



Acadiana Cellular General Partnership (Acadiana).<sup>1</sup> In its Petition, Acadiana seeks reconsideration of the Commission's Memorandum Opinion and Order, released October 26, 2004, granting applications filed by AT&T Wireless Services, Inc. (AT&T Wireless) and Cingular Wireless Corporation (Cingular) for consent to transfer control of all licenses and authorizations held by AT&T Wireless and its subsidiaries to Cingular (*Cingular-AWS Order*).<sup>2</sup> Acadiana, a wireless service provider offering cellular service in two license areas in Louisiana, argues that Cingular has obtained an anti-competitive amount of spectrum and should be required to divest itself of certain spectrum licenses formerly controlled by AT&T Wireless that extend into Acadiana's service territories. In the alternative, Acadiana requests that the Commission engage in a further examination of these markets. For the reasons set forth below, we deny the Petition for Reconsideration.

## I. BACKGROUND

2. Acadiana is a general partnership established on July 19, 1989 that operates an analog cellular system in Louisiana. The partnership consists of Louisiana Cellular, Inc. (LCI), which holds a 32.5% interest, Dellsouth Cellular, Inc. (DCI), which also holds a 32.5% interest, and BellSouth Mobility LLC (BellSouth Mobility), now doing business as Cingular, which holds the remaining 35%. While Acadiana's service uses spectrum licensed to Acadiana, the service has been marketed under Cingular's brand name, managed at all times by Cingular, and operated with Cingular's switch and billing and collection operations.

3. Acadiana has licensed services areas in two Cellular Market Areas (CMAs), with 25 MHz of spectrum in each market.<sup>3</sup> CMAs are the 734 regions originally used by the Commission in issuing licenses for cellular service, made up of 305 Metropolitan Statistical Areas (MSAs), 428 Rural Service Areas (RSAs), and a market for the Gulf of Mexico.<sup>4</sup> Acadiana's specific service area consists of portions of CMA 458 and CMA 459, both of which are RSAs within the State of Louisiana.

4. Acadiana's Petition concerns the amount of spectrum that is controlled by or attributable to Cingular in Acadiana's service area as a result of the merger and the impact of this spectrum concentration on Cingular's ability to act in an anti-competitive fashion. Both before and after the merger, Cingular was, in addition to being affiliated with Acadiana, also affiliated with other entities that offered cellular service in portions of either CMA 458 or 459, but whose service areas did not overlap with Acadiana's service area.<sup>5</sup> Thus, prior to the merger, the amount of spectrum attributable to Cingular inside Acadiana's service area was limited to Acadiana's own 25 MHz of spectrum. After the merger, however, Cingular obtained control of AT&T Wireless's Personal Communications Service (PCS) spectrum licenses, including 30 MHz of spectrum in Basic Trading Area (BTA) 032. PCS is licensed using 51 Major Trading Areas (MTAs) and 493 BTAs, as defined in the Rand McNally Commercial Atlas

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<sup>1</sup> *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, Petition for Reconsideration by Acadiana Cellular General Partnership, filed November 26, 2004 (Petition).

<sup>2</sup> See *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket No. 04-70, 19 FCC Rcd 21522 (2004) (*Cingular-AWS Order*).

<sup>3</sup> Petition at 3-4; Cingular Opposition at 2.

<sup>4</sup> *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 Services*, Eighth Report, 18 FCC Rcd. 14783, 14795 (2003).

<sup>5</sup> Petition at 4-5; Cingular Opposition at 8. Acadiana specifically notes that, in addition to itself, Cingular is affiliated with cellular providers BellSouth Mobility in CMA 458 and Lafayette MSA LP in CMA 459. Petition at 4-5.

and Marketing Guide and our rules.<sup>6</sup> BTA 032 in particular covers territory in Louisiana and encompasses portions of CMA 458 and CMA 459 served by Acadiana.<sup>7</sup> Thus, after the merger, the total spectrum attributable to Cingular in these areas increased from 25 MHz to 55 MHz.<sup>8</sup>

5. In its Petition, Acadiana asserts that, in the *Cingular-AWS Order*, the Commission failed to analyze the impact of the merger on competition in CMA 458 and CMA 459. Acadiana asserts that we therefore failed to recognize that the BTA 032 spectrum licenses previously held by AT&T Wireless, combined with the cellular licenses that were already controlled or attributable to Cingular in CMAs 458 and 459, would provide Cingular with pervasive market power in those service areas and enable it to engage in anti-competitive conduct.

6. Acadiana further asserts that Cingular's anticompetitive conduct has already begun. Specifically, it asserts that before the transfer applications were approved, Cingular had promised LCI and DCI that it would sell Acadiana the AT&T Wireless licenses in BTA032 on fair terms and conditions.<sup>9</sup> Acadiana claims that after the approval, Cingular violated this promise and would agree to sell the spectrum to Acadiana only if LCI and DCI gave up voting rights and agreed to be limited partners thereafter.<sup>10</sup> Cingular further allegedly indicated that, if LCI and DCI did not agree to this arrangement, then Cingular would quit as Managing General Partner, deny Acadiana access to Cingular's switching facilities and billing and collections services, withdraw from Acadiana the right to market services under the Cingular brand name, and use the newly acquired AT&T Wireless spectrum to provide service in those parts of CMAs 458 and 459 served by Acadiana in direct competition with the partnership.<sup>11</sup>

7. As a remedy, Acadiana requests that the Commission order Cingular to divest itself of all acquired AT&T Wireless assets in BTA 032.<sup>12</sup> In the alternative, Acadiana requests a thorough, on-the-record investigation to determine how the merger of Cingular and AT&T Wireless will impact competition in Acadiana's service territory. In connection with the latter request, Acadiana notes that the Wireless Telecommunications Bureau, on June 20, 2004, issued a letter directing Cingular and AT&T Wireless to provide further information regarding their services and holdings in a number of specific markets, which included CMA 458 (but not CMA 459).<sup>13</sup> Acadiana requests that, if the Commission pursues a further investigation, the Commission issue a new letter requesting the same information for all of AT&T Wireless's spectrum holdings in CMA 459 as well as CMA 458.

## II. DISCUSSION

8. Pursuant to section 1.106 of our rules, parties may petition for reconsideration of final

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<sup>6</sup> See Rand McNally, 1992 Commercial Atlas & Marketing Guide, 123rd Edition, 1992 (Rand McNally); 47 C.F.R. § 24.202.

<sup>7</sup> Cingular Opposition at 2.

<sup>8</sup> See AT&T Wireless Services, Inc., Transferor, and Cingular Wireless Corporation, Transferee, Application for Transfer of Control of Section 214-Authorized International Carrier, File No. ITC-T/C-20040318-00126, at Exh. VIII (filed Mar. 18, 2004).

<sup>9</sup> Petition at 5.

<sup>10</sup> Petition at 6.

<sup>11</sup> *Id.*

<sup>12</sup> Petition at 3; Acadiana Reply to Opposition at 2.

<sup>13</sup> See Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, to David C. Jatlow, AT&T Wireless Services, Inc., and David G. Richards, Cingular Wireless Corporation (June 30, 2004); see also Petition at 7-8.

Commission actions.<sup>14</sup> Reconsideration is generally appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to respond.<sup>15</sup>

9. We find no material error or omission in our original decision to grant transfer of control over AT&T Wireless PCS licenses in BTA 032 generally, and CMAs 458 and 459 in particular, to Cingular. Contrary to Acadiana's assertions, we already have considered in our previous order the impact of the merger on competition in Acadiana's service area, CMAs 458 and 459. In fact, these were two of the CMAs that we identified in an initial screening as deserving a detailed, case-by-case analysis of whether there would be competitive harms if the transaction were approved without conditions.<sup>16</sup> We therefore performed a market-specific analysis on both CMA 458 and CMA 459 to determine whether the transaction would be harmful to competition.<sup>17</sup> Specifically, we considered: (1) the number of rival carriers that offer competitive nationwide service plans as well as regional and local plans; (2) the spectrum holdings of each of the rival carriers identified in (1) above; (3) the geographic coverage of their respective networks; (4) the combined entity's post-transaction market share; (5) the share of spectrum suitable for the provision of mobile telephony services controlled by the combined entity; and (6) whether additional spectrum suitable for the provision of mobile telephony services would be made available in the Commission's Auction No. 58 or in the secondary market directly from NextWave.<sup>18</sup> Based on an examination of these factors, we concluded that, in both CMA 458 and 459, the transaction was "unlikely to diminish competition through either unilateral action by the merged entity or coordinated interaction among competing carriers."<sup>19</sup>

10. Nothing in Acadiana's Petition gives us reason to doubt our conclusions. Indeed, it is Acadiana that makes a material omission, as it fails to note or consider the impact of competitors in its service areas other than those rivals using cellular spectrum. In CMA 458, Acadiana notes the post-merger presence of unaffiliated rivals Centennial Communications (Centennial) and Kaplan Telephone Company, both of which operate with cellular spectrum, but Acadiana neglects other providers of mobile telephony in the area that use PCS or other non-cellular spectrum, including Nextel Communications, Inc. (Nextel), Sprint Corporation (Sprint), T-Mobile USA, Inc. (T-Mobile), and Verizon Wireless. Similarly, Acadiana notes the presence in CMA 459 of Cingular rivals Centennial and ALLTEL Communications, Inc., but again does not mention Nextel, Sprint PCS, T-Mobile, or Verizon Wireless, all of whom are launched in this CMA.<sup>20</sup>

<sup>14</sup> 47 C.F.R. § 1.106. See also 47 U.S.C. § 405.

<sup>15</sup> *In the Matter of Northstar Technology, LLC*, 19 FCC Rcd 22275, 22280 para. 11 (2004). The Commission may also consider additional facts if it determines that such consideration is in the public interest. 47 C.F.R. 1.106(c)(2).

<sup>16</sup> *Cingular-AWS Order*, 19 FCC Rcd at 21569 para. 112.

<sup>17</sup> *Id.*, 19 FCC Rcd at 21579 para. 149, 21593 para. 184.

<sup>18</sup> *Id.*, 19 FCC Rcd at 21595 para. 190.

<sup>19</sup> *Id.*, 19 FCC Rcd at 21596 para. 192.

<sup>20</sup> In terms of spectrum concentration, the record demonstrates that Cingular would hold no more than 55 MHz in any geographic area in BTA 032, out of a total of 200 MHz that the Commission noted was currently available. See *Cingular-AWS Order*, 19 FCC Rcd at 21561 para. 81. See also Application at Exh. VIII. Further, this degree of concentration will likely be reduced in the near future because the Commission, in calculating the 200 MHz total, did not include spectrum that has been allocated and designated for advanced wireless services including PCS, but has not yet been auctioned. See, e.g., *Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands*, WT Docket No. 02-353, Report and Order, 18 FCC Rcd 25162, 25172 para. 28 (2003) (establishing service rules for 90 MHz of spectrum to be used for advanced wireless services, including 10 MHz licensed on an RSA/MSA basis).

11. We further find that Acadiana's evidence of current anti-competitive conduct by Cingular does not undermine any of the Commission's conclusions. Acadiana's only such evidence is that Cingular allegedly now requires LCI and DCI to surrender voting control over Acadiana to Cingular and warns that, absent this condition, it would withdraw its support and brand name from Acadiana and compete as a separate service provider in Acadiana's territory. These allegations do suggest that the merger may have adverse consequences for Acadiana, by reducing Cingular's need for Acadiana's spectrum. Our concern in merger analysis is not, however, the protection of particular service providers, but the protection of the public interest and, as an essential part of that interest, preserving and enhancing competition.<sup>21</sup> As Acadiana concedes, it has never been a competitor of Cingular, and does not wish to be a competitor.<sup>22</sup> Rather, it essentially operates as a part of Cingular's business: it provides service under the Cingular brand name and under Cingular management, using Cingular's facilities and operating resources. Given that Acadiana is a Cingular affiliate rather than a competitor, our analysis of the state of competition in no way relied on any competition from Acadiana. To the contrary, in determining the state of competition and spectrum concentration in Acadiana's markets, the Commission attributed Acadiana's subscribers and spectrum entirely to Cingular, and still concluded that the merger would not lead to excessive concentration in the Acadiana markets.<sup>23</sup> Thus, any adverse effects to Acadiana do not affect our analysis or alter our conclusion that the post-merger level of competition will be sufficient in CMAs 458 and 459.<sup>24</sup>

12. We also disagree with Acadiana that any negotiating advantage that Cingular has gained from its new licenses is indicative of market power in the relevant geographic areas. As noted above, Cingular will not have even a third of the available spectrum in CMAs 458 and 459. To the extent that Acadiana faces new demands in negotiation, they arise from the apparent fact that Cingular no longer requires the use of Acadiana's specific spectrum licenses as much as it did before, not from any dominance over available spectrum more generally.<sup>25</sup>

13. Acadiana also asserts that, if Cingular does choose to compete with Acadiana, Cingular may use its knowledge of Acadiana's proprietary information to engage in unfair competition.<sup>26</sup> As noted above, the potential of an adverse impact on Acadiana from the merger does not undermine our conclusions regarding the state of competition, because Acadiana was not a competitor when the conclusions were made. Further, the contention of such future misconduct by Cingular is purely speculative, and even if such conduct were to occur, it would only suggest a problem between Cingular

<sup>21</sup> See *Cingular-AWS Order*, 19 FCC Rcd at 21542-44 paras. 40-41; see also 19 FCC Rcd at 21552 para. 57 ("as an essential part of our public interest analysis, we analyze the potential competitive harms of the proposed transaction ...."), 21588 para. 172 ("In evaluating the impact of the proposed merger on roaming services, we focus on the potential harm to consumers of mobile telephony services, rather than to mobile telephony providers.").

<sup>22</sup> Petition at 4 n.3, 6.

<sup>23</sup> In this respect, Acadiana's Petition presents something of a contradiction, for Acadiana wants to be treated as attributable to Cingular for purposes of determining Cingular's aggregated spectrum, see Petition at 4, but then wishes to stand in the place of a competitor in order to characterize Cingular's treatment of it as anti-competitive. See Petition at 7.

<sup>24</sup> Indeed, it would be strange to conclude that Cingular's mere indication that it might provide new competition in an area is itself anti-competitive.

<sup>25</sup> Acadiana's own position undermines its assertion of a competitive concern stemming from Cingular's aggregation of 55 MHz. If Acadiana gained the AT&T Wireless licenses as it wishes to, it would have direct control over the same 55 MHz that is now attributed to Cingular. While claiming that 55 MHz empowers Cingular to act in an anti-competitive manner, however, Acadiana finds no danger to competition from the prospect of controlling a similar amount. See Acadiana Reply to Opposition at 5 n.10 (asserting that, notwithstanding its spectrum holdings, it is the "obvious first choice" to receive the AT&T Wireless licenses); Cingular Opposition at 8 n.25.

<sup>26</sup> Petition at 8; Acadiana Reply to Opposition at 5 n.10.

and Acadiana, not between Cingular and the market more generally. Thus, while unlawful use of proprietary information might warrant some judicial remedy, it would most likely not warrant divestiture, which would prevent Cingular from competing fairly as well as unfairly.<sup>27</sup>

14. For these reasons, we find that Acadiana has failed to demonstrate any error or omission in the *Cingular-AWS Order*, and we therefore deny its Petition.<sup>28</sup>

### III. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed by Acadiana Cellular General Partnership on November 26, 2004 IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

<sup>27</sup> We make no conclusions with regard to whether the alleged conduct would warrant any remedy. Similarly, with regard to Acadiana's allegations that Cingular has violated a promise to sell the AT&T Wireless spectrum to the partnership, we make no conclusions as to the truth of these allegations or the legal merits of any claim based on them. We find that this is a private contractual dispute that is not relevant to our public interest analysis, and is best resolved in a court of competent jurisdiction, where, according to the record, it is already pending. *See Cingular-AWS Order*, 19 FCC Rcd at 21551 n.222; *see also* Cingular Opposition at 3 & n.6, 8-9.

<sup>28</sup> Because we find that Acadiana has failed to demonstrate any error, we need not determine whether divestiture, further investigation, or some other action would be the appropriate remedy. Similarly, given that the Petition clearly lacks merit, we find it unnecessary to address whether the Petition should be dismissed for failure to satisfy the requirements of section 1.106(b). *See* 47 C.F.R. § 1.106(b)(1) (requiring petitioners who are not parties to demonstrate good reason why it was not possible for them to appear at an earlier stage of the proceeding); *see also Office of Communication of the United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990) ("Interested persons seeking to participate in FCC proceedings are required to join the proceedings at the earliest opportunity.").