

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

In the Matter of	)	
	)	
Applications for Consent to the Transfer	)	Lead USL File No. 0001656065
of Control of Licenses from AT&T	)	WT Docket No. 04-70
Wireless Services, Inc., Transferor,	)	(Re: Public Notice, DA 04-932)
Cingular Wireless Corporation, Transferee	)	

To: The Commission

PETITION TO DISMISS OR DENY

AW Acquisition Corp., Pace Communications Services Corporation, Edward Garcia dba Comm One Systex of Ohio and Comm One Wireless of Chicago, Ed Wicks dba Mercedes Wireless, Inc., Kempner Mobile Electronics, Inc., and Airborne Beepers and Video, Inc. (collectively "Petitioners"), pursuant to Section 309(d) of the Communications Act of 1934, as amended ("Act"), hereby petition the Commission to dismiss or deny the captioned applications for consent to the transfer of control of licenses from AT&T Wireless Services, Inc. ("AT&T Wireless") to Cingular Wireless Corporation ("Cingular").

The interests of the Petitioners in this proceeding are described as follows.

AW Acquisition Corp. ("AWA")

Robert Kaplan attests to the following facts in Attachment 1. AWA, an Illinois Corporation, is a plaintiff in an action pending in U.S. District Court against Southwestern Bell Mobile Systems, LL, d/b/a/ Cingular Wireless.<sup>1</sup> AWA's complaint seeks to redress the wrongful, unconscionable, systematic and fraudulent practices engaged in by Cingular at the expense of AWA, one of its former dealers. Specifically, AWA alleges that Cingular used

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<sup>1</sup> Southwestern Bell Mobile Systems, Inc. is a wholly owned subsidiary of SBC Communications, Inc., the U.S. wireless operations of which are part of Cingular. Prior to a merger of the wireless operations of SBC Communications and Bell South Corporation in 2001, Cingular was known as Southwestern Bell Mobile Systems, Inc. d/b/a Cingular One.

independent dealers to market and sell its cellular telephone products and services to customers. Areawide Cellular Corporation (“Areawide”) was one of the dealers with which Cingular entered into an Authorized Sale and Service Agreement, whereby Areawide agreed, among other things, to market cellular telephone products and services on Cingular’s behalf. In exchange, Cingular agreed to pay Areawide a 5% residual commission on recurring monthly charges billed by Cingular to customers who were originated by Areawide, in addition to standard commissions that could total more than \$250 per line if sales goals were reached.

Areawide filed for Chapter 11 bankruptcy protection last year, and AWA purchased all of its assets including causes of action that existed against Cingular. As set forth in AWA’s lawsuit, the bankruptcy filing was necessitated by the egregious treatment Areawide received at the hands of Cingular. AWA alleges that Cingular did all that it could to ensure Areawide’s failure as an approved dealer by directly soliciting Areawide’s customers, encouraging those customers to end their relationship with Areawide and, instead, forge a new relationship with Cingular’s internal channels of distribution. In addition to breach of contract for shorting Areawide on commissions and soliciting its customers directly, AWA sued Cingular for fraud for knowingly misrepresenting to Areawide that Areawide had access to the same level of pricing and equipment discounts as Cingular’s internal channels of distribution; that Cingular was selling equipment to Areawide at cost; that the terms offered in joint promotional advertising would be available to Areawide’s customers; and that Areawide’s commissions from existing customers would be unaffected if Cingular directly sold replacement phones to those customers. AWA also alleges that Cingular falsely represented to Areawide that Cingular would assist it in growing its business when Cingular actually intended to steal Areawide’s customers, using Areawide’s own information to do so in violation of the Illinois Franchise Disclosure Act (“IFDA”). AWA

further alleges that Cingular violated the IFDA by falsely representing that Areawide would be able to purchase equipment “at cost,” when in fact Cingular sold equipment to Areawide at a price higher than it sold the same equipment to company-owned stores. Areawide’s business diminished greatly, the value of the business was lost, and Areawide was forced to file bankruptcy.

AWA’s suit also alleges a violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § § 1961-1968. Specifically, Count V of the suit alleges that Cingular began and expanded its cellular telephone subscriber base by using the resources of independently owned sales locations, many of which were independent owners like Areawide, and engaged in a pattern of racketeering activity to control and eventually force independent agents, like Areawide, out of business, thereby converting to itself the value created by these independent owners. AWA alleges a pattern of racketeering that includes fraudulent representations concerning service and equipment pricing, fraud in the delivery of payments of independent owners, threats of economic destruction, and threats of the imposition of draconian contract terms. AWA’s lawsuit includes a count for tortious interference with commercial expectation, as well as for defamation resulting from alleges false representations Cingular made to Areawide customers after Areawide filed for bankruptcy.

After terminating its relationship with Cingular, Areawide became a dealer for AT&T Wireless. AT&T Wireless, however, recently canceled Areawide’s dealer contract for no cause. If the Commission approves the proposed Cingular/AT&T merger of which the captioned applications are a part, AWA will face an even bigger opponent in its lawsuit.

Pace Communication Services Corporation (“Pace”)

Michael DeBates attests to the following facts in Attachment 2. Pace, another former Cingular dealer, sued in the Illinois state courts as the lead plaintiff in a class action against Cingular for breach of contract, common law fraud and for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and the consumer fraud acts of each state where Cingular does business. Pace alleges that its agreement with Cingular prevented any entity from opening a store or other sales location for the sale of its cellular telephone equipment, products and services within a three-mile radius of Pace store locations. Pace, likewise, was prohibited from opening a store within three miles of any other store that marketed and sold Cingular cellular equipment, product and services. Pace cites 30 specific examples of how Cingular implemented a scheme that had the effect of eroding Pace’s business and pushing it into insolvency, including by intentionally and unjustifiably interfering with Pace’s relationship with its customers by soliciting, marketing and contacting them while their separate contracts with Pace were still in effect and offering these customers to purchase, upgrade or receive cellular products directly without going through Pace; charging back commissions to Pace, improperly claiming disconnects; demanding repayment of commissions, rebates and residuals when it terminated the service of a Pace customer for nonpayment or untimely payment, then failing to reinstate those commissions, rebates and residuals when it reinstated the customer’s service; requiring Pace to submit research in order to receive commissions, rebates and residual when Cingular possessed the information as a means for denying compensation already owed; violating the three-mile limitation by permitting Pace’s competitors to offer Cingular’s products and services near Pace’s existing locations and thus cannibalize Pace’s business; despite representations to the contrary, charging Pace an inflated price for equipment that was higher

than the price Cingular sold to national or regional discounters such as Best Buy and Circuit City, thus secretly discriminating in the sales price and causing Pace to lose business and customers; eliminating approximately 2,500 customers of Pace from the payment of commission to Pace without explanation; directly soliciting Pace's customers with promotions with an intent to steal and pirate the customers away from Pace; and offering promotions, special pricing and features through "big box" retailers such as Best Buy and Circuit City for better terms than Pace was permitted to offer, with the intent to minimize the amount of new business Pace could acquire. Pace's suit provides specific examples of how Cingular representatives knowingly made false statements to dealers to put them out of business and steal and pirate their customers. Pace's suit also requests a Declaratory ruling that the new Agency Agreement that Cingular provided to Pace is illegal under state franchise laws and the Federal Trade Commission Act. Subsequent to severing its relationship with Cingular, Pace became an AT&T Wireless dealer. If the Commission approves the Cingular/AT&T merger, however, Pace will be forced to deal with Cingular again or close its business.

Edward Garcia dba Comm One Systex of Ohio and Comm One Wireless of Chicago  
("Comm One")

Garcia attests to the following facts in Attachment 3. Comm One Systex of Ohio and Comm One Wireless of Chicago were both Cingular dealers. During the time that Comm One acted as dealer for Cingular, Comm One alleges that Cingular engaged in a series of unconscionable activities that resulted in driving Comm One out of business. Specifically, Comm One alleges that Cingular repeatedly breached its dealer agreements with Comm One by wrongfully refusing to pay commissions, residuals and co-op when due, depriving Comm One of much-needed cash flow, and that Cingular breached the agreements by failing to supply store

signage in a timely manner. It also alleges that Cingular wrongfully encroached into Comm One's territories and that unauthorized agents were permitted by Cingular to open and operate stores within one-half mile or less from Comm One locations. Further, Comm One alleges that Cingular directed Comm One to open stores in certain locations and allowed Comm One to operate the store, testing the strength of the market. Once market viability was established, Cingular would then open company stores within three-tenths of a mile of the Comm One stores, thereby substantially diluting the volume of business received by the Comm One stores. Even though Comm One Systex of Ohio and Comm One Wireless of Chicago are separate legal entities, Comm One alleges that Cingular wrongfully applied equipment credits due to the Chicago entity to the Ohio entity, and that because Comm One Systex of Ohio was in arrears with Cingular, Cingular forced Comm One Wireless of Chicago to be on COD terms with Cingular, severely and negatively impacting its cash flow and ability to grow. Comm One further alleges that Cingular forced Comm One to enter into exclusive equipment purchase agreements, constituting an illegal tying arrangement. It also alleges that Cingular provided its own customers with service and equipment discounts with providing such discounts to Comm One, thereby substantially decreasing the ability of Comm One to attract new customers. Comm One alleges that Cingular expanded its cellular telephone subscriber base in the areas in which Comm One operated by using the resources of independently owned sales locations, including Comm One, and engaged in a pattern of racketeering activity to control and eventually force Comm One out of business, thereby converting to Cingular the value created by these independent owners. Comm One alleges a pattern of racketeering that includes fraudulent representations concerning service and equipment pricing, fraud in the delivery of payments, and threats of the imposition of draconian contract terms. Cingular terminated Comm One without

cause. As a result of Cingular's misconduct, Comm One is contemplating a lawsuit against Cingular. If the FCC approves the merger between AT&T and Cingular, Comm One will face an even bigger opponent in the lawsuit.

Ed Wicks dba Mercedes Wireless, Inc. ("Wicks")

Wicks attests to the following facts in Attachment 4. Wicks is one of several plaintiffs in a lawsuit filed under Title VII of the 1964 Civil Rights Act against Cingular in U.S. District Court in Illinois. Wicks, an African-American doing business under Mercedes Wireless, entered into an authorized dealer contract with Cingular. A White manager at Cingular refused to modify the contract to permit Wicks to be a full-service agent who could sell prepaid as well as postpaid-contracted wireless service, telling him that he would not do well as a full-service agent in his neighborhood, though it consists of Blacks and other minorities. When Wicks sought to modify the contract again, he dealt with a Cingular manager who was Hispanic American and obtained the modification. With the ability to sell postpaid-contract services, Wicks's business skyrocketed. To continue to grow, Wicks had to become a sales and service dealer, the requirement for which was an average of 75 contracted new lines a month for over one year. Wicks alleges that he could not qualify because Cingular's managers made a concerted effort to put him out of business by withholding the sale of desperately needed equipment, withholding earned commissions and residuals, and not properly serving customers causing many service terminations before the 180 day period after customer activation, resulting in Cingular imposing "charge back" fees. Wicks's suit cites specific racist comments and false statements made by Cingular's management to Wicks, including a statement that Wicks had a great future with Cingular once Wicks paid \$150,000 in charge backs. Wicks alleges that after he paid the \$150,000 Cingular shut his business down by not paying commissions and residuals and not

extending a credit line like Cingular said it would and does for White dealers. Without a credit line Wicks was unable to purchase inventory from Cingular, was unable to meet growing demand for products and services, and could no longer operate his business. Cingular allegedly told Wicks to close his store, sell his truck and sell phones out of the back of his car. Even though Wicks earned \$17,000 in commissions in one particular month, he received none due to the charge-back balance, and Cingular's managers sent a check to him for one dollar that they claimed was consistent with the terms of the contract. They kept sending him checks for less than \$1.00 even after he asked them to stop. Wicks stated to them, "there was no way in heaven and earth that you can work a man for 30 days and send him a check for less than one dollar and be acting in good faith." Wicks alleges that these checks were sent with the intent to cause harm to Wicks, hurt him and crush him financially, emotionally and spiritually. The lawsuit relates the experience of another co-plaintiff who, though being very successful with prepaid sales, was refused his request to become a "sales and service" representative though he met the requirement of contracting 75 new lines per month for over one year. The lawsuit alleges that there are no Blacks with Cingular who have received a sales and service contract, and that all the dealers with sales and service contracts are White. It further alleges that Cingular breached its dealer agreement with both of these plaintiffs by failing to give earned commissions when consumers, who failed to stay active for 181 days, were later reinstated; by authorizing currency dealers within the plaintiffs' service area which reduced plaintiffs' market share; and by permitting unauthorized dealers to sell Cingular products by supplying such products to "sales and service centers" that in turn supply unauthorized dealers. The suit also alleges that Cingular withheld approval for plaintiffs and other Black dealers to open new sites in non-minority areas, and provided free dealer lines and unlimited time to White dealers but not Black dealers. It also

alleges that when plaintiffs had some credit line, Cingular required them to pay for the products received within 30 days, but it would not pay them their commission or residuals for over 180 days, while White dealers were paid within 10 days and granted more than 120 days to pay for products supplied by Cingular. The suit also alleges specific incidents of common law fraud against Cingular, including false representations made by Cingular to Wicks that he would receive the same equipment and service pricing as Cingular gives to its internal distribution channels and that Wicks's new store would be on Cingular's "support number system." The latter gives customers who call Cingular the location of stores selling its products within a zip code. Wicks's store, however, was not listed. The suit alleges that after Wicks and another plaintiff complained to Cingular about these matters, Cingular managers commenced a concerted effort to put them out of business. The lawsuit contains further counts for breach of contract, breach of covenant of good faith and fair dealings and violation of the Illinois Franchise Disclosure Act. Cingular's misconduct forced Wicks out of business. He submits that if the Commission approves the merger of Cingular and AT&T Wireless, his opponent will only become stronger.

Kempner Mobile Electronics, Inc. ("Kempner")

Scott Kempner attests to the following facts in Attachment 5. Kempner is an Illinois corporation and a former authorized dealer of Cingular's products and services. Kempner also sued Cingular in Illinois court. Kempner's allegations included that Cingular intentionally and unjustifiably interfered with Kempner's relationships with customers Kempner had originated by contacting them directly and offering to allow such customers to upgrade their cellular telephone products directly from Cingular without providing Kempner the opportunity to sell the equipment on the same terms. When such customers upgraded equipment directly from

Cingular, Cingular purged them from its records as Kempner-originated customers and terminated the monthly residuals for those customers. Kempner also alleged that Cingular failed to deliver the same level of pricing and equipment discounts that Cingular offered its internal channels of distribution, despite making affirmative representations to the contrary. It further alleged that Cingular used “bait and switch” ads to attract Kempner’s customers and then switch that customer to accept services on terms and conditions more favorable to Cingular. In addition, Kempner alleged that Cingular diverted customers from Kempner and misdirected them to Cingular by misidentifying Kempner’s name and address in the support number system that directs customers to dealers through the telephonic input of zip code numbers. Kempner further alleged that Cingular failed to pay commissions and monthly residual payments due under Kempner’s dealer agreement with Cingular. On November 21, 2003, a judgment against Cingular was entered in Kempner’s case. The jury returned a verdict in favor of Kempner for, among other things, its claims regarding commission and residuals, fraud, and tortious interference with prospective economic advantage. The case has entered a damages phase. Cingular’s misconduct drove Kempner out of the cellular phone and service business. Kempner submits that if the Cingular/AT&T Wireless merger is approved, its opponent in the litigation will only grow stronger.

Airborne Beepers and Video, Inc. (“Airborne”)

Gustavo Calderon attests to the following facts in Attachment 6. Airborne is an Illinois corporation and a plaintiff in a separate lawsuit against Cingular that is pending in U.S. District Court in Illinois. Airborne alleges that Cingular and its parent companies have been engaged in a widespread pattern and practice of discrimination against Blacks and minorities who are Cingular employees and dealers. Airborne alleges that Cingular systematically fails to uphold

its contractual obligations with Black and minority dealers while not doing the same with White dealers, and that Cingular has never sold a sales and service contract to a Black dealer. Airborne further alleges that Cingular refuses to rent or sell certain cellular phones under the sales and service contract to Blacks on the basis of race, and has used its corporate power to keep Black and minority dealers within their geographical area in which Blacks and minorities reside relying on the three-mile rule. It also alleges that Cingular prohibiting such Black and minority dealers from expanding outside Black and minority areas by not allowing them to become sale and services dealers, while not prohibiting White dealers from expanding into Black or minority areas by allowing them to become sale and service dealers. Airborne's suit gives 19 examples of how Cingular discriminated against Airborne's principal, Gustavo Calderon, for instance, by withholding approval for him to open new sites in non-minority areas, by failing to make prompt and complete repairs to phones sold to his customers, by providing free dealer lines and unlimited time to White dealers but not to him, by providing poor service to minority areas, providing inventory to White dealers and Cingular's own stores before his store, thus leaving him without product to sell, and by changing the method of payment from credit to cash on delivery while White dealers maintained line credit. Airborne also alleges that when it had some credit, Cingular required it to pay for products within 30 days, but would not pay Airborne's commissions or residuals for over 180 days, while White dealers were paid within 30 days and were granted more than 120 days to pay for products supplied by Cingular. Airborne also alleges that Cingular caused customers to terminate service because of overcharging, failing to provide the expected service, and failing to properly fix customer phones within a reasonable amount of time. Cingular would then impose charge back fees on Airborne even for customers who reinstated, and would not pay Airborne commissions and residuals for reinstated customers.

Airborne further alleges that Cingular breached their agreement by consistently excluding or failing to include Airborne's stores in its advertisements, authorizing currency exchanges as dealers within its geographic area, thus reducing its market share. Airborne's causes of action against Cingular included discrimination in contractual relationship under 42 U.S.C. § 1981, discrimination in sale and rent, 42 U.S.C. § 1982, breach of contract, breach of covenant of good faith and fair dealings, violation of the Illinois Franchise Disclosure Act, and common law fraud. Airborne alleges that Cingular falsely promised to promote it to a sales and service dealer if it was able to get 75 contract lines of service per month, but was denied that promotion after achieving that rate of sale. Airborne also alleges that Cingular falsely expressed to Airborne that it would receive the same equipment and service pricing as Cingular gives to its internal distribution channels, falsely told Airborne that it would be on the support number system, and falsely stated to Airborne that only exclusive agents earned residuals, inducing Airborne to renew its contract. Airborne alleges that once it complained about these matters to Cingular, Cingular commenced a concerted effort to put Airborne out of business in the same manner described in Wicks's case. Subsequent to severing its relationship with Cingular, Airborne became an AT&T Wireless dealer. If the Commission approves the Cingular/AT&T merger, however, Airborne will be forced to deal with Cingular again or close its business.

The Commission may consider the relevancy of civil misrepresentations not involving governmental units to a licensee's character qualifications on a case-by-case basis. *Policy Regarding Character Qualifications in Broadcast Licensing*, 6 FCC Rcd 3448 (1991). Though the Commission may not have the expertise or resources in each and every case to resolve questions of state or federal law outside its principal area of jurisdiction, it nonetheless remains free to exercise its discretion in situations that arise. *Policy Statement and Order*, 5 FCC Rcd

3252 (1990). In particular, adjudicated violations of antitrust or anticompetitive laws are relevant to the agency's licensing decisions as they have potential bearing on an applicant's proclivity to comply with the Commission's rules and policies. *Id.*; *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1200-1203 (1986). Petitioners submit that the Commission should conclude from the adjudicated Kempner case that Cingular has in fact engaged in anticompetitive conduct and unfair methods of competition, including engaging in fraud to steal customers from one of its authorized dealers.

Where an applicant has allegedly engaged in misconduct so egregious as to shock the conscience and evoke almost universal disapprobation, such conduct can rise to a matter of Commission concern even prior to adjudication by another body. *Policy Statement and Order*, 5 FCC Rcd 3252, 3254 at n. 5 (1990). The Kempner case is not an isolated one, and the pending lawsuits of the other Petitioners share common allegations and causes of action with those presented in Kempner's lawsuit -- adjudicated in Kempner's favor on counts including fraud. In the Wicks and Airborne cases, the alleged misconduct includes racial discrimination on a broad scale, while AWA and Comm One allege that Cingular has been engaged in a RICO enterprise.

Cingular's alleged misconduct therefore is not limited to a single dealer, but is massive and widespread, raising serious questions as to its truthfulness in its dealings with other parties, including the Commission. In this regard, Petitioners submit that Cingular's misconduct, both alleged and adjudicated, amount to unfair methods of competing against Petitioners. Cingular therefore should have reported Petitioners' lawsuits in response to Items 76 and 77 of the FCC Form 603. Because Cingular did not do so, the transfer applications are defective and should be dismissed. Moreover, Cingular's pattern of anti-competitive behavior is likely to continue after the merger, and Cingular will have more opportunities to engage in such misconduct.

For these reasons, Petitioners respectfully request that the Commission dismiss or deny the captioned applications.

Respectfully submitted,

AW ACQUISITION CORP.  
PACE COMMUNICATIONS  
SERVICES CORPORATION  
COMM ONE SYSTEX OF OHIO AND COMM  
ONE WIRELESS OF CHICAGO  
ED WICKS DBA MERCEDES WIRELESS, INC.  
KEMPNER MOBILE ELECTRONICS, INC.  
AIRBORNE BEEPERS, INC.

By: /s/ Richard S. Myers  
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Date: May 3, 2004

**Certificate of Service**

I, Richard S. Myers, hereby certify that a copy of the forgoing Petition To Dismiss Or Deny was served upon the following on May 3, 2004:

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