS Wireless and MTA Wireless contend that GCI's ownership of two of the three submarine fiber optic cables that connect Alaska to the Lower 48 gives GCI dominant market strength in the provision of wholesale transport services because construction of new submarine cables by other carriers is cost-prohibitive; and satellite technology is not an effective substitute for fiber-based transport because of latency and cost issues, especially for data transmissions.<sup>288</sup> Further, ACS Wireless and MTA Wireless argue that GCI has a monopoly on redundant transport facilities to the Lower 48 required by certain customers, such as the banking industry and the military.<sup>289</sup> ACS Wireless also argues that special access transport service is strategically important because of the growth in data, Internet and other private line traffic.<sup>290</sup>

99. ACS Wireless and MTA Wireless claim that GCI could use its control over Alaska DigiTel to restrict competition in the roaming market, in several ways.<sup>291</sup> First, GCI could offer Lower 48 carriers a "sweetheart deal" on roaming if the carriers use GCI for wholesale transport.<sup>292</sup> Further, GCI could anti-competitively tie wholesale transport and roaming through coercion,<sup>293</sup> below-cost pricing of either transport or roaming services,<sup>294</sup> in contract negotiations,<sup>295</sup> and through deals offered to integrated wireline and wireless carriers.<sup>296</sup>

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<sup>286</sup> ACS Wireless July 21, 2006 Comments/Petition at 16-17; Doucette July 21, 2006 Declaration at 5 ¶ 19; ACS Wireless September 6, 2006 Comments at 4, 38; MTA Wireless August 2, 2006 Comments at 11.

<sup>287</sup> ACS Wireless September 6, 2006 Comments at 4, 38; ACS Wireless December 4, 2006 Comments at 4, 6.

<sup>288</sup> ACS Wireless July 21, 2006 Comments/Petition at 10-13, n.56; Doucette July 21, 2006 Declaration at 3 ¶¶ 11-12; MTA Wireless August 2, 2006 Comments at 3; Kenshalo August 2, 2006 Declaration at 1-2 ¶¶ 2-4; ACS Wireless September 6, 2006 Comments at 22; ACS Wireless December 4, 2006 Comments at 6.

<sup>289</sup> ACS Wireless July 21, 2006 Comments/Petition at 12-13; Doucette July 21, 2006 Declaration at 3-4 ¶¶ 13-14; MTA Wireless August 2, 2006 Comments at 2-3; Kenshalo August 2, 2006 Declaration at 2 ¶ 5.

<sup>290</sup> ACS Wireless July 21, 2006 Comments/Petition at 13-14; ACS Wireless August 14, 2006 Comments at 2.

<sup>291</sup> ACS Wireless July 21, 2006 Comments/Petition at 13.

<sup>292</sup> ACS Wireless July 21, 2006 Comments/Petition at 13; Doucette July 21, 2006 Declaration at 4-5 ¶ 18; ACS Wireless August 14, 2006 Comments at 2.

<sup>293</sup> GCI could coerce carriers that require wholesale transport between Alaska and the Lower 48 to use GCI for roaming. ACS Wireless July 21, 2006 Comments/Petition at 13.

<sup>294</sup> ACS Wireless July 21, 2006 Comments/Petition at 14; ACS Wireless August 14, 2006 Comments at 2; Doucette July 21, 2006 Declaration at 4-5 ¶ 18.

<sup>295</sup> Doucette July 21, 2006 Declaration at 4-5 ¶ 18; ACS Wireless September 6, 2006 Comments at 22.

<sup>296</sup> Doucette July 21, 2006 Declaration at 4-5 ¶ 18.

100. ACS Wireless argues that provisions in the *Resale Agreement*, the *Letter of Intent*, and the *Operating Agreement* further support its allegation that, post-transaction, GCI is likely to tie transport and roaming. According to ACS Wireless, under the *Resale Agreement*, GCI has already implemented a strategy to [REDACTED].<sup>297</sup> ACS Wireless also argues that GCI can bundle Dobson's wireless services with its own services at a blended rate. Further, ACS Wireless argues that the *Operating Agreement* aligns GCI's and Alaska DigiTel's financial interests through the sharing of Alaska DigiTel's profits and losses and the consolidation of the two companies' financial statements, and that this consolidation would permit any losses from pricing one service below cost to be offset by gains from the other bundled services.<sup>298</sup> ACS Wireless also argues that GCI has the ability to charge below-cost prices for transport services because Section 112 of Title I of Division J of the Consolidated Appropriations Act, 2005 does not affect GCI's prices for interstate special access services, and therefore GCI would have flexibility to offer below-cost transport pricing if it ties wholesale transport and roaming services.<sup>299</sup>

101. In addition, ACS Wireless claims that there is no prohibition in the *Operating Agreement* to prevent GCI from bundling its and Alaska DigiTel's services.<sup>300</sup> ACS Wireless also claims that the *Letter of Intent* shows that GCI is already employing strategies to [REDACTED].<sup>301</sup> ACS Wireless and MTA Wireless argue that in the *Letter of Intent*, Dobson and GCI commit to enter negotiations to [REDACTED].<sup>302</sup>

102. ACS Wireless requests the Commission consider barring GCI from tying wholesale transport and roaming.<sup>303</sup> Further, ACS Wireless and MTA Wireless argue that the Commission should initiate a proceeding to reclassify GCI's cable landing licenses as common carrier licenses to prevent GCI from tying its wholesale transport and roaming services, based on changes in market circumstances since GCI obtained its submarine cable licenses, including increased demands for data transmission and redundancy.<sup>304</sup> ACS Wireless and MTA Wireless

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<sup>297</sup> ACS Wireless [REDACTED]. ACS Wireless September 6, 2006 Comments at 23; *Resale Agreement*, Art. II, 2(a)(ii).

<sup>298</sup> ACS Wireless September 6, 2006 Comments at 22-24.

<sup>299</sup> ACS Wireless August 14, 2006 Comments at 2.

<sup>300</sup> ACS Wireless September 6, 2006 Comments at 22-23; *see also Operating Agreement* Art. 5, 5.2, 10.5.

<sup>301</sup> ACS Wireless September 27, 2006 Comments at 4.

<sup>302</sup> ACS Wireless September 27, 2006 Comments at 4; MTA Wireless September 25, 2006 Comments at 3; *see also Letter of Intent* at 2.

<sup>303</sup> ACS Wireless September 6, 2006 Comments at 4, 38.

<sup>304</sup> ACS Wireless July 21, 2006 Comments/Petition at 16-17; Doucette July 21, 2006 Declaration at 5 ¶ 19; ACS Wireless September 6, 2006 Comments at 4, 38; MTA Wireless August 2, 2006 Comments at 11.

argue that the Commission may change the regulatory status of GCI's non-common carrier licenses if it is in the public interest.<sup>305</sup>

103. The Applicants claim that ACS Wireless's arguments regarding the potential tying of wholesale transport and roaming services are speculative, and the Commission rejected a similar argument because it was based on "speculation and surmise."<sup>306</sup> Further, the Applicants argue that they have no pricing flexibility on interstate wholesale switched service elements provided over GCI's undersea cables. The Applicants claim that they are bound by the statutory pricing mechanism set forth in Section 112 of Title I of Division J of the Consolidated Appropriations Act, 2005, which codified the pricing for these service elements from the Alascom, Inc. Tariff FCC No. 11 and made the pricing applicable to GCI. The Applicants argue that ACS Wireless's request that the Commission reclassify GCI's cable landing licenses as common carrier has no place in this proceeding.<sup>307</sup> Further, the Applicants argue that the International Bureau reviewed the competitive situation in the wholesale transport market and found that GCI's submarine cable should not be licensed as common carrier.<sup>308</sup> The Applicants claim that the International Bureau's conclusions do not change as a result of this transaction, and because there are no transaction-specific effects on the transport market, the Commission should not consider these allegations. Further, the Commission has previously noted that it will not consider allegations that are not transaction-specific.<sup>309</sup>

104. We deny ACS Wireless's request that we condition our approval of this transaction on a bar against GCI's ability to tie wholesale transport service and roaming services.<sup>310</sup> Under some circumstances, the bundling or tying of two products or services may result in economic efficiencies, including consumer benefits and the lowering of production costs, although in other circumstances tying may result in competitive harms.<sup>311</sup> We find, however, that ACS Wireless and MTA Wireless have failed to provide any evidence that this transaction increases the risk of tying transport and roaming services in the future, and as such

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<sup>305</sup> ACS Wireless July 21, 2006 Comments/Petition at 16; MTA Wireless August 2, 2006 Comments at 11-12; ACS Wireless September 6, 2006 Comments at 38.

<sup>306</sup> Applicants August 4, 2006 Joint Reply at 4; Applicants September 13, 2006 Joint Response at 25-26 (citing *Cable & Wireless, PLC*, 12 FCC Rcd 17669, 17683 (1997)). The Applicants also cite the *Cingular-AT&T Wireless Order* where the Commission found claims of harms to the roaming market to be unsupported speculation. See Applicants September 13, 2006 Joint Response at 25-26.

<sup>307</sup> Applicants August 4, 2006 Joint Reply at 4.

<sup>308</sup> Applicants September 13, 2006 Joint Response at 24.

<sup>309</sup> Applicants September 13, 2006 Joint Response at 25.

<sup>310</sup> ACS Wireless September 6, 2006 Comments at 4, 38.

<sup>311</sup> See, e.g., Christian Ahlborn, David S. Evans, and A. Jorge Padilla, "The Antitrust Economics of Tying: A Farewell to Per Se Illegality," *The Antitrust Bulletin*, Spring-Summer 2004 at 318; *Jefferson Parish Hospital District No. 2 v. Edwin G. Hyde*, 466 U.S. 2 (1984) ("*Jefferson Parish*").

their tying claims amount to unsupported speculation.<sup>312</sup> In making these tying claims, neither ACS Wireless nor MTA Wireless have presented any specific allegations that GCI intends to tie the provision of wholesale transport service and roaming service in a manner that results in competitive harm.<sup>313</sup> Moreover, as discussed below, we find that adequate alternative capacity exists in the wholesale transport market to enable companies to purchase such capacity separate from roaming services.

105. We also deny the request to consider reclassification of the regulatory status of the Alaska United submarine cables at this time. ACS Wireless and MTA have not demonstrated that there is a reason to compel GCI to operate these cables on a common carrier basis.<sup>314</sup> The Commission maintains both non-common carrier and common carrier regulatory options for operating a submarine cable system.<sup>315</sup> In determining the regulatory status of a submarine cable, the Commission applies the two-part test set forth by the court in *NARUC I*.<sup>316</sup> The Commission generally has focused on the availability of alternative facilities in assessing whether to require that a submarine cable operate on a common carrier basis.<sup>317</sup> Here, as noted above, the Alaska Northstar submarine cable competes with GCI for traffic on the Alaska-Pacific Northwest route. Fixed Satellite Service providers offer additional transport capacity. In addition, Lower 48 traffic to Alaska may be able to transit Canadian facilities, as there is some

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<sup>312</sup> See *Cingular-AT&T Order*, 19 FCC Rcd at 21591 ¶ 181 (rejecting a claim by consumer protection groups that, post-merger, Cingular would have the ability and the incentive to exact discriminatory rates from roaming partners because the claim was based on unsupported speculation).

<sup>313</sup> For tying to be found illegal under the antitrust laws, courts look for the following factors at a minimum: (1) the tying and tied products or services are separate; (2) the firm effecting the tie has market power in the tying market; (3) the firm can use its market power in the tying market to “force” customers to purchase the tied product; and (4) the tying arrangement forecloses a substantial amount of interstate commerce. See, e.g., *Jefferson Parish* at 12-18. In most circumstances a court will then analyze the reasonableness of the effects of the tie, *i.e.*, whether the economic, technological or competitive effects of tying the good or services outweighs the competitive harms. See *United States v. Microsoft Corp.*, 253 F.3d 34, 89-96 (D.C. Cir. 2001); *Jefferson Parish* at 29-32.

<sup>314</sup> See *In the Matter of Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable Extending Between the United States and the United Kingdom*, File No. SCL-96-005, *Cable Landing License*, FCC 97-204, 12 FCC Rcd 17669, 17683 ¶ 38 (1997) (declining to require common carrier treatment of the proposed submarine cable facility based on unsubstantiated discrimination concerns).

<sup>315</sup> See *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, *Report and Order*, 16 FCC Rcd 22167, 22202-03 ¶ 70 (2001).

<sup>316</sup> *Id.*; see also *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (*NARUC I*), *cert. denied*, 425 U.S. 992 (1976) (whether an entity holds itself out to serve the public indifferently or whether there is a public policy reason to require the entity to hold out indifferently).

<sup>317</sup> See *Alaska United East Order*, 12 FCC Rcd at 18297 ¶ 15 (authorizing Alaska United East as a non-common carrier cable), *Order on Review*, 16 FCC Rcd at 4315-16 ¶ 4.

common carrier terrestrial microwave capacity between Alaska and Canada.<sup>318</sup> Thus, we find that adequate alternative capacity exists and the claims of competitive harm are largely speculative.

106. Should MTA Wireless or ACS Wireless have evidence at some future date that the Alaska United cable system has become a potential bottleneck or that GCI has engaged in anticompetitive conduct in providing Alaska United cable capacity, it may ask the Commission to reconsider the regulatory status of the Alaska United cables separate from this proceeding. The Commission retains the ability to reclassify a submarine cable to common carrier status if the public interest requires that the facilities be offered to the public indifferently.<sup>319</sup>

#### d. Predatory Pricing

107. ACS Wireless alleges that GCI through its relationship with Dobson and its control over Alaska DigiTel would provide it with the incentive and ability to deploy a predatory pricing strategy.<sup>320</sup> Predatory pricing occurs when a firm first lowers its price to drive its rivals out of the market as well as to deter entry, and then raises its price once its rivals exit the market.<sup>321</sup> Generally, when a firm adopts a predatory pricing strategy it sets price below some

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<sup>318</sup> See, e.g., < <http://wireless2.fcc.gov/UlsApp/UlsSearch/searchLicense.jsp> > (Alascom's facilities with call signs WFY510, WGW718 and WBA894 provide transborder links into Canada).

<sup>319</sup> In the Matter of Review of Commission Consideration of Applications Under the Cable Landing License Act, Report and Order, 16 FCC Rcd 22167, 22203 ¶ 70 n.164 (2001) (“*Submarine Cable Report and Order*”); 47 C.F.R. § 1.767(g)(10). In authorizing the Alaska United East cable in 1997, the Commission explicitly noted that its decision to grant the cable landing license to GCI on a non-common carrier basis was predicated in part on the current and planned facility alternatives on the route. *Alaska United East Order*, 12 FCC Rcd at 18298 ¶ 20 (1997), *Order on Review*, 16 FCC Rcd at 4315 ¶ 4 (alleged lack of sufficient facility/service capacity on route proven wrong). The Commission stated that, should the Alaska United East cable become a potential bottleneck facility, or should concerns be raised about anticompetitive conduct, it could consider common carrier regulation. *Id.* Moreover, the Commission imposed a recordkeeping requirement on GCI to improve the Commission's ability to monitor for any anticompetitive activity on Alaska United East. That condition requires GCI to maintain complete records including the percentage of circuits conveyed on the cable, to whom capacity is sold, and on what terms and conditions capacity is conveyed. These records are to be made available to the Commission on request. *Alaska United East Order*, 12 FCC Rcd at 18302 ¶ 33, 18304 ¶ 40(5).

<sup>320</sup> ACS Wireless September 6, 2006 Comments at 38.

<sup>321</sup> See CARLTON & PERLOFF at 334-339, 739. *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13098-99 ¶ 126; *Deutsche Telecom-VoiceStream Wireless Order*, 16 FCC Rcd at 9828-30 ¶¶ 88-92. Finding it unlikely that predatory pricing would occur in the United States mobile telephony market. The Supreme Court explained in *Matsushita Electric Industrial Co. v. Zenith Radio Corp* that “the success of such [predatory] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in excess profits. The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predators' losses and to harvest some additional gain.... For this reason, there is consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.” (continued....)

measure of cost.<sup>322</sup> ACS Wireless claims that post-transaction, GCI may package Alaska DigiTel services in its bundles or otherwise offer GCI and Alaska DigiTel services jointly.<sup>323</sup> ACS Wireless requests that the Commission bar GCI from offering any wireless services below its (GCI's) cost.<sup>324</sup> For example when GCI resells Dobson or Alaska DigiTel services, ACS Wireless argues that the Commission must require GCI to charge a price that has a positive contribution margin net of all of its costs, both direct and allocated.<sup>325</sup> Further, ACS Wireless argues that because GCI is a "passive investor" it should be prohibited from using intra-company (GCI-Alaska DigiTel) trades, in-kind payments, or eliminations in order to justify below-cost pricing.<sup>326</sup>

108. We conclude that we need not adopt such an unprecedented condition here. We are not persuaded that GCI and Alaska DigiTel would be able to engage in successful price predation. We find it unlikely that such a strategy would succeed since Dobson and ACS Wireless both have extensive network coverage and have more subscribers than GCI and Alaska DigiTel combined would have post-transaction.<sup>327</sup> Post-transaction, if GCI and Alaska DigiTel were to attempt to engage in predatory pricing, it is highly unlikely that either carrier could maintain an artificially low price for a sufficient period of time to drive out either Dobson or ACS Wireless. Finally, neither the record nor our analysis of market conditions indicates that this transaction would likely provide GCI with the ability to engage in a long-term successful price predation strategy. Therefore, we deny ACS Wireless's request to impose a condition on the price GCI could charge for its bundled services post-transaction.

### C. Public Interest Benefits

109. In addition to assessing the potential competitive harms of the GCI-Alaska DigiTel-Denali transaction, we also consider whether the proposed transaction would be likely to generate verifiable, transaction-specific public interest benefits.<sup>328</sup> In doing so, we ask whether,

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*See Matsushita Electric Industrial Co v. Zenith Radio Corp.*, 475 U.S. 574,589 (1986) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 149-155 (1978)).

<sup>322</sup> *See* CARLTON & PERLOFF at 334-339, 739.

<sup>323</sup> ACS Wireless September 6, 2006 Comments at 38.

<sup>324</sup> ACS Wireless September 6, 2006 Comments at 4, 38.

<sup>325</sup> These costs include general and administrative expenses, marketing, and handset subsidies. ACS Wireless September 6, 2006 Comments at 38-39.

<sup>326</sup> ACS Wireless September 6, 2006 Comments at 39. In-kind trades would be equivalent to barter services. *See* ACS Wireless September 6, 2006 Comments at 39 n.138. Eliminations is an accounting procedure where one affiliate may eliminate expenses and/or revenues for reporting purposes when it provides a service to another affiliate. For example if GCI provides local transport service to Alaska DigiTel, then this should appear as revenue for GCI and as an expense for Alaska DigiTel in order to calculate "true costs". *See* ACS Wireless September 6, 2006 Comments at 39 n.139.

<sup>327</sup> *See* para. 76, *supra*.

<sup>328</sup> *See, e.g., DoCoMo-Guam Cellular Order*, FCC 06-167 at 24 ¶ 39; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 105; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 182; *Verizon-MCI Order*, 20 FCC (continued....)



post-transaction, GCI and Alaska DigiTel would be able, and would be likely, to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the transaction.<sup>329</sup>

110. As discussed below, we find that the proposed transaction may result in certain transaction-specific public interest benefits. We recognize that many of these benefits may be challenging to achieve in the near future because of sizable technological and financial requirements. As a result, it is difficult for us to precisely quantify either the magnitude of or the time period in which these benefits will be realized. Further, the Applicants did not provide sufficient details and documentation of claimed benefits to enable us to arrive at a definitive conclusion regarding transaction-specific public interest benefits.

111. *Analytical Framework.* The Commission has recognized that efficiencies generated through a transaction or merger can mitigate competitive harms if such efficiencies enhance the combined entity's ability and incentive to compete and therefore result in lower prices, improved quality, enhanced service or new products.<sup>330</sup> Under Commission precedent, the Applicants bear the burden of demonstrating that the potential public interest benefits of the proposed transaction outweigh the potential public interest harms.<sup>331</sup>

112. There are several criteria the Commission applies in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction- or merger-specific. This means that the claimed benefit must be likely to be accomplished as a result of the proposed transaction or merger but unlikely to be realized by other means that entail fewer anticompetitive effects.<sup>332</sup> Second, the claimed benefit must be

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Rcd at 18530 ¶ 193; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

<sup>329</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 24 ¶ 39; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 105; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 182; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 193; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13100 ¶ 132; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 201.

<sup>330</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167 at 24-25 ¶ 41; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 107; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 183; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 194; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204; see also *DOJ/FTC Merger Guidelines* § 4.

<sup>331</sup> See, e.g., *DoCoMo-Guam Cellular Order*, FCC 06-167, at 24-25 ¶ 41; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 107; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 183; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 194; *Sprint-Nextel Order*, 20 FCC Rcd at 14013 ¶ 129; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 135; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599 ¶ 204.

<sup>332</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 25 ¶ 42; *ALLTEL-Midwest Wireless Order*, 2006 WL FCC 06-146 at 39 ¶ 108; *SBC-AT&T Order*, 20 FCC Rcd at 18384 ¶ 184; *Verizon-MCI Order*, 20 FCC Rcd at 18530 ¶ 195; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21599-600 ¶ 205; accord *Application of EchoStar Communications Corporation (A Nevada Corporation), General Motors (continued...)*

verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude.<sup>333</sup> In addition, as the Commission has noted, “the magnitude of benefits must be calculated net of the cost of achieving them.”<sup>334</sup> Furthermore, as the Commission explained in the *ALLTEL-Midwest Wireless Order* and *Cingular-AT&T Wireless Order*, “benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.”<sup>335</sup> Third, the Commission has stated that it “will more likely find marginal cost reductions to be cognizable than reductions in fixed cost.”<sup>336</sup> The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.<sup>337</sup>

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Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications Corporation (A Delaware Corporation) (Transferee), CS Docket No. 01-348, *Hearing Designation Order*, 17 FCC Rcd 20559, 20630 ¶ 189 (2002) (“*EchoStar-DirecTV HDO*”); Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, *Memorandum Opinion and Order*, 12 FCC Rcd 19985, 20063-64 ¶ 158 (“Pro-competitive efficiencies include only those efficiencies that are merger-specific, *i.e.*, that would not be achievable but for the proposed merger. Efficiencies that can be achieved through means less harmful to competition than the proposed merger . . . cannot be considered to be true pro-competitive benefits of the merger.”); Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14825 ¶ 255 (“Public interest benefits also include any cost saving efficiencies arising from the merger if such efficiencies are achievable only as a result of the merger. . . .”). *Cf. DOJ/FTC Merger Guidelines* § 4.

<sup>333</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 25 ¶ 42; *ALLTEL-Midwest Wireless Order*, 2006 FCC 06-146 at 39 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

<sup>334</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 25 ¶ 42; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13101-02 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205.

<sup>335</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 25 ¶ 42; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205 (citing *EchoStar-DirecTV HDO*, 17 FCC Rcd at 20630 ¶ 190).

<sup>336</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 25 ¶ 42; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 136; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 205. See also *DOJ/FTC Merger Guidelines* § 4.

<sup>337</sup> See *DoCoMo-Guam Cellular Order*, FCC 06-167 at 25 ¶ 42; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 39 ¶ 108; *Sprint-Nextel Order*, 20 FCC Rcd at 14014 ¶ 130; *ALLTEL-Western Wireless Order*, (continued....)

113. Finally, the Commission applies a “sliding scale approach” to evaluating benefit claims.<sup>338</sup> Under this sliding scale approach, where potential harms appear “both substantial and likely, a demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.”<sup>339</sup> On the other hand, where potential harms appear less likely and less substantial, as in this case, we will accept a lesser showing to approve the transaction.<sup>340</sup>

114. *Discussion.* The Applicants assert that the assignment of Denali’s PCS license to Alaska DigiTel and the transfer of control of a 78-percent non-controlling interest in Alaska DigiTel to GCI will yield “significant public interest benefits.”<sup>341</sup> The Applicants state that the reorganization of Alaska DigiTel and GCI’s acquisition of a 78 percent ownership interest in Alaska DigiTel “will result in an infusion of capital into [Alaska DigiTel].”<sup>342</sup> The Applicants further state that these increased resources will allow Alaska DigiTel “to improve its services to the public and to compete more effectively against other large competitors in the market.”<sup>343</sup> The Applicants also note that there will be continuity in the management of Alaska DigiTel and in the service provided to customers.<sup>344</sup>

115. In rebuttal to these claims, ACS Wireless notes that the capital infusion from GCI may create a stronger GCI/Alaska DigiTel combined entity aligned with Dobson that would concentrate spectrum and market power, thus harming rather than serving the public interest.<sup>345</sup> Applicants respond that the capital infusion will enhance the ability of Alaska DigiTel to

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20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206; *see also DOJ/FTC Merger Guidelines* § 4.

<sup>338</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 26 ¶ 43; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 40 ¶ 109; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206.

<sup>339</sup> *DoCoMo-Guam Cellular Order*, FCC 06-167 at 26 ¶ 43; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 40 ¶ 109; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 185; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 196; *ALLTEL-Western Wireless Order*, 20 FCC Rcd at 13102 ¶ 137; *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21600 ¶ 206. *Cf. DOJ/FTC Merger Guidelines* § 4 (“The greater the potential adverse competitive effect of a merger . . . the greater must be cognizable efficiencies in order for the Agency to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly large, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

<sup>340</sup> *See, e.g., DoCoMo-Guam Cellular Order*, FCC 06-16, at 26 ¶ 43; *ALLTEL-Midwest Wireless Order*, FCC 06-146 at 40 ¶ 109; *SBC-AT&T Order*, 20 FCC Rcd at 18385 ¶ 185; *Verizon-MCI Order*, 20 FCC Rcd at 18531 ¶ 195.

<sup>341</sup> Application Exhibit 1 at 4.

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *See id.*

<sup>345</sup> ACS Wireless July 24, 2006 Comments/Petition at 15.

compete against the two most dominant wireless carriers in the market, ACS Wireless and Dobson Communications, and so the transaction is pro-competitive.<sup>346</sup> Applicants also note that MTA Wireless argues in its September 7, 2006 Reply that Alaska “DigiTel will provide a vehicle for GCI to jumpstart its own state-wide system . . . [and] to develop a facilities-based system.”<sup>347</sup> This statement, the Applicants claim, contradicts the MTA Wireless argument that the proposed transaction would harm competition.

116. We find that the proposed transaction may result in the transaction-specific public interest benefits discussed above and result in the combined company being a more effective competitor. Although the Applicants did not provide sufficient details and documentation of claimed benefits to enable us to arrive at any conclusions, we accept a lesser showing to approve a transaction where potential harms appear less likely and less substantial. As discussed above, we find that this transaction would increase the potential for coordinated interaction based on various contracts entered into by and the corporate structure of GCI/Alaska DigiTel/Denali, and we have conditioned this order to ensure that such coordinated interaction does not occur.<sup>348</sup> Further, besides the contractual issues that are resolved by the imposed conditions, we find that it is unlikely that this transaction would result in any potential harm. Thus, using the sliding-scale approach described above,<sup>349</sup> we are able to conclude that this transaction is in the public interest.

## V. CONDITIONS/REMEDIES

117. Using the analytical standards outlined above, we find that the Applicants’ proposed transaction poses a risk of coordinated interaction.<sup>350</sup> That is, certain provisions of the *Resale Agreement* between GCI and Dobson indicate that GCI’s investment in Alaska DigiTel/Denali may provide the ability and incentive for coordinated interaction between Dobson and Alaska DigiTel. Under the *Resale Agreement*, GCI will have advance notice of competitively sensitive information about [REDACTED], among other things, and could serve as the conduit for such information. The proposed relationship between GCI and Alaska DigiTel, as outlined by the *Operating Agreement* and *Management Agreement*, under which GCI occupies a position on Alaska DigiTel’s Board of Managers, increases the opportunity for such competitively sensitive information to be conveyed between Alaska DigiTel, GCI, and Dobson, resulting in coordinated interaction among these service providers.

118. In its review of proposed transactions, the Commission is empowered to impose conditions to mitigate the harms the transaction would likely create, including coordinated interaction. Such conditions are tailored to address the specific harms anticipated based on economic analysis, examination of documents submitted in response to our inquiry, and public comment contained in the record of this proceeding.

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<sup>346</sup> Applicants September 13, 2006 Joint Response at i.

<sup>347</sup> *Id.* at 5.

<sup>348</sup> See para. 85, *supra*, and Part V, *infra*.

<sup>349</sup> See para. 113, *supra*.

<sup>350</sup> See paras. 82-85, *supra*.

119. Subsequent to the original filing of its applications GCI proposed certain conditions to guard against the transmission to Alaska DigiTel of competitively sensitive information received by GCI under its reseller arrangement with Dobson, and the transmission to Dobson of competitively sensitive information received by the GCI member of the Alaska DigiTel Board, following consummation of the proposed transaction.<sup>351</sup> These conditions consist of modifications to the *Resale Agreement* and the *Operating Agreement* between GCI and Dobson, to establish a definition for competitively sensitive information, and establish procedures and policies for the protection of such information. Among other things, the conditions provide that the GCI Relationship Officer appointed under the *Resale Agreement* shall be responsible for protecting the confidentiality of competitively sensitive information provided by Dobson to GCI. The GCI Relationship Officer is prohibited from serving as the GCI-appointed member of the Alaska DigiTel Board both during service as the Relationship Officer and for two years following such service; likewise, a former GCI-appointed Alaska DigiTel Board Member may not serve as the GCI Relationship Officer for two years following departure from the Board. In addition, reciprocal restrictions are established on the flow of competitively sensitive information regarding Dobson to Alaska DigiTel employees or representatives and on the flow of competitively sensitive information regarding Alaska DigiTel to Dobson employees or representatives. Finally, GCI will appoint a compliance officer to oversee its compliance with these conditions.

120. ACS Wireless and MTA Wireless contend that the conditions proposed by the Applicants would not prevent coordination between Dobson and Alaska DigiTel.<sup>352</sup> ACS Wireless and MTA Wireless argue that GCI would still be able to use the competitively sensitive information from Dobson and Alaska DigiTel in an anticompetitive manner.<sup>353</sup> Both ACS Wireless and MTA Wireless advocate that changes should be made to the conditions submitted by the Applicants. They state that the conditions should be expanded to include competitively sensitive information from all sources rather than just from the Board Member or Relationship Officer and that penalties should be detailed in the order.<sup>354</sup> Further, ACS Wireless argues that the definition of “trade secrets” should include operation, marketing, and strategic business plans, and that the Commission should require that the Commission approve the compliance procedures and should require regular filings certifying compliance.<sup>355</sup>

121. The Applicants argue that their proposed conditions directly and effectively address the transmission of competitively sensitive information between Dobson and Alaska

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<sup>351</sup> Applicants Proposed Conditions.

<sup>352</sup> ACS Wireless December 4, 2006 Comments at 1-2; MTA Wireless December 4, 2006 Comments at 1-2.

<sup>353</sup> ACS Wireless December 4, 2006 Comments at 2-3; MTA Wireless at 2 (arguing that GCI would need to be divided in half to prevent the flow of proprietary information between Dobson and Alaska DigiTel through GCI, and that this would be difficult to implement and enforce.

<sup>354</sup> ACS Wireless December 4, 2006 Comments at 4; MTA Wireless December 4, 2006 Comments at 2.

<sup>355</sup> ACS Wireless December 4, 2006 Comments at 4.

DigiTel through GCI.<sup>356</sup> Further the Applicants argue that changes to the conditions proposed by ACS Wireless and MTA Wireless are overly broad and would interfere with normal day-to-day operations, and therefore would not serve the public interest.<sup>357</sup>

122. We adopt the Applicants' proposed conditions, with certain additions and clarifications, as fully set forth in Appendix A to this order. For example, we expand the scope of the conditions to cover any non-public information about Alaska DigiTel and Dobson obtained by any GCI employee, thus addressing the concerns ACS Wireless and MTA Wireless have expressed about non-public information being conveyed by GCI employees other than the GCI Relationship Officer and the Alaska DigiTel Board member. We decline to adopt other changes to the conditions proposed by ACS Wireless and MTA Wireless. We find that it is unnecessary to set forth specific penalties in the event of a violation, because any violation would constitute a violation of this order and would be subject to enforcement action. We also find that it is unnecessary to expand on the broad definition of trade secrets found in state law, which would, in general, includes all non-public information that has an "economic value."<sup>358</sup> Further, we do not require the Applicants to seek approval of the compliance procedures or file regular certifications of compliance. If we suspect or are informed that the conditions adopted herein are not being implemented, we have the authority to request information regarding the implementation of these conditions.<sup>359</sup>

123. We conclude that these conditions mitigate the harm identified with this transaction<sup>360</sup> and require that the appropriate agreements be amended in accordance with these conditions. Accordingly, with the conditions that we adopt in this order, and assuming the Applicants compliance with these conditions, we find that the Applicants have demonstrated that the proposed transaction would serve the public interest, convenience and necessity.

## VI. CONCLUSION

124. We conclude that approval of this transaction, subject to the conditions set forth herein, is in the public interest. We deny MTA Wireless's petition to deny the applications or, in the alternative, order an evidentiary hearing because we do not find that the petition or the record raises substantial and material questions of fact. Finally, we deny, as moot, ACS Wireless's petition to intervene in an evidentiary hearing. We therefore grant the applications of Alaska DigiTel, Denali, and GCI, subject to the conditions specified in this Order.

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<sup>356</sup> Applicants Joint Response December 6, 2006 at 5.

<sup>357</sup> Applicants Joint Response December 6, 2006 at 5.

<sup>358</sup> See ALASKA STAT. § 45.50.940(3), which defines "trade secret" as information that "(A) derives independent value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

<sup>359</sup> See 47 U.S.C. § 308(b).

<sup>360</sup> See paras.82-85, *infra*.

**VII. ORDERING CLAUSES**

125. Accordingly, having reviewed the applications, the petitions, and the record in this matter, IT IS ORDERED that, pursuant to sections 4(i) and (j), 309, 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the applications for the assignment of license from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the transfer of control of a 78 percent ownership interest in Alaska DigiTel to GCI are GRANTED, to the extent specified in this order and subject to the conditions specified in Appendix A.

126. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petition to Deny the applications for the assignment of license from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the transfer of control of a 78-percent non-controlling interest in Alaska DigiTel, L.L.C. to General Communication, Inc. filed by MTA Communications, Inc., d/b/a MTA Wireless is DENIED for the reasons stated herein.

127. IT IS FURTHER ORDERED that, pursuant to sections 4(i) and (j), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 309, 310(d), the Petition to Intervene filed by ACS Wireless is DISMISSED, for the reasons stated herein.

128. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

**APPENDIX A**

## Conditions

The grants by the Commission of the Joint Applications<sup>361</sup> filed by Denali PCS, L.L.C. (“Denali”), Alaska DigiTel, L.L.C (“Alaska DigiTel”) and General Communication, Inc. (“GCI”) are subject to the following conditions:

1. The Agreement entered into between GCI and Dobson Cellular Systems, Inc. (“Dobson”) as of July 26, 2004 (“Resale Agreement”) and the concurrent letter of intent (“LOI”) associated therewith shall be amended prior to the consummation of the transaction contemplated by the Joint Applications to provide that:

(a) Any Non-Public Competitively Sensitive Information, as defined in paragraph 7 herein (which definition shall be incorporated into the Resale Agreement and the LOI), provided by Dobson to GCI shall be shall be treated as “Confidential” by GCI.

(b) The role of the “Relationship Officer;” appointed by GCI pursuant to Section 8(a)(i) of the Reseller Agreement ( “GCI Relationship Officer”) shall be expanded to include responsibility for overseeing all aspects of the contractual relationship with Dobson. Any Non-Public Competitively Sensitive Information provided by Dobson to GCI shall be so designated to the GCI Relationship Officer by Dobson at the time of delivery so that the GCI Relationship Officer may take appropriate steps to protect the confidentiality of the Non-Public Competitively Sensitive Information.

2. The GCI Relationship Officer designated by GCI under the Reseller Agreement with Dobson shall not be the individual designated by GCI to serve on the Alaska DigiTel Board (“Alaska DigiTel Board Member”).

(a) Once a GCI employee ceases serving as the GCI Relationship Officer, that employee shall not serve as the Alaska DigiTel Board Member designated by GCI for a period of at least two years.

(b) Once a GCI employee ceases serving as the Alaska DigiTel Board Member designated by GCI, that employee shall not serve as the GCI Relationship Officer for a period of at least two years.

3. Neither the GCI Relationship Officer, nor any GCI employee that becomes privy to any Non-Public Competitively Sensitive Information pertaining to Dobson shall provide, communicate, or

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<sup>361</sup> See Application to Assign Licenses Held by Denali PCS, L.L.C. to Alaska DigiTel, L.L.C., File No. 0002453582 (filed Jan. 27, 2006); Application to Transfer Control of Licenses Held by Alaska DigiTel, L.L.C., File No. 0002453706 (filed Jan. 27, 2006).



convey in any manner such Non-Public Competitively Sensitive Information to any officer, director, employee or representative of Alaska DigiTel, including, without limitation, the individual designated by GCI to serve on the Alaska DigiTel Board.

4. Any officer, director, employee or representative of GCI who, by the nature of his or her duties, requires access to Non-Public Competitively Sensitive Information concerning both the Reseller Agreement and LOI, and the Alaska DigiTel investment shall not be permitted to be either the GCI Relationship Officer or Alaska DigiTel Board Member.

(a) Once a GCI officer, director, employee or representative has ceased to receive Non-Public Competitively Sensitive Information from Dobson for a period of two years, he or she may be permitted to be the Alaska DigiTel Board Member.

(b) Once a GCI officer, director, employee or representative has ceased to receive Non-Public Competitively Sensitive Information from Alaska DigiTel for a period of two years, he or she may be permitted to be the GCI Relationship Officer.

5. Any Non-Public Competitively Sensitive Information provided by Alaska DigiTel to the Alaska DigiTel Board Member shall be so designated to the Alaska DigiTel Board Member by Alaska DigiTel at the time of delivery so that the Alaska DigiTel Board Member may take appropriate steps to protect the confidentiality of the Non-Public Competitively Sensitive Information.

6. Neither the Alaska DigiTel Board Member designated by GCI, nor any GCI employee that becomes privy to any Non-Public Competitively Sensitive Information pertaining to Alaska DigiTel shall provide, communicate, or convey in any manner such Non-Public Competitively Sensitive Information to the GCI Relationship Officer or to any officer, director, employee or representative of Dobson.

7. For the purpose of these conditions, the term “Non-Public Competitively Sensitive Information” shall refer to any and all non-public information provided by Dobson to GCI pursuant to the Reseller Agreement or the LOI or by Alaska DigiTel to the Alaska DigiTel Board Member designated by GCI that, if released to a competitor, would allow the competitor to gain a significant advantage in the marketplace, such as (i) customer and subscriber data, (ii) customer proprietary network information (CPNI), (iii) rate and pricing data, (iv) trade secrets, (v) information pertaining to new product or service offerings, (vi) information pertaining to network changes, system coverage and technology selection, and (vii) information relating to the terms and conditions of service. Non-Public Competitively Sensitive Information pertaining to Dobson also shall include non-public information provided by Dobson to GCI pursuant to Sections 3(b)(v), 4(a)(i), 7(a)(i), 7(a)(iii), and 9(a)(i) of the Distribution Agreement and non-public information provided by Dobson to GCI with respect to the possible network enhancements and service enhancements referenced in the LOI.

8. GCI will appoint a compliance officer (the “Conditions Compliance Officer”) to oversee GCI’s compliance with the foregoing provisions. The Conditions Compliance Officer shall (i) communicate the nature and extent of the confidentiality restrictions to potentially affected GCI personnel along with the fact that GCI would consider any violation of the restrictions to be a serious matter that could result in disciplinary action or dismissal; (ii) act as a point of contact for GCI personnel who have information to report regarding a violation or possible violation of the foregoing provisions; (iii) review the appointments of the GCI Relationship Officer and the individual designated by GCI to serve on the Alaska DigiTel Board to ensure compliance with the foregoing provisions; (iv) investigate and act upon any known or reported violations of the foregoing provisions.

9. The Applicants will amend the Alaska DigiTel *Operating Agreement* to remove any veto rights of GCI with regard to the Alaska DigiTel budget.

10. These conditions will terminate if GCI terminates its relationship with Dobson, except for conditions 2(a), 3, 4(a), 7, 8, and 9, which will remain in effect.

**APPENDIX B**

Commenting Parties

ACS Wireless, Inc.  
Alaska DigiTel, L.L.C.  
Denali PCS, L.L.C.  
General Communications, Inc.  
MTA Wireless, Inc. d/b/a/ MTA Wireless

Petitioners

MTA Wireless, Inc. d/b/a/ MTA Wireless

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

Re: *Applications for the Assignment of License from Denali PCS, L.L.C. to Alaska DigiTel, L.L.C. and the Transfer of Control of Interests in Alaska DigiTel, L.L.C. to General Communications, Inc.*, (WT Docket No. 06-114)

We have an obligation in transactions coming before the Commission to weigh their proposed benefits against their potential harms to ensure that the transaction is in the public interest. For me, this particular transaction was a close call. There are benefits to this proposed transaction, specifically in making Alaska DigiTel a stronger competitor. In this regard, I also recognize and appreciate GCI's agreement to remove any veto rights over Alaska DigiTel's budget. At the same time, as the order points out, there is a real potential for post-transaction coordinated interaction among the applicants and through contracts with third parties. The Bureau should be commended for pointing out this concern and in crafting proposed conditions designed to remedy this potential harm. Ultimately, I would have preferred to have had stronger firewalls in place to help ensure that competitively sensitive information does not find its way into improper hands. As a result, I will concur in today's decision. Nevertheless, the Commission should keep a careful eye on future developments in the market and act swiftly in response to any evidence of anti-competitive or anti-consumer tactics. The good people of Alaska deserve no less.

**CONCURRING STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: Applications for the Assignment of License from Denali PCS, LLC to Alaska DigiTel, LLC and the Transfer of Control of Interests in Alaska DigiTel, LLC to General Communications, Inc., (WT Docket No. 06-114)*

This is a surprisingly complicated set of assignment and transfer of control applications. I cannot recall a transaction that implicates so many of the major communications providers in a market because of a variety of existing overlapping business arrangements and ventures.

I have tried to ask the hard questions regarding this transaction. I have explored the complicated relationships that GCI has with both Alaska DigiTel and Dobson. But it feels like we are leaving a stone unturned here – that there is more to the transaction that meets the eye. While I appreciate the several voluntary conditions advanced by the applicants, I am only able to concur in this transaction. I am concerned that GCI has such a close relationship with Dobson at the same time GCI is acquiring a 78 percent of Alaska DigiTel's membership interests, is receiving certain non-controlling investor protection rights, and has an option to acquire the remaining equity interest in Alaska DigiTel. And I am concerned that GCI has such a close relationship with Alaska DigiTel at the same time GCI has a distribution agreement with Dobson, is leasing PCS spectrum to Dobson pursuant to a long-term *de facto* transfer spectrum leasing arrangement, and has a Letter of Intent with Dobson to possibly pursue further strategic goals. Indeed our own item concludes that the proposed transaction poses a risk of coordinated interaction.

We rightly put in a place conditions regarding the GCI Relationship Officer and on the flow of competitively sensitive information regarding Alaska DigiTel to Dobson employees. These are important steps to limit the transfer of potentially damaging information. I hope they are enough. For the sake of Alaskans, I encourage the Commission to monitor this market carefully to make sure our conditions have the required effect of promoting a vibrant and competitive wireless marketplace.