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

In the matter of	)	
	)	
Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation	)	WT Docket No. 04-70
	)	
Emergency Joint Petition of NEATT Wireless, LLC and Cingular Wireless LLC for Partial Waiver to Transfer Previously Divested Customer Base to Prevent Loss of Service	)	

Order

Adopted: December 9, 2005

Released: December 9, 2005

By the Commission:

I. INTRODUCTION

1. We have before us an Emergency Joint Petition for Partial Waiver, dated November 29, 2005,<sup>1</sup> filed by NEATT Wireless, LLC d/b/a NEAT Wireless ("Dempster")<sup>2</sup> and Cingular Wireless LLC ("Cingular"), requesting partial waiver of the Commission's 2004 order approving the transfer of control of AT&T Wireless Services, Inc. ("AT&T Wireless") to Cingular Wireless Corporation.<sup>3</sup> Specifically, the parties request that Dempster be permitted to reassign to Cingular the customer contracts that were originally divested by Cingular to Dempster as required by the *Cingular-AT&T Wireless Order*.<sup>4</sup> To avoid potential disruption and loss of service to Dempster's customers, we find that it is in the public interest, convenience, and necessity to allow Cingular to reacquire these Dempster customer contracts, subject to certain conditions described in this order.

II. BACKGROUND

2. On March 18, 2004, Cingular and AT&T Wireless filed applications, pursuant to section 310(d) of the Communications Act of 1934, as amended ("Communications Act"),<sup>5</sup> seeking consent to the proposed transfer of control of licenses, authorizations, and minority interests held by subsidiaries of

<sup>1</sup> NEATT Wireless, LLC and Cingular Wireless LLC Emergency Joint Petition for Partial Waiver to Transfer Previously Divested Customer Base to Prevent Loss of Service, Emergency Joint Petition for Partial Waiver - Expedited Action Requested, filed Nov. 29, 2005 ("Petition").

<sup>2</sup> Dempster Group, LLC negotiated the purchase of the NEAT Wireless properties and is an investor in NEATT Wireless, LLC. See Petition at 1 n.1.

<sup>3</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, *Memorandum Opinion and Order*, 19 FCC Rcd. 21522 (2004) ("*Cingular-AT&T Wireless Order*"). Cingular Wireless Corporation is the manager of Cingular Wireless LLC. See *id.* at 21529 n.34.

<sup>4</sup> Petition at 1.

<sup>5</sup> 47 U.S.C § 310(d).

AT&T Wireless to Cingular.<sup>6</sup> The Commission found that, subject to conditions, the transfer of control of AT&T Wireless' licenses to Cingular was in the public interest.<sup>7</sup> Specifically, it found that while competitive harm was unlikely in most mobile telephony markets, there were markets in which the likely competitive harms exceeded the likely public interest benefits of the transaction.<sup>8</sup> Thus, the Commission imposed conditions on the transfer of control of the licenses to mitigate the likely competitive harms.<sup>9</sup>

3. The specific conditions imposed by the Commission varied depending upon the competitive situation in each individual market.<sup>10</sup> In sixteen markets, the Commission found that, post-merger, there would not be "enough competing carriers remaining, post-merger, with sufficient network and spectrum assets, to deter anticompetitive behavior by the merged entity."<sup>11</sup> The Commission explicitly conditioned its approval of the transfer of control on the divestiture of AT&T Wireless operating units (including the spectrum AT&T Wireless held in these markets) in these markets, which included the five markets in Arkansas at issue in this order ("Arkansas Markets").<sup>12</sup>

4. On December 12, 2004, Cingular and Dempster filed applications seeking consent to transfer licenses in the Arkansas Markets from Cingular to Dempster in accordance with the divestiture provisions in the *Cingular-AT&T Wireless Order*.<sup>13</sup> As part of the transaction, Dempster received Personal Communications Services (PCS) spectrum, towers, facilities, stores, employees, customer contracts, and other assets in the Arkansas Markets.<sup>14</sup> The Commission consented to this application on March 4, 2005,<sup>15</sup> and the transaction was consummated on March 10, 2005.<sup>16</sup> Pursuant to a Transition Services Agreement ("TSA") entered into by the parties, Cingular agreed to provide network, billing, software support, and other related functions to Dempster until such time as it could obtain and deploy such services on its own, but no later than December 31, 2005.<sup>17</sup>

5. The parties now request a partial waiver of the divestiture requirement to permit Dempster to transfer the customer contracts in the Arkansas Markets back to Cingular. The parties claim that

<sup>6</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21539 ¶ 34.

<sup>7</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21626 ¶ 269.

<sup>8</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21611, 21619, 21626 ¶¶ 236, 251, 269.

<sup>9</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21626 ¶ 269.

<sup>10</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21619-22, 21624-25 ¶¶ 251-57, 265-67.

<sup>11</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21620 ¶ 254.

<sup>12</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21620 ¶ 254. The five Arkansas Markets in which the Commission ordered operating unit divestitures are CMA326 (Arkansas 3-Sharp), CMA 327 (Arkansas 4-Clay), CMA328 (Arkansas 5-Cross), CMA329 (Arkansas 6-Cleburne), and CMA330 (Arkansas 7-Pope).

<sup>13</sup> Application to Transfer Control of Dempster Newco LLC from Cingular Wireless LLC to Northeastern Arkansas Telephone and Transport, L.L.C., File No. 50002CWTC05 (Mar. 16, 2005).

<sup>14</sup> See Petition at 3; Declaration of William Hogg, Petition, Attachment B, at 1 ("Hogg Declaration").

<sup>15</sup> See Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications Action, *Public Notice*, Report No. 2093 (rel. Mar. 9, 2005).

<sup>16</sup> See Notification of Consummation, File No. 0002089922 (Mar. 17, 2005); see also Wireless Telecommunications Bureau Assignment of License Authorization Applications, Transfer of Control of Licensee Applications, De Facto Transfer Lease Applications and Spectrum Manager Lease Notifications Action, *Public Notice*, Report No. 2105 (rel. Mar. 23, 2005); Petition at 2-3; Hogg Declaration at 2; Declaration of Percy L. Berger, Petition, Attachment A, at 1 ("Berger Declaration").

<sup>17</sup> Petition at 2-3.

Dempster will not be able to support operations in the Arkansas Markets after the TSA expires, because Dempster was unable to obtain the necessary support services from a third party or to find a third-party buyer for the Arkansas Markets capable of operating the networks on a stand-alone basis by December 31, 2005.<sup>18</sup> Additionally, Cingular states that it is unable to provide services in support of Dempster beyond December 31, 2005.<sup>19</sup> Cingular asserts that many of the systems currently being used to support Dempster's operations are provided by third-party vendors,<sup>20</sup> and that some of these vendor agreements, which were entered into by the former AT&T Wireless, are due to expire on December 31, 2005.<sup>21</sup> Cingular further indicates that it is unwilling to extend the TSA because it has fully integrated the former AT&T Wireless operations that it retained into the Cingular systems, and extending the TSA would therefore require it to bear the expense of maintaining two duplicative systems.<sup>22</sup>

6. The parties assert that Dempster "approached Cingular to acquire the customers only as a last resort,"<sup>23</sup> and that "the transfer of [Dempster's] customers to Cingular is the one option available to ensure that approximately 37,000 Dempster customers in Arkansas do not lose wireless service at the end of the year."<sup>24</sup> In the Petition, Dempster explicitly states that it will retain all other divestiture assets (e.g., spectrum and infrastructure) acquired from Cingular in the Arkansas Markets.<sup>25</sup> The parties state that, if this transition does not occur, Dempster intends to notify its customers that service will terminate on December 31, 2005.<sup>26</sup>

### III. DISCUSSION

7. In the Petition, the parties request that we partially waive the conditions in the *Cingular-AT&T Wireless Order* to allow Cingular to reacquire Dempster's customers in the Arkansas Markets. As noted above, the Commission implemented these operating unit divestiture conditions to mitigate the potential competitive harms of the transaction in the Arkansas Markets.<sup>27</sup> After completing our review of the transaction, we stated that in these markets, "our analysis indicated that . . . there will not be enough competing carriers remaining, post-merger, with sufficient network and spectrum assets, to deter anticompetitive behavior by the merged entity."<sup>28</sup> In evaluating the parties' request, we must consider whether modifying the merger condition in the Arkansas Markets as the parties propose serves the public interest, convenience, and necessity.<sup>29</sup>

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<sup>18</sup> Petition at 3.

<sup>19</sup> Petition at 2, 3.

<sup>20</sup> Hogg Declaration at 1.

<sup>21</sup> Hogg Declaration at 1.

<sup>22</sup> Petition at 3; Hogg Declaration at 1.

<sup>23</sup> Petition at 2.

<sup>24</sup> Petition at 1, 2.

<sup>25</sup> Petition at 3.

<sup>26</sup> Petition at 1.

<sup>27</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21596, 21619, 21620 ¶¶ 193, 251, 254.

<sup>28</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21620 ¶ 254.

<sup>29</sup> See Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, CC Docket No. 98-141, *Second Memorandum Opinion and Order*, 15 FCC Rcd. 17521, 17532 ¶ 21 (2000) ("*SBC-Ameritech Order*"); see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, CS Docket No. 00-30, *Memorandum Opinion and Order*, 18 FCC Rcd. 16835, 16836 ¶ 5 (2003). We note that we are not granting the

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8. In the *Cingular-AT&T Wireless Order*, we imposed the conditions at issue to “deter anticompetitive behavior by the merged entity” and to ensure that “there would be sufficient competitive forces remaining after the merger” in these five Arkansas Markets.<sup>30</sup> When we imposed the divestiture conditions initially, we did so to ensure that an additional competitor would successfully provide service in these markets to constrain the merged entity’s “conduct with regard to pricing and other terms and conditions of service.”<sup>31</sup>

9. Contrary to this expectation, the Petition makes clear that in the Arkansas Markets, Dempster is not adequately prepared to provide service without Cingular’s assistance.<sup>32</sup> Without some provision for their transition to alternative providers, Dempster’s existing customers would be discontinued with very limited notice, resulting in significant disruption. Furthermore, given the timing of the impending disruption, the parties make clear that there is no satisfactory way to address the problem in a manner that is consistent with the merger conditions (e.g., transferring Dempster’s customer contracts to a third party).<sup>33</sup> In light of these unanticipated circumstances, we find that allowing Cingular to reacquire the Dempster customers appears to be the least disruptive means of ensuring continuity of service to these customers. We note that this action does not fully reverse the original business unit divestitures in the Arkansas Markets, because Dempster will continue to retain the spectrum licenses and other assets.<sup>34</sup> Accordingly, we find that it is in the public interest to modify the conditions in the *Cingular-AT&T Wireless Order* to the extent necessary to authorize Dempster to transfer its customers to Cingular in the Arkansas Markets, subject to the conditions we set forth below. We impose these conditions to ameliorate any potential harm to Dempster’s customers and the competitive advantage that Cingular will gain by the reacquisition of the Dempster contracts.

10. *Waiver of Early Termination Fees.* First, while we will allow Dempster to transfer its customers to Cingular, we conclude that it is important from a competitive and consumer perspective that the Dempster customers subject to transfer have the ability to select an alternative provider without suffering a financial penalty. Therefore, as a condition to granting relief, we require that Cingular and Dempster waive the application of any and all early termination fees, for a reasonable period beyond the contemplated completion of the switchover at the end of December, to allow the Dempster customers to port their numbers to alternative carriers or cancel their agreements without penalty. Such a measure will ensure both that service to these customers does not lapse, and at the same time will preserve their option to select another service provider without incurring financial penalties. The waiver of early termination fees must be effective immediately upon the parties’ written acceptance of the terms of this order (see paragraph 12 below). To provide customers with a meaningful opportunity to exercise the option to change providers without penalty, we find that the waiver should last through March 1, 2006. Specification of the March 1, 2006 fixed date provides clarity and certainty to both the Dempster

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waiver pursuant to section 1.3, as requested by petitioners, since Section 1.3 concerns waiver of our rules. See 47 C.F.R. § 1.3. Rather, we are modifying the merger conditions pursuant to our authority under sections 303(r) (which authorizes the Commission “as public convenience, interest or necessity requires ... [to] prescribe ... such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act”) and 4(i) (which authorizes the Commission to “issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions”). See 47 U.S.S. §§ 154(i), 303(r).

<sup>30</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21595-96, 21620 ¶¶ 191, 254

<sup>31</sup> *Cingular-AT&T Wireless Order*, 19 FCC Rcd. at 21596 ¶ 192.

<sup>32</sup> Berger Declaration at 2.

<sup>33</sup> See Petition at 3, Berger Declaration at 2; Hogg Declaration at 3.

<sup>34</sup> We expect that these licenses and assets will not be acquired by the primary incumbents in the Arkansas Markets, but rather that they will be made available to enable entry or expanded service by another provider.

customers and Cingular, while affording the Dempster customers at least 60 days after their transition to Cingular to make informed decisions about wireless service provider selection.

11. *Customer Notification.* We further condition the relief herein granted on the parties' notification to customers that Dempster will be discontinuing the provision of service and that Cingular will become their new service provider no later than January 1, 2006. This notification should be issued jointly by Cingular and Dempster and must be provided in writing by mail, as well as telephonically, to each individual Dempster customer immediately following the parties' written acceptance of the terms of this order (see paragraph 12 below). Specifically, notices should be mailed out to the Dempster customers as soon as possible, but no later than 48 hours after the parties' written acceptance of the terms of this order, and telephonic notifications also must commence within that same time frame. The notification must inform customers clearly and prominently that Dempster and Cingular have agreed not to impose any early termination fees on customers that make arrangements to switch to an alternate wireless service provider prior to March 1, 2006, and must provide a toll-free number that customers may call for further information. Additionally, the parties should notify the Dempster customers whether they will need to acquire new handsets, or take any other actions, in order to maintain their current level of service when transferred to Cingular's network as a Cingular customer.

12. *Acceptance of Conditions.* As an additional condition of this waiver, Cingular and Dempster must each notify the Commission in writing of their acceptance of these conditions within three business days of release of this order. If by the end of this three-day period, either party does not notify the Commission in writing of their acceptance of these conditions, (i) our authorization permitting Dempster to transfer its customers to Cingular will automatically cancel, and any transfer of customers that may have occurred prior to such cancellation will be deemed unauthorized and in violation of the *Cingular-AT&T Wireless Order*; and (ii) Dempster must immediately notify its customers in writing and by telephone that it is discontinuing service and that they must select another service provider.

#### IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), the Petition filed by Dempster and Cingular IS GRANTED to the extent specified in this order and subject to the conditions specified in paragraphs 10-12 above.

14. IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE immediately.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary