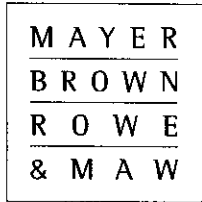


DOCKET FILE COPY ORIGINAL



March 9, 2005

Mayer, Brown, Rowe & Maw LLP
1909 K Street, N.W.
Washington, D.C. 20006-1101

RECEIVED

MAR - 9 2005

Main Tel (202) 263-3000
Main Fax (202) 263-3300
www.mayerbrownrowe.com

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Federal Communications Commission
Office of Secretary

Julian P. Gehman
Direct Tel (202) 263-3279
Direct Fax (202) 263-5279
jgehman@mayerbrownrowe.com

Re: Petition to Deny of Dobson WT Docket No. 05-50

Dear Madam Secretary:

Enclosed please find five copies of the Petition to Deny of Dobson Cellular Systems, Inc. and American Cellular Corporation ("Dobson") in the above referenced proceeding. The enclosed is **REDACTED – FOR PUBLIC INSPECTION**.

Should there be a question, please contact the undersigned.

Sincerely,

Julian P. Gehman

014

Before the
Federal Communications Commission

RECEIVED

MAR - 9 2005

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Applications for the Transfer of Control)
Of Licenses and Authorizations)
)
From)
)
Western Wireless Corporation)
And its Subsidiaries To)
)
To)
)
ALLTEL Corporation)

WT Docket No. 05-50

**PETITION TO DENY OF DOBSON CELLULAR SYSTEMS, INC. AND
AMERICAN CELLULAR CORPORATION**

Dobson Cellular Systems, Inc. and American Cellular Corporation (“Dobson”)¹ hereby submit their Petition to Deny the proposed acquisition (the “Merger”) of Western Wireless Corporation (“Western Wireless”) by ALLTEL Corporation (“ALLTEL”) in the captioned proceeding.

Interest of Dobson

Dobson is a leading provider of wireless communications services to rural markets. Headquartered in Oklahoma City, the Company owns wireless operations in 16 states. Dobson competes with Western Wireless and ALLTEL, parties to the Merger, who also are leading providers of wireless service to rural areas.

As described below, if the Merger is approved as proposed, Dobson will be negatively affected by ALLTEL’s acquisition of the Cellular One brand. Dobson operates under the

¹ Dobson Cellular Systems, Inc. and American Cellular Corporation are subsidiaries of Dobson Communications Corporation.

licensed brand name Cellular One in all but three of Dobson's markets. Dobson has made a substantial investment in the Cellular One brand, and Dobson's public image and ability to compete is tied up in this brand. Cellular One branded operations are composed of (i) Western Wireless, which owns the Cellular One Group (the brand licensor), and has properties covering 41% of the total Cellular One POPs; (ii) Dobson, with properties covering 45% of the total Cellular One POPs; and (iii) fifteen other licensee companies which together cover 13% of the total Cellular One POPs. As described below, approval of the merger as proposed would result in severe harm to the Cellular One brand which in turn would adversely impact Dobson's substantial investment in Cellular One and Dobson's ability to compete.

Relief Requested and Anticompetitive Harm of the Merger

The Commission should order Western Wireless to divest the Cellular One Group, a Western Wireless subsidiary that owns, manages and promotes the Cellular One brand. Any Merger approval should be conditioned on the sale of the Cellular One brand to a buyer who has the economic incentive to promote and develop the brand. If the Cellular One Group is not divested, the Commission should not approve the Merger. Dobson takes no position on other aspects of the Merger.

Absent such divestiture, the Merger would have "double whammy" anticompetitive harms. *First*, ALLTEL would own the Cellular One Group, which owns, manages and promotes the brand. ALLTEL would have the economic incentive to destroy the Cellular One brand and instead promote ALLTEL's own brand. *Second*, ALLTEL has announced it will re-brand, to ALLTEL's brand, the current Western Wireless properties operating under the Cellular One brand. This will result in an immediate 41% shrinkage in the population covered by this brand.

Absent an FCC-ordered divestiture, ALLTEL could simply refuse to re-license the Cellular One brand in these markets, thereby extinguishing the brand from 41% of its markets covered. Alternatively, ALLTEL could degrade the Cellular One brand by re-licensing to weak carriers.

The foregoing “double whammy” is compounded by the fact that it is primarily rural markets that are affected. As the Commission knows, rural markets have fewer carriers than urban markets. Because of the smaller number of competitors, the degradation or disappearance of the Cellular One brand from a rural market will have a disproportionately anticompetitive effect.

ALLTEL Will Have the Incentive and Ability to Harm the Cellular One Brand

ALLTEL has already announced it will re-brand and eliminate the Cellular One brand from the properties it acquires from Western Wireless. ALLTEL’s economic interest is to promote the ALLTEL brand. Cellular One is a competing brand. ALLTEL’s economic interest is to have the Cellular One brand disappear as a viable competitor to ALLTEL’s brand.

ALLTEL’s ability to do mischief with the Cellular One brand is evident from the License Agreement between Cellular One Group and Dobson Cellular Systems, Inc. (the “License Agreement”).² The License Agreement governs the legal relationships between Cellular One Group, owner of the Cellular One and related trademarks (“Licensor”), and Dobson and other wireless carriers operating under the Cellular One brand (each, a “Licensee”). The License Agreement was appropriately structured with the Licensor (i) having a substantial economic incentive to promote the brand (because the Licensor was owned by one of the largest Licensees), and (ii) having substantial discretion as to whether, when, and how to advertise and take other

² The Cellular One license agreements with American Cellular Corporation are substantially similar to the License Agreement.

actions to promote the brand and preserve the quality of service provided under the brand. Absent an FCC-ordered divestiture, the Licensor would have the opposite incentive, namely, to destroy the brand. Significantly, because of the substantial latitude conferred on the Licensor, ALLTEL likely could destroy the Cellular One brand without breaching the License Agreement.

The FCC should not create a circumstance (by approving the Merger without ordering a divestiture) where a carrier's competitor controls the carrier's brand. Dobson should not be placed in the awkward and dangerous position of having to monitor ALLTEL's every move with respect to the Cellular One brand (the fifteen other, smaller Cellular One licensees probably are not in a position to protect their rights viz a viz ALLTEL). Instead, the FCC should structure the economic incentive so that the owner of the brand has the incentive to promote the brand, thereby promoting competition.

The FCC Has The Authority To Require A Divestiture In Order To Preserve Competition

In the recent Cingular/AT&T Wireless merger, the Commission articulated once again its standard of review and public interest framework for evaluating the proposed merger of wireless companies.³ The Commission must determine whether the proposed merger will serve the public interest, convenience and necessity. The applicable public interest standards involve a balancing process that weighs the potential public interest harms against the potential public interest benefits. The applicants bear the burden of proving, by a preponderance of the evidence that the proposed merger, on balance, serves the public interest. *Id.* para. 40. The Commission's public interest evaluation includes "a deeply rooted preference for preserving and enhancing competition in relevant markets." *Id.* para. 41. The Commission's public interest authority

³ See In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, 19 FCC Rcd 21522, paras. 40-44 (2004).

enables the agency to impose and enforce narrowly tailored, transaction-specific conditions that ensure the public interest is served by the transaction. These conditions may include divestiture, *id.* para. 43.

The FCC Recognizes Brands As Important To Wireless Competition

Strong brands, as evidenced by brand loyalty and brand differentiation, are critical to maintaining healthy competition among wireless carriers. In its Eighth Report on CMRS competition, the Commission reviewed analysts' comments that brand differentiation helps consumers distinguish among the quality of carriers' networks.⁴ In its recent Ninth Report, the Commission similarly noted the brands of individual carriers, the brands of national carriers using affiliates, the effect of branding and advertising, and the importance of brand differentiation.⁵ In analyzing the effect on competition of Cingular's acquisition of AT&T Wireless, the Commission noted that carriers use marketing strategies to differentiate their brands, as well as the success of various carriers in achieving brand differentiation.⁶

The Commission's recognition of branding as important to competition among wireless carriers parallels acknowledgement by antitrust enforcers and the courts of the importance of branding to competition. For example, in a merger of white bread bakers, the United States brought suit under Section 7 of the Clayton Act, 15 U.S.C. §18, and the court ordered the

⁴ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, Eighth Report, 18 FCC Rcd 14783, 14825 (2003) (the "Eighth Report").

⁵ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Radio Services, Ninth Report, 19 FCC Rcd 20597 (2003) (the "Ninth Report") (paras. 67, 73, 75-79 (brands of carriers); paras. 103-106 (branding and advertising); paras. 149-50 (brand differentiation based on quality of network)).

⁶ Applications of AT&T Wireless and Cingular Wireless, *supra*, n1, paras. 65, 157-59.

divestiture of brands or labels, because the consolidation and loss of brands resulting from the merger would have reduced competition.⁷

Loss of the Cellular One Brand Would Harm Competition in Rural Wireless Services

Competition occurs in the mind of the consumer. The brand is the hook that gets the wireless carrier into the mind of the consumer, and brand differentiation helps consumers choose between carriers. Where the Cellular One brand disappears or is weakened, the presence in the mind of the consumer of the carriers utilizing the Cellular One brand disappears or is weakened. This hurts competition.

The Commission traditionally has analyzed the effect on competition of a merger by reviewing the number of competitors remaining in a market after the merger. The loss of a competitor usually results from the acquiring party buying and consolidating the operations of the target company. However, in this instance, where ALLTEL will acquire the Cellular One brand, the Commission should consider the effect on rural markets of the loss or degradation of the Cellular One brand. The effect is similar to the loss of a competitor in a market. Loss or degradation of the Cellular One brand will result in greater concentration among wireless competitors in rural markets.

In the Ninth Report, the Commission found that less densely populated counties (100 or fewer population per square mile) have an average of 3.7 mobile competitors, while more densely populated counties (greater than 100 population per square mile) have an average of 5.9 competitors.⁸ In those rural markets where the Cellular One brand will disappear or be degraded, the Commission should factor in the immediate or eventual loss of a competitor due to the loss or

⁷ United States v. Interstate Bakeries Corporation and Continental Baking Company, 1996 U.S. Dist. LEXIS 19734; 1996-1 Trade Cas. (CCH) P71,271 (N.D. Ill. 1996).

⁸ Ninth Report, *supra*, n3, para. 109.

REDACTED - FOR PUBLIC INSPECTION

degradation of the Cellular One brand name. The concentration, from four to three, or from three to two effective competitors, resulting from loss of the brand name, is a significant concentration that will result in anticompetitive harm. This harm requires preventative action by the Commission in the form of a mandated divestiture of the Cellular One brand.

WHEREFORE, the FCC should require Western Wireless to divest the Cellular One Group prior to closing the Merger by selling to a party with an economic interest in promoting this brand.

Respectfully submitted,

**DOBSON CELLULAR SYSTEMS, INC.,
AMERICAN CELLULAR CORPORATION**

By: 

Ronald L. Ripley
Senior Vice President and Corporate Counsel
14201 Wireless Way
Oklahoma City, Oklahoma 73134
(405) 529-8500

Julian P. Gehman
Mayer, Brown, Rowe & Maw
1909 K Street, N.W.
Washington, DC 20006-1101
(202) 263-3279

Date: March 9, 2005