

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Service Rules for the 698–746, 747–762 and 777–792 MHz Bands)	WT Docket No. 06-150
)	
Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Section 68.4(a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones)	WT Docket No. 01-309
)	
Biennial Regulatory Review – Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services)	WT Docket No. 03-264
)	
Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission’s Rules)	WT Docket No. 06-169
)	
Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band)	PS Docket No. 06-229
)	
Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010)	WT Docket No. 96-86
)	

To the Commission

MOTION OF FRONTLINE WIRELESS, LLC

Pursuant to 47 C.F.R. § 1.1 and § 1.41, Frontline Wireless, LLC (“Frontline”) respectfully requests that the Commission refuse to consider any substantive arguments Verizon Wireless (“Verizon”) has made or will make in opposition to the Commission’s *700 MHz Second Report & Order* until Verizon files a written petition for reconsideration in the above-captioned

proceeding. Verizon is clearly seeking reconsideration. Its specific requests and its arguments in support of those requests should be placed in the docket for comment by the other parties in this proceeding and the public — just as have all the other parties seeking reconsideration.

1. Through its ongoing *ex parte* activity, Verizon is plainly requesting reconsideration of the conclusions the Commission reached in the *700 MHz Second Report & Order*. However, unlike other parties seeking to do the same, Verizon has not filed a petition for reconsideration.

Accordingly, the Commission cannot, consistent with its own regulations and the Administrative Procedure Act’s requirements for reasoned and transparent decisionmaking, consider any Verizon arguments to change the *Order* until it formally submits such a petition. Nor should the Commission meet with any Verizon representatives until it does so.

- a. As courts and the Commission have regularly noted, one function of the petition for reconsideration process is to “mak[e] sure that the FCC has an opportunity to consider any challenge, legal or factual, to its order before the challenge is brought to court.” *North American Telecommunications Ass’n v. FCC*, 772 F.2d 1282, 1286 (7th Cir. 1985). However, the procedure is also intended to grant *other affected parties* the opportunity to pass upon reconsideration arguments made in the proceeding. *See* 47 C.F.R. § 1.429(f)-(g) (granting the right to file oppositions and replies to oppositions to reconsideration petitions); *cf.* Petition for Reconsideration, *In the Matter of Mediacom Southeast LLC*, 22 FCC Rec. 4825, 4828 (2007) (extending reconsideration period so as to allow interested parties to file on level of MVPD competition in affected market because “the public interest supports considering fully the arguments” “raised in the complete record in this proceeding”).

- b. In an *ex parte* notice filed on September 19, 2007, Verizon disclosed a meeting held with Commissioner Martin and several members of his staff. That notice stated that in the meeting, Verizon discussed “its positions regarding paragraphs 206 and 222 of the 700 MHz Order.” Verizon *ex parte*, Sept. 19, 2007. These two paragraphs set out the open access requirements that the Commission imposed upon the C Block, and the scope of those requirements. Given that Verizon has been vociferous in its objections to the C Block open access requirements — going so far as to challenge them in court, see *infra* — these specific references dispel any doubt that the purpose of the meeting was to cause the Commission to alter the *Order*. The meeting was undeniably a request for reconsideration.
- c. Later, after a request from the Wireless Bureau to make a more complete disclosure, Verizon filed an additional *ex parte* on September 25, 2007 that further detailed its objections to the *Order*’s open access requirements.
- d. By attempting to persuade the Commission to reconsider the *Second Report & Order* outside of the view of affected parties, Verizon is consciously circumventing the established petition for reconsideration process. As the D.C. Circuit stated 30 years ago, “[e]ven the possibility that there is here one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable.”¹ The administrative record that determines the final outcome in this critically important proceeding cannot consist simply of *ex parte* conversations between the Commission and a party “in the know.” Such a back-room policy for special interest advocates flies in the face of

¹ *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977).

first principles of administrative procedure,² and is an affront to the more than 190 emergency responders' associations, municipalities, public interest groups, public safety representatives, rural operators, and communications companies that have dutifully followed the Commission's public filing rules in this proceeding.

- e. Verizon's *ex parte* communications of September 19 and 25 unmistakably reveal what the company seeks: a reversal of the decision on open access requirements that the Commission reached in the *Order*. The Commission cannot honor this unlawful request to jump line ahead of every other party who has lawfully sought agency reconsideration under the Commission's rules.³ The other parties seeking reconsideration of the conclusions reached in the *Order* have submitted petitions, and other interested parties, plus the public, will have a full opportunity to respond and oppose those arguments. Verizon's arguments against the *Order*'s conclusions must be subjected to the same process.
- f. The current reconsideration record consists of nine reconsideration petitions, submitted by a number of parties, totaling hundreds of pages. Oppositions and replies will likely be as voluminous. Verizon's attempts to achieve the same effect through the use of three pages of *ex parte* filings is a conscious evasion of required procedure, and it would be inconsistent with the Commission's obligations under the law to rely on any Verizon arguments in its reconsideration of the *Order*.

² See Attorney General Tom C. Clark, *Attorney General's Manual on the Administrative Procedure Act* (1947) at 9 (two of the APA's basic purposes are "[t]o require agencies to keep the public currently informed of their organization, procedures and rules" and "[t]o provide for public participation in the rule making process").

³ Of course, any reliance on the Commission's part on arguments that were not submitted for comment in the record in modifying the *700 MHz Second Report & Order* would be a clear violation of the APA's mandate to make a "rational connection between the facts found and the choice made." *Prometheus Radio Project v. FCC*, 373 F.3d 372, 390 (3d Cir. 2004).

g. Given its clear motives, Verizon's conduct also gives the Commission ample justification for barring any future *ex parte* communications with it. Any discussions with the Commission will surely focus on proposed changes to the *Order* — changes that will not receive the benefit of the public comment process that *every other* party in this proceeding is subject to. The integrity of this proceeding is at risk.

2. In addition to its circumvention of the reconsideration process, Verizon's actions before the Commission and in the D.C. Circuit make clear that it is unlawfully pursuing simultaneous judicial and administrative review of the *Order*.

- a. On September 10, 2007, Verizon sought judicial review of the Commission's July 31, 2007 700 MHz *Second Report & Order* in the U.S. Court of Appeals for the D.C. Circuit. Verizon challenges the "open access" requirements the *Order* imposed on the C Block as unconstitutional and violative of the Communications and Administrative Procedure Acts.
- b. As noted, on September 25, just a day after the deadline for initial petitions for reconsideration of the Commission's *Order* had passed, Verizon submitted notice of an *ex parte* meeting between high-level Verizon executives and Chairman Martin and members of his staff. In its *ex parte* notice, Verizon states that it expressed "its opposition to" the very same open access requirements that it has challenged in its appeal. Its description of what was discussed at that meeting incorporates by reference several written *ex parte* submissions and several notices of *ex parte* meetings previously submitted in the 700 MHz *Report & Order* docket prior to the Commission's issuance of the *Order*, including a written *ex parte* filed

on July 24, 2007 cited in the September 25 letter at note 2. Verizon's notice states that in the September 17 meeting it had "reiterated positions in five previous *ex parte* presentations on open access requirements."

- c. As is clear, Verizon's attempt to file orally via *ex parte* with the Commission what is in effect a petition for reconsideration represents a clear attempt to flout well-settled law that holds a party is precluded from simultaneously seeking judicial and administrative review on the same issues in an agency proceeding.
 - i. As the court in which Verizon has filed its Petition has consistently stated, it will not entertain a petition for review while an appeal is before an agency. *United Transp. Union v. ICC*, 871 F.2d 1114, 1117 (D.C. Cir. 1989). The reason a party cannot simultaneously petition an agency for reconsideration and a Court for review is because "there is always a possibility that the order complained of will be modified in a way which renders judicial review unnecessary." *Outland v. CAB*, 284 F.2d 224, 227-28 (D.C. Cir. 1960). Once a party has chosen a court as a forum to contest an agency decision as unlawful, that party is foreclosed from pursuing administrative reconsideration of that same decision on the same grounds.
 - ii. Here, Verizon's *ex parte* filings with the Commission show that it is attempting to continue to pursue administrative relief on the same grounds that it has already petitioned the D.C. Circuit to review. By its own admission, the issues discussed at the September 17 meeting regarding the *700 MHz Report & Order's* open access conditions are the very same substantive legal arguments as those raised in its petition for review.

Compare Petition for Review at 2 (“Verizon Wireless seeks judicial review on the grounds that the *Report and Order* exceeds the Commission’s authority under the Communications Act of 1934, violates the United States Constitution, violates the Administrative Procedure Act, and is arbitrary, capricious, unsupported by substantial evidence and otherwise contrary to law”) *with* Verizon July 24, 2007 *ex parte* at 2 (“There are also serious legal problems associated with adopting any form of open access in this proceeding ... [a]dopting any form of open access in this docket would violate the Administrative Procedure Act and the auction statute in multiple respects, violate the First Amendment, [and] exceed the Commission’s statutory authority on numerous grounds”).⁴

- d. Undoubtedly aware of the longstanding rule barring it from seeking simultaneous judicial and administrative review, Verizon has sought to manipulate the *ex parte* process to do what it is unable to do under the law — press the FCC’s review of the *Order*, based on arguments it has previously raised in this proceeding, without filing a petition for reconsideration.⁵
3. It should also be noted that Verizon has deliberately chosen to act outside of the normal petition for reconsideration process so as to preserve its contemporaneous claim in the D.C. Circuit. If Verizon gets the relief it presently seeks from the Commission —

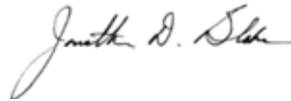
⁴ The other four *ex parte* notices incorporated by the September 25, 2007 *ex parte* also refer to these arguments. *See* Verizon July 25, 2007 *ex parte*, WT Docket No. 06-150, at 1 (“[Verizon legal representatives] stated that these proposals raised serious legal issues”); Verizon July 27, 2007 *ex parte*, WT Docket No. 06-150 (notice of meeting with Commissioner Robert M. McDowell), at 1 (same); Verizon July 27, 2007 *ex parte*, WT Docket No. 06-150 (notice of meeting with Commissioner Deborah Taylor Tate), at 1 (same); Verizon July 27, 2007 exempt *ex parte* from Ann D. Berkowitz, WT Docket No. 06-150, at 1 (“reiterat[ing] company’s position regarding open access requirements on 700 MHz licenses”).

⁵ Verizon’s continuing efforts to force the Commission to reconsider issues that it has already petitioned a court to review could also constitute sufficient grounds for the D.C. Circuit to dismiss its petition for lack of jurisdiction. *See United Transp. Union, supra*.

namely, the relaxation or removal of the open access conditions on reconsideration — Verizon will undoubtedly move to dismiss its pending petition seeking judicial review. The Commission should carefully consider the implications of its complicity in a party's circumvention of its rules that allows the party to apply added lobbying leverage upon the agency.

For the foregoing reasons, the Commission should refuse to consider Verizon's arguments for substantive modification of the *700 MHz Second Report & Order* or meet with Verizon officials on an *ex parte* basis unless Verizon files a written petition for reconsideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2007, I caused copies of the foregoing Motion to be served via U.S. Mail, first class postage prepared, upon the following:

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