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July 12, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: WT Docket 04-70

Dear Ms. Dortch:

On behalf of Kempner Mobile Electronics, Inc. ("Kempner"), this letter responds to the written ex parte presentation filed on June 10, 2004 ("June 10 Letter") by Cingular Wireless Corporation ("Cingular") and AT&T Wireless Services, Inc. ("AT&T") in the referenced docket.

In their June 10 filing, Cingular and AT&T took issue with the May 20 reply submitted by Kempner and other former Cingular dealers. The main argument asserted by Cingular and AT&T is that the fraud verdict Kempner obtained against Cingular "is irrelevant for purposes of judging whether a grant of the transfer is in the public interest." As shown below, this argument should be rejected.

The Commission's "concerns with anticompetitive and antitrust activity in broadcasting have occupied a unique position in the Commission's regulatory scheme."[1] Such activity can have a bearing "on an applicant's proclivity to comply with the Commission's rules and policies."[2] The Commission thus distinguishes anticompetitive behavior from other types of business conduct for purposes of basic qualifications determinations.[3] The Commission has also stated that, "in an era of increasing reliance on marketplace forces to achieve public interest goals, fraud which negatively affects the market place might be proper matter of consideration."[4] Thus, contrary to the interpretation of Commission's character qualifications policy advanced by Cingular and AT&T, relevant adjudicated "non-FCC" misconduct is *not* strictly limited to fraudulent misrepresentations to governmental units and criminal misconduct, but encompasses anticompetitive activity as

[1] *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1201 (1986).

[2] *Id.* at 1201-1202.

[3] *Id.*

[4] *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1198 (1986).

well.[5] Indeed, non-FCC misconduct may be considered even *prior* to adjudication where the alleged misconduct "is so egregious as to shock the conscience and evoke almost universal disapprobation."[6]

Kempner's Illinois state court complaint alleged, among other things, Cingular's fraud in its dealings with Kempner, including falsely represented to Kempner that Kempner had access to the same level of pricing and equipment discount as Cingular's internal channels of distribution. Kempner alleged that this fraudulent activity enabled Cingular to obtain customers that would otherwise have been directed to Kempner or other competitors. Kempner also alleged that Cingular intended to conceal from Kempner the fact that Cingular had breached its dealer agreements with Kempner, and that Kempner relied on the deception by refraining from exercising its right to expand its business by offering the cellular telephone products and service of competitors. Kempner further alleged that Cingular falsely represented to Kempner that Cingular would cooperate with Kempner to grow Kempner's customer base when Cingular actually intended to steal as many customers as possible from Kempner and drive Kempner out of business.

The evidence at trial showed that after January of 2001, when Cingular's management changed, Kempner observed that Cingular appeared to be engaged in the practice of making direct service and equipment offers to Kempner's customer base that Kempner was not able to offer, and directing those customers to Cingular's internal channels. Kempner determined that its "customer base was under attack." The apparent purpose and actual effect of this practice was to eliminate residual payments to Kempner for customers that Cingular was able to convert to an internal channel, resulting in injury to Kempner and enrichment to Cingular.

In response to such observation, Kempner's principal had a meeting with a Regional Vice President of Cingular, who falsely represented to him that Kempner would continue to receive the same service and pricing discounts as Cingular's internal channels so that competition between Kempner and Cingular would be on an "even playing field." This representation was made to induce Kempner not to terminate its authorized dealer contract with Cingular, so that Kempner would continue as an exclusive Cingular dealer and Cingular could continue to attack Kempner's customer base. In fact, Cingular continued to cause injury to Kempner by offering service and pricing discounts to Kempner's customers through its internal channels that Kempner was not permitted to offer.

The jury agreed with Kempner, returning a fraud verdict in its favor. The case (as noted by Cingular and AT&T) has entered the damages phase concerning Cingular's fraudulent activity.[7] At trial, Kempner plans to offer the testimony of other current or former Cingular dealers to show, among other things, that Cingular employed a pattern of unfair and coercive business practices designed to: (a) make it impossible for dealers to recognize that they were not being properly paid commissions and residuals by Cingular; (b) make it impossible for dealers who actually discovered these payments discrepancies to work through the morass of Cingular's "research" process and obtain the funds that Cingular improperly failed to pay; (c) facilitate Cingular's theft of

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[5] *Id.* at 1200-1203; *Policy Statement and Order*, 5 FCC Rcd 3252 (1990); *Policy Regarding Character Qualifications in Broadcasting Licensing*, 6 FCC Rcd 3448 (1991) (Commission may consider relevancy of civil misrepresentations not involving governmental units on case-by-case basis).

[6] *Policy Statement and Order*, 5 FCC Rcd 3252, 3254 at n. 5 (1990).

[7] Cingular and AT&T correctly observed that the jury's verdict in favor of Kempner on the tortious interference count subsequently was set aside and set for a new trial (which begins on August 2, 2004). Kempner stands corrected on this point.

the dealer's customers through direct solicitation of the customers of the dealers by Cingular's internal sales channels offering equipment upgrades and service changes; and (d) keep the dealers in the Cingular fold through a series of non-negotiable, one-sided contracts, while denying and concealing evidence of customer theft.

Kempner submits that Cingular's anticompetitive activities, notably involving management in the upper echelon of Cingular's decision making, are well within the Commission's discretion to consider in making its public interest determinations in the context of the referenced proceeding. Such activities negatively affect the marketplace on which the Commission increasingly relies to achieve its goals (such as increasing competition) and bear on Cingular's proclivity to comply with the Commission's rules and policies.

In their May 3 Petition to Dismiss or Deny, Kempner and the other former Cingular agents who have filed similar lawsuits against Cingular, described *allegations* of widespread fraud, racial discrimination and racketeering, never stating that Cingular has been found guilty of such widespread misconduct (yet) nor even implying as much.[8] In any event, the Commission has the discretion to take such allegations into account in reaching its decision in the referenced proceeding. In light of the fraud verdict returned in Kempner's case, the Commission should exercise that discretion and consider these matters rather than brushing them off as "irrelevant." This proposed merger -- a combination that will result in the nation's largest wireless carrier that will be a huge one-third larger than the second largest carrier -- will vastly broaden opportunities for Cingular to engage in the kinds of anticompetitive conduct detailed in the Kempner proceeding, which involved much more than one conversation between Kempner and Cingular representative, but rather a systematic effort to drive Kempner out of business.[9]

Cingular and AT&T should have disclosed the dealer lawsuits in response to Items 76 and 77 of Form 603. Their reliance on a 13-year old division staff interpretation of what these items require is flawed.[10] First, Items 15 and 17 of FCC Form 401 do not exactly mirror the language of Items 76 and 77 of Form 603. The last phrase of the former states "… or any other means *of* unfair method of competition" while that of the latter states, "…or any other means *or* unfair methods of competition" (Emphasis added). This difference -- between "of" and "or" -- reasonably supports the interpretation that the disclosure requirements of Items 76 and 77 are not limited to suits involving monopolization, but include unfair methods of competition.[11] Indeed, given the Commission's concerns about anticompetitive conduct previously cited herein, which by no means are restricted to monopolization, Kempner submits that its interpretation of the language in Items 76 and 77 best serves the public interest, and to the extent necessary the staff decision in *Danbury Cellular* should simply be overruled. Otherwise, the Commission will severely narrow in the future information provided by applicants bearing on one of the Commission's most crucial public interest goals, which is to promote competition in the marketplace.

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[8] *Cf. Petition To Dismiss Or Deny of Kempner et al.,* p. 13, with *June 10 Letter*, p. 4.

[9] *See June 10 Letter*, p. 4.

[10] *Danbury Cellular Telephone Co.*, 6 F.C.C.R. 4186, 4187 (MSD 1991).

[11] Cingular and AT&T never explain why, if their interpretation of Items 76 and 77 is correct, they nonetheless disclosed an abundance of matters in response to those questions *not* involving allegations of monopolization.

Sincerely,

/s/

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