IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF CONNECTICUT and STATE OF TEXAS, *Plaintiffs,* v. CINGULAR WIRELESS CORPORATION, SBC COMMUNICATIONS INC., BELLSOUTH CORPORATION and AT&T WIRELESS SERVICES, INC., *Defendants.*	Civil No. 1:04CV01850 (RBW) Filed: February 17, 2005

PLAINTIFF UNITED STATES'S RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of the comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response has been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

On October 25, 2004, plaintiffs filed the Complaint in this matter alleging that the proposed acquisition of AT&T Wireless Services, Inc. ("AT&T Wireless") by Cingular Wireless Corp. ("Cingular") and its parents, SBC Communications Inc. ("SBC") and BellSouth Corp. ("BellSouth"), would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Simultaneously with

the filing of the Complaint, the plaintiffs filed a proposed Final Judgment[1] and a Preservation of Assets Stipulation and Order signed by plaintiffs and defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on October 29, 2004; published the proposed Final Judgment and CIS in the *Federal Register* on November 15, 2004, *see* 69 Fed. Reg. 65,633 (2004); and published a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in the *Washington Post* for seven days beginning on November 10, 2004 and ending on November 16, 2004. The 60-day period for public comments ended on January 15, 2005, and two comments were received as described below and attached hereto.

I. Background

As explained more fully in the Complaint and CIS, this transaction substantially lessened competition in mobile wireless telecommunications services and mobile wireless broadband services in 13 geographic markets, located in 11 states. To restore competition in these markets, the proposed Final Judgment, if entered, would require Cingular to divest (1) AT&T Wireless's

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[1] A corrected version of the proposed Final Judgment was filed on November 3, 2004. The only change was the addition of the underlined language to the last sentence of Section II.F:

> Plaintiff United States in its sole discretion may approve this request if it is demonstrated that the retained minority interest will become irrevocably and entirely passive, so long as defendants own the minority interests, and will not significantly diminish competition.

The corrected version is what was published in the *Federal Register*. None of the public comments addressed this aspect of the proposed Final Judgment.

wireless business in 5 geographic markets (Connecticut RSA-1 (CMA 357), Kentucky RSA-1 (CMA 443), Oklahoma City (CMA 045), Oklahoma RSA-3 (CMA 598), and Texas RSA-11 (CMA 662)); (2) minority interests in other wireless service providers in 5 geographic markets (Shreveport, LA (including CMAs 100, 219, 454, 455, and 456), Pittsfield, MA (CMA 213), Athens, GA (CMA 234), St. Joseph, MO (CMA 275), and Topeka, KS (CMA 179)); and (3) 10 MHz of contiguous PCS spectrum in 3 geographic markets (Detroit, MI (BTA 112), Dallas, TX (CMA 009), and Knoxville, TN (BTA 232)). Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and punish violations thereof.

II. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e). The Court, in making its public interest determination, shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1). As the U.S. Court of Appeals for the District of Columbia Circuit has held, the Tunney Act permits a court to consider, among other things, the relationship between the

remedy secured and the specific allegations set forth in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the proposed Final Judgment may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[2] Rather:

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at ¶ 71,980 (W.D. Mo. 1977).

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[2] *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the CIS and Response to Comments filed by the Department of Justice. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538-39.

Accordingly, with respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a consent judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T Corp.*, 552 F. Supp. 131, 151 (D.D.C. 1982)

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[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); *see generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

(citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent judgment even though the court would have imposed a greater remedy).

Moreover, the Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id*. at 1459-60. The United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (citing *Microsoft*, 56 F.3d at 1461).

III. Summary of Public Comments and the United States's Response

During the 60-day public comment period, the United States received two comments–one from the Oklahoma Corporation Commission ("OCC") and the other from William Lovern, Sr.–which are attached hereto and summarized below. The United States appreciates the comments from the OCC and Mr. Lovern. As explained below, neither comment addresses whether the proposed Final Judgment is in the public interest or warrants any change to the

proposed Final Judgment. Copies of this Response and its attachments have been mailed to the OCC and Mr. Lovern.

A. Oklahoma Corporation Commission

1. Summary of Comment

The OCC is the state agency charged with regulatory oversight of the telecommunications industry in Oklahoma. In its comment of January 6, 2005, the OCC expresses concern about the potential for the merger to harm Oklahoma consumers, specifically Oklahomans throughout the state who are current subscribers to AT&T Wireless's services and "may not wish to do business with Cingular, or any other company acquiring the AT&T Wireless customer base, and that those customers may be assessed a fee to terminate their existing AT&T Wireless contracts." The OCC's comment also quotes a portion of the language from Section II.L of the proposed Final Judgment, which it believes may address this concern, at least for consumers in Oklahoma City and Oklahoma RSA-3: "[A]ny subscribers who obtain mobile wireless services through any contract retained by [Cingular] and who are located in [Oklahoma City, Oklahoma, Oklahoma RS-3 (CMA598), and some other areas outside Oklahoma], shall be given the option to terminate their relationship with [Cingular], without financial cost, within one year of closing of the Transaction." (Brackets in original.) The OCC asks that the language in the proposed Final Judgment be clarified or expanded to include all AT&T Wireless subscribers in Oklahoma and state that no "Oklahoma consumer with an existing contract for wireless service with AT&T Wireless will be charged a termination fee by AT&T Wireless, Cingular or any other company that acquires that customer contract, after the closing of the Cingular acquisition of AT&T Wireless."

B. Response

The OCC's primary concern appears to be that the merger could harm Oklahoma consumers. The Department also was concerned about the welfare of residents of Oklahoma. The Complaint alleges competitive harm in Oklahoma City and Oklahoma RSA-3, and the proposed Final Judgment provides for the divestiture of AT&T Wireless's wireless businesses in those markets in order to preserve the existing competition for the benefit of Oklahoma's citizens. The OCC's concern that most AT&T Wireless customers would be forced to deal with Cingular after the merger is a consequence of the companies' decision to merge and not the proposed Final Judgment. Although consumers may not like to switch providers, switching caused by a merger that does not harm competition does not constitute a harm to competition that is recognized by the antitrust laws.

It would also be inappropriate for plaintiffs or the Court to require as part of the settlement of this matter that all of AT&T Wireless's customers in the wireless business divestiture markets be allowed to cancel existing contracts when the divestiture assets are sold. To preserve competition, any divestiture package must include the necessary assets for the purchaser to be a viable, ongoing competitor to the merged firm in the affected markets. *See* U.S. Dep't of Justice, Antitrust Div., *Policy Guide to Merger Remedies* at 4, 9-12 (Oct. 2004) ("Restoring competition is the 'key to the whole question of an antitrust remedy.'" (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961))). A package without sufficient assets to allow a divestiture purchaser to quickly replace the competition lost as a result of the merger and give it the incentive to do so fails to protect competition. *See Policy Guide to Merger Remedies* at 9-11. To be a viable competitor, the divestiture purchaser needs

access to the divested business's customers.[4] Therefore, the proposed Final Judgment in Section II.L provides for customer contracts to be included in the Wireless Business Divestiture Assets in order to ensure that a suitable purchaser would be willing to acquire the assets and make the effort necessary to maintain competition for the benefit of all consumers in these areas.

The OCC's request for clarification of the language in Section II.L of the proposed Final Judgment is unnecessary. This Section relates solely to business customer contracts that cover subscribers both inside and outside the wireless business divestiture markets. In an effort to avoid forcing these customers who previously had a single contract to deal with both Cingular and the divestiture purchaser, the proposed Final Judgment assigns the contracts to Cingular or the divestiture purchaser based upon where the majority of the subscribers covered by the business customer contract are located. Section II.L of the proposed Final Judgment requires Cingular to divest business customer contracts where more than 50 percent of the subscribers are

[4] *See Policy Guide to Merger Remedies* at 10 ("In markets where an installed base of customers is required in order to operate at an effective scale, the divested assets should either convey an installed base of customers to the purchaser or quickly enable the purchaser to obtain an installed customer base.").

located in the wireless business divestiture markets.[5] This will give the purchaser the necessary access to business customers to make it a viable competitor to preserve the existing competition.

Under the terms of the proposed Final Judgment, any business subscriber located in the wireless business divestiture markets covered by a business customer contract retained by Cingular has the right to terminate their service without financial penalty within one year of the closing of the merger. *See* Proposed Final Judgment, § II.L. This last provision is what was quoted by the OCC, but by its very terms it applies only to subscribers covered by the business customer contracts retained by Cingular. The provision's purpose is to provide additional incentive to the divestiture purchaser by expanding the base of customers to which it could immediately market its services.

After reviewing the concerns raised by the OCC, the United States continues to believe that the proposed Final Judgment is in the public interest and that it appropriately addresses the competitive harm alleged in the Complaint.

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[5] The proposed Final Judgment reads in part:

> [P]rovided that defendants shall only be required to divest Multi-line Business Customer contracts, if 50 percent or more of the Multi-line Business Customer's subscribers reside or work within any of the five (5) license areas described herein [the wireless business divestiture areas which include Oklahoma City and Oklahoma RSA-3], and further, any subscribers who obtain mobile wireless services through any *such* contract retained by defendants and who are located within five (5) geographic areas identified above, shall be given the option to terminate their relationship with defendants, without financial cost, within one year of the closing of the transaction.

Proposed Final Judgment, § II.L (emphasis added). "Multi-line Business Customers" are defined as AT&T Wireless business customers that have contracts for multiple wireless phones for their employees for which the business is liable. *See id.* § II.G.

B. William Lovern, Sr.

1. Summary of Comment

William Lovern, Sr., President of Trial Management Associates (a self-described "private company that litigates international public interest cases"), submitted a comment on November 11, 2004. First, Mr. Lovern is concerned that "AT&T Wireless has been looted by its executives in conjunction with Cingular's takeover, even though the merger is not final." In conversations with the United States, he discussed this looting in relation to documents being taken from AT&T Wireless. Second, he asserts that the Regional Bell Operating Companies ("RBOCs"), including SBC and BellSouth (the parents of Cingular), are "operating an anticompetitive Universal Billing & Collection System known as the InterCompany Settlement System (ICS)" that allegedly controls the billing and collection for the RBOCs as well as their competitors. He claims that the new Cingular/AT&T Wireless and Verizon Wireless will have "market share advantages" that will force competitors out of business because they will be the only two entities that have "100% on net Universal Billing & Collection." Finally, he states that "SBC has violated Sarbanes-Oxley with their 2004, 1st, 2nd and 3rd Quarter Q filings with the [Securities and Exchange Commission]," which he alleges is a result of its operation of the ICS. Along with his comment, Mr. Lovern submitted a copy of a letter he sent to James S. Turley, Chairman and CEO of Ernst & Young, LLP, stating that SBC has "committed flagrant securities fraud" allegedly by "operating a criminal enterprise" (i.e., the ICS) that illegally overcharges consumers and put four of his telecommunications companies out of business.

Mr. Lovern provided additional information on November 24, 2004 in the form of a November 22, 2004 letter to Warburg Pincus LLC and Providence Equity Partners Inc. detailing

his long-running dispute with the RBOCs over the ICS, which he alleges is a "criminal racketeering enterprise," and Warburg Pincus's and Providence Equity Partners' alleged liability from purchasing Telcordia Technologies, which he claims was involved with the ICS. As described in this second submission, Mr. Lovern sued SBC in 1992, and the lawsuit was subsequently settled against his wishes. He now claims that the court lacked jurisdiction, making the settlement invalid. Mr. Lovern also alleges that the Missouri Public Service Commission covered up the fraud he alleges was committed by the RBOCs through the ICS. Finally, he forwarded a series of demand letters via e-mail threatening lawsuits or regulatory complaints against SBC and its executives on December 9 and 10, 2004.

2. Response

Mr. Lovern's series of submissions has nothing to do with the issue before this Court–whether the proposed Final Judgment is in the public interest. Nothing in Mr. Lovern's comments relates to competition in the relevant product markets (i.e., mobile wireless telecommunications and mobile wireless broadband services) or to the assets that Cingular must divest under the proposed Final Judgment. Mr. Lovern's allegations about the ICS remain unchanged by the merger, and the alleged Sarbanes-Oxley violations are, by their very nature, not addressable by the antitrust laws.

IV. Conclusion

After careful consideration of these public comments, the United States still concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is, therefore, in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is submitting the public comments and its

Response to the *Federal Register* for publication. After the comments and its Response are published in the *Federal Register*, the United States will move this Court to enter the proposed Final Judgment.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Plaintiff United States' Response to Public Comments have been mailed, by U.S. mail, postage prepaid, to the attorneys listed below, the 17th day of February 2005.

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