Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
ATLANTIS HOLDINGS LLC, Transferor,	)	
	)	
and	)	
	)	
CELLCO PARTNERSHIP D/B/A	)	WT Docket No. 08-95
VERIZON WIRELESS, Transferee	)	DA 08-1481
	)	
For Consent to Transfer Control of Licensees,	)	
Authorizations, and Spectrum Manager and	)	
De Facto Transfer Leasing Arrangements	)	
	)	
File Nos. 0003464996 *et al.*	)	

SUPPLEMENT TO PETITION TO DENY OF CELLULAR SOUTH, INC.

David L. Nace
LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102
(703) 584-8661

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SUMMARY

On September 24, 2008, Cellular South, Inc. ("Cellular South') notified the parties, particularly Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and ALLTEL Corporation ("ALLTEL"), that this proceeding returned to its restricted status under § 309(d) of the Communications Act of 1934 ("Act") and § 1.1208 of the Commission's Rules ("Rules") on August 11, 2008. ALLTEL and Verizon Wireless ("the Applicants") did not deign to respond to Cellular South's request that they adhere to the Commission's *ex parte* rules. Instead, they proceeded to prosecute their applications entirely on an *ex parte* basis. Cellular South is now responding to some of the *ex parte* presentations made by the Applicants, most particularly Verizon Wireless' *ex parte* disclosure that it would divest 15 additional cellular markets.

At the very least, §§ 308(a), 309(d)(2) and 310(d) of the Act prohibit the Commission from basing its public interest determination in any § 309(d) licensing case on any oral *ex parte* presentation, or any written statement of facts it requested pursuant to § 308(a) unless it: (1) placed the written statement in the public record; (2) notified petitioners that the statement had been submitted; and (3) specified a reasonable deadline by which petitioners could respond to or rebut the facts alleged. Consequently, the Commission cannot consider any of the approximately 40 oral *ex parte* presentations that have been made in this case. Furthermore, if it decides this case at its November 4, 2008 meeting, the Commission cannot do so on the basis of any of the written statements that the Wireless Telecommunications Bureau ("WTB") required the Applicants to submit pursuant to § 308(a). Prohibited from considering information that the WTB deemed necessary for a public interest determination, the Commission must either designate the merger applications for hearing or defer its decision until after the petitioners have had a reasonable opportunity to inspect and rebut all the evidence submitted by the Applicants.

The Commission's change in the *ex parte* rules applicable to this restricted proceeding not only violated due process, but it constituted an unlawful modification of Congress' directive in § 309(d)(2) that the Commission consider only the applications, the pleadings filed, or other matters that it can officially notice. Even if the *ex parte* rules could be modified in § 309(d) cases, § 1.1200(a) of the Rules permits such a modification only if the Commission determines that the restricted proceeding involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties. The Commission did not, and could not, make the requisite determination prior to abandoning its *ex parte* rules in this case. Because the application of permit-but-disclose *ex parte* procedures was invalid, and since the information deemed essential to the Commission's decision was presented *ex parte*, the Commission's decision-making process must be deemed irrevocably tainted by the *ex parte* contacts.

Under § 1.65(a) of the Rules, the Applicants are responsible for the continuing accuracy and completeness of information furnished in their pending applications. They are still prosecuting applications for Commission consent for Verizon Wireless to exercise control over licensed wireless operations in 390 Cellular Market Areas ("CMAs"). However, Verizon Wireless has disclosed that it is seeking Commission consent to control licensed operations in up to 100 CMAs that it has no intent of exercising. The table below identifies 15 applications that are contingent on Verizon Wireless still-undisclosed divestiture plans and compares the number of CMAs in which transfers of control are proposed to the number of CMAs in which Verizon Wireless will control if it divests the ALLTEL properties.

FILE NO.	TRANSFEROR	CMAs PROPOSED	CMAs AFTER DIVESTITURE
0003463892	ALLTEL Communications, LLC	170	146
0003465064	Georgia RSA #8 Partnership	1	0
0003465053	Midwest Wireless Communications, L.C.C.	6	2
0003464848	ALLTEL Communications of Virginia No. 1, LLC	9	6
0003464833	Ohio RSA 6 Limited Partnership	1	0

0003464834	Ohio RSA 5 Limited Partnership	1	0
0003464836	Ohio RSA 2 Limited Partnership	1	0
0003464839	Ohio RSA #3 Limited Partnership	1	0
0003464814	Southern Illinois RSA Partnership	2	0
0003464786	WWC Holding Co., Inc.	42	5
0003464784	WWC License L.L.C.	30	12
0003464406	ALLTEL Communications of New Mexico, Inc.	4	2
0003464404	ALLTEL Communications of Nebraska, Inc.	12	11
0003464703	ALLTEL Communications of the Southwest L.P.	6	5
0003465057	Las Cruces Cellular Telephone Company	1	0

Verizon Wireless has yet to update the Commission as to the full extent of the divestitures. Considering the obvious need for the Applicants to file § 1.65(a) amendments to update their transfer applications, the Commission cannot adopt a reasoned decision on November 4, 2008 that approves the ALLTEL/Verizon Wireless merger. The uncertainty surrounding the possible divestiture of up to 26 percent of the CMAs involved in the transaction is enough to preclude a determination that the proposed merger would serve the public interest. That being so, the Commission's rush to a decision on November 4, 2008 should lead to the issuance of a hearing designation order.

The Commission has not only disregarded its own *ex parte* rules in this case, but the due process principles that they once safeguarded. The decision-making process that the Commission has employed to date no more comports with traditional notions of fairness than it bears resemblance to the adjudicatory process called for by Congress. When Congress requires a decision based entirely on verified pleadings that were submitted on-the-record, served on opposing parties, and readily available to the public, the Commission appears headed to a decision based on at least 40 *ex parte* presentations, redacted pleadings, and an incomplete record that is withheld from public inspection. To remove the taint of the *ex parte* contacts and to conform the conduct of this proceeding to the on-the-record procedures required by § 309,. the Commission should either adopt a hearing designation order on November 4, 2008, or defer

action in this case until it can issue an order that: (1) lifts the WTB's protective order; (2) gives the petitioners access to the "confidential versions" of the Applicants' written submissions; and (3) affords the petitioners a reasonable time respond to those submissions.

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SUPPLEMENT TO PETITION TO DENY OF CELLULAR SOUTH, INC.

Cellular South, Inc. ("Cellular South"), by its attorney, hereby supplements its petition to deny the above-captioned applications by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), Atlantis Holdings LLC ("Atlantis"), and ALLTEL Corporation ("ALLTEL").

INTRODUCTION

Exhibit 1 hereto is a copy of the letter, dated September 24, 2008, by which Cellular South notified the parties, particularly Verizon Wireless and ALLTEL (together with Atlantis, "the Applicants"), that the above-captioned proceeding became restricted under § 309(d) of the Communications Act of 1934, as amended ("Act"), and § 1.1208 of the Commission's Rules ("Rules") on August 11, 2008. That is the date on which Cellular South and others filed petitions to deny the applications for Commission consent to the transfer of control of ALLTEL's authorizations to Verizon Wireless.

The Applicants did not deign to respond to Cellular South's request that they adhere to the Commission's *ex parte* rules. Instead, they proceeded to prosecute their applications entirely

on an *ex parte* basis. This supplement will serve as Cellular South's response to some of the *ex parte* presentations made by the Applicants, most particularly Verizon Wireless' *ex parte* notification that, during discussions with the Department of Justice ("DOJ"), it offered to "divest assets in 15 additional cellular markets." Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95, at 2 (Oct. 7, 2008) ("Divestiture Offer II").

The Commission has announced that a decision on the ALLTEL/Verizon Wireless merger has been circulated for consideration as part of the tentative agenda for its meeting scheduled for November 4, 2008. Cellular South will address the legal ramifications of deciding this matter at the November 4, 2008 meeting on the basis of the record as it will likely exist on the day the matter of the ALLTEL/Verizon Wireless merger is placed on the Sunshine Agenda.

ARGUMENT

I. THE RECORD WILL LEAVE THE COMMISSION NO OPTION OTHER THAN TO DESIGNATE THE MERGER APPLICATIONS FOR A HEARING

Transfer of control applications are subject to the same standards and are treated in the same manner as initial license applications unless they do not entail a substantial change in ownership or control. *See* 47 U.S.C. §§ 308, 309(c)(2)(B), 310(d); *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 258 n.15 (D.C. Cir. 1974). The subject applications unquestionably involve a substantial change in ownership and control. Since the applications were subjected to formal petitions to deny filed in accordance with § 309(d)(1), the Commission's decision-making process in this case must conform to the requirements of § 309(d)(2) of the Act. Therefore, the Commission must base its public interest determination "on the basis of the application[s], the pleadings filed, or other matters which it may officially notice." 47 U.S.C. § 309(d)(2). *See Civic Telecasting Corp. v. FCC*, 523 F.2d 1185, 1188 (D.C. Cir. 1975).

The Commission does not have to make its public interest determination on the basis of

the initial pleadings. *See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630 n.34 (D.C. Cir. 1978) (*en banc*). Section 308(a) of the Act permits the Commission to request that an applicant provide "further written statements of fact to enable it to determine whether … [the] application should be granted or denied." 47 U.S.C. § 308(a). Any written statement of fact thus generated becomes either part of the application or are facts which the Commission may officially notice. *See Bilingual*, 595 F.2d at 630 nn.34 & 36. However, whether the evidence is to be considered as part of the application or as the subject of official notice,[1] the Commission must afford the petitioners a "reasonable time in which to comment on or rebut newly submitted evidence as well as reasonable notice of what the applicable deadlines are." *Id.*, at 632. Thus, in order to permit "meaningful participation by petitioners," all written statements obtained from an applicant by the Commission pursuant to § 308(a) "must be placed in the public record, and a stated reasonable time allowed for response and rebuttal by petitioners." *Id.*, at 634.

At the very least, §§ 308(a), 309(d)(2) and 310(d) of the Act prohibit the Commission from basing its public interest determination in any § 309(d) licensing case on any oral *ex parte* presentation, or any written statement of facts it requested pursuant to § 308(a) unless it: (1) placed the written statement in the public record; (2) notified petitioners that the statement had been submitted; and (3) specified a reasonable deadline by which petitioners could respond to or rebut the facts alleged. Consequently, in this case, the Commission cannot consider any oral *ex parte* presentation made by any individual. Furthermore, if it decides this case on November 4,

[1] The Commission can take official notice of facts within its area of expertise as long as the parties to the proceeding have an adequate opportunity to respond. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 298 (2000) (citing *National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775 (1978)). *See also* 2 K. Davis & R. Pierce, *Administrative Law Treatise* § 10.6, at 150-51 (3rd ed. 1994); C. Koch, *Administrative Law and Practice* § 5.55[2], at 208 (2nd ed. 1997).

2008, the Commission cannot do so on the basis of any written statement it obtained from the Applicants pursuant to § 308(a).

By letter dated September 11, 2008, the Wireless Telecommunications Bureau ("WTB") required the Applicants to provide additional information pursuant to § 308(a) that the WTB deemed necessary for the Commission to complete its review of the transfer of control applications and to make its public interest findings under § 310(d). *See* Letter of James D. Schlichting to Kathleen Q. Abernathy and Nancy J. Victory, WT Docket No. 08-95, at 1 (Sept. 11, 2008) ("Section 308(a) Letter"). The WTB required the submission of written responses and supporting documentation to 17 "document and data requests" relevant to the transfer of control applications and four requests for information regarding documents provided the DOJ. *See id.*, General Information Request, at 2-5. It also required the Applicants to amend their lead application "where appropriate" to reflect their responses to the Section 308(a) Letter. *Id.*, at 2.

The WTB set September 22, 2008 as the deadline by which the Applicants were required to provide the necessary information and documents. *See id.* However, the WTB neither notified Cellular South that information was being sought from the Applicants nor required the Applicants to serve Cellular South and the other petitioners with copies of their response to the Section 308(a) Letter. Nor did the WTB establish any procedures under which the petitioners would be afforded a reasonable opportunity to respond to the Applicants' submissions.

The Applicants' response to the Section 308(a) Letter was apparently submitted on September 17, 2008, but never placed in the public record nor served on the petitioners. Instead, a heavily redacted version was filed on an *ex parte* basis and made available for public inspection. In order to obtain access to all the information submitted by the Applicants, Cellular South would have had to acquiesce to, and agree to be bound by, the wholly unlawful and

prejudicial terms of the anticipatory Protective Order issued by the WTB on July 29, 2008. *See infra* Ex. 1, at 3-4.

Because the Applicants never amended their lead transfer of control application to reflect the information they provided the WTB in confidence and off-the-record, none of the information provided the WTB pursuant to § 308(b) can be treated as part of the lead application and considered by the Commission under § 309(d)(2). And the Commission cannot take official notice of information that is neither in the public record nor routinely available for public inspection in accordance with the Rules. *See* 47 C.F.R. §§ 0.451(a), 0.453(a)(2)(iii), 0.460.

For the same reasons, the Commission cannot consider the additional information concerning the Johnson City-Kingsport-Bristol, TN/VA, Tennessee 4 - Hamblen, and Tennessee 8 – Johnson Cellular Market Areas ("CMAs") that the Applicants provided at the WTB's request on October 1, 2008. *See* Letter of Kathleen Q. Abernathy and Nancy J. Victory to Marlene H. Dortch, WT Docket No. 08-95 (Oct. 1, 2008).[2]

For its part, the Commission never afforded notice of the Applicants' submissions nor prescribed procedures under which the petitioners were afforded a reasonable opportunity to respond to or rebut the facts submitted. Now, no such opportunity can be provided prior to the release of the Sunshine Agenda. Therefore, if the Commission acts on the ALLTEL/Verizon Wireless merger applications on November 4, 2008, § 309(d)(2) and *Bilingual* will prohibit the Commission from basing its decision on any of the information submitted by the Applicants on September 17, 2008 and October 1, 2008. The Commission will be left with no option but to

[2] On October 14, 2008, the Applicants complied with routine staff requests for information or clarifications. *See* Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 08-95 (Oct. 14, 2008); Letter from Eric W. DeSilva and Tom W. Davidson to Marlene H. Dortch, WT Docket No. 08-95 (Oct. 14, 2008). The Applicants responded *ex parte*, but at least unredacted copies of their submissions could be found in the public record.

rule on the transfer of control applications based on the information properly before it. *See Civic Telecasting,* 523 F.2d at 1189.

If it acts on November 4, 2008, the Commission must designate the ALLTEL/Verizon Wireless merger applications for a full hearing if it is "for any reason" unable, on the basis of the application, pleadings and officially noticeable matters, to make the requisite finding that the public interest would be served by the grant of the application. *See* 47 U.S.C § 309 (d)(2), (e). *See also Citizens Committee to Save WEFM v. FCC,* 506 F.2d 246, 259 (D.C. Cir. 1974) (*en banc*). Prohibited from considering information that the WTB deemed necessary for it to make its public interest determination, the Commission must either designate the merger applications for hearing or defer its decision until after the petitioners have had a reasonable opportunity to inspect and rebut all the evidence submitted by the Applicants.

II. THE COMMISSION'S DECISION-MAKING PROCESS HAS BEEN IRREVOCABLY TAINTED BY THE *EX PARTE* PRESENTATIONS

Acting pursuant to § 1.1200(a) of the Rules, the Commission announced that permit-but-disclose *ex parte* procedures would govern this restricted Title III licensing case.[3] The Commission took that action prior to the filing of Cellular South's petition to deny on August 11, 2008. Cellular South initially assumed that the proceeding reverted to its restricted status as of that date.[4] It quickly became clear that neither the WTB nor the Applicants were going to abide by the ban of *ex parte* presentations in § 309(d) proceedings. *See infra* Ex. 1, at 1-2. Following Cellular South's request that the *ex parte* rules be enforced, this case has been litigated primarily

[3] *See Verizon Wireless and Atlantis Seek FCC Consent to Transfer Licenses, Spectrum Manager and De Facto Transfer Leasing Arrangements and Authorizations, and Request for a Declaratory Ruling on Foreign Ownership,* DA 08-1481, 2008 WL 2549846, at *4 (June 25, 2008).

[4] *See* Reply of Cellular South, Inc. to Joint Opposition to Petition to Deny and Comments, WT Docket No. 08-95, at 14 n.36 (Aug. 26, 2008) ("Reply").

on the basis of *ex parte* presentations. Consequently, this case presents the issue of whether the Commission can lawfully modify its rules to permit it to entertain *ex parte* presentations on the merits of applications subject to the procedural requirements of § 309(d) of the Act.

The D.C. Circuit, which has exclusive jurisdiction to review the Commission's Title III licensing decisions under 47 U.S.C. § 402(b) and 28 U.S.C. § 2342(1), has not reached the issue of whether the Commission can modify its rules to permit *ex parte* presentations in any restricted proceeding, much less a restricted § 309(d) licensing case. *See Beehive Telephone Co., Inc. v. FCC*, 179 F.3d 941, 944-45 (D.C. Cir. 1999) (issue avoided on standing grounds). However, the D.C. Circuit has spoken on whether an agency can modify a statutory ban on *ex parte* communications:

> [W]hen an agency acts in violation of an express congressional mandate, its motives are irrelevant. If, as is the case here, a statute of general applicability directs that certain procedures must be followed, an agency cannot modify or balance away what Congress has required of it. The Commission is powerless to override Congress' directive banning *ex parte* communications relevant to pending on-the-record proceedings between decisional staff and interested persons outside the agency. Consequently, FERC's orders modifying its *ex parte* regulations must be reversed and remanded.[5]

Cellular South submits that the Commission's perfunctory modification of its *ex parte* rules applicable to this restricted proceeding under § 1.1200(a) of the Rules violated due process. *See* Ex. 1, at 2-3. Setting due process considerations aside, § 1.1200(a) of the Rules would be patently invalid if applied to permit the Commission to modify its *ex parte* rules so that it could entertain *ex parte* presentations on the merits of an application designated for hearing under § 309(e) of the Act. *See Electric Power,* 391 F.3d at 1266. *See also* 47 C.F.R. § 1.1208, Note 2. Similarly, § 1.1200(a) could not be lawfully invoked to permit the Commission to consider *ex parte* presentations on the merits of applications that are subject to § 309(d). By departing from

[5] *Electric Power Supply Ass'n v. FERC,* 391 F.3d 1255, 1266 (D.C. Cir. 2004) (citation omitted).

its *ex parte* rules in this case, the Commission modified Congress' directive that it consider only the applications, the pleadings filed, or other matters that it can officially notice. That was unlawful.

Even if the *ex parte* rules could be modified in § 309(d) cases, § 1.1200(a) of the Rules permits such a modification only if the Commission determines that the restricted proceeding "involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties." 47 C.F.R. § 1.1208, Note 2. The Commission did not make the requisite determination prior to abandoning its *ex parte* rules in this case. Moreover, the detailed, transaction-specific standard of review purportedly applied by the Commission in wireless merger cases precludes a finding that this proceeding would primarily involve "broadly applicable policy" issues. *See, e.g., AT&T, Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20301-06 (2007).

Because the Commission was without authority to entertain *ex parte* presentations in this case, any decision reached on November 4, 2008 that is favorable to the Applicants and based on their *ex parte* presentations will be subject to vacatur. Since the information deemed essential to the Commission's public interest determination was presented *ex parte*, and considering the number of oral *ex parte* presentations made to the Commissioners, the Commission's decision-making process must be deemed "irrevocably tainted" by the *ex parte* contacts under *Professional Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 565 (D.C. Cir. 1982).

III. FIFTEEN CONTINGENT APPLICATIONS SHOULD BE DISMISSED OR DESIGNATED FOR HEARING

With the *ex parte* disclosure that Verizon Wireless has made an offer to the DOJ to divest 15 additional markets, *see* Divestiture Offer II, at 2, it now appears that the Applicants are prosecuting 15 transfer of control applications that are contingent on (1) whether the DOJ

accepts the divestiture offer and, if so, (2) Verizon Wireless' decision as to which one of the "overlapping properties" in each of the 100 markets will be divested. *Id.* Absent clarification from the Applicants, Cellular South must assume that the latest divestiture offer reflects the DOJ's determination that Verizon Wireless' acquisition of control over additional spectrum in the 15 CMAs would substantially lessen competition in those markets in violation of § 7 of the Clayton Act. Accordingly, it appears that the Applicants are prosecuting at least 15 transfer of control applications that are subject to amendment.

Under § 1.65(a) of the Rules, the Applicants are responsible for the continuing accuracy and completeness of information furnished in their pending applications. *See* 47 C.F.R. § 1.65(a). According to the Applicants, they are currently prosecuting applications for Commission consent to transfer control over ALLTELs licensed wireless operations in 390 CMAs (125 Metropolitan Statistical Areas ("MSAs") and 265 Rural Service Areas ("RSAs")) that serve over 13 million subscribers. *See* File No. 0003463892, Ex. 1, at 4. However, since no later than July 22, 2008, Verizon Wireless has known that it would not, and could not, exercise control over the ALLTEL properties in all 390 CMAs.[6]

As it stands now, Verizon Wireless has disclosed that it is seeking Commission consent to control licensed operations in up to 100 CMAs that it has no intent of exercising. Table 1 below identifies the 15 contingent applications and compares the number of CMAs in which transfers of control are proposed to the number of CMAs in which Verizon Wireless will actually control if it divests the ALLTEL properties.[7]

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[6] *See* Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95, at 1 (July 22, 2008) ("Divestiture Offer I").

[7] *See infra* Exs. 2 & 3. It should be noted that the table and Exhibits 2 and 3 provide the maximum number of CMAs in which ALLTEL currently operates. Cellular South only researched the facilities that ALLTEL operates in CMAs subject to divestiture. With regard to

TABLE 1

FILE NO.	TRANSFEROR	CMAs PROPOSED	CMAs AFTER DIVESTITURE
0003463892	ALLTEL Communications, LLC	170	146
0003465064	Georgia RSA #8 Partnership	1	0
0003465053	Midwest Wireless Communications, L.C.C.	6	2
0003464848	ALLTEL Communications of Virginia No. 1, LLC	9	6
0003464833	Ohio RSA 6 Limited Partnership	1	0
0003464834	Ohio RSA 5 Limited Partnership	1	0
0003464836	Ohio RSA 2 Limited Partnership	1	0
0003464839	Ohio RSA #3 Limited Partnership	1	0
0003464814	Southern Illinois RSA Partnership	2	0
0003464786	WWC Holding Co., Inc.	42	5
0003464784	WWC License L.L.C.	30	12
0003464406	ALLTEL Communications of New Mexico, Inc.	4	2
0003464404	ALLTEL Communications of Nebraska, Inc.	12	11
0003464703	ALLTEL Communications of the Southwest L.P.	6	5
0003465057	Las Cruces Cellular Telephone Company	1	0

Table 1 shows that it is extremely unlikely that the information furnished in the 15 applications is still "substantially accurate and complete in all significant respects." 47 C.F.R. § 1.65(a). Cellular South has opined as to the properties that Verizon Wireless is likely to divest that operate in the initial 85 divestiture markets. *See* Reply, at 8-10. It need not do so with respect to the 15 additional CMAs that are subject to divestiture. Cellular South can rest on the reasonable assumption that Verizon Wireless decided on the properties in each CMA that it would be willing to divest before it made its divestiture offers to the DOJ. That being the case, Verizon Wireless was required to amend all or some of its 15 contingent applications within 30 days to disclose its divestiture plans. As far as Cellular South can tell, Verizon Wireless has not amended its applications after July 22, 2008, when it first disclosed the initial divestiture offer to the DOJ, *see* Divestiture Offer I, at 1-2, which subsequently ripened into a divestiture "commitment." *See* Divestiture Offer II, at 2.

Section 1.65(a) amendments were clearly required with respect to the seven applications

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CMAs that are not implicated by Verizon Wireless' divestiture offer, Cellular South assumed for the purposes of this analysis that ALLTEL operates under a single call sign in each CMA.

(File Nos. 0003465064, 0003464833, 0003464834, 0003464836, 0003464839, 0003464814 and 0003465057) in which Verizon Wireless proposes to acquire ALLTEL's partnership interests in licensees that operate only in CMAs that are subject to divestiture. Clearly, Verizon Wireless intends to divest those partnership interests in favor of retaining its own "overlapping properties." The fact that Verizon Wireless intends to divest the properties it proposes to acquire clearly constitutes a "substantial and significant change" in the information it furnished in the seven transfer applications. 47 C.F.R. § 1.65.

Unless and until the Applicants comply with § 1.65(a), the Commission will lack the current and accurate information necessary to determine whether the contingent applications should be dismissed, designated for hearing, or granted under §§ 309(d) and 310(d) of the Act. If Verizon Wireless discloses that it will divest all of the properties it proposes to acquire by one or more of its applications, or all of its interests in properties as in the case of the seven applications identified above, those applications should be dismissed. As Cellular South has argued, an application for consent to a transfer of control of a licensee to an entity that cannot and will not exercise it is a nullity and defective on its face. *See* Reply, at 9-10. Verizon Wireless cannot prosecute applications for Commission consent to acquire control of licenses that it cannot control under an agreement with the DOJ. *See id.*, at 9.

If Verizon Wireless reveals that it intends to divest some of the properties it proposes to acquire by an application (such as in File Nos. 0003463892, 0003465053, 0003464848, 0003464786, 0003464784, 0003464406, 0003464404, and 0003465057), the Commission cannot grant the application on the condition that it fulfills its divestiture commitment. Cellular South has established that:

(1) The Commission cannot issue a reasoned decision explaining how the grant of

its consent to the transfer of control of licenses to Verizon Wireless would serve the public interest when Verizon Wireless has been prohibited from acquiring such control by the DOJ;

(2) The Commission cannot grant a transfer of control application subject to the condition that Verizon Wireless divest the transferred license, because the imposition of the divestiture condition/remedy constitutes a Commission finding that it is unable to make the § 309(d)(2) public interest determination;

(3) §§ 308 and 310(d) of the Act prohibit the Commission from granting its consent to the transfer of a controlling interest in an operating licensee to an entity that is ineligible to exercise licensee control;

(4) The Commission cannot find that Verizon Wireless has the character, financial, technical and other qualifications to operate licensed facilities when it is legally prohibited from operating those facilities;

(5) The Commission is prohibited by § 310(b) from considering whether the public interest might be served by the transfer of a controlling interest in a licensee to a "management trustee" or any entity other than Verizon Wireless; and,

(6) The Commission is without authority to consent to a transfer of control, or to issue any license under Title III of the Act, to an entity on the condition that the entity cannot exercise the rights conveyed by the Commission.[8]

November 4, 2008 will only be day 132 on the General Counsel's Transaction Team's timeline for the ALLTEL/Verizon Wireless transaction. Considering the woefully inadequate state of the public record in this case, the obvious need to update the ALLTEL/Verizon Wireless

[8] *See* Reply, at 12-15.

transfer applications, and the fact that the DOJ has not completed its review of the merger, the Commission cannot issue a reasoned decision on November 4, 2008 that approves the merger. The uncertainty surrounding the possible divestiture of up to 26 percent of the CMAs involved in the transaction is enough to preclude a determination that the proposed merger would serve the public interest. At this juncture, Verizon Wireless has yet to "update the Commission" as to "the full extent of the divestitures." Divestiture Offer II, at 2. That being so, the Commission's rush to a decision will lead to a hearing. As the Commission has repeatedly recognized, § 309(e) of the Act requires it to designate the wireless merger applications for hearing if it cannot make the requisite public interest finding for any reason. *See, e.g., AT&T Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20302 (2007). The Applicants have left the Commission with no other option but to have all the uncertainty surrounding the transaction resolved in an evidentiary hearing.

IV. THE POSSIBLE DIVESTITURE OF FIFTEEN ADDITIONAL MARKETS WILL NOT RESOLVE THE SPECTRUM AGGREGATION ISSUES

Verizon Wireless' offer to divest an additional 15 markets is insufficient to moot the issues raised by Cellular South concerning Verizon Wireless' accumulation of premium low-band spectrum (cellular and 700 MHz spectrum) and particularly its attempt to acquire local cellular monopolies. Verizon Wireless' latest divestiture offer confirms that the DOJ employs an enforcement standard under which it requires divestiture if a proposed merger would otherwise give one carrier access to all 50 MHz of cellular spectrum in a single CMA. As depicted in Exhibit 4 *infra,* Verizon Wireless would have acquired 50 MHz of cellular spectrum in 99 of the 100 CMAs that it has been forced to divest. Nebraska 5 – Boone (CMA537) is the lone exception, and Cellular South suspects that the Applicants initially miscalculated the spectrum

that would have been attributable to Verizon Wireless post-transaction.[9]

The Commission will recall that when they responded to Cellular South's argument that the Commission should follow the DOJ's lead in preventing Verizon Wireless by acquiring local cellular monopolies, the Applicants argued:

> While acknowledging that the transaction involves cellular/cellular overlaps in 26 markets where DOJ has not yet requested divestiture or further proceedings, Cellular South illogically concludes that "the DOJ apparently is seeking divestiture if the spectrum includes 50 MHz of cellular spectrum," and that "the DOJ recognizes that Verizon Wireless should not be allowed access to all 50 MHz of that spectrum in one CMA." If the DOJ permits Verizon Wireless to hold cellular overlaps, the correct conclusion is that cellular overlaps are not a *per se* problem.[10]

In fact, Cellular South acknowledged that the transaction involved cellular/cellular overlaps in 79 CMAs (43 MSAs and 36 RSAs). *See* Reply, at 19, Ex. 6. And as Cellular South assumed, *see id.*, at 19, the DOJ had not finished with the matter of the cellular overlaps. As of now, the DOJ has whittled the number of CMAs with cellular overlaps down from 79 to 65 CMAs (38 MSAs and 27 RSAs). *See infra* Ex. 5. It appears that the DOJ is still at it since Verizon Wireless has yet to update the Commission as to "the full extent of the divestitures." Divestiture Offer II, at 2.

As of now, Commission approval of the proposed merger will give Verizon Wireless a post-divestiture, attributable interest in: (1) all the cellular spectrum in 65 CMAs; (2) 84 MHz of low-band spectrum, or 65 percent of all allocated cellular and 700 MHz spectrum, in 24 CMAs;

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[9] According to the Applicants, Verizon Wireless would have gained access to 25 MHz of cellular spectrum and a total of between 52 and 67 MHz of spectrum had it acquired ALLTEL's operations in CMA537. *See* File No. 0003463892, Ex. 4, at 23. The amount of spectrum involved is too far below the Commission's 95 MHz screen to be correct. And the Applicants have admitted that their spectrum aggregation exhibit contained errors. *See* Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, Attachment 2, at 1 n.2 (Aug. 9, 2008) ("Joint Opposition").

[10] Joint Opposition, at 39 n.118 (citation omitted).

and (3) 72 MHz or 55 percent of all allocated low-band spectrum in 41 CMAs. *See infra* Ex. 5. Based on the pleadings, the Commission should agree with the DOJ that the consolidation of control over cellular spectrum can substantially lessen competition, especially in the 28 RSAs where Verizon Wireless currently stands to acquire local cellular monopolies. *See id.* It should also find that the anticompetitive effect of placing all 50 MHz of cellular spectrum under Verizon Wireless' control in 68 CMAs will be exacerbated by its access to between 55 and 65 percent of the 700 MHz spectrum in those same CMAs.

Verizon Wireless' latest divestiture offer will not divest Cellular South of its standing in this proceeding. For example, if the merger is approved and Verizon Wireless honors its current divestiture commitments, Cellular South will compete with Verizon Wireless in four of its local cellular monopolies in Alabama: the Montgomery (CMA139) and Columbus (CMA153) MSAs; RSA 4 – Bibb (CMA310); and RSA 8 – Lee (CMA314). *See infra* Exhibit 6. In those four cellular monopolies, Verizon Wireless will have the use of either 72 MHz or 84 MHz of Low-Band spectrum. *See id.* And in RSA 5 – Cleburne, it will be able to use all of the cellular spectrum in three of the six counties in the RSA. *See id.*

In the four Alabama CMAs, as in all the areas where Verizon Wireless is authorized to operate on 50 MHz of cellular spectrum, there will be a "consolidation in a local cellular market from duopoly to monopoly status" with the result that consumers will have "less choice and potentially less benefits from competition." *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 19 FCC Rcd 19078, 19115 n.204 (2004); *E.N.M.R. Telephone Cooperative*, 22 FCC Rcd 4512, 4513-14 n.13 (WTB 2007). If it applies the same competitive standard as employed by the DOJ, the Commission must find that the effect of allowing the

consolidation in the local cellular markets proposed by Verizon Wireless will be to substantially lessen competition.

CONCLUSION

In the interests of facilitating wireless mergers and the resulting consolidation of the wireless industry, the Commission has not only disregarded its own *ex parte* rules, but the due process principles that they once safeguarded. The decision-making process that the Commission employs in wireless merger cases no more comports with traditional notions of fairness than it bears resemblance to the adjudicatory process called for by Congress.

There was a time when the Commission reached its decisions in the manner required by § 309(d) of the Act and administrative due process: entirely on the basis of verified pleadings that were submitted on-the-record, served on opposing parties, and readily available to the public. As demonstrated by the conduct of this proceeding to date, the Commission's decision-making process in wireless merger cases involves an endless procession of *ex parte* presentations (at least 40 by our count), redacted pleadings, and an incomplete record that is withheld from public inspection.

Where once equal and fair access to the Commission's processes was protected, *see Bilingual,* 595 F.3d at 635, the Commission now issues protective orders that favor merger applicants, but circumvent the Freedom of Information Act ("FOIA"), invites applicants to shield relevant information from the public that is not FOIA-exempt, and denies opposing parties free and unencumbered access to evidence.

Cellular South suggests that the issuance of a hearing designation order would serve as a necessary first step to remove the taint of the *ex parte* contacts from the decision-making process in this case and to conform its conduct to the on-the-record procedures required by § 309 of the

Act. The Commission should either adopt a hearing designation order on November 4, 2008, or defer action in this case until it can issue an order that: (1) lifts the WTB's protective order; (2) gives the petitioners access to the "confidential versions" of the Applicants' written submissions; and (3) affords the petitioners reasonable time to respond to those submissions.

Respectfully submitted,

CELLULAR SOUTH, INC.

By: David L. Nace

Its Attorney
LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102
(703) 584-8661

October 24, 2008

CERTIFICATE OF SERVICE

I, David L. Nace, hereby certify that on this 24th day of October 2008, copies of the foregoing Supplement to Petition to Deny of Cellular South, Inc. were sent by e-mail to:

Best Copy and Printing, Inc.
FCC@BCPIWEB.COM

Erin McGrath
Mobility Division
Wireless Telecommunications Bureau
Federal Communications Commission
Erin.McGrath@fcc.gov

Susan Singer
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
Susan.Singer@fcc.gov

Linda Ray
Broadband Division
Wireless Telecommunications Bureau
Federal Communications Commission
Linda.Ray@fcc.gov

David Krech
Policy Division
International Bureau
Federal Communications Commission
David.Krech@fcc.gov

Jodie May
Competition Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
Jodie.May@fcc.gov

Jim Bird
Office of General Counsel
Federal Communications Commission
Jim.Bird@fcc.gov

ALLTEL Communications, LLC
Wireless Regulatory Supervisor
ACI.Wireless.Regulatory@alltel.com

Atlantis Holdings LLC
Attention: Clive D. Bode, Esq.
cbode@tpg.com

Kathleen Q. Abernathy, Esq.
Wilkinson Barker Knauer, LLP
Attorney for Atlantis Holdings LLC
kabernathy@wbklaw.com

Cellco Partnership
Attention: Michael Samsock
Michael.Samsock@Verizon.Wireless.com

Nancy J. Victory, Esq.
Wiley Rein LLP
Attorney for Cellco Partnership
nvictory@wileyrein.com

William L. Roughton, Jr.
Centennial Communications Corp.
broughton@centennialcorp.com

Caressa D. Bennet
Bennet & Bennet, PLLC
Attorney for Rural Telecommunications Group, Inc.
cbennet@bennetlaw.com

John A. Prendergast
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
Attorney for North Dakota Network Co.
jap@bloostonlaw.com

Robert M. Jackson
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
Attorney for North Dakota Network Co.
rmj@bloostonlaw.com

Benjamin H. Dickens
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
Attorney for South Dakota Telecommunications Association
bhd@bloostonlaw.com

D. Cary Mitchell
Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP
Attorney for Rural Carriers
cary@bloostonlaw.com

Daniel K. Alvarez
Willkie Farr & Gallagher LLP
Attorney for Roaming Petitioners
dalvarez@willkie.com

Mary McDermott
NTELOS
mcdermottm@ntelos.com

David Don
SpectrumCo LLC
david_don@comcast.com

Michael Rosenthal
SouthernLINC Wireless
mdrosent@southernco.com

Jean L. Kiddoo
Bingham McCutchen LLP
Attorney for MetroPCS Communications, Inc. and NTELOS
jean.kiddoo@bingham.com

Patrick J. Whittle
Bingham McCutchen LLP
Attorney for MetroPCS Communications, Inc. and NTELOS
patrick.whittle@bingham.com

Stephen G. Kraskin
Attorney for The Rural Independent Competitive Alliance
skraskin@independent-tel.com

Daniel Mitchell
National Telecommunications Cooperative Association
dmitchell@ntca.org

Jill Canfield
National Telecommunications Cooperative Association
jcanfield@ntca.org

Pantelis Michalopoulos
Steptoe & Johnson LLP
Attorney for Leap Wireless International, Inc.
pmichalopoulos@steptoe.com

Kenneth E. Hardman
Attorney for Ritter Communications, Inc. and Central Arkansas Rural Cellular Limited Partnership
kenhardman@att.net

Whitney North Seymour, Jr.
Attorney for The EMR Policy Institute
wseymour@stblaw.com

Larry A. Blosser
Law Office of Larry A. Blosser, P.A.
Ad Hoc Public Interest Spectrum Coalition
larry@blosserlaw.com

Michael Calabrese
New America Foundation
calabrese@newamerica.net

Chris Murray
Consumers Union
murrch@consumer.org

Harold Feld
Media Access Project
hfeld@mediaaccess.org

Jef Pearlman
Public Knowledge
jef@publicknowledge.org

Chris Riley
Free Press
criley@freepress.net

Donald L. Herman, Jr.
Bennet & Bennet, PLLC
Attorney for Palmetto Mobilenet, L.P.
dherman@bennetlaw.com

Michael R. Bennet
Bennet & Bennet, PLLC
Attorney for Palmetto Mobilenet, L.P.
mbennet@bennetlaw.com

Stuart Polikoff
Organization for the Promotion and Advancement of Small Telecommunications Companies
sep@opastco.org

Brian Ford
Organization for the Promotion and Advancement of Small Telecommunications Companies
bjf@opastco.org

Aaron Shainis
Shainis & Peltztman, Chartered
Attorney for Chatham Avalon Park Community Council
aaron@s-plaw.com

David L. Nace