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September 24, 2008

James D. Schlichting, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC
WT Docket No. 08-95

Dear Mr. Schlichting:

This letter is submitted on behalf of Cellular South, Inc. ("Cellular South"), which is prosecuting a petition to deny the applications (File Nos. 0003463892 *et al.*) for Commission consent to the transfer of control of the authorizations held by ALLTEL Corporation ("ALLTEL") from Atlantis Holdings LLC ("Atlantis") to Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). Those applications are under consideration in the above-referenced adjudicatory proceedings. Although the Commission initially announced that the consideration of the ALLTEL transfer applications would be governed by the permit-but-disclose *ex parte* procedures applicable to non-restricted proceedings, WT Docket No. 08-95 became restricted under 47 U.S.C. § 309(d) and 47 C.F.R. § 1.1208 on August 11, 2008, when Cellular South filed its petition to deny.

In its reply pleading filed in this docket on August 26, 2008, Cellular South set forth its understanding that the proceedings had reverted to their status as restricted under the Commission's *ex parte* rules. *See* Reply of Cellular South, Inc. to Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, at 14 n.36 (Aug. 26, 2008). Nevertheless, Cellular South was not served with a copy of your letter to counsel for Atlantis and Verizon Wireless (together the "Applicants") requesting additional information relevant to their applications purportedly pursuant to § 308(b) of the Communications Act of 1934, as amended ("Act"). Nor was it served with the response submitted by the Applicants on September 17, 2008. *See* Letter from Kathleen Q. Abernathy and Nancy J. Victory to Marlene H. Dortch,

WT Docket No. 08-95 (Sept. 17, 2008). Obviously, it appears that the Commission and the Applicants either overlooked Cellular South's argument or disagree with its reading of § 309(d)(2) of the Act. Accordingly, and for the record, Cellular South respectfully requests that the Commission and the parties adhere to the *ex parte* rules applicable to restricted proceedings. The reasons for this request are repeated and amplified below.

The ALLTEL transfer of control applications request authority under § 310(d) of the Act. Because the applications are for authority under Title III of the Act, the Commission's process for the formulation of a decision whether or not to grant the individual applications constitutes restricted proceedings under the *ex parte* rules. *See* 47 C.F.R § 1.1208. As noted above, the Commission "modified" the *ex parte* rules applicable to these proceedings pursuant to § 1.1200 of its rules. That rule, however, permits such a modification only "[w]here the public interest so requires in a particular proceeding." 47 C.F.R. § 1.1200. For nearly ten years, the Commission has followed the practice of applying permit-but-disclose procedures in every single proceeding involving applications for § 310(d) authority that affect the mobile telephony market. *See, e.g.*, *Frontier and Global Crossing*, 14 FCC Rcd 7481, 7481 (1999). The Commission has never explained why the public interest was served by lifting the restrictions imposed by § 1.1208 in the scores of these "particular proceedings" over the past decade. In fact, the Commission appears to have employed the identical conclusory statements when it invariably departed from its *ex parte* rules in wireless transfer of control cases.

In view of the foregoing, Cellular South does not concede that the initial modification of the *ex parte* rules in the ALLTEL transfer of control proceedings comports with federal common law developed primarily by the D.C. Circuit through the exercise of its exclusive jurisdiction to review the Commission's Title III licensing decisions. *See* 47 U.S.C. § 402(b). Since the seminal decision in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1965), it has been an accepted principle of administrative/communications law that, because "the very essence of waiver is the assumed validity of the general rule," the Commission must not "tolerate the evisceration of a rule by waivers." 418 F.2d at 1158, 1159. An equally accepted principle (albeit not emanating entirely from the D.C. Circuit) is that the FCC "must adhere to its own rules and regulations." *Reuters Ltd v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). Considering it never adheres to § 1.1208 in proceedings involving proposed transfers of control of wireless carriers, the Commission appears to have either eviscerated the rule or refused to obey it in this particular type of Title III licensing case.

If the Commission has the discretion to eviscerate or ignore its own rules, it would seem that one of the Commission's *ex parte* rules would be a particularly poor choice for evisceration or to be disobeyed. The Commission's *ex parte* rules embody and safeguard "fundamental notions of fairness implicit in due process." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977). For years, the stated purpose of the Commission's *ex parte* rules was "[t]o ensure that the Commission's decisional processes are fair, impartial, and otherwise comport with the concept of due process." *E.g.*, 47 C.F.R. § 1.1200(a) (1989). Those rules are still intended to ensure that the conduct of restricted proceedings comport with due process whether or not the

Commission is willing to acknowledge that purpose. And it seems axiomatic that a federal agency cannot eviscerate or ignore due process safeguards.

Assuming that the Commission had the discretion to modify its *ex parte* procedures in this case initially, that discretion evaporated when Cellular South and thirteen others filed petitions to deny in accordance with § 309(d)(1) of the Act. From that point on, § 308(b) no longer governed the ALLTEL transfer of control proceedings. After the petitions to deny were filed, the Commission must make its public interest determination "on the basis of the application, the pleadings filed, or other matters which it may officially notice." 47 U.S.C. § 309(d)(2). Whatever latitude the Commission has to consider matters beyond those permitted by § 309(d)(2), the statute cannot be construed to permit the Commission to make a public interest determination on the basis of new information regarding the merits obtained in the course of *ex parte* presentations. Even if it managed to construe such presentations to be exempt under § 1.1204 of its rules, the Commission cannot exempt itself from the statutory limitation of § 309(d)(2).

By our count, the Applicants and their affiliates have made five *ex parte* presentations since the petitions to deny their applications were filed.

In addition, Cellular South respectfully submits that the Commission's "general information request" and the Applicants' response should have been served on the parties that filed petitions to deny in these proceedings. Furthermore, since the response provided information that is presumably relevant to the merits (as the Commission sees them) or outcome of the proceedings, the unredacted, "confidential" version of the response must be provided to the petitioners and placed in the public record. If the information requested was deemed to be privileged or confidential commercial or financial information under 5 U.S.C. § 552(b)(4) by either Atlantis or Verizon Wireless, that party had the option either of: (1) respectfully declining to provide the confidential information; or (2) following the Commission's procedures to request that the information submitted be withheld from public inspection. *See* 47 C.F.R. § 0.459(b).

Cellular South recognizes that the Commission has substantial discretion to make *ad hoc* procedural rulings on subordinate questions of procedure. *See FCC v. Schreiber*, 281 U.S. 279, 289 (1965). However, that discretion does not extend to establishing *ad hoc* procedures that are inconsistent with the Act or with the Commission's existing procedural rules. *See* 47 U.S.C. § 154(i). The procedures applicable to the consideration of arguably confidential information in these proceedings are set forth in § 309 of the Act and § 0.459 of the Commission's rules. Therefore, the adoption of an anticipatory protective order in these proceedings conflicts with § 0.459 which places the onus on the Applicants to demonstrate that the information should be withheld from public inspection. *See* 47 C.F.R. § 0.459(b). The Commission's protective order relieves the Applicants of that requirement. Moreover, the protective order applies to "proprietary or confidential information," but such information is not protected from disclosure. *See id.* § 0.457(d).

Unless the Commission's departure from its *ex parte* rules and the requirements of § 309(d) is remedied forthwith, Cellular South will conclude that the Commission's consideration of the information submitted by the Applicants irrevocably tainted these proceedings under the standard set by *Professional Air Traffic Controllers Organization v. FLRA*, 685 F.2d 547, 565 (D.C. Cir. 1982). Furthermore, Cellular South does not acknowledge the assumed confidentiality of the information submitted by the Applicants under the Commission's protective order. Therefore, undersigned counsel will not agree to be bound by the protective order, thereby effectively waiving Cellular South's right as a party in interest under § 309(d)(1) to have unimpeded access to relevant information proffered by the Applicants for consideration by the Commission. Finally, Cellular South does not waive it rights as a party to these proceedings under § 1.1202(d) of the rules (1) to be served with copies of written presentations to Commission decision-makers on the merits, and (2) to advance notice and the opportunity to be present when the Applicants make oral presentations on the merits to decision-makers. *See* 47 C.F.R. § 1.1202(b).

Very truly yours,

David L. Nace

cc: Service List Attached

CERTIFICATE OF SERVICE

I, David L. Nace, hereby certify that on this 24th day of September, 2008, copies of the foregoing letter were sent by e-mail to:

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