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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 12, 2001

Magalie Roman Salas, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Counter TW-A325
Washington, DC 20554

Re: *Ex Parte Presentation on behalf of Cingular Wireless LLC*
WT Docket No. 98-205

Dear Ms. Salas:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R § 1.1206, Cingular Wireless LLC hereby provides notice of an *ex parte* meeting in the above-referenced permit-but disclose rulemaking. On January 11, 2001, Brian Fontes, Ben Almond, and L. Andrew Tollin met with Ellen Christoffersen and Peter A. Tenhula, Senior Legal Advisor to Commissioner Powell to discuss application of the CMRS spectrum cap to data-only services. The attached document was used to facilitate the discussion.

Should you have any questions, please do not hesitate to contact Ben Almond at (202) 463-4112.

Sincerely,

L. A. Tollin

L. Andrew Tollin
Counsel for Cingular Wireless LLC

Enclosure
cc: Peter A. Tenhula, Esq.
Ellen Christoffersen

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List A B C D E

APPLICABILITY OF BROADBAND CMRS SPECTRUM CAP TO DATA SERVICES

- In 1996, the Commission indicated that the economic basis for the Broadband CMRS spectrum cap was predicated on the assumption that "the relevant product market is mobile *two-way voice* communications service." *Report and Order*, 11 F.C.C.R. 7824, 7904 (1996).

- On July 30, 1996, BellSouth filed a petition urging the Commission to reconsider the Broadband CMRS spectrum cap to exclude non-voice, data-only SMR service. On the same day, BellSouth requested a waiver that would allow its SMR data-only operations to be excluded from the cap.

- The WTB denied the waiver request because it was based on "the mistaken assumption that the underlying purpose of the CMRS spectrum cap is only to ensure competition in voice transmission" when the rule was actually designed to prevent "excessive aggregation of spectrum" that "could reduce competition by precluding entry" and "might thus confer excessive market power on incumbents." *Beasley Letter*, 11 F.C.C.R. 9970, 9971 (WTB 1996). BellSouth sought FCC review of this decision.

- On September 10, 1997, the Commission denied both BellSouth's petition for reconsideration and its application for review of the waiver denial, specifically rejecting BellSouth's contention that the relevant market for spectrum cap purposes was the mobile voice market. According to the Commission, "[t]he spectrum cap is not limited to real time, two-way switched phone service; rather it covers a variety of services within the definition of CMRS." *Memorandum Opinion and Order*, 12 F.C.C.R. 14031, 14039 (1997). Moreover, the "anticipated convergence of data, voice, and other services recommends against changing our spectrum aggregation rule as BellSouth has requested. . . ." *Id.* at 14040.

- On appeal, the D.C. Circuit affirmed the FCC based on Commission statements "that it was concerned with the effect of CMRS spectrum aggregation on the development of market power and on the competitive market for mobile services *as a whole* in light of the predicted potential for various services along that spectrum to converge. The general cap on CMRS spectrum thus reflects concern for the CMRS market generally." *BellSouth Corporation v. FCC*, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (emphasis added).

- In its 1998 Biennial Order revisiting the need for the CMRS spectrum cap, the Commission appeared to select the interconnected mobile voice telephone market as the relevant product market:

> At this time, we also reject arguments by commenters for a more broadly defined product market. Consumers obtain mobile phone services principally from cellular, PCS, and digital SMR carriers. . . . In connection with various merger reviews, the Commission has previously defined interconnected mobile voice telephone service as a separate product market. In general, commenters appear to share the Commission's view that our focus on

> competitive conditions in the market for mobile voice telephone services is appropriate.

Report and Order, 15 F.C.C.R. 9219, 9241 (1999). The Commission also relied on a similar analysis undertaken by DOJ in the merger review context. *Id.*

- BellSouth filed a petition for reconsideration asking the Commission to clarify the relevant product and geographic product markets and requested that, if the only relevant product market was voice services, the CMRS spectrum cap rule be modified consistent with this rationale.

- On November 8, 2000, the Commission denied reconsideration but confirmed that the relevant product market justifying the CMRS spectrum cap was voice services, which was separate and distinct from the market for data and other non-voice offerings:

> *[O]ur focus on competitive conditions in the market for mobile voice telephone services is appropriate.* Consumers obtain their mobile telephone services principally from cellular, PCS, or digital SMR carriers. Our finding that mobile voice services constitute a separate product market is consistent with previous decisions by the Commission in which it has defined interconnected voice services as a separate product market and concluded that consumers obtain such service principally from broadband PCS, cellular, and digital SMR licensees, even though CMRS licensees may also provide other types of communications services.*
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> * *See id.* These services may include, for example, trunked dispatch, paging, messaging services, and two-way mobile data services. We note also that our determination is consistent with analyses by the U.S. Department of Justice when reviewing large mergers of telecommunications companies. *Id.*

Reconsideration Order, FCC 00-376, para. 15 (Nov. 8, 2000). The FCC failed, however, to change the spectrum cap rule to conform to this voice rationale. The rule itself still covers all CMRS spectrum, however used.

- Cingular, which holds spectrum dedicated to data-only services, timely appealed the most recent spectrum cap orders to the D.C. Circuit on January 5, 2001 based on the fact that the FCC's rationale for the rule is far narrower than the rule itself.

- Remedy – add the following sentence to the end of Section 20.6(a): CMRS spectrum used exclusively for non-voice services is excluded from the cap.