

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

In the Matter of)
)
Application for the Transfer of Control of)
Licenses and Authorizations from AT&T Wireless)
Services, Inc., and Its Subsidiaries to Cingular) **WT Docket No. 04-70**
Wireless Corporation)

**REPLY OF
CONSUMER FEDERATION OF AMERICA
AND
CONSUMERS UNION
TO
JOINT OPPOSITION TO PETITIONS TO DENY OF
AT&T WIRELESS INC. AND CINGULAR WIRELESS CORPORATION**

May 20, 2004

Pursuant to sections 214 and 309 (d) of the Communications Act of 1934, as amended, and section 1.939 of the Commission's rules, the Consumer Federation of America (CFA) and Consumers Union (CU) have filed a Petition to Deny the Application for Transfer of Control of Licenses and Authorizations for AT&T Wireless Service Inc. to Cingular Wireless Corporation.¹ The joint response of AT&T Wireless Services, Inc. (AWS) and Cingular Wireless Corporation (Cingular)² fails to address the serious anticompetitive problems raised by the Consumer Federation of America and Consumers Union in our petition to deny. That response raises a further issue in its reliance on confidential data not made available for review under protective cover. The Commission should suspend this proceeding until Cingular makes that data available.

The suggestion that CFA and CU do not have standing to petition to deny the transfer of control of these licenses is absurd on its face. Only by ignoring the public and consumer interest of the 50 million members of the groups who form the Consumer Federation of America could Cingular/AWS claim that we lack standing to challenge the merger. The anticompetitive harms identified in the petition will certainly afflict members of CFA, who are a substantial part of the public. In addition, CFA and CU have participated in dozens of similar proceedings before this agency. To our knowledge, we have never been denied standing in any such proceeding. The attached declaration makes clear what was obvious in the petition – CFA's members will be harmed and the public interest will not be served by this merger.

¹ WT Docket No. 04-70, May 3, 2004, *Joint Opposition to Petitions to Deny the Transfer of Control of Licenses of AT&T Wireless, Inc. and Cingular Wireless*.

² WT Docket No. 04-70, May 13, 2004.

Spectrum Hogger and Infrastructure Inefficiency

It remains clear that Cingular's management choices have led it to require far more spectrum than others in the industry.³ To the extent that those past mistakes create a need to support multiple technologies, there is no reason that Cingular should be allowed to hold licenses to so much more spectrum than its competitors after those multiple technologies have been eliminated.⁴

Cingular describes full service competitors who use substantially less than half the spectrum that Cingular claims to need to provide the same service. Our recommendation—that Cingular return spectrum in excess of 40 MHz after it eliminates its reliance on old, inflexible spectrum—would make available the essential input for another full service competitor, which would compensate for the competitor lost in this merger. The ability of competitors to provide the services (with substantially less spectrum) to which Cingular aspires is proof enough that a give back of spectrum is appropriate.⁵

Cingular seems to have difficulty deciding whether barriers to entry are significant or not in this industry. It asserts that infrastructure costs are not a barrier to entry for competitors who “include licensed PCS providers who have not yet built out in a particular area (for whom barriers to entry are low and consist mainly of the costs to build out or lease infrastructure and market the network in that area).”⁶ Yet, for Cingular, these very same costs and activities become a major hurdle because “a company must find a tower location with the

³ Opposition, p. 10, note 4, and p. 11 at 37.

⁴ Opposition, p. 12, “Cingular’s competitors using CDMA technology have substantially more flexibility to use their existing spectrum to offer new and advanced services while continuing to serve their existing customer base.”

⁵ Opposition, note 30, asks for technical support, but real world examples of the technical ability to provide full service with far less spectrum are strewn throughout the application and the opposition (e.g., note 42).

⁶ Opposition, p. 16, note 55.

right coverage and then address zoning, environmental, and political issues concerning the tower. This is both time-consuming and costly.”⁷

Cingular seeks to cushion the anti-competitive impact of the huge swath of spectrum it would hold by reminding the Commission that there are plans to auction additional spectrum for wireless networks.⁸ Yet it never acknowledges the possibility that its needs could be met in this manner.

In other words, far from “punishing” consumers as Cingular suggests,⁹ AWS/Cingular’s past mistakes have harmed consumers and their comments outline the procompetitive, consumer-friendly transition path to full service wireless networks. Cingular and AWS can each bid for the spectrum with the other competitors that will soon be available, acquire the infrastructure that is a low barrier to entry, and consumers will not have to suffer the competitive cost of a merger between a number two and number three firm in markets that would be rendered highly concentrated by this merger.

Anti-Competitive Effects of the Merger

In responding to the serious anticompetitive risks we identified, in virtually every case Cingular dismisses the numerous theoretical and empirical discussions of anticompetitive harm offered by CFA/CU as lacking merit¹⁰ by restating its earlier positions without providing any new empirical evidence. In the few cases where it tries to add new fact, the evidence is suspect or irrelevant.

Cingular’s obsession with flow share analysis was refuted by CFA/CU in the Petition to Deny with an analysis that showed market shares have become stable as the industry has

⁷ Application, p. 6.

⁸ Opposition, p. 12.

⁹ Opposition, p. 13.

matured. Cingular's insistence on flow shares and the use of the web browser example are entirely misplaced.¹¹ CFA/CU have shown that market shares in the wireless industry have stabilized and, with penetration of 60 percent, the market is mature. Changes at the margin have reduced significance.

The web browser example points to a period in which the browser penetration was low and the industry immature. Moreover, the change in market shares that became obvious was not the result of market forces, but of the abuse of market power.

The importance of the subscriber base, rather than marginal revenue, is reinforced by the fact that a substantial part of the Cingular strategy is to bundle and add services to the subscriber base. In other words, the current flow of revenue shares is the exception, not the rule.

Cingular attempts to gloss over the highly concentrated nature of the wireless market that would obtain post-merger, by recalling that the FCC eliminated the spectrum cap on the presumption that four competitors would be enough. That ruling did not bind the Commission to approve every merger, until there are only four competitors left, no matter who the merging parties are. That logic would support a merger between Cingular, AWS and Verizon, an outrageous proposition from both competition and public interest points of view.

Moreover, if the Commission accepts Cingular's math, it is highly unlikely that there will be four competitors in the future, because there is not enough spectrum available to support even three. The Commission can avoid that danger by denying this merger and allowing both Cingular and AWS to compete for the spectrum that they assure us the Commission will soon make available.

¹⁰ Opposition, p. 20.

Cingular ignores the comprehensive competitive problems identified in the CFA/CU Petition to Deny and claims to have divined our “true agenda... is not this transaction; it is that the Commission will ‘chalk a baseline that will dictate approval of the next several wireless combinations.’”¹² Our true agenda is the half dozen competitive concerns we detailed and documented in our filing. The likelihood that approving this merger would set off a merger wave that the agency would be unable to stop because this merger is worse than several others that would follow is an additional concern that is well within the scope of public policy.

The legislative language cited by Cingular in an attempt to prevent the Commission from exercise a legitimate concern for industry structure is entirely inapplicable to our Petition to Deny. Cingular reminds the Commission that “in acting [on transfer applications,] the Commission may not consider whether the public interest... might be served by the transfer, assignment of disposal of the... license to a person other that the proposed transferee.”¹³ We made no such recommendation or comparison. We were careful to consider future mergers that did not involve any of the licenses at issue in this transfer.

The Market Definition Issue

Cingular tries to rebut one of the central element of our discussion, the leverage that results from combining a dominant position in the spectrum market with the dominant position in the wireline market, but asserting that home territory market shares are smaller than nationwide shares. Gilbert asserts that, based on his flow analysis, Cingular has no advantage in the home service territories of its wireline parents. No actual data is presented,

¹¹ Gilbert, Supplemental, p. 4.

¹² Opposition, p. 4.

¹³ Opposition, p. 4.

nor is a parallel set of analyses based on market shares presented. Gilbert's claims are undocumented, supported by a footnote that asserts his findings are based on "Telephia data provided by Cingular."¹⁴ No such evidence has been entered into the record. Without making the supporting documentation available for scrutiny, this claim should be treated as unsubstantiated and given no weight whatsoever in this proceeding.

The failure of Cingular to put this evidence on the record points to the major flaw in its claims. Such data would certainly show higher market shares for Cingular in the local exchange service areas of its parent companies. This would undermine the claim that wireless is purely a national service. It would also show the basis for the concern that combining a dominant position in local wireline and wireless services raises anticompetitive bundling issues.

Incentives to Discriminate and Bundle

Cingular's recounting of current industry practices and the claim that its incentives will not change after the merger simply ignores the fact that size matters in determining the profitability of discrimination and anticompetitive efforts to raise rivals costs. The larger the size of the firm instituting an effort to raise rivals costs, the more likely it is to succeed, as competitors have fewer options. The larger the share of a leading firm in a market, the more it benefits from a generalized increase in prices (when not driven by underlying costs). Given its control of spectrum in the home service territories of the parents of Cingular, their number one position in wireless accounts, both nationally and locally, and their dominance of the wireline markets in those areas, the post-merger incentives will be very different. The statement that "Cingular is a net payor under virtually all of its roaming agreements (i.e.,

¹⁴ Gilbert Supplemental Declaration, p. 14, note 35.

Cingular subscribers roam more on the other carrier's network than the other carrier's subscribers roam on Cingular's network)"¹⁵ is a perfect example of the misstatement of the issue. What happens when Cingular doubles its subscriber base, and expands its coverage? With Cingular being 50 percent larger than its nearest rival and three to five times as large as the other national players, it is almost certain to shift from being a net payor in reciprocal roaming agreements to a net receiver.

The Record of Broken Promises and Anticompetitive Behavior

Cingular dismisses the evidence on anticompetitive behaviors, claiming that the evidence is stale. The abysmal record of SBC and BellSouth is a matter of record and it should inform the Commission's judgment about likely future behavior. But the record is certainly not stale.

The recent effort of SBC to impose thoroughly anticompetitive terms on competitive local exchange carriers is but the most recent in a long line of such activities.¹⁶ It bears directly on the one of the issues that CFA/CU raised in our Petition to Deny. CLECs need interconnection to reach the local market, as wireless competitors will need roaming in areas where Cingular holds a huge swath of spectrum.

Homeland Security Benefits

The claim that the merger will contribute to enhanced homeland security is specious at best. The applicant stands before the Commission as one of the least efficient users of spectrum for its routing commercial operations. Cingular does not present any evidence whatsoever to show that it would be able to handle the massive increase in call volumes that

¹⁵ Opposition, p. 48.

¹⁶ James S. Granelli, "Bells Now Aim for Rivals to Use Gear: The Apparent Shift Seeks to Keep Competitors from Installing their Own Equipment," *Los Angeles Times*, May 7, 2004.

are attendant on major security events. If national security is to drive the allocation of spectrum, it would make more sense to award spectrum to the most efficient operators, not the least efficient.

In light of the failure of Cingular/AWS to rebut the serious anticompetitive harms that are likely to flow from the merger its failure to further the public interest, the merger should be denied.

Respectfully Submitted,



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**DECLARATION OF MARK N. COOPER,
DIRECTOR OF RESEARCH,
CONSUMER FEDERATION OF AMERICA**

1. The Consumer Federation of America is a Federation (CFA) is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor farm, public power and cooperative organizations, with more than fifty million individual members.
2. AARP is the largest member of the Consumer Federation of America. I am a member of AARP.
3. CFA and its member groups have routinely participated in license transfer proceedings at the Federal Communications Commission as both petitioners and interveners.

Among the most recent activities are "Petition to Deny of Arizona Consumers Council, Association Of Independent Video And Filmmakers, CalPIRG, Center For Digital Democracy, Center For Public Representation, Chicago Consumer Coalition, Civil Rights Forum On Communications Policy, Citizen Action Of Illinois, Consumer Action, Consumer Assistance Council, Consumer Federation Of America, Consumer Fraud Watch, Consumers United/Minnesotans For Safe Food, Consumers Union, Consumers' Voice, Democratic Process Center, Empire State Consumer Association, Florida Consumer Action Network, ILPIRG (Illinois), Massachusetts Consumers Coalition, MassPIRG, Media Access Project, Mercer County Community Action, National Alliance For Media Arts And Culture, MontPIRG, New York Citizens Utility Board, NC PIRG, North Carolina Justice And Community Development Center, OsPIRG(Oregon State), Oregon Citizens Utility Board, Texas Consumer Association,

Texas Watch, United Church Of Christ, Office Of Communication, Inc., US PIRG, Virginia Citizens Consumer Council, WashPIRG, Wisconsin Consumers League, ” In the Matter of Application for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee, April 29, 2002; “Petition to Deny of Consumers Union, the Consumer Federation of America, Media Access Project and Center for Media Education,” In the Matter of Application of America Online, Inc. and Time Warner for Transfer of Control, CS 00-30, April 26, 2000; “Reply comments of the Consumer Federation of America, Consumers Union and AARP, before the Federal communications Commission, before the Federal Communications Commission, Proposed Transfer of Control SBC and Ameritech, CC Docket” No. 98-141, November 16, 1998;

4. The anticompetitive effects of the proposed merger are neither speculative nor hypothetical. The loss of a choice of a major national carrier through this merger and the huge market share of the resulting from the merger will deny consumers an important competitive choice in the marketplace.
5. CFA’s members have suffered from the anti-competitive activities of the parent companies involved in this merger.

The undersigned declares under penalty of perjury that the foregoing is true and correct.



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