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

In re Public Notice re	)	
	)	
CENTENNIAL COMMUNICATIONS	)	WT Docket No. 08-246
CORP. and AT&T INC.	)	DA 08-2713
	)	
Announcing the Modification of the *Ex Parte*	)	
Procedures Applicable to a Restricted Proceeding	)	
to Permit-But-Disclose Procedures Applicable	)	
to Non-Restricted Proceedings	)	

PETITION FOR RECONSIDERATION OF CELLULAR SOUTH, INC.

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TABLE OF CONTENTS

SUMMARY

The Wireless Telecommunications Bureau ("Bureau") simultaneously announced: (1) the filing of applications for Commission consent to effect the merger of Centennial Communications Corporation ("Centennial") and AT&T Inc "("AT&T"); (2) petitions to deny the applications ("Merger Applications") would be due on January 15, 2009; and (3) its decision that the permit-but-disclose *ex parte* procedures of 47 C.F.R. § 1.1206 would govern the conduct of the restricted Article III licensing proceeding in which the Merger Applications will be considered.

Cellular South, Inc. ("Cellular South") is filing a petition to deny the Merger Applications. Cellular South seeks the reconsideration and rescission of the Bureau's decision not to enforce 47 C.F.R. § 1.1208. If allowed to stand, the Bureau's action will deprive Cellular South of a procedural safeguard that protects its right to a fair decision-making process guaranteed by 47 U.S.C. § 309(d) and due process. The Bureau's decision not to abide by § 1.1208 in this case is but the latest example of the Commission's ten-year practice of ignoring the dictates of its own *ex parte* rule.

Cellular South was victimized when the Bureau abandoned the *ex parte* rules and opened the floodgates to *ex parte* presentations on the merits of the merger of ALLTEL Corporation ("ALLTEL") and Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). The procedures employed by the Bureau, and later by the Commissioners, in the aid of the merging parties in that proceeding violated 47 U.S.C. § 309(d), and were inconsistent with 47 C.F.R. §§ 1.65, 1.927(i), 1.939(a)(2), 1.945(c), 1.1200(a), and 1.1208, as well as the Freedom of Information Act, Government in Sunshine Act, and the Administrative Procedure Act. The number and gravity of the procedural errors in their totality were so prejudicial to Cellular South

as to deprive it of its statutory and due process right to fair decisionmaking. To prevent another deprivation of its rights in this proceeding, Cellular South is formally asserting its procedural rights at the first opportunity and at the earliest date practicable.

Rules that restrict *ex parte* presentations in order to ensure the fairness and integrity of the Commission's decision-making process should rarely, if ever, be disturbed. Nevertheless, the Commission gave the Bureau the authority to specify that a restricted proceeding be governed by the permit-but-disclose procedures if it involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties. The Bureau did not make any determination as to the issues presented by the Merger Applications. In fact, the Bureau made no finding whatsoever before simply announcing that permit-but-disclose procedures would govern the conduct of the proceeding.

The Bureau's discretion to modify the applicable *ex parte* rules under 47 C.F.R. § 1.1200(a) and Note 2 to 47 C.F.R. §1.1208 does not extend to a proceeding such as this which was restricted under § 1.1208 and is now governed by 47 U.S.C. § 309(d). The procedural requirements set forth in § 309(d), which limit the Commission to considering the application, pleadings supported by affidavits, and other matters subject to official notice, clearly express the intent of Congress that the Commission not consider unverified written *ex parte* presentations and unverifiable oral *ex parte* presentations in the disposition of a petition to deny. And it is axiomatic that the Commission cannot permit *ex parte* presentations to be made that it is statutorily prohibited from considering

Allowing permit-but-disclose *ex parte* procedures to govern the presentation and consideration of evidence in an adjudication under 47 U.S.C. § 309(d) deprives the parties in interest of procedural rights guaranteed them by rules other than, but implicated by, the

Commission's *ex parte* rules. By virtue of filing a petition to deny the Merger Applications, Cellular South will acquire the right to receive service under 47 C.F.R. §§ 1.47, 1.65(a), 1.927(i), 1.939(a)(2), 1.939(c), 1.1202(b)(1), 1.1204(a)(10)(ii) & 1.1208. However, such rights are ignored by the Bureau and merger applicants alike once permit-but-disclose procedures are put in place. For example, if Centennial and AT&T conduct themselves as did ALLTEL and Verizon Wireless, amendments to the Merger Applications will be filed, but none will be served on Cellular South despite the mandatory language of 47 C.F.R. § 1.927(i).

Allowing *ex parte* presentations in adjudications under 47 U.S.C. § 309(d) effectively nullifies the statutory right of parties in interest to notice and the opportunity to participate meaningfully in the decision-making process. For example, the Commission based its decision on the ALLTEL/Verizon Wireless merger in part on the *ex parte* presentation of decisionally significant information during the Sunshine period on the day before the Commission rendered its decision. If past is prologue, consideration of the Merger Applications will be tained by such due process violations unless the Bureau reconsiders and restores the proceeding to its restricted status wherein prohibited *ex parte* presentations will not be permitted or entertained.

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PETITION FOR RECONSIDERATION OF CELLULAR SOUTH, INC.

Cellular South, Inc. ("Cellular South"), by its attorney and pursuant to § 405(a) of the Communications Act of 1934, as amended ("Act"), and § 1.106(a)(1) of the Commission's Rules ("Rules"), hereby requests that the Wireless Telecommunications Bureau ("Bureau" or "WTB") reconsider and rescind its action modifying the *ex parte* procedures that will govern the adjudicatory proceeding involving the proposed transfer of control of licenses, authorizations and *de facto* transfer spectrum and spectrum manager leasing arrangements held by Centennial Communications Corporation ("Centennial") and its subsidiaries to AT&T Inc "("AT&T"). Public notice of the Bureau's action was provided on December 16, 2008.[1] In support of the reconsideration and rescission of that action, the following is respectfully submitted.

INTRODUCTION

The Commission maintains that its regulatory processes are "conducted openly and subject to public scrutiny" to the extent possible and consistent with its duties under the Communications Act of 1934, as amended ("Act"), the Freedom of Information Act ("FOIA"),

[1] *See AT&T Inc. and Centennial Communications Corp. Seek FCC Consent to Transfer Control of Licenses, Leasing Arrangements, and Authorizations*, DA 08-2713 (WTB Dec. 16, 2008) ("*Public Notice").*

the Government in Sunshine Act ("Sunshine Act"), and the Administrative Procedure Act ("APA"). *Michael Ravnitzky,* 17 FCC Rcd 23240, 23242 (2002). Such has not been the case with respect to the conduct of adjudicatory proceedings involving applications for authority under § 310(d) of the Act that impact competition within the mobile telephony market. And it certainly was not the case with respect to the decision-making process by which the Commission recently granted its consent to the transfer of control of licenses held by ALLTEL Corporation ("ALLTEL") to Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"). *See Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC,* FCC 08-258, 2008 WL 4876064 (2008) ("*ALLTEL/Verizon Wireless Order").*

Cellular South was a party in interest with regard to the ALLTEL/Verizon Wireless merger applications. As was the case here, the ALLTEL/Verizon Wireless proceeding involved applications for authority under Title III of the Act and, therefore, was a restricted proceeding from the inception. *See* 47 C.F.R. §1.1208.[2] As was also the case here, the Bureau abandoned the *ex parte* rules the day it notified the public that Verizon Wireless was seeking Commission consent to its acquisition of ALLTEL.[3] After it filed a petition to deny, Cellular South assumed that the Bureau would return the proceeding to its restricted status under the *ex parte* rules. When that assumption proved incorrect, Cellular South attempted to get the Bureau to respect its

[2] The Commission's *ex parte* rules use the restricted category as the "catch-all." *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings,* 12 FCC Rcd 7348, 7352 (1997), *reconsideration denied,* 14 FCC Rcd 18831, 18831 (1999) "*1997 Ex Parte Amendments").* The rules were intended to put everyone on notice that a proceeding involving a Title III application is "restricted unless and until its status is altered by the Commission or its staff." *Id.,* 12 FCC Rcd at 7352.

[3] *See Verizon Wireless and Atlantis Seek FCC Consent to Transfer Licenses, Spectrum Manager and De Facto Transfer Leasing Arrangements, and Authorizations, and Request a Declaratory Ruling on Foreign Ownership,* 23 FCC Rcd 10004, 10008 (WTB 2008).

rights under § 309(d)(1) of the Act and § 1.1208 of the Rules. Even after Cellular South formally asserted its procedural rights, the Bureau proceeded to make a written request for information pursuant to § 308(b) of the Act to resolve issues in the § 309(d) proceeding without serving Cellular South.

The procedures employed by the Bureau, and later by the Commissioners, in the aid of the merging parties during the decision-making process in ALLTEL/Verizon Wireless proceeding violated § 309(d) of Act, and were inconsistent with §§ 1.65, 1.927(i), 1.939(a)(2), 1.945(c), 1.1200(a), and 1.1208 of the Rules, as well as the FOIA, the Sunshine Act, and the APA. The number and gravity of the procedural errors in their totality were so prejudicial to Cellular South as to deprive it of its statutory and due process right to fair decisionmaking. To prevent another deprivation of its rights in this proceeding, Cellular South is formally asserting its procedural rights at the first opportunity and at the earliest date practicable.

Cellular South will plead its case for reconsideration primarily under the federal common law derived from the exercise of the exclusive jurisdiction of the D.C. Circuit Court of Appeals to review the Commission's Title III licensing decisions under § 402(b) and of the Act.

STANDING

At the same time it modified the *ex parte* procedures, the Bureau set January 15, 2009 as the deadline by which interested parties must file petitions to deny the applications for Commission consent to the proposed merger of Centennial and AT&T ("Merger Applications"). *See Public Notice*, at 4. Cellular South is filing a petition to deny the Merger Applications pursuant to § 309(d)(1) of the Act. To demonstrate that it has standing as a party in interest, Cellular South will show that the grant of the Merger Applications will cause it legally-cognizable injury-in-fact.

Inasmuch as it had a statutory right as a party in interest under § 309(d)(1) to file its petition to deny, s*ee Springfield Television Broadcasting Corp. v. FCC*, 328 F.2d 186, 187-88 (D.C. Cir. 1964), Cellular South also has standing to seek reconsideration of the Bureau's decision not to enforce § 1. 1208 of the Rules which safeguards "basic tenets of fair play and due process" in restricted Article III licensing cases that are subject to § 309(d) procedures. *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 10 FCC Rcd 3240, 3240 (1995). Cellular South's specific claim is that the Bureau's action deprived it of a procedural safeguard that protects its right to a fair decision-making process that is guaranteed by § 309(d).[4] Such claims are cognizable for the purposes of establishing standing. *See Electric Power Supply Ass'n v. FERC,* 391 F.3d 1255, 1261-62 (D.C. Cir. 2004); *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1356 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 907 (1991).

ARGUMENT

I. THE BUREAU'S ACTION VIOLATED § 1.1208 OF THE RULES

Rules that restrict *ex parte* presentations in order to "ensure the fairness and integrity" of the Commission's decision-making process, *see* 47 C.F.R. § 1.1200(a), should rarely, if ever, be disturbed. Nevertheless, the Commission gave the Bureau the discretion to modify the "applicable *ex parte* rules," if "the public interest so requires in a particular proceeding." *Id.* However, in a restricted proceeding under § 1.1208 that has not been designated for hearing, the Bureau may specify that the proceeding will be governed by the permit-but-disclose procedures that apply under § 1.1206 if it "involves primarily issues of broadly applicable policy rather than

[4] In procedural rights cases, an administrative litigant claiming injury to a legally protected interest in fair decisionmaking does not have to show injury in fact to establish constitutional standing. *See, e.g., Shays v. Federal Election Comm'n*, 414 F.3d 76, 85-86 (D.C. Cir. 2005).

the rights and responsibilities of specific parties." 47 C.F.R. § 1.1208, Note 2. *See General Motors Corp. and Hughes Electronics Corp.,* 23 FCC Rcd 3131, 3136 (2008).

The Bureau did not make the requisite determination that the Merger Applications involve "broadly applicable policy" issues prior to abandoning § 1.1208 in this case. In point of fact, the Bureau made no finding whatsoever before simply announcing that permit-but-disclose procedures would govern the conduct of this proceeding. The Bureau's treatment of the issue was so perfunctory as to suggest that it modified the procedures simply because it can. *See Public Notice*, at 3. Obviously, since the Bureau did not find it necessary to give any reason to apply permit-but-disclose procedures in a restricted proceeding, its unexplained action hardly meets the standard of "reasoned decisionmaking" required of the Commission. *See, e.g., Alegria I, Inc. v. FCC,* 905 F.2d 471, 475 (D.C. Cir. 1990) ("An unexplained invocation of 'the public interest' is not, and never has been, a substitute for the reasoned decisionmaking required of administrative agencies").

It is so perfectly obvious that the Bureau is ignoring the *ex parte* rules in restricted wireless merger cases that no "danger signals" need be shown to prove the point. *But see Office of Communication of the United Church of Christ v. FCC,* 707 F.2d 1413, 1425 (D.C. Cir. 1983). Nevertheless, we will point out two such signals. First, the Bureau either has been using its boiler plate announcement so long, or puts so little thought into it, that it still stated that § 1.1200(a) of the Rules allows it to adopt "modified or more stringent *ex parte* procedures." *Public Notice,* at 3. The Commission deleted that language from the rule in 1997 at a time it tried unsuccessfully to treat most non-hearing adjudications as permit-but-disclose proceedings.[5]

[5] *See* 47 C.F.R. § 1.1200(a) (1996). The "modified or more stringent ex parte procedures" language was inserted in § 1.1200(a) in 1987. *See Amendment of Subpart H, Part 1 of the Rules Concerning Ex Parte Communications and Presentations in Commission Proceedings,* 2 FCC

The second danger signal is the obvious fact that the Bureau gave no thought whatsoever to whether the Merger Applications involved "broadly applicable policy" issues or the "rights and responsibilities of specific parties." Obviously, the Bureau could not be sure of the nature of the issues that would be raised in this proceeding until after the January 15, 2009 deadline for filing petitions to deny. Nevertheless, the Bureau changed the status of the proceeding under the *ex parte* rules from restricted to permit-but-disclose the day it announced the 30-day window in which petitions to deny could be filed. But even 30 days before the petition to deny deadline — had the Bureau given it any thought — it should have realized that the detailed, transaction-specific standard of review purportedly applied by the Commission in wireless merger cases precluded a finding that the Merger Applications would primarily present "broadly applicable policy" issues. *See, e.g., AT&T, Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20301-06 (2007).

Cellular South alleged in the ALLTEL/Verizon Wireless proceeding that for nearly ten years the Commission has followed the practice of applying permit-but-disclose procedures in every single case that involved applications for § 310(d) authority filed by wireless telecommunications carriers.[6] The Commission considered Cellular South's arguments, but did not deny the allegation that it never enforces § 1.1208 in cases such as this. *See ALLTEL/Verizon Wireless Order,* FCC 08-258, at 98-99. By its silence, the Commission tacitly admitted what Cellular South's research had showed. With respect to obeying § 1.1208 in

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Rcd 3011, 3012, 3024 (1987). It was deleted in 1997 in a rulemaking in which the Commission abandoned its "primary proposal" to expand the use of permit-but-disclose procedures after concerns were expressed by experienced practitioners. *1997 Ex Parte Amendments,* 12 FCC Rcd at 7351. *See* 47 C.F.R. § 1.1200(a) (1997).

[6] *See* Supplement to Petition to Deny of Cellular South, Inc., WT Docket No. 08-95, Ex. 1, at 2 (Oct. 24, 2008); 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).

wireless merger cases, the Commission has been violating the "rudimentary principle that that agencies are bound to adhere to their own rules and procedures." *Achernar Broadcasting Co. v. FCC,* 62 F.3d 1441, 1447 (D.C. Cir. 1995). The Bureau's decision not to abide by § 1.1208 in this case is the latest example of the Commission's ten-year practice of ignoring the dictates of its own *ex parte* rule.

II. *EX PARTE* PRESENTATIONS ARE PROHIBITED IN § 309(d) ADJUDICATIONS

The issue is whether the Bureau's discretion to modify the applicable *ex parte* rules under § 1.1200(a) and Note 2 to §1.1208 extends to a proceeding such as this which was restricted under § 1.1208 and is now governed by § 309(d) of the Act.[7] Clearly, the Commission has no discretion with respect to the procedures required by § 309(d). *See RKO General, Inc. v. FCC,* 670 F.2d 215, 233 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 927 (1982). That section establishes the "statutory framework" within which the Commission must dispose of a petition to deny an Article III application. *Gencom Inc. v. FCC,* 832 F.2d 171, 180 (D.C. Cir. 1987).

The D.C. Circuit has read the two subsections of § 309(d) as "assigning distinct tasks to the Commission." *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399, 1409 (D.C. Cir.), *cert. denied,* 519 U.S. 823 (1996). The second subsection requires a determination of whether a substantial and material question of fact is presented by "the material properly before the Commission." *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 397 (D.C. Cir. 1985). The statute explicitly limits the materials that can be properly before the Commission to "the

[7] 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 246, 258 n.15 (D.C. Cir. 1973). 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 had to conform to the requirements of § 309(d)(2).

application, the pleadings filed, or other matters of which it may officially notice." 47 U.S.C. § 309(d)(2). *See Mobile Communications,* 77 F.3d at 1409-10.

As for the pleadings filed, the first subsection of § 309(d) specifies that a petition to deny (which must be served on the applicant) must contain "specific allegations of fact" that are "supported by affidavit of a person or persons with personal knowledge thereof." 47 U.S.C. § 309(d)(1). It provides that the Commission must give the applicant "the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit." *Id.* By virtue of § 309(d)(1), the pleadings that the Commission may consider under § 309(d)(2) are those in which allegations of fact, "except for those of which official notice may be taken," must be supported by affidavit. *Id.*

The congressional directive limiting the Commission to considering the application, pleadings supported by affidavits, and other matters subject to official notice constitutes an implicit congressional ban on considering unverified written *ex parte* presentations and unverifiable oral *ex parte* presentations. And it is axiomatic that the Commission cannot permit *ex parte* presentations to be made that it is statutorily prohibited from considering

The discretion the Commission gave itself under §§ 1.1200(a) and 1.1208 of its Rules to specify that a restricted proceeding will be conducted in accordance with permit-but-disclose procedures cannot override Congress' directive banning *ex parte* presentations in proceedings governed by § 309(d)(2). Such was the holding in *Electric Power Supply Ass'n v. FERC,* 391 F.3d 1255, 1266 (D.C. Cir. 2004), a case involving the Sunshine Act:

> If … 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.

Even if the proposition that the Merger Applications initially presented "broadly applicable policy issues" can be rationally accepted, the proposition was rendered moot by the filing of a petition to deny. With that filing, the Bureau's discretion is overridden by the intent of Congress. If this matter reaches it, the D.C. Circuit is likely to review the Commission's application of permit-but-disclose procedures under the standards of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and give effect to the clearly expressed intent of Congress that the agency not permit *ex parte* presentations in proceedings governed by § 309(d)(2) of the Act.

III. *EX PARTE* PRESENTATIONS IN § 309(d) ADJUDICATIONS VIOLATE PROCEDURAL RIGHTS GUARANTEED BY THE RULES

The Commission has never explained the legal principles that allow it to depart from the letter of its *ex parte* rules when they are intended to safeguard due process rights. *See* 47 C.F.R. § 1.1200(a). Be that as it may, Cellular South submits that the Commission cannot permit *ex parte* presentations in an adjudication under § 309(d) wherein *ex parte* presentations are banned by its wireless licensing rules. Allowing permit-but-disclose *ex parte* procedures to govern the presentation and consideration of evidence in a § 309(d) proceeding deprives the parties of procedural rights guaranteed them by rules other than, but implicated by, the *ex parte* rules.

Section 1.939 of the Rules permits a party in interest to file a petition to deny a non-auctionable application that is subject to § 309(d). *See* 47 C.F.R. § 1.939(a)(2). With the decision to entertain a petition to deny, the Commission "assumes an obligation to assure that the proceeding satisfies the basic procedural requirements set forth in its own regulations and the [APA]." *Gardner v. FCC*, 530 F.2d 1086, 1090-91 (D.C. Cir. 1976). Parties to the proceeding are vested in the corresponding right to have the Commission adhere to those requirements. *See id.* Thus, by virtue of filing a petition to deny the Merger Applications in accordance with §

309(d)(1), Cellular South will acquire procedural rights under the Rules, including the right to:

(1) File a petition to deny a major amendment to any of those applications, *see* 47 C.F.R. § 1.939(a)(2);

(2) Be served with a copy of an opposition filed by Centennial and/or AT&T to its petition to deny, *see id.* §§ 1.47 & 1.939(c);

(3) Be served with a copy of any amendment to one of the Merger Applications, *see id.* § 1.927(i);

(4) Be served with a copy of any other filing made by, or on behalf of, Centennial and/or AT&T that relates to the merits the Merger Applications, *see id.* §§ 1.927(i), 1.1202(b)(1), 1.1204(a)(10)(ii) & 1.1208;

(5) Be served with a copy of a statement filed by Centennial and/or AT&T within 30 days of a substantial change as to any matter that may be of decisional significance, *see id.* § 1.65(a);

(6) Be given advance notice and the opportunity to be present when the Centennial, AT&T or their affiliates discuss the merits or outcome of the proceeding with Commission decision-makers, *see id.* §§ 1.1202(b)(2) & 1.1208;

(7) Have the Commission act on the Merger Applications based on an examination of the applications, the pleadings filed, or other matters which it may officially notice; *see id.* § 1.945(c); and,

(8) Have the Commission issue a statement of the reasons for its denial of the petition to deny that disposes of "all substantive issues raised in the petition." *Id.* § 1.939(h).

Five of Cellular South's enumerated rights involve being served with copies of papers that Centennial and AT&T ("Merger Applicants") may file with the Commission. However,

because the Bureau detached this proceeding from its moorings as a restricted adjudicatory proceeding, the Merger Applicants will be free to conduct themselves as if this were a notice-and-comment rulemaking proceeding. For example, if the Merger Applicants conduct themselves as did ALLTEL and Verizon Wireless, amendments to the Merger Applications will be filed, but none will be served on Cellular South despite the mandatory language of the wireless service rule. *See* 47 C.F.R. § 1.927(i) ("If a petition to deny … has been filed, a copy of any amendment (or other filing) *must* be served on the petitioner") (emphasis added).

Again, if past is prologue, Cellular South can expect the Bureau to send a letter to the Merger Applicants pursuant to § 308(b) of the Act requiring them to provide additional information deemed necessary for the Commission to complete its review of the Merger Applications and to make its public interest findings under § 310(d). The Bureau will likely require the submission of written responses and supporting documentation to "document and data requests" relevant to the Merger Applications. But the Bureau will not serve a copy of its § 308(b) letter on Cellular South even though it will be a communication from a decision-maker to the Merger Applicants that will be directed to the merits or outcome of this proceeding.

Under the Rules, the Merger Applicants will be required to serve Cellular South with any filings that they make in response to the Bureau's § 308(b) letter. *See* 47 C.F.R. §§ 1.927(i) & 1.1204(a)(10)(ii). Again, if they proceed as did ALLTEL and Verizon Wireless, the Merger Applicants will make a joint filing in response to the § 308(b) letter without serving Cellular South or having requested or obtained a waiver of the service requirements of §§ 1.927(i) and 1.1204(a)(10)(ii). The Merger Applicants undoubtedly will serve copies of their response to six members of the Commission's staff and Best Copy and Printing, Inc.,[8] but not on Cellular South.

[8] *See Public Notice,* at 4-5.

Consistent with § 309(d)(2) of the Act, § 1.945(c) of the Rules allows the Commission to grant a non-auctionable application over a petition to deny and without a hearing based on findings "from an examination of such application and supporting data, any pleading filed, or other matters which it may take official notice." 47 C.F.R. § 1.945(c). By dictating that this proceeding be governed by permit-but-disclose *ex parte* procedures, the Bureau has invited relevant information to be presented in unverified or unverifiable *ex parte* presentations that are made in violation of the Commission's wireless licensing rules, if not its *ex parte* rules. By ultimately considering improperly presented information in its decision-making process, the Commission will violate § 1.945(c) if it consents to the transfer of control of Centennial to AT&T based on its examination of matters that were not in the Merger Applications, or in any of the pleadings filed, and are not subject to official notice.

If this proceeding plays out as did the ALLTEL/Verizon Wireless proceeding, but it undergoes judicial review, the D.C. Circuit can easily find that the Commission violated both § 309(d)(2)of the Act and the fundamental precept of administrative law that "agencies must abide by their rules and regulations." *Reuters Ltd. v. FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986). The reversible errors will be the direct result of the Bureau's initial departure from the *ex parte* rules.

IV. THE COMMISSION'S CONSIDERATION OF *EX PARTE* PRESENTATIONS WILL VIOLATE CELLULAR SOUTH'S STATUTORY DUE PROCESS RIGHTS

Congress conferred standing upon interested parties, such as Cellular South, to file petitions to deny in order to "enable them to convey information bearing on the qualifications of licensees and potential licensees to the Commission." *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 875 (D.C. Cir. 1977). The D.C. Circuit has recognized that any Commission practice which would seriously inhibit this flow of intelligence could be "inconsistent with the congressional mandate" and "injurious of the public interest." *Id.* Cellular South submits that the

Commission's practice of treating contested wireless merger cases as permit-but-disclose proceedings is inconsistent with the procedural framework of § 309(d) and inhibits the ability of petitioners to submit adversarial comments on the matters at issue.

The D.C. Circuit has held that the Commission must employ procedures for the resolution of issues in adjudicatory proceedings under § 309(d) that permit "meaningful participation by petitioners." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.3d 621, 634 (D.C. Cir. 1978) (*en banc*). Thus, any information the Commission obtains for the resolution of issues "must be placed in the public record, and a stated reasonable time allowed for response and rebuttal by petitioners." *Id.* Allowing *ex parte* presentations in § 309(d) adjudications effectively nullifies the statutory right of parties in interest to notice and the opportunity to "participate meaningfully in the decision-making process." *Cf., United States Lines, Inc. v. Federal Maritime Comm'n,* 584 F.2d 519, 540 (D.C. Cir. 1978).

In the case of the ALLTEL/Verizon Wireless merger, the Commission claimed that "all *ex parte* presentations have been made part of the public record in this proceeding and commenters have had ample time to review and respond to all such filings if they chose to do so." *ALLTEL/Verizon Wireless Order*, FCC 08-258, at 99. That claim was contradicted by revelations made elsewhere in the Commission's decision. Take, for example, one of the three written *ex parte* presentations made by Verizon Wireless during the Sunshine period.

The so-called "Verizon Wireless November 3, 2008 *Ex Parte* Letter" was filed, and served of the Commissioners, the day before they were to vote to approve the ALLTEL/Verizon Wireless merger. The filing was ostensibly in response to a question posed by the Commission and was an attempt to provide "further assurance" that the proposed transaction was in the public interest. *ALLTEL/Verizon Wireless Order*, FCC 08-258, at 89-90. In its Sunshine period *ex*

parte letter, Verizon Wireless offered "commitments" to phase down its high-cost universal service fund support, *see ALLTEL/Verizon Wireless Order,* FCC 08-258, at 89-90, improve wireless E911 location accuracy on a county-by-county basis, *see id.,* 91-92, and to "double" the period it would honor ALLTEL's roaming rates from two to four years. *Id.*, at 81. The next day, the Commission conditioned its consent to the merger on Verizon Wireless' compliance with its three "voluntary commitments." *See id.*, at 4, 82-83, 90, 92.

In the ALLTEL/Verizon Wireless case, the Commission solicited information from Verizon Wireless for the purpose of resolving contested issues, but it did so without notifying Cellular South and during the Sunshine period when Cellular South was prohibited from responding. *See* 47 C.F.R. § 1.1203(a). In its *ex parte* presentation, Verizon Wireless changed or reversed positions it had taken on-the-record in its pleadings and took a position on an issue that had not been raised in the case. *See ALLTEL/Verizon Wireless Order,* FCC 08-258, at 81, 89-90, 91-92. Consequently, the Commission decided the case in part on the *ex parte* presentation of decisionally significant information during the Sunshine period on the day before the Commission rendered its decision. The Verizon Wireless November 3, 2008 *Ex Parte* Letter, had not "been made part of the public record" and Cellular South had no time "to review and respond" to the filing and no opportunity to "choose to do so." *But see id.*, at 99. By its actions, the Commission deprived Cellular South of its right under § 309(d) and *Bilingual* to participate meaningfully in the decision-making process.

In *United States Lines,* the D.C. Circuit warned that for an agency adjudication of private rights "to pass muster in this court, it must be impeccably dressed with fairness." 584 F.2d at 536 (quoting *Sea-Land Service, Inc. v. Connor,* 418 F.2d 1142, 1146 (D.C. Cir. 1969)). In that case, the court was "squarely presented with a situation in which one interested party had private

access to the Commission and in which a decision was made at least in part on contacts that were kept completely secret." *United States Lines 584 F2d,* at 542 n.63. The court held the agency violated "the basic fairness concept of due process" by allowing the *ex parte* contacts in a quasi-adjudicatory proceeding. *See id.*, at 539-41. By inviting *ex parte* presentations in this proceeding, the Bureau opened a Pandora's Box of possible due process violations similar to those found in *United States Lines* and those that tainted the ALLTEL/Verizon Wireless proceeding. The Bureau should reconsider and close the box as required by "fundamental notions of fairness implicit in due process." *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 56 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

REQUEST FOR RELIEF

For all the foregoing reasons, Cellular South respectfully requests that the Bureau reconsider its decision to follow permit-but-disclose procedures in the proceeding and to issue a public notice announcing that the proceeding was restored to restricted status wherein prohibited *ex parte* presentations would not be permitted or entertained.

Respectfully submitted,

/s/ *[filed electronically]*

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January 15, 2009

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 15th day of January, 2009, copies of the foregoing PETITION FOR RECONSIDERATION were sent by e-mail, in pdf format, to the following:

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