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

In re Public Notice re	)	
	)	
CENTENNIAL COMMUNICATIONS	)	
CORP. and AT&T INC.	)	DA 08-2713
	)	WT Docket No. 08-246
Announcing that Permit-But-Disclose *Ex Parte*	)	
Procedures Would Apply in a Proceeding in	)	
which *Ex Parte* Presentations Are Prohibited	)	

REPLY OF CELLULAR SOUTH, INC. TO JOINT
OPPOSITION TO PETITION FOR RECONSIDERATION

Cellular South, Inc. ("Cellular South"), by its attorneys and pursuant to § 1.106(h) of the Commission's Rules ("Rules"), hereby replies to the joint opposition filed by AT&T Inc. ("AT&T") and Centennial Communications Corp. ("Centennial")[1] to Cellular South's petition for reconsideration of the action of the Wireless Telecommunications Bureau ("Bureau") modifying the *ex parte* procedures that will govern the adjudicatory proceeding involving the proposed AT&T/Centennial merger.[2]

INTRODUCTION

AT&T and Centennial chose not to defend the Bureau's action. Rather, they first ask that the Petition be dismissed, apparently because the Commission rejected "similar claims" in *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444 (2008)

[1] *See* Joint Opposition of AT&T Inc. and Centennial Communications Corp. to Petitions to Deny or to Condition Consent, and Reply to Comments and Petition for Reconsideration, WT Docket No. 08-246 (Jan. 26, 2009) ("Jt. Opp.").

[2] *See* Petition for Reconsideration of Cellular South, Inc., WT Docket No. 08-246 (Jan. 26, 2009) ("Petition"). On January 23, 2009, Cellular South filed a motion for leave to supplement its Petition. *See* Motion of Cellular South, Inc. for Leave to File a Supplement to Its Petition for Reconsideration, WT Docket No. 08-246 (Jan. 23, 2009). AT&T and Centennial did not oppose the acceptance and consideration of the supplement to the Petition. *See* Supplement to Petition for Reconsideration of Cellular South, Inc., WT Docket No. 08-246 (Jan. 23, 2009) ("Supplement").

("*Verizon Wireless/ALLTEL"*), and "made clear" that the Bureau is authorized by § 1.1200(a) to assign the permit-but-disclose procedures to a merger proceeding. Jt. Opp., at 2 n.1. AT&T and Centennial also contend that the Petition should be denied for the reasons set forth in *Verizon Wireless/ALLTEL*. *See id.* We will show that *Verizon Wireless/ALLTEL* was wrongly decided and that the Bureau's authority under § 1.1200(a) was limited by Note 2 to § 1.1208 of the Rules and trumped by § 309(d) of the Communications act of 1934, as amended ("Act").

ARGUMENT

I. *VERIZON WIRELESS/ALLTEL* DID NOT ADDRESS THE ISSUES AND WAS OTHERWISE WRONGLY DECIDED

In *Verizon Wireless/ALLTEL*, Cellular South alleged that the Commission had: (1) eviscerated its ban on *ex parte* presentations in restricted Title III licensing cases, *see* 47 C.F.R. § 1.1208, by applying permit-but-disclose *ex parte* procedures in every single proceeding involving applications for authority under § 310(d) of the Act, 47 U.S.C. § 310(d), that affect the mobile telephony market;[3] (2) failed to obey its own *ex parte* rules in the proceeding;[4] (3) modified the *ex parte* procedures without making the prerequisite determination, *see* 47 C.F.R. § 1.1208, Note 2;[5] (4) violated § 309(d)(1) of the Act, 47 U.S.C. § 309(d)(1), and statutory due process, by considering *ex parte* presentations on the merits of applications that were subject to petitions to deny;[6] and (5) left the proceeding "irrevocably tainted" by the *ex parte* contacts under *Professional Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 565 (D.C. Cir. 1982).[7]

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

[4] *See id.*

[5] *See id.*, at 8.

[6] *See id.*, at 7-8.

[7] *Id.*, at 8.

The Commission declined the opportunity to pass on those specific issues. Instead, it devoted a footnote reference and one paragraph of its 240-paragraph decision to state its conclusion that all the *ex parte* presentations in the proceeding were appropriately made and considered. *See Verizon Wireless/ALLTEL*, 23 FCC Rcd at 17497 n.375, 12540.

In lieu of addressing Cellular South's arguments, the Commission voiced its general disagreement and flew off on a largely-unrelated tangent. It began with the demonstrably incorrect contention that "[t]he permit-but-disclose status of a proceeding (and the *ex parte* status of a proceeding generally) continues until 'the proceeding is no longer subject to reconsideration or review or to judicial review.'" *Id.*, at 17540 (quoting 47 C.F.R. § 1.1206(a)). If that was true, then the *ex parte* status of the proceeding in *Verizon Wireless/ALLTEL* should have continued as restricted under § 1.1208 of the Rules.

Because it involved applications for authority under Title III of the Act (47 U.S.C. § 310(d)), the *Verizon Wireless/ALLTEL* proceeding was a restricted proceeding from its inception. *See* 47 C.F.R. §1.1208. It only remained restricted from June 13, 2008 until June 25, 2008, when the Bureau simply announced that the proceeding would "be governed by permit-but-disclose *ex parte* procedures that are applicable to non-restricted proceedings."[8] The fact that the Bureau altered the *ex parte* status of the proceeding disproves the Bureau's contention that a proceeding's status under the *ex parte* rules continues until it is no longer subject to administrative or judicial review.

The Bureau's authority to assign the permit-but-disclose procedures to a merger proceeding under § 1.1200(a) is limited by the terms of Note 2 to § 1.1208. Note 2 provides that

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[8] *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).

the Bureau may alter the *ex parte* status of a restricted proceeding only after a determination that the 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. *See General Motors Corp. and Hughes Electronics Corp.*, 23 FCC Rcd 3131, 3136 (2008). As was the case with the AT&T/Centennial merger, the Bureau did not make the prerequisite Note 2 determination before changing the *ex pa*rte status of the *Verizon Wireless/ALLTEL* proceeding. Nor could the Bureau make that determination on June 28, 2008. It would not know with the nature of the issues that would be raised in the proceeding with any certainty until after August 11, 2008, the deadline for filing petitions to deny the Verizon Wireless/ALLTEL merger applications.[9] Nevertheless, the Bureau changed the status of the proceeding under the *ex parte* rules from restricted to permit-but-disclose two weeks before the petition-to-deny deadline.

In the *Verizon Wireless/ALLTEL* proceeding, as well as in this case, the Bureau exercised its authority under § 1.1200(a) in violation of Note 2 of § 1.1208. By failing in both cases to follow the "clear dictate" of Note 2, the Bureau violated the "rudimentary principle 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).

Following its false principle that the status of a proceeding under its *ex parte* rules continues until the proceeding is no longer subject to review, the Commission stumbled again in *Verizon Wireless/ALLTEL*:

> [T]here is no reason to distinguish between a proceeding that is designated permit-but-disclose by the rules or, as is the case here, by the staff under its authority to change the *ex parte* status of a proceeding pursuant to Section

[9] *See Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 11210, 11214 (WTB 2008).

> 1.1200(a). Thus, the permit-but-disclose status continues through the entire course of the proceeding and any subsequent administrative or judicial review.[10]

The Commission failed to expressly consider the impact of an intervening petition to deny filed in accordance with § 309(d)(1) of the Act, thereby avoiding the fundamental issue raised by Cellular South. There is an obvious distinction between a proceeding that is restricted only under the Commission's own *ex parte* rules and a proceeding that is restricted by statute as well as by rule. The following hypothetical highlights the distinction (and points to the Commission's error). After the Bureau properly changed the status of a restricted Title III licensing case to a permit-but-disclose proceeding (assuming such a change is lawful), a petition to deny is filed that presents a substantial and material question of fact in accordance with § 309(d)(1) of the Act. In our hypothetical, the Commission would be required to designate the Title III application for a "full hearing." 47 U.S.C. § 309(e). Once the application is designated for hearing, the status of the proceeding under the *ex parte* rules does change. The permit-but-disclose proceeding becomes a restricted proceeding in which *ex parte* presentations are prohibited by operation of § 4(a) of the Sunshine Act. *See* 5 U.S.C. § 557(d). *See also* 47 U.S.C. § 1.1202(e).

Needless to say, the Commission would have no discretion in our hypothetical. "[N]o federal agency that is subject to the Sunshine Act is authorized to modify, abrogate, or otherwise violate the statutory ban on *ex parte* communications." *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1258 (D.C. Cir. 2004). For that reason, the discretion that the Commission gave itself to "modify" the applicable *ex parte* rules under § 1.1200(a) does not extend to restricted proceedings designated for hearing under § 309(e) of the Act. *See* 47 C.F.R § 1.1208, Note 2.

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[10] *Verizon Wireless/ALLTEL*, at 17540 (footnote omitted).

By analogy, the Commission's discretion also does not extend to restricted proceedings under § 309(d) of the Act.

In *Verizon Wireless/ALLTEL*, the Commission did not attempt to square the procedural requirements of § 309(d) with its practice of following permit-but-disclose procedures in a proceeding in which a petition to deny a wireless merger application was filed in accordance with § 309(d)(1). Cellular South is aware of no authority or maxim of statutory construction under which the language of § 309(d)(2) that limits the Commission to making its public interest finding "on the basis of the application, the pleadings filed, or other matters it may officially notice"[11] could be reasonably interpreted as permitting the Commission to make its finding on the basis of oral *ex parte* presentations to decision-makers. Certainly, the Commission has never provided a reasoned analysis of the issue raised by Cellular South — whether the Commission can entertain and consider *ex parte* presentations directed to the merits or outcome of a proceeding subject to § 309(d) of the Act, or as a basis on which to dispose of "substantial issues" raised by a petition to deny. 47 U.S.C. § 309(d)(2).

Finally, in *Verizon Wireless/ALLTEL*, the Commission appeared to make a "harmless error" claim:

> We also note that all *ex parte* presentations have been made a 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. The Commission may consider all *ex parte* presentations made and appropriately filed with the Commission.[12]

As Cellular South has shown, the Commission's claim was not true. *See* Petition, at 13-14. In addition to the so-called "Verizon Wireless November 3, 2008 *Ex Parte* letter,"[13] Cellular

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[11] 47 U.S.C. § 309(d)(2).

[12] *Verizon Wireless/ALLTEL*, 23 FCC Rcd at 17540-41 (footnote omitted).

[13] *Id.*, at 17457 n.116.

South had no notice of, or opportunity to respond to, two written *ex parte* presentations submitted by Verizon Wireless on the day the Commission adopted its decision in *Verizon Wireless/ALLTEL*.[14]

Verizon Wireless' two November 4, 2008 *ex parte* presentations were in response to the "consensus position" of MetroPCS Communications, Inc. ("MetroPCS") and four other parties with regard to additional roaming conditions that was presented to the Commission in one of the three meetings that were held on the eve of the Sunshine period.[15] On October 31, 2008, the MetroPCS proposal was addressed by Thomas Tauke, Executive Vice President of Verizon Communications, Inc., apparently in a meeting with Commissioner Adelstein's legal advisor.[16]

The Commission's November 4, 2008 open meeting was postponed for approximately four hours, which apparently gave Verizon Wireless time to put two written *ex parte* presentations before the Commission relating to the roaming issues discussed by Mr. Tauke on October 31, 2008.[17] When it finally convened its meeting, the Commission adopted a decision which tracked the positions taken by Mr. Tauke and confirmed in Verizon Wireless' two *ex parte*

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[14] From the very outset, the Commission treated its consideration of the Verizon Wireless/ALLTEL merger as if it were a notice-and-comment rulemaking under § 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, in which its "liberal" permit-but-disclose procedures allow *ex parte* presentations even at the "11th hour." *EchoStar Satellite L.L.C. v. FCC*, 457 F.3d 31, 39 (D.C. Cir. 2006). Indeed, the Commission even referred to Cellular South and the other petitioners as "commenters." *E.g.*, *Verizon Wireless/ALLTEL*, 23 FCC Rcd at 17526. However, the proceeding was clearly an "adjudication" or a "licensing" proceeding as defined by the APA, *see* 5 U.S.C. § 551(8), (9), and cannot be a rulemaking. An "adjudication" is the "process for the formulation of an order," 5 U.S.C. § 551(7), but an "order" is a final disposition "in a matter other than rule making but including licensing." *Id.* § 551(6). The *Verizon Wireless/ALLTEL* proceeding was also governed by § 309(d) of the Act, not § 553 of the APA.

[15] *See* Letter from Jean L. Kiddoo to Marlene H. Dortch, WT Docket No. 08-95 (Oct. 28, 2008); Letters of John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95 (Oct. 28, 2008).

[16] *See* Letters of John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95 (Nov. 4, 2008).

[17] *See id.*

letters submitted that very day. The Commission declined to impose a condition ensuring "network neutrality," rejected MetroPCS' requests, and declined to require Verizon Wireless to maintain ALLTEL's GSM network. *See Verizon Wireless/ALLTEL*, 23 FCC Rcd at 17524-25, 17529.

Verizon Wireless' *ex parte* presentations were made during the Sunshine "period of repose," during which the Commissioners were supposed to reach decisions "free from any hint of external pressure,"[18] and they continued up to the very day the Commission adopted *Verizon Wireless/ALLTEL*. Not only was it given no notice or opportunity to respond to Verizon Wireless' *ex parte* presentations,[19] Cellular South was prohibited by the Sunshine cut-off rule from responding. *See* 47 C.F.R. § 1.1203(a).

Unbridled by the restrictions normally imposed on § 309(d) adjudications under §§ 1.939(a)(2), 1.945(c), and 1.1208 of the Rules, the Commissioners felt free to negotiate *ex parte* with Verizon Wireless during the Sunshine period and to reach an agreement as to the conditions under which the Commission would consent to the merger at its November 4, 2008 open meeting. In his concurrence, Commission Copps candidly stated that he concurred in part "only because the company and my colleagues have agreed to modest roaming conditions that will partly — but only partly — ameliorate the problems of creating such an enormous force in the wireless marketplace." *Verizon Wireless/ALLTEL*, 23 FCC Rcd at 17565. Consequently, the *ex parte* presentations made during the Sunshine period unquestionably influenced the Commission's decision in *Verizon Wireless/ALLTEL*.

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[18] *Amendment of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3020 (1987).

[19] Verizon Wireless' *ex parte* presentations were first posted online on November 4, 2008, the day of the Commission's decision. The letter disclosing Mr. Tauke's oral *ex parte* presentation on October 31, 2008 was late-filed on November 4, 2008. *See* 47 C.F.R. § 1.1206(b)(2).

Whereas the Commission may have "clearly rejected" Cellular South's arguments in *Verizon Wireless/ALLTEL*, it did not provide a "reasoned analysis" showing that § 309(d) of the Act and § 1.1208 of the Rules were not being "casually ignored." *AT&T Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *WLOS TV, Inc. v. FCC*, 932 F.2d 993, 995 (D.C. Cir. 1991) (same). The Commission's "conclusory statements" in *Verizon Wireless/ALLTEL* could not substitute for the reasoned explanation that was required in that case. *AT&T Corp.*, 236 F.3d at 737. The Bureau must either provide such an explanation or return this proceeding to its status as restricted under § 1.1208 of the Rules.

II. THE BUREAU HAS BEEN DISOBEYING OR CASUALLY IGNORING AN *EX PARTE* RULE THAT SAFEGUARDS DUE PROCESS RIGHTS

Since the seminal decision in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1965), it has been an accepted principle of administrative/communications law that, because "the very essence of waiver is the assumed validity of the general rule," the Commission must not "tolerate the evisceration of a rule by waivers." 418 F.2d at 1158, 1159. An equally accepted principle is that the Commission "must adhere to its own rules and regulations." *Reuters Ltd v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

Cellular South has alleged that the Bureau never adheres to § 1.1208 in proceedings involving proposed transfers of control of wireless carriers. *See* Petition, at 6. In support of that allegation, Cellular South has produced a list of citations to 69 public notices issued by the Bureau between May 14, 1999 and December 16, 2008, announcing that permit-but-disclose *ex parte* procedures would apply in such proceedings. *See* Supplement, Appendix, at 1-4. Research has not uncovered a wireless merger case in which the Bureau actually obeyed or enforced the § 1.1208 ban on *ex parte* presentations after May 14, 1999. And neither the parties to the Verizon

Wireless/ALLTEL merger nor the AT&T/Centennial merger were able to cite a proceeding involving the merger of wireless telecommunications carriers in which the Bureau enforced § 1.1208. Thus, the Bureau appears to have either eviscerated the rule or refused to obey it in this particular type of Title III licensing case.

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

Respectfully submitted,

/s/ [filed electronically]

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February 2, 2009

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 2nd day of February, 2009, copies of the foregoing REPLY OF CELLULAR SOUTH, INC. TO JOINT OPPOSITION TO PETITION FOR RECONSIDERATION were sent by e-mail, in pdf format, to:

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