October 5, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW, Room TW-A325
Washington, DC 20554

Re: *WT Docket No. 04-70 – Written Ex Parte Presentation*

Dear Ms. Dortch:

Cingular Wireless Corporation ("Cingular") and AT&T Wireless Services, Inc. ("AWS") (collectively "Applicants") hereby respond to eleventh-hour *ex parte* presentations made on behalf of (i) CompTel/ASCENT ("CompTel"),[1] (ii) Kaplan Telephone Company d/b/a PACE Communications ("Kaplan"),[2] and certain limited partners in the Citrus Cellular Limited Partnership ("Citrus Partners").[3] As discussed below, these filings are unrelated to consideration of the merger and were made well outside the pleading cycle.

CompTel Ex Parte

As a threshold matter, CompTel's filing was submitted months after the conclusion of the pleading cycle and after the Commission's 180 day merger timeline. No justification is offered and thus the submission should not be considered.[4] The timing of the filing reveals an obvious attempt to leverage the merger proceeding for other ends.

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[1] Letter from Jonathan Lee, Senior Vice President, Regulatory Affairs for CompTel/ASCENT, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 1, 2004) ("CompTel Letter").

[2] Informal Objection and Request for Commission Action, WT Docket No. 04-70 (Sept. 27, 2004) ("Objection").

[3] *See* Letter from Robert H. Jackson, Reed Smith LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 30, 2004) ("Citrus Letter").

[4] *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (quoting *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003)) (upholding the FCC's decision not to entertain a late-filed petition in the absence of extenuating circumstances); *FM Broadcasters*, 10 F.C.C.R. 10429, n.3 (1995) (unauthorized pleadings stricken pursuant to Section 1.45); *Arlie L. Davison*, 11 F.C.C.R. 15382, n.5 (1996) (accord).

CompTel's filing is merely another attempt to obtain special access relief.[5] As previously indicated,[6] CompTel's concerns involve an "industry-wide" issue which is the subject of a petition for rulemaking.[7] A rulemaking, not the merger, is the appropriate place for addressing special access rates.[8] Moreover, as Applicants demonstrated in their Joint Opposition to Petitions to Deny, the merger will have no impact on special access services.[9]

In any event, the CompTel Letter and associated merger "simulation" contain substantial flaws, four of which will be discussed here. These flaws are so serious that the merger simulation should be given no weight.

First, the merger simulation assumes that other carriers do not reposition their brands to replace the AWS brand. If such repositioning occurs, then the price effect predicted by the

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[5] *See* Reply Comments of CompTel/ASCENT Alliance, WT Docket No. 04-70, at i, 5-10, 12-14 (filed May 20, 2004) ("CompTel Reply") (requesting that the FCC abrogate existing special access contracts involving SBC and BellSouth as a merger condition); CompTel Letter at 2 (seeking special access relief).

[6] *See* Joint Opposition to Petitions to Deny and Comments of Cingular Wireless Corporation and AT&T Wireless Services, Inc., WT Docket No. 04-70, at 37-38 (filed May 13, 2004) ("Joint Opposition").

[7] *See* Comments of CompTel, CC Docket No. 01-321 (filed Jan. 22, 2002); *see also* Petition for Writ of Mandamus, *AT&T Corp. v. FCC*, D.C. Cir. No. 03-1397 (D.C. Cir. filed Nov. 5, 2003) (CompTel is a party to the petition seeking an order requiring the FCC to act on a petition for rulemaking filed by AT&T Corp. regarding the rates charged for special access services). The FCC filed its opposition to the Petition on January 28, 2004 and observed that the Commission was not obliged to act on AT&T's rulemaking request expeditiously because a new regulatory regime for special access services had been adopted and affirmed by the court less than two years earlier. *See* Opposition of the FCC to Petition for Writ of Mandamus, *AT&T Corp. v. FCC*, D.C. Cir No. 03-1397 (D.C. Cir. filed Jan. 28, 2004).

[8] *See Great Empire Broadcasting, Inc., Memorandum Opinion and Order*, 14 F.C.C.R. 11145, 11148 (1999) (noting that a challenge to transfer applications is not the appropriate vehicle for seeking rule changes and citing *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) ("rulemaking is generally better, fairer, and more effective method of implementing a new industry wide policy than the uneven application of conditions in isolated [adjudicatory] proceedings")).

[9] *See* Joint Opposition at 38-41.

merger simulation disappears.[10] Because AWS has no unique advantage over the other national carriers, there is no reason to believe that Verizon, T-Mobile, Nextel, or Sprint cannot be as vigorous a competitor to Cingular as AWS was. Indeed, these carriers already are.

Second, the merger simulation depends critically on the estimated elasticities of demand. CompTel uses aggregate data on revenues and subscribers – not minutes of use – from SEC 10-K reports to calculate the elasticities rather than using consumer level price and quantity data that details how consumers behave in response to relative price changes.[11] As was recently recognized by Judge Walker in *Oracle*, merger simulation that is "devoid of any thorough econometric analysis" of how consumers switch between competing products should be entitled to no evidentiary weight.[12]

Third, without any explanation, the merger simulation completely excludes the regional carriers, which collectively account for 20% of wireless subscribers.[13] Because regional carriers are present in almost all areas of the country, and also offer national plans, there is no basis for their exclusion. Further, because subscriber shares entirely drive the merger simulation, their exclusion biases the predicted post-merger price effect.

Fourth, the merger simulation assumes that both AWS and Cingular's brands survive the merger. But it is undisputed that Cingular will not be able to use the AT&T Wireless brand after a post-merger transition period, and the merged firm's service will be sold under the Cingular brand.[14] Because only the Cingular brand will survive, the world modeled by the simulation does not bear any resemblance to reality.

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[10] *See* Merger Guidelines, 2.212; *see also* The Antitrust Source, May 2004, Remarks by Greg Werden, Senior Economic Counsel, Department of Justice.

[11] *See generally* J. Hausman and G. Leonard, "Economic Analysis of Differentiated Products Mergers Using Real World Data," George Mason Law Review 5, 3, 1997. The aggregate data used by CompTel uses the wrong measure of price, looking at ARPU instead of price per minute. Because a carrier could have a higher ARPU because it has a lower price per minute – thus attracting high volume users – this data cannot be used to predict post-merger increases in price per minute.

[12] *United States v. Oracle Corp.*, 2004 U.S. Dist. LEXIS 18063 (D. Cal., 2004).

[13] Gilbert Aff. ¶16.

[14] Associated Press, Cingular, AT&T Settle Branding Deal, Monday August 23, 5:59 pm, http://www.msnbc.msn.com/id/5800408/

Kaplan

On September 27, 2004, Kaplan filed an informal Objection urging the Commission to impose conditions on the merger because Cingular allegedly had failed to comply with a private contractual arrangement, in particular a Switching Services Agreement.[15] On October 5, 2004, Kaplan and Cingular resolved their contractual dispute regarding the Switching Services Agreement. As a result, Kaplan will be seeking Commission approval to withdraw its Objection tomorrow.

Citrus Partners

The Citrus Partners opposed the transfer of one of the licenses involved in the merger – KNKN738 – because the limited partners in Citrus were allegedly entitled to have their interests purchased by Cingular as part of the merger. As the Citrus Partners recognize, however, the Commission has long held that private contractual matters have no place in the consideration of a license transfer.[16] Moreover, Citrus is not even the licensee of KNKN738. Accordingly, their objection to the merger should be rejected.

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[15] Objection at 2-3.

[16] *See* Citrus Letter at 1; *accord Applications of Centel Corporation and Sprint Corporation, Memorandum Opinion and Order*, 8 F.C.C.R. 1829, 1831 (CCB 1993) ("*Centel Order*") ("[T]he alleged violation of the partnership agreements amounts to a contractual dispute … and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them." (citation omitted)); *Sonderling Broadcasting Co.*, 46 Rad. Reg.2d (P&F) 890, 894 (1979) (Commission is not the proper forum for the resolution of private contractual disputes and such matters are appropriately left to the courts); *see Mid-Missouri Telephone Company*, 14 F.C.C.R. 18613 (CWD 1999) ("It is the Commission's policy, however, to not defer the consideration of outstanding matters, pending the outcome of litigation involving private contractual matters. Because the litigation at issue concerns a contractual dispute between the petitioner and the transferor, we will not defer or condition the grant of the above-captioned transfer of control applications.").

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

/s/
Douglas I. Brandon
Vice President, Federal Affairs
AT&T WIRELESS SERVICES, INC.

/s/
Brian F. Fontes
Vice President – Federal Relations
CINGULAR WIRELESS CORPORATION