

**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

**REPLY TO OPPOSITION TO 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”), hereby reply to the May 13 opposition (“Opposition”) filed by Cingular Wireless Corporation and AT&T Wireless Services, Inc. to Petitioners’ May 3 petition to dismiss or deny in the captioned docket.

**I. THE COMMISSION HAS DISCRETION TO CONSIDER CINGULAR’S MISCONDUCT – BOTH ALLEGED AND ADJUDICATED – IN THE CONTEXT OF THE PROPOSED MERGER**

Petitioners have made specific allegations that Cingular has repeatedly engaged in a widespread pattern of misconduct, including common law fraud, racial discrimination and violations of the RICO laws. Cingular and AT&T conveniently overlook that one Petitioner, Kempner Mobile Electronics, Inc. (“Kempner Mobile”), has already won a judgment against Cingular for fraud and tortious interference with prospective economic advantage.<sup>1</sup> Contrary to the Opposition’s assertions, the Commission has explicitly stated that it will take cognizance of

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<sup>1</sup> In its litigation with Cingular, Kempner Mobile did not prevail on counts based on violations of RICO or the “three-mile rule” provision of its contract. The pending lawsuits of other Petitioners, however, contain such counts based on the unique facts of their cases. Kempner Mobile’s RICO count against Cingular failed on procedural grounds, not on the merits.

adjudicated, anticompetitive conduct. *Policy Regarding Character Qualifications in Broadcast Licensing* (“*Policy Statement*”), 102 FCC 2d 1179, 1200-1205 (1986). Likewise, misconduct that is “so egregious as to shock the conscience and evoke almost universal disapprobation,” can be a matter of Commission concern even prior to adjudication. *Id.* at 1205, n. 60, *cited at Policy Statement and Order*, 5 FCC Rcd 3252, 3254 at n. 6 (1990).<sup>2</sup> Moreover, the Commission

will consider conditioning the grant in any case in which a matter being litigated in another forum could result in an adjudication that an applicant before the FCC has engaged in relevant non-FCC misconduct and an adjudication of that misconduct raises serious questions as to whether the applicant before the FCC is possessed of the requisite propensity to obey the law.

*Policy Statement and Order*, 5 FCC Rcd at 3253. Petitioners submit that allegations of widespread fraud, racial discrimination and racketeering as detailed by Petitioners – and, in Kempner Mobile’s case, an adjudication of fraud the Opposition ignores – demonstrate that Cingular lacks the requisite propensity to obey the law, thus meriting the exercise of the Commission’s discretion to take cognizance of that misconduct in the context of the Cingular/AT&T merger. The Opposition cites cases that the Commission is not the proper forum for resolving private contract disputes, and that the agency will not defer action pending such litigation.<sup>3</sup> Those cases, however, are inapposite because they deal with isolated, purely contractual disputes.<sup>4</sup> Here, Petitioners are not asking the Commission to resolve such disputes but to consider Petitioners’ allegations of Cingular’s repeated misconduct involving fraud

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<sup>2</sup> The Opposition, p. 51, quotes the *Policy Statement* stating that it “prohibits” licensing decisions based on mere allegations of non-FCC misconduct. The text cited by Cingular, however, does not use the word “prohibits.”

<sup>3</sup> Opposition, p. 51.

<sup>4</sup> For example, *General Motors Corp. and Hughes Electronics Corp. (Transferors) and The News Corp. Ltd. (Transferee) for Authority To Transfer Control, Memorandum Opinion and Order*, 19 F.C.C.R. 473, 609 (2004) deals with a shareholder derivative suit.

(including an adjudication on the merits), racketeering and racial discrimination which bear on Cingular's propensity to obey the law and its qualifications to be a Commission licensee.

## II. CINGULAR IS REQUIRED TO REPORT THE MATTERS IN RESPONSE TO ITEMS 76 AND 77

Cingular and AT&T claim that Items 76 and 77 are limited to monopolization claims, which are absent from the pending litigation.<sup>5</sup> They cite no authority to support that proposition, nor could they, for it would equate matters involving "unfair methods of competition" -- the information items 76 and 77 call for -- with "monopolization." Further, Cingular's responses to items 76 and 77 contradict its own position, because those responses include matters other than "monopolization" claims.<sup>6</sup> The captioned applications therefore are defective and should be dismissed.

## III. PETITIONERS HAVE STANDING

Asserting that Petitioners "have not alleged the type of direct consequences needed to confer standing to challenge the merger," the Opposition notes that "most" of the Petitioners claim they will face a bigger opponent in their lawsuits "over conduct completely unrelated to the merger," making "these claims non-cognizable."<sup>7</sup> To support that argument the Opposition

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<sup>5</sup> Opposition, p. 64, n. 197.

<sup>6</sup> For example, Cingular describes the following matter in response to question 77 in application number 0001656065: "American Cellular Network Company, LLC, d/b/a Cingular Wireless v. Capital Management Communications, Inc., d/b/a CMCI, C.A. No. 02-15175 (Montg. CCP): CMCI resells Cingular's wireless service pursuant to a 1992 Settlement Agreement. In August 2002, Cingular instituted litigation to terminate CMCI's agreement citing CMCI's refusal to participate in a contractually required migration of customers and recovery of past due balances. CMCI has asserted counterclaims for breach of contract and tortious interference with contract claiming Cingular failed to provide free or discounted phones and customers service support for CMCI's customer base. CMCI also denies it owes Cingular any monies. The parties have exchanged discovery requests. Recently, the parties have agreed to a stay any further discovery and explore whether settlement is possible." In addition, Cingular's response to question 77 describes suits involving allegations of tying arrangements similar to allegations made by some of the Petitioners.

<sup>7</sup> Opposition, p. 59 and p. 64, n. 197.

cites *Applications of Centel Corporation and Sprint Corporation, Memorandum Opinion and Order*.<sup>8</sup> In *Centel*, however, the Commission did *not* find that the petitioner lacked standing to challenge the transfer though it refused to adjudicate what it deemed was a contract dispute. Likewise inapposite is the Opposition's other cited case, *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987). Standing was not in issue in that case; rather, it involved parties seeking to intervene based on a purely contractual dispute, unlike here where Petitioners allege misconduct bearing on Cingular's basic qualifications.<sup>9</sup>

Moreover, the Opposition ignores that Kempner Mobile obtained a judgment against Cingular for its anticompetitive activity, a type of adjudicated misconduct cognizable under the *Policy Statement*. That fact alone confers standing upon Kempner Mobile under the Opposition's own reasoning. As for the other Petitioners, the Opposition leaves unchallenged the fact that they will be dealing with a larger opponent post-merger, while ignoring that some of the Petitioners -- having been driven out of business by Cingular to become AT&T dealers -- will have to deal with Cingular again post-merger or simply discontinue their business. Petitioners submit that these injuries are cognizable to confer standing to challenge Cingular's qualifications based on misconduct going far beyond an isolated contract dispute.

#### CONCLUSION

By combining the second and third largest cellular carriers, the Cingular/AT&T merger will create the largest in the country. Before acting on the captioned applications, Petitioners respectfully request that the Commission conduct a public forum to permit the broadest airing of views and analyses concerning whether a merger of such historically large proportions is in the

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<sup>8</sup> 8 F.C.C.R. 1829, 1831 (CCB 1993) ("*Centel*").

<sup>9</sup> Further, the Commission in *Listener's Guild* indicated that its licensing action *would* remain subject to the outcome of pending state court action. See 813 F.2d at 469.

public interest. As shown above, Cingular's widespread misconduct makes a grant of the captioned applications inconsistent with the public interest, convenience and necessity. The Commission therefore should dismiss or deny the applications.

Respectfully submitted,

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## 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 20, 2004:

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