

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

In the Matter of)
)
AT&T Wireless Services, Inc. and) WT Docket No. 04-70
Cingular Wireless Corporation)
Seek FCC Consent to Transfer)
Control of Licenses and Authorizations)

To: The Wireless Telecommunications Bureau

INFORMAL OBJECTION AND REQUEST FOR COMMISSION ACTION

Kaplan Telephone Company d/b/a PACE Communications (“Kaplan”), by its attorneys, and pursuant to Section 1.41 of the Rules and Regulations of the Federal Communications Commission (“FCC” or “Commission”),¹ Sections 201 and 202 of the Communications Act of 1934, as amended (the “Act”) and *Pubic Notice* DA 04-932 (rel. April 2, 2004), hereby requests that the FCC investigate Cingular’s denial of GSM-related services (the “Services”) to Kaplan that would allow Kaplan to provide competitive GSM service in its licensed area in the Louisiana 5 – Beauregard Rural Service Area (“LA5 RSA”) in competition with AT&T Wireless Services, Inc. (“AT&T”). Cingular’s denial of service to Kaplan has harmed competition and consumers and given AT&T an unfair competitive advantage over Kaplan in the provision of GSM and advanced services in the LA5 RSA. Kaplan therefore objects to the proposed merger of Cingular and AT&T without remedial conditions and requests that the Commission condition the merger on: (1) Cingular’s provision of the Services to

¹ 47 C.F.R. § 1.41.

Kaplan; (2) AT&T's divestiture of licenses in the LA5 RSA; and, (3) conditions to protect the provision of competitive wireless service and roaming in rural areas.

Kaplan provides Time Division Multiple Access ("TDMA") Commercial Mobile Radio Service ("CMRS") to subscribers in rural Vermillion Parish in the LA5 RSA. Because Kaplan is a small rural CMRS provider, it does not own its own TDMA switch, and instead purchases TDMA and analog switching and related services (including subscriber activation) from Cingular. In order to provide more advanced service to its subscribers and to satisfy the demands of Cingular—Kaplan's primary roaming partner, Kaplan and Cingular strategically planned to overlay Kaplan's network with a GSM network. As with the TDMA system, Cingular was to provide switching and GSM-related services to allow Kaplan to offer competitive GSM services to its subscribers. This would allow Cingular GSM subscribers to roam in Kaplan's market, and would allow Kaplan to offer competitive retail GSM services without purchasing its own GSM switch.

On September 19, 2003, Kaplan and Cingular entered into a Switching Services Agreement (the "Agreement") pursuant to which Cingular, unequivocally was to provide the Services to allow Kaplan to offer competitive GSM service to its subscribers in the market.² Pursuant to the Agreement, in November of 2003, Kaplan deployed a GSM network overlaying its existing TDMA network.

² For example, Section 4.2.1 of the Agreement, provides in relevant part:

Cingular shall give authorized [Kaplan] personnel access to the Cingular Equipment and Facilities used to provide Switching Services, *including the means of activating or deactivating* electronically a [Kaplan] subscriber's telephone number and according [Kaplan] electronic access to

In violation of the Agreement and Act, Cingular has failed to provide Kaplan with the required Services to allow Kaplan to offer competitive retail GSM services in the LA5 RSA. Cingular's failure to provide the Services has prevented Kaplan from offering competitive GSM service in the rural LA5 RSA in competition with AT&T, Cingular's bride to be. Kaplan's GSM network functions only as an extension of Cingular's network, and serves only Cingular subscribers.

Although Cingular does not hold a CMRS license covering Kaplan's service area, AT&T does, and AT&T has deployed a GSM network that substantially covers Kaplan's market.³ Cingular's intentional denial of service to Kaplan in clear violation of the Agreement, has given AT&T an unfair competitive advantage over Kaplan by allowing AT&T to offer GSM service to Kaplan's customers in the LA5 RSA. AT&T has particularly targeted Kaplan's business customers. Kaplan has been unable to compete with AT&T because of Cingular's denial of service.

While the Commission may not normally involve itself in a contractual dispute, Cingular's denial of service in this case constitutes highly anticompetitive behavior that the Commission should not ignore or tolerate. Cingular's denial of service has harmed consumers by effectively eliminating Kaplan as a competitor to AT&T's GSM and data services. This intentional elimination of a competitor is an unreasonable practice in

such other equipment and facilities as may be reasonably necessary for [Kaplan] to receive Switching Services in the applicable Markets.

(emphasis added). This is one of the services that Cingular has refused to provide, and the lack of which has prevented Kaplan from being able to offer competitive GSM service.

³ AT&T, through its affiliates TELECORP PCS, L.L.C, AT&T Wireless PCS, LLC, and TeleCorp Holdings Corp. II, L.L.C. holds the D, E and F block PCS licenses (call signs KNLG462, KNLG463, and KNLG921), respectively, in the Lafayette-New Iberia, LA Basic Trading Area ("BTA") (BTA236) which overlaps the LA5 RSA.

violation of section 201 of the Act. Cingular's refusal also unreasonably discriminates against Kaplan in violation of Section 202 of the Act, because Cingular is not providing Kaplan with services of the same "quality and character" of the services that "Cingular provides itself in the Associated Cingular System" as required by the Agreement.

Kaplan requests that the Commission investigate Cingular's failure to provide the Services and condition any approval of the merger on Cingular's provision of the Services to allow Kaplan to offer competitive GSM and data services in its licensed area in the LA5 RSA.⁴ Kaplan has suffered substantial competitive harm due to Cingular's

⁴ The Agreement clearly requires Cingular to provide services to Kaplan that will allow Kaplan to provide competitive GSM service to its own end user customers in the LA5 RSA. For example, pursuant to Section 4.1.1, of the Agreement, Cingular agreed to "perform all other functions customarily performed by an MSC." Section 4.2.1, provides in relevant part:

Cingular shall give authorized Company personnel access to the Cingular Equipment and Facilities used to provide Switching Services, *including the means of activating or deactivating* electronically a Company subscriber's telephone number and according Company electronic access to such other equipment and facilities as may be reasonably necessary for Company to receive Switching Services in the applicable Markets....

Section 2.4 specifies, "[T]he quality and *character* of the Services shall be the same as that which Cingular provides itself in the Associated Cingular System...." (emphasis added). Section 2.3 also provides, "[T]he Services shall be provided in accordance with the normal and usual procedures employed by Cingular in connection with the operation of its own CMRS Systems...." Pursuant to Section 5.1.1, Cingular agreed to provide Kaplan with such Home Location Register ("HLR") and authentication services or similar services "used by Cingular in its own GSM Systems...." Section 5.1.3 requires Cingular to provide Kaplan with "such other database services as Cingular employs in its own GSM Systems ..., or which are otherwise *reasonably necessary for [Kaplan] to provide competitive GSM Service in its Licensed Areas.*" (emphasis added). In addition, pursuant to Section 9.3, Cingular agreed to provide Kaplan with "detailed call data information in the same standard electronic format as Cingular employs for its Associated Cingular System as may be reasonably necessary for [Kaplan] to issue bills for services to its customers in the Market." The excerpted provisions are illustrative and not exhaustive of Cingular's obligations. Upon FCC request, Kaplan immediately will provide the Commission with a copy of the Agreement.

actions. Cingular's denial of service has given AT&T an unfair and anticompetitive head start. In addition, Cingular's denial of the Services has prevented Kaplan from generating additional roaming revenue from other GSM carriers roaming on Kaplan's network, because Kaplan's network "appears" to be part of Cingular's network. Cingular's failure to provide the services also has prevented Kaplan from offering subscribers advanced services such as data, text messaging or anything other than voice and has prevented Kaplan from generating revenue from these services. Kaplan's network is built to provide these additional services, and Cingular is selling advanced services on Kaplan's system but has prevented Kaplan from doing so. Cingular's anticompetitive actions have placed Kaplan at a significant competitive disadvantage.

In order to redress this situation, and without limiting additional remedies which are available to Kaplan, Kaplan further requests that the Commission condition any approval of the merger on AT&T-Cingular's divestiture of some or all of AT&T's licenses in the LA5 RSA. Divestiture of these licenses will lead to increased competition in the market.

Kaplan recognizes that its request and objection are filed beyond the deadlines established in *Public Notice* DA 04-932 in this proceeding. This delay resulted from negotiations between Kaplan and Cingular to resolve this matter, and specifically from Cingular's repeated verbal representations that it would provide Kaplan with the Services to allow Kaplan to provide competitive GSM services. Even as of today, September 23, 2004, Kaplan and Cingular participated in negotiations for Cingular's provision of the Services. Unfortunately, these negotiations have failed to produce resolution of this matter, and Kaplan can no longer delay bringing this situation before the FCC. Because

Cingular continues to intentionally eliminate competition with AT&T in the LA5 RSA, Kaplan must bring the matter before the FCC to eliminate the harm to consumers and Kaplan.

Kaplan also notes that Cingular's actions in the LA5 RSA demonstrate how Cingular's merger with AT&T will harm rural carrier's and their subscribers unless the Commission imposes conditions to prevent the deterioration of wireless service and competition in rural areas.⁵ Cingular's anticompetitive behavior has placed Kaplan at an extreme competitive disadvantage to AT&T and has prevented Kaplan from providing competitive voice and advanced services to consumers in the LA5 RSA. Upon approval of the merger, Cingular will almost certainly shift its roaming traffic to AT&T's GSM network and will almost certainly restrict its customers from roaming on Kaplan's network. In order to mitigate the loss of CMRS service in rural areas, at a minimum, the Commission should consider conditioning the Cingular-AT&T Merger on the following: 1) Requiring Cingular-AT&T to allow roaming access to the merged network by subscribers of Kaplan and similarly situated subscribers of other rural wireless carriers at affordable rates; and, 2) Ensuring that Cingular-AT&T subscribers can access Kaplan's CMRS network and other rural wireless carriers' networks at affordable rates.

Conclusion

The Commission should investigate Cingular's anticompetitive behavior and condition on any approval of the Cingular-AT&T merger on Cingular's provision of the Services and on the conditions explained above to redress Cingular's harm to competition in the LA5 RSA. Kaplan would like to discuss these concerns with the Commission as

⁵ See, e.g., *ex parte* of Public Service Communications, NTCA and OPASTCO, filed September 9, 2004.

CERTIFICATION OF SERVICE

I, Joy Barksdale, hereby certify that on this 27th day of September, copies of the foregoing Informal Objection and Request for Commission Action of Kaplan Telephone Company d/b/a PACE Communications were served via electronic mail and U.S. Mail, postage prepaid, upon the following parties:

Joaquin Carbonell, General Counsel
Joaquin.carbonell@cingular.com
Cingular Wireless, LLC
5565 Glenridge Connector
Atlanta, GA 30342

Brian F. Fontes, Vice President-Federal Relations
brian.fontes@cingular.com
Cingular Wireless, LLC
1818 N Street, NW
Suite 800
Washington, DC 20036

Douglas I. Brandon, Vice President
Internal Affairs and Law
Doug.Brandon@attws.com
AT&T Wireless
1150 Connecticut Avenue, NW
Fourth Floor
Washington, DC 20036

/s/
Joy Barksdale