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October 31, 2008

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Docket Nos. 96-45, 96-98, 99-68, 01-92, 03-109, 04-36,
05-337, 06-122. 03-123

Dear Madam Secretary:

On behalf of NE Colorado Cellular, Inc. and Montana PCS, d/b/a Cellular One, I write concerning the enclosed ex parte disclosure submitted to the agency on October 29, 2008, one day following the release of the Sunshine Agenda in the above-referenced dockets.¹ The disclosure summarizes a meeting that OPASTCO and WTA representatives had with the Chairman and certain Commission staff in the Chairman's office on October 28, shortly before the Sunshine Agenda was published.

In accordance with 47 C.F.R. Sections 1.1202(a) and 1.1203(a), our submission here is not directed to the merits of the outcome of any of the above-referenced proceedings, but is limited to the procedures followed to date. We therefore believe that the submission of this letter is not prohibited during the Sunshine Period by the terms of Section 1.1203(a).

We believe the information set forth below underscores what many have been saying for the past few weeks. At least 81 members of the House and Senate have written to urge the Commission to place the pending proposals on public notice. This will enable all industry participants to have sufficient time to provide meaningful input to the agency as a whole, and so all five commissioners have an opportunity to make informed judgments as to these critical policy decisions. Because there are certain statutorily required actions the Commission must take with respect to the pending rulemakings, it should do the absolute minimum required by

¹ FCC to Hold Open Commission Meeting Tuesday, November 4, 2008 (rel. October 28, 2008).

statute and allow the remaining issues to be decided following public comment on the full item currently being contemplated.

As we understand the ex parte disclosure filed on October 29, OPASTCO and WTA secured an agreement of sorts with the Chairman concerning specific provisions that would be included in the order scheduled to be voted on by the Commission on Election Day. Based on our review of the ex parte, and a press release by OPASTCO also dated October 29, 2008 (copy enclosed), it appears that one or more “concessions”² obtained by the participants from the Chairman may not have been properly noticed by the Commission in accordance with the requirements of the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*).

For example:

- OPASTCO describes in significant detail how rural wireline carriers will be protected from revenue losses due to access charge reductions, access line losses, and reductions in interstate access minutes of use for five years, with total protection apparently valued at \$1.5 billion.
- Apparently, there were specific agreements reached about the scope of a broadband build-out commitment imposed on wireline carriers, including an automatic right to resell satellite service in areas where broadband cannot be provided, up to 2% of a carrier’s total loops within its study area.
- Support for Rate of Return (“RoR”) ILECs will continue through 2010, after which it will be frozen. Presumably, this would enable wireline carriers to increase their support until such time as it is frozen.
- OPASTCO’s release also included the statement: “The plan also designated rural RoR carriers as the default broadband carrier of last resort and established the traditional telephone study area as the broadband support area.”³

On October 10, 2008, OPASTCO/WTA filed a letter proposing a compromise plan that includes some of what appears in the October 29 ex parte notice. Between October 15 and October 29, OPASTCO/WTA filed five ex parte notices summarizing additional meetings with the Chairman.⁴ Some notices attach the original October 10 submission and each describes, in one or two sentences, what was discussed at the meetings, such as for example:

The purpose of both meetings was to discuss intercarrier compensation and universal service reform and its potential impacts on rural, rate of return (RoR)-regulated incumbent local exchange carriers (ILECs). Specifically, we discussed the unification and reduction of terminating access charges, access revenue replacement options,

² See OPASTCO release at p. 1.

³ *Id.* at p. 2.

⁴ Copies of those notices from the FCC’s ECFS are appended hereto.

broadband build-out requirements and related Universal Service Fund changes, and transport changes and obligations with respect to broadband networks.⁵

We are concerned that a relatively detailed disclosure of the substance of what was being discussed at the five meetings with the Chairman was made only after the Sunshine Agenda was published and that interim disclosures did not provide the public with sufficient detail concerning the ongoing negotiations.⁶

In addition, certain elements of the concessions referenced in OPASTCO's October 29 press release do not appear to be set forth in either the FCC's NPRM (released January 29, 2008)⁷ or prior OPASTCO/WTA ex parte notices, such as the proposed decision to establish any class of carrier as the "default" broadband carrier of last resort, or to establish a broadband support area that is congruent with the service boundaries of landline carriers. We have attempted to review the voluminous material set forth in Commission's ECFS system in the referenced dockets – and concede that in the thousands of presentations therein, perhaps we have missed these proposals somewhere.⁸ If nothing else, this highlights our point that the public would be best served by having an opportunity to review and comment on the Commission's tentative conclusions, and the basis therefor, prior to an order being adopted.

We note here some similarities between this situation and the Commission's recent deliberations in its Wireless E911 Location Accuracy Requirements proceeding.⁹ There, two public safety organizations filed an ex parte recommending that the FCC adopt a five-year timetable for PSAP-level compliance, with specific benchmarks set forth in the letter, which proposal was adopted by the Commission shortly thereafter. The proposal was not fully aired before its adoption and the U.S. Court of Appeals for the District of Columbia Circuit noted the procedural problems in its order staying the Commission's action.¹⁰

We mention this because the Joint Board's Recommended Decision (on which the Commission sought comment in its January 29 NPRM) is both sparse and vague, compared to the work it did in implementing universal service following the 1996 Act. The Commission put the Recommended Decision out for public comment without adding any detail to the decisions which might be forthcoming. Thus, despite the voluminous commentary put into the record between 2001, when the FCC last took any substantive action on universal service distributions, and 2007, we arrive at the precipice of a hugely complex decision without the particulars having ever been aired publicly.

⁵ OPASTCO/WTA ex parte letter dated October 28, 2008.

⁶ See 47 C.F.R. Section 1.1206(b)(2) ("Memoranda must contain a summary of the substance of the ex parte presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.").

⁷ See, 23 FCC Rcd 1531 (2008).

⁸ In addition to the dockets referenced in the Commission's Sunshine Agenda, Dockets 80-286, 97-21, 00-256, 02-6, 02-60, 05-195 were referenced in the Commission's Public Notice inviting parties to refresh the record on various and related issues. See, News Release, Interim Cap Clears Path For Comprehensive Reform (rel. May 2, 2008).

⁹ See, 22 FCC Rcd 20105 (2007).

¹⁰ *Rural Cellular Association and T-Mobile USA, Inc., v. FCC*, No. 08-1069, Order (D.C. Cir, rel. March 25, 2008).

Decisions here have far reaching and significant effects. In a financial crisis such as the one the nation now faces, the largest since the Great Depression, it is not understating matters to think that an action this large, this complex, and this significant should be well considered and deliberative. Unlike many other actions the Commission takes, what happens here cannot easily be undone. Moreover, the mere expectation of change brought about by the adoption of an order, despite the possibility of reconsideration or appeals changing the outcome, can cause significant inadvertent collateral effects among market participants who are dependent upon the credit markets.

In sum, the thousands of presentations made to date on these issues may now become largely irrelevant in that they do not provide input on proposed decisions the Commission intends to make, as reflected in the concessions described by OPASTCO and WTA. There needs to be a more detailed proposal, set forth before the public, than has been provided in the Commission's January 29 NPRM, so that everyone can have a fair opportunity to provide comment.

We ask the Commission to provide the public that opportunity.

Respectfully submitted,

NE Colorado Cellular, Inc.
Montana PCS, d/b/a CellularOne



By: _____

David A. LaFuria

Enclosures

Hon. Kevin J. Martin
Hon. Michael J. Copps
Hon. Jonathan S. Adelstein
Hon. Deborah Taylor Tate
Hon. Robert M. McDowell
Amy Bender, Esq.
Scott Deutchman, Esq.
Scott Bergmann, Esq.
Greg Orlando, Esq.
Nick Alexander, Esq.
The Honorable Lamar Alexander
The Honorable Rodney Alexander
The Honorable Michael Arcuri

The Honorable Tammy Baldwin
The Honorable John Barrow
The Honorable Max Baucus
The Honorable Marion Berry
The Honorable Kit Bond
The Honorable John Boozman
The Honorable Leonard Boswell
The Honorable Rick Boucher
The Honorable Bruce Braley
The Honorable Sherrod Brown
The Honorable Jim Bunning
The Honorable Christopher P. Carney
The Honorable Steve Chabot

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The Honorable Howard Coble
The Honorable Thad Cochran
The Honorable Norm Coleman
The Honorable John Cornyn
The Honorable Lincoln Davis
The Honorable Nathan Deal
The Honorable Lloyd Doggett
The Honorable Elizabeth Dole
The Honorable Jo Ann Emerson
The Honorable Bob Etheridge
The Honorable Jeff Fortenberry
The Honorable Louie Gohmert
The Honorable Bart Gordon
The Honorable Chuck Grassley
The Honorable Ralph Hall
The Honorable Phil Hare
The Honorable Tom Harkin
The Honorable Dave Heineman
The Honorable Maurice Hinchey
The Honorable Ruben Hinojosa
The Honorable Tim Holden
The Honorable Kenny Hulshof
The Honorable Walter Jones
The Honorable Steve Kagen
The Honorable Ron Kind
The Honorable Steve King
The Honorable Randy Kuhl
The Honorable Ray LaHood
The Honorable Tom Latham
The Honorable Dave Loebsack
The Honorable Jim Matheson
The Honorable Mitch McConnell
The Honorable Jim McCrery
The Honorable Patrick McHenry
The Honorable John McHugh
The Honorable Mike McIntyre
The Honorable Cathy McMorris Rodgers
The Honorable Dennis Moore
The Honorable Sue Myrick
The Honorable Ben Nelson
The Honorable James L. Oberstar

The Honorable Collin C. Peterson
The Honorable Thomas E. Petri
The Honorable Jon Porter
The Honorable Dennis R. Rehberg
The Honorable Harold Rogers
The Honorable Stephanie Herseth Sandlin
The Honorable Joseph Sestak
The Honorable Jean Schmidt
The Honorable Adam Smith
The Honorable Adrian Smith
The Honorable Lamar S. Smith
The Honorable Vic Snyder
The Honorable Zack Space
The Honorable Bart Stupak
The Honorable Lee Terry
The Honorable Jon Tester
The Honorable Mac Thornberry
The Honorable John Thune
The Honorable Greg Walden
The Honorable Tim Walz
The Honorable Zach Wamp
The Honorable Ed Whitfield
The Honorable Roger Wicker
The Honorable Charlie Wilson
The Honorable Ron Wyden

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