

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

In the Matter of the Public Notice re)	
)	
AT&T INC. and CELLCO PARTNERSHIP)	
D/B/A VERIZON WIRELESS)	DA 09-1350
)	WT Docket No. 09-104
Announcing the Modification of the <i>Ex Parte</i>)	
Procedures Applicable to a Restricted Proceeding)	
to Permit-But-Disclose Procedures Applicable)	
to Non-Restricted Proceedings)	

PETITION FOR EXPEDITED RECONSIDERATION

RUSSELL D. LUKAS
DAVID L. NACE
LUKAS, NACE, GUTIERREZ & SACHS, LLP
1650 Tysons Blvd., Suite 1500
McLean, VA 22102
(703) 584- 8678

Attorneys for Cellular South, Inc.

July 20, 2009

TABLE OF CONTENTS

SUMMARY ii

INTRODUCTION 1

STANDING 3

ARGUMENT 4

 I. THE BUREAU MUST RECONSIDER ITS ACTION BEFORE
 IMPLEMENTING PERMIT-BUT-DISCLOSE PROCEDURES..... 4

 II. THE BUREAU’S ACTION VIOLATED § 1.1208 OF THE RULES..... 6

 III. *EX PARTE* PRESENTATIONS ARE PROHIBITED IN § 309(d)
 ADJUDICATIONS..... 9

 IV. *EX PARTE* PRESENTATIONS IN § 309(d) ADJUDICATIONS
 VIOLATE PROCEDURAL RIGHTS GUARANTEED BY THE RULES..... 11

 V. THE BUREAU WILL COMPOUND ITS VIOLATION OF DUE
 PROCESS BY ISSUING AN UNLAWFUL PROTECTIVE ORDER..... 14

 VI. THE COMMISSION’S CONSIDERATION OF *EX PARTE*
 PRESENTATIONS WILL VIOLATE CELLULAR SOUTH’S
 STATUTORY DUE PROCESS RIGHTS..... 21

REQUEST FOR RELIEF 24

SUMMARY

The Wireless Telecommunications Bureau (“Bureau”) simultaneously announced: (1) the filing of applications for Commission consent to the assignment or transfer of control of certain wireless licenses and related authorizations held by Cellco Partnership d/b/a Verizon Wireless (“VZW”) and its subsidiaries to AT&T Inc. (“AT&T”); (2) petitions to deny the applications (“Transfer Applications”) would be due on July 20, 2009; and (3) its decision that the permit-but-disclose *ex parte* procedures of § 1.1206 of the Commission’s Rules (“Rules”) would govern the conduct of the restricted Article III licensing proceeding in which the Transfer Applications will be considered.

Cellular South, Inc. (“Cellular South”) is filing a petition to deny the Transfer Applications. Cellular South seeks the expeditious reconsideration and rescission of the Bureau’s decision not to enforce § 1.1208 of the Rules. 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 due process and § 309(d) of the Communications Act of 1934, as amended (“Act”). 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 VZW’s merger of ALLTEL Corporation (“ALLTEL”). The procedures employed by the Bureau, and later by the Commissioners, in the aid of the merging parties during the decision-making process in the VZW/ALLTEL proceeding violated § 309(d) of the 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 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 decision-making. To prevent another deprivation of its rights in this proceeding, Cellular South is formally asserting its procedural rights at its first opportunity.

Rules that restrict *ex parte* presentations are intended to ensure the fairness and integrity of the Commission's decision-making process. Such rules 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 determines that the proceeding primarily involves issues of broadly applicable policy rather than the rights and responsibilities of specific parties. However, the Bureau made no finding whatsoever before simply announcing that permit-but-disclose procedures would govern this proceeding.

The Bureau's discretion to modify the applicable *ex parte* rules does not extend to a proceeding such as this which is restricted under § 1.1208 of the Rules and is governed by § 309(d) of the Act. 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 expresses 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 § 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 Transfer Applications, Cellular South has the right to receive service under §§ 1.47, 1.65(a), 1.927(i), 1.939(a)(2), 1.939(c), 1.1202(b)(1),

1.1204(a)(10)(ii) and 1.1208 of the Rules. However, such rights are ignored by the Bureau and the applicants alike once permit-but-disclose procedures are put in place. Moreover, the Bureau compounds the prejudice to petitioners by inviting applicants to make *ex parte* presentations on a confidential basis under the terms of a wholly-unlawful protective order.

Allowing *ex parte* presentations in adjudications governed by § 309(d) of the Act 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 VZW/ALLTEL 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 Transfer Applications will be tainted 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.

Because its initial decision to entertain *ex parte* presentations threatens the integrity of the Commission's decision-making process and the fairness of its ultimate decision, the Bureau should reconsider the lawfulness of its action as expeditiously as possible. The Bureau must act before the *ex parte* presentations that it invited reach the ultimate decision-makers, thereby putting their decision-making at risk of becoming irrevocably tainted.

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

In the Matter of the Public Notice re)	
)	
AT&T INC. and CELLCO PARTNERSHIP)	
D/B/A VERIZON WIRELESS)	DA 09-1350
)	WT Docket No. 09-104
Announcing the Modification of the <i>Ex Parte</i>)	
Procedures Applicable to a Restricted Proceeding)	
to Permit-But-Disclose Procedures Applicable)	
to Non-Restricted Proceedings)	

PETITION FOR EXPEDITED RECONSIDERATION

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”) expeditiously reconsider and rescind its action modifying the *ex parte* procedures that will govern the adjudicatory proceeding involving the proposed assignment or transfer of control of the wireless licenses and related authorizations held by Cellco Partnership d/b/a Verizon Wireless and its subsidiaries (collectively “VZW”) to AT&T Inc. (“AT&T”). Public notice of the Bureau’s action was provided on June 19, 2009.¹ In support of the expeditious 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 Act, the Freedom of Information Act (“FOIA”), the Government in Sunshine Act (“Sunshine Act”), and

¹ See *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, DA 09-1350 (WTB June 19, 2009) (“*Public Notice*”).

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 VZW. *See Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444 (2008) (“VZW/ALLTEL”).

Cellular South was a party in interest with regard to the VZW/ALLTEL merger applications. As was the case here, the VZW/ALLTEL 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 VZW 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 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

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).

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 VZW/ALLTEL 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 decision-making. To prevent another deprivation of its rights in this proceeding, Cellular South is formally asserting its procedural rights at this first opportunity.

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 July 20, 2009 as the deadline by which interested parties must file petitions to deny the applications for Commission consent to the proposed transfer of control or assignment of the VZW authorizations to AT&T ("Transfer Applications"). See *Public Notice* at 5. Cellular South is filing a petition to deny the Transfer 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 Transfer Applications will cause it legally-cognizable injury-in-fact.

Inasmuch as it has a statutory right as a party in interest under § 309(d)(1) to file its petition to deny, see *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 will deprive 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 MUST RECONSIDER ITS ACTION BEFORE IMPLEMENTING PERMIT-BUT-DISCLOSE PROCEDURES

The purpose of the Commission’s *ex parte* rules is “[t]o ensure the fairness and integrity of its decision-making.” 47 C.F.R. § 1.1200(a). Cellular South asks the Bureau to pass on an issue that is fundamental to the fairness and integrity of the decision-making process in contested licensing cases under § 310(d) of the Act: whether it can permit *ex parte* presentations to be made to Commission decision-makers that are directed to the merits or outcome of an adjudicatory proceeding that is subject to both § 309(d)(2) of the Act and § 1.1208 of the Rules. This is the second time that Cellular South has asked the Bureau to address that issue on reconsideration.

On January 15, 2009, Cellular South sought reconsideration of the Bureau’s decision to employ permit-but-disclose *ex parte* procedures in the restricted proceeding involving the

⁴ In procedural rights cases, an administrative litigant claiming injury to a legally protected interest in fair decision-making 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).

applications for Commission consent to the merger of AT&T and Centennial Communications Corp. (“Centennial”).⁵ Consequently, the issue that Cellular South presents here has been pending before the Bureau in the AT&T/Centennial case for six months. If Cellular South is correct on the law, the decision-making process in the AT&T/Centennial proceeding already has been tainted by at least 32 violations of §§ 0.459, 1.927(i), 1.1202(b), 1.1204(a)(10)(ii) and 1.1208 of the Rules. *See infra* Ex. 1. In that case, the issue has become one of due process: whether the *ex parte* contacts already permitted by the Bureau have “irrevocably tainted” the Commission’s decision-making process so as to make the grant of the AT&T/Centennial unfair. *See, e.g., Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995).⁶ If so tainted, the AT&T/Centennial case has become a “voidable agency proceeding.” *PATCO v. FLRA*, 685 F.2d 547, 565 (D.C. Cir. 1982).

Because its initial decision to entertain *ex parte* presentations threatens the integrity of the Commission’s decision-making process and the fairness of its ultimate decision, the Bureau should reconsider the lawfulness of its action as expeditiously as possible. Such expedition is the necessary corollary to the Commission’s procedures on reconsideration that are “designed to bring a prompt and final resolution to matters,” including matters of due process. *21st Century*

⁵ *See AT&T Inc. and Centennial Communications Corp. Seek FCC Consent to Transfer Control of Licenses, Leasing Arrangements, and Authorizations*, 23 FCC Rcd 17966, 17968 (WTB 2008).

⁶ In cases tainted by violations of the Commission’s *ex parte* rules, the D.C. Circuit considers several factors including: (1) whether the *ex parte* presentations were made to decision-making personnel; (2) the gravity of the *ex parte* communications; (3) whether the *ex parte* contacts influenced the Commission’s ultimate decision; (4) whether the party making the *ex parte* presentations benefitted from that decision; (5) whether the substance of the presentations was unknown to opposing parties; (6) whether opposing parties were given the opportunity to respond; and (7) whether vacation of the Commission’s decision and remand for new proceedings would serve a useful purpose. *See Freeman Engineering Associates, Inc. v. FCC*, 103 F.3d 169, 184 (D.C. Cir. 1997).

Telesis Joint Venture, 16 FCC Rcd 17257, 17263 (2001), *aff'd*, *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192 (D.C. Cir. 2003). If Cellular South must present its due process claim to the Bureau in order to preserve the issue for appeal, the Bureau must decide the issue with the dispatch necessary either to adopt an effective remedy or to preserve Cellular South's ability to seek an effective remedy from the Commission. In either case, the Bureau should act before the *ex parte* presentations that it invited reach the ultimate decision-makers, thereby putting their decision-making at risk of becoming irrevocably tainted. *See Press Broadcasting*, 59 F.3d at 1369-70.

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

Rules that “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 discretion to modify the “applicable *ex parte* rules,” if “the public interest so requires in a particular proceeding.” 47 C.F.R. § 1.1200(a). In a restricted proceeding under § 1.1208 of the Rules 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 the rights and responsibilities of specific parties.” *Id.* § 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 Transfer 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. *See Public Notice*, at 4. Obviously, since the Bureau did not find it necessary to give any reason for applying 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”).

Attached as Exhibit 2 is a list of the citations to 70 public notices issued by the Bureau (or in concert with other bureaus) between May 14, 1999 and June 19, 2009, that announced the filing of applications for Commission authority under § 310(d) of the Act to assign, or transfer control of, authorizations to provide wireless telecommunications services.⁷ Because the applications were “for authority under Title III of the Communications Act,” the public notices were issued in “restricted” proceedings in which *ex parte* presentations were prohibited. 47 C.F.R. § 1.1208. Nevertheless, the Bureau announced that the permit-but-disclose *ex parte* procedures of § 1.1206(b) of the Rules would apply in all 70 restricted proceedings. Not one of the public notices included the requisite finding by the Bureau that the proceeding involved “primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties.” *Id.*, Note 2.⁸

It is so perfectly obvious that the Bureau is ignoring the *ex parte* rules in restricted wireless telecommunications § 310(d) 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,

⁷ With the exception of the public notice issued by the Bureau in this case, Exhibit 2 lists only public notices issued by the Bureau that were published in the FCC Reports.

⁸ In contrast, the Media Bureau has, on occasion, made the requisite finding to justify application of permit-but-disclose procedures in an otherwise restricted Article III licensing case. *See News Corp., The DIRECTV Group, Inc., and Liberty Media Corp.*, 22 FCC Rcd 3493, 3494 (MB 2007); *General Motors Corp., Hughes electronics Corp., and The News Corp. Ltd.*, 18 FCC Rcd 10450, 10452 (MB 2003).

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 4. 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.⁹

The second danger signal is the obvious fact that the Bureau gave no thought whatsoever to whether the Transfer Applications involved “broadly applicable policy” issues or the “rights and responsibilities of specific parties.” Obviously, the Bureau will not be sure of the nature of the issues that would be raised in this proceeding until after the 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 § 310(d) cases precluded a finding that the Transfer 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 VZW/ALLTEL proceeding that for nearly ten years the Commission has followed the practice of applying permit-but-disclose procedures in every single

⁹ *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 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).

case that involved applications for § 310(d) authority filed by wireless telecommunications carriers.¹⁰ 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 VZW/ALLTEL*, 23 FCC Rcd At 17540-41. By its silence, the Commission tacitly admitted what Cellular South’s research had showed. With respect to obeying § 1.1208 in wireless telecommunications § 310(d) 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 due process as set forth in its own *ex parte* rule.

III. 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 will be governed by § 309(d) of the Act.¹¹ 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).

¹⁰ *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).

¹¹ 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 will be subject to a formal petition to deny filed in accordance with § 309(d)(1), the Commission’s decision-making process in the licensing case will have to conform to the requirements of § 309(d)(2).

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 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 Transfer Applications initially presented “broadly applicable policy issues” can be rationally accepted, the proposition will be 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.

IV. 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.*

By virtue of filing a petition to deny the Transfer 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 VZW and AT&T (“Transfer Applicants”) 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 Transfer Applications, *see id.* § 1.927(i); (4) be served with a copy of any other filing made by, or on behalf of, the Transfer Applicants that relates to the merits the Transfer 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 the Transfer Applicants 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 Transfer Applicants 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 Transfer 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), 1.945(d).

Five of Cellular South's enumerated rights involve being served with copies of papers that the Transfer Applicants may file with the Commission. However, because the Bureau detached this proceeding from its moorings as a restricted adjudicatory proceeding, the Transfer Applicants will be free to conduct themselves as if this were a notice-and-comment rulemaking proceeding. For example, if the Transfer Applicants conduct themselves as did VZW/ALLTEL and AT&T/Centennial, amendments to the Transfer 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 send a letter to the Transfer 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 Transfer 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 Transfer 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 Transfer Applicants that will be directed to the merits or outcome of this proceeding.¹²

Under the Rules, the Transfer 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). If they proceed as did VZW/ALLTEL and AT&T/Centennial, the Transfer Applicants will make a joint filing in response to the § 308(b) letter without serving Cellular

¹² To make matters worse, the Bureau is likely to permit the Transfer Applicants to respond to its § 308(b) letter on a confidential basis under the terms of a wholly-unlawful protective order. *See infra* pp. 14-21.

South or having requested or obtained a waiver of the service requirements of §§ 1.927(i) and 1.1204(a)(10)(ii). They undoubtedly will serve copies of their response to six members of the Commission's staff and Best Copy and Printing, Inc.,¹³ but not on Cellular South.

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 or assignment of VZW's authorizations based on its examination of matters that were not in the Transfer Applications, or in any of the pleadings filed, and will not be subject to official notice.

If this proceeding plays out as did the VZW/ALLTEL 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.

V. THE BUREAU WILL COMPOUND ITS VIOLATION OF DUE PROCESS BY ISSUING AN UNLAWFUL PROTECTIVE ORDER

The Bureau exacerbates the harm caused by permitting *ex parte* presentations in § 310(d) proceedings that are subject to § 309(d), by inviting *ex parte* presentations to be made on a

¹³ See *Public Notice* at 6.

confidential basis under the terms of a wholly-unlawful protective order. In the AT&T/Centennial proceeding, for example, the Bureau issued a protective order in anticipation that the Commission “may seek documents in this proceeding ... that contain proprietary or confidential information.”¹⁴ In order to ensure “adequate protection” is afforded “any confidential or proprietary documents” that may be filed,¹⁵ the Bureau established burdensome procedures for obtain access to “confidential documents.”¹⁶

Although the AT&T/Centennial protective order was couched in language suggesting that it will protect parties in addition to AT&T and Centennial, in reality the Bureau was protecting the merger applicants. They carried the burden of producing evidence of the potential public benefits of the proposed merger, most of which would be in their sole possession. *See, e.g., VZW/ALLTEL*, 23 FCC Rcd at 17495-96. By adopting both permit-but-disclose procedures and a protective order, the Bureau invited AT&T and Centennial to make *ex parte* presentations of the evidence in their sole possession and do so with the assurance that the Commission would not make the evidence routinely available to adverse parties in interest.

By its terms, the Bureau’s standard protective order provides confidential treatment to any document that contains information that an applicant maintains “should be subject to protection under FOIA and the Commission’s implementing rules” and designates as a “Stamped Confidential Document.”¹⁷ A Stamped Confidential Document would be entitled to confidential treatment under the protective order based solely on the applicant’s designation.¹⁸ To gain

¹⁴ *AT&T Inc. and Centennial Communications Corp.*, 24 FCC Rcd 2900, 2900 (WTB 2009) (“*Protective Order*”).

¹⁵ *Id.*

¹⁶ *See id.* at 2900-06.

¹⁷ *Id.* at 2901.

¹⁸ *See id.*

access to a protected document, an adverse party is given the option of either: (1) complying with a time-consuming procedure that would allow the applicant to block access indefinitely;¹⁹ or (2) making a request, presumably of the Commission, that would be “treated in accordance with” §§ 0.442 and 0.461 of the Rules.²⁰ Those terms are contrary to the FOIA and the Commission’s implementing rules.

The FOIA is exclusively a disclosure statute. *See Chrysler v. Brown*, 441 U.S. 281, 292-93 (1979). It obviously applies only to “records” that an agency can “make available to the public.” 5 U.S.C § 552(a). The FOIA does not authorize the Commission “to withhold information or limit the availability of records to the public, except as specifically stated in [5 U.S.C. § 552].” 5 U.S.C. § 552(d). Under the FOIA, the Commission may withhold information or limit the availability of records that are “trade secrets and commercial or financial information *obtained from a person* and privileged or confidential.” *Id.* § 552(b)(4) (emphasis added) (“Exemption 4”). The FOIA does not empower the Commission to withhold information or limit the availability of records that *may be obtained from a person* and *may* be exempt from disclosure under Exemption 4.²¹

The Commission’s rules implementing the FOIA allow “[a]ny person submitting information or materials to the Commission” to “request that such information not be made

¹⁹ *See Protective Order*, 24 FCC Rcd at 2902.

²⁰ *See id.* at 2903.

²¹ The D.C. Circuit has held that an agency’s “pledge of confidentiality” cannot “override” the FOIA. *Ackerly v. Ley*, 420 F.2d 1336, 1339 n.3 (D.C. Cir. 1969). Based on that holding, the law is that federal agency “assurances of confidentiality have no binding effect.” 1 Charles H. Koch, Jr., *Administrative Law and Practice* § 3.37[3], at 230 (2d ed. 1997). Therefore, the Bureau’s standard protective order is of no effect under the FOIA. The Bureau could not bind the Commission to afford confidential treatment to a document submitted by an applicant on the belief that it contains information that would be exempt from disclosure under Exemption 4.

routinely available for public inspection.” 47 C.F.R. § 0.459(a). However, a person making such a request under Exemption 4 must satisfy nine requirements, including providing facts showing that disclosure could result in “substantial competitive harm.” *Id.* § 0.459(b)(5). “Casual requests” which do not comply with those requirements “will not be considered” by the Commission. *Id.*, § 0.459(c). Both under the FOIA and the Rules, the Bureau has no authority to exclude any documents from the public record under Exemption 4 without the requisite showing that the documents qualify as “trade secrets” or “commercial or financial information” that is “privileged or confidential” within the meaning of the FOIA and § 0.457(d) of the Rules. *See AudioText International, Ltd. v. AT&T Corp.*, 19 FCC Rcd 1221, 1226 (Enf. Bur. 2004).

The Commission has made it clear that protective orders may not be used for information falling outside of the nine categories of material exempt from disclosure under the FOIA. *See Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24832 (1998), *reconsideration denied*, 14 FCC Rcd 20128 (1999) (“*Confidential Treatment*”). Non-exempt information must be publicly disclosed. *See id.* A protective order may only be used to limit access to information that the Commission determines should not be routinely available for public inspection pursuant to §§ 0.457(d) and 0.459(a) of the Rules. *See id.* Thus, the Bureau may issue a protective order *after* an applicant has requested that the information it is submitting be withheld from public inspection in accordance with § 0.459(a) and *after* the Bureau determines that the information is of the kind that is protected under Exemption 4.

Recognizing that “petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications,”²² and that “most information submitted

²² *Confidential Information*, 13 FCC Rcd at 24837.

in Title III licensing proceedings should be made publicly available,”²³ the Commission expected that “requests for confidentiality or protective orders in licensing proceedings will and should remain relatively rare.” *Confidential Information*, 13 FCC Rcd at 24839. Now, the Bureau “routinely adopts protective orders when it *anticipates* that it may seek documents that contain confidential or proprietary information.” *VZW/ALLTEL*, 23 FCC Rcd at 17540 n.763 (emphasis added). The practice of routinely adopting anticipatory protective orders is grossly inconsistent with the FOIA, Title III licensing procedures, § 0.459(a) of the Rules, and the policy adopted in *Confidential Information*.

Furthermore, Cellular South submits that a wireless telecommunications carrier does not need to divulge “trade secrets” or “commercial or financial information” that is “privileged or confidential” in order to plead its case in a § 309(d) proceeding or to carry its burden of proof under § 310(d). If it was convinced to the contrary, the applicant would be on notice that “it is important for any person who submits materials which he wishes withheld from public inspection under [FOIA Exemption 4] to submit therewith a request for non-disclosure pursuant to § 0.459.” 47 C.F.R. § 0.457(d)(2). Thus, it would be incumbent on the applicant to file an appropriate § 0.459 request for non-disclosure. The Bureau cannot issue a protective order that would place the burden of obtaining an Exemption 4 ruling on an opposing party when §§ 0.457(d)(2) and 0.459 placed that burden squarely on the applicant.

It is also difficult to understand how applicants could justify Exemption 4 protection for “confidential” commercial or financial information provided in a licensing case that is subject to §§ 301, 307(a), 308(b), 309(a) and 310(d) of the Act. In the first place, such applicants do not voluntarily furnish information to the Commission. They provide information that is nothing

²³ *Confidential Information*, 13 FCC Rcd at 24838.

more than the Commission requires all applicants to supply in order to demonstrate that they are qualified to obtain a license, *see* 47 U.S.C. § 308(b), and that the grant of their applications would serve the public interest. *See id.* §§ 307(a), 309(a), 310(d). Furthermore, applicants furnish information to the Commission in order to receive what they perceive to be a valuable authorization. Under these circumstances, applicants for a § 310(d) authorization would not be entitled to Exemption 4 protection under the lesser standard applicable to “voluntarily” provided information under the *Critical Mass* test.²⁴ *See Mobile Relay Associates*, 14 FCC Rcd 18919, 18922 n.24 (WTB 1999). *See also Freeman v. BLM*, 526 F.Supp. 2d 1178, 1187 (D. Or. 2007).

The Bureau’s protective orders have resulted in gross violations of the FOIA, Title III of the Act, and the Rules. In the VZW/ALLTEL proceeding, for example, the applicants claimed that the merger would generate substantial public benefits by expanding the geographic reach of the combined entity.²⁵ They disclosed that VZW served over 67 million customers²⁶ and that its Evolution-Data Optimized (“EvDO”) network was available where more than 200 million Americans reside.²⁷ They also represented that ALLTEL served over 13 million customers²⁸ and its EVDO Revision 0 network reached 76 percent of its POPs,²⁹ but the merged entity planned on “increasing EvDO Rev. A covered POPs in the ALLTEL footprint to 76 percent.”³⁰

²⁴ *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (en banc). In *Critical Mass*, the court held that “financial or commercial information provided to the Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Id.* at 879.

²⁵ *See* File No. 0003464996, Ex. 1 at 9-14.

²⁶ *See id.* at 2.

²⁷ *See id.* at 11-12.

²⁸ *See id.* at 4.

²⁹ *See id.* at 5, 12-13.

³⁰ *See id.* at 13.

Stating that it needed additional information concerning such claims so that the Commission could make its public interest determination under § 310(d),³¹ the Bureau requested that VZW and ALLTEL provide the POPs, the percentage of the total U.S. geographic area, and the number of RSA areas covered by their licenses and their various networks.³²

VZW and ALLTEL provided the information requested by the Bureau.³³ However, claiming only that the information was “extremely sensitive, from a commercial, and financial perspective,”³⁴ VZW and ALLTEL withheld data from public inspection under the Bureau’s protective order that showed the percentage of the U.S. geographic area that they served.³⁵ Moreover, they also withheld as confidential the POPs and RSAs covered by ALLTEL’s EvDO Rev. A network.³⁶ Consequently, the Commission’s published decision was based on a finding that VZW’s license coverage would increase post-transaction “by more than 2.8 million POPs in an area covering approximately [REDACTED] of the geographic United States.” *VZW/ALLTEL*, 23 FCC Rcd at 17498-99. The Commission also based its decision on the uninformative finding that ALLTEL’s customers will benefit because “the merged network will cover an additional [REDACTED] POPs covering [REDACTED] of the geographic U.S., including another

³¹ See Letter from James D. Schlichting to Kathleen Q. Abernathy and Nancy J. Victory, at 1 (Sept. 11, 2008).

³² See *id.*, General Information Request, at 1. Because the Commission is limited to deciding a § 309(d) case on the basis of the applications, the pleadings filed, or other matter which it may officially notice, the Bureau should not request information from an applicant for consideration in such a proceeding that clearly would be subject to being withheld from public inspection under Exemption 4.

³³ See Letter from Kathleen Q. Abernathy and Nancy J. Victory to Marlene H. Dortch (Sept. 17, 2008).

³⁴ See *id.*, Response of ALLTEL and VZW to the Bureau’s September 11, 2008 General Information Request, at 1.

³⁵ See *id.* at 3-6.

³⁶ See *id.* at 4.

[REDACTED] RSAs.” *Id.* at 17499-50.

Cellular South is at a loss to understand how a wireless telecommunications carrier’s service areas can be considered confidential commercial information protected under Exemption 4. Nor can it understand how such information can be withheld from the public considering the policy of ensuring “an informed citizenry” that is set forth in the FOIA. *See FBI v. Abramson*, 456 U.S. 615, 621 (1982). In any event, the Commission cannot withhold facts on which it based its public interest determination and engage in the reasoned decision-making that is required of it under §§ 309(d)(2) and 310(d) of the Act.

The issuance of the Bureau’s protective order in a § 309(d) licensing case will not withstand scrutiny by the D.C. Circuit under the “general principle of administrative law that an agency is bound by its own rules” and its “established and announced procedures.” *Gardner*, 530 F.2d at 1090. The Bureau is bound by § 0.459(b) of the Rules, which set forth the procedures that parties are required to follow if they believe that any documents that they are submitting to the Commission are exempt from disclosure under Exemption 4. Hence, the Bureau violates § 0.459 when it issues protective orders that allow applicants in restricted § 310(d) cases to obtain confidential treatment of information contained in documents submitted to the Commission without requesting or justifying such treatment.

VI. 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.” *Faulkner*, 557 F.2d at 875. 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 VZW/ALLTEL 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.” *VZW/ALLTEL*, 23 FCC Rcd at 17540. 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 VZW 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 VZW/ALLTEL 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.

VZW/ALLTEL, 23 FCC Rcd at 17531. In its Sunshine period *ex parte* letter, VZW offered “commitments” to phase down its high-cost universal service fund support, *see VZW/ALLTEL*, 23 FCC Rcd at 17531, improve wireless E911 location accuracy on a county-by-county basis, *see id.* at 17533, and to “double” the period it would honor ALLTEL’s roaming rates from two to four years. *Id.* at 17523. The next day, the Commission conditioned its consent to the merger on VZW’s compliance with its three “voluntary commitments.” *See id.*, at 17447, 17524, 17532, 17533.

In the VZW/ALLTEL case, the Commission solicited information from VZW 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, VZW 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 VZW/ALLTEL*, 23 FCC Rcd at 17522, 17531, 17533. 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 decisionmaking 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.” *Id.*, 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 VZW/ALLTEL 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 expeditiously reconsider its decision to follow permit-but-disclose procedures in the proceeding and to issue a public notice announcing that the proceeding is restored to restricted status wherein prohibited *ex parte* presentations would not be permitted or entertained.

Respectfully submitted,

[s] filed electronically

RUSSELL D. LUKAS
DAVID L. NACE
LUKAS, NACE, GUTIERREZ & SACHS, LLP
1650 Tysons Blvd., Suite 1500
McLean, VA 22102
(703) 584- 8678

Attorneys for Cellular South, Inc.

July 20, 2009

**Office of General Counsel, Transaction Team**
[FCC](#) > [OGC](#) > [Transaction Team](#) > AT&T - Centennial

[site map](#)
Search the FCC:

[Help](#) | [Advanced](#)
[Transaction Team Home](#)
Major Transactions:

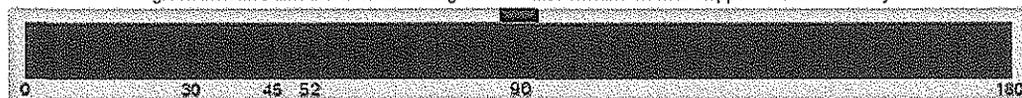
[ALLTEL/Atlantis](#)
[AT&T/Centennial](#)
[AT&T/Dobson](#)
[CenturyTel/Embarq](#)
[GHL Acquisition/Iridium](#)
[Inmarsat/CIP/Stratos](#)
[Liberty Media/DirecTV](#)
[News Corp/DIRECTV](#)
[Sprint/Clearwire](#)
[Stratos/CIP/Franklin](#)
[Time Warner Inc/Time Warner Cable](#)
[Verizon/ALLTEL](#)
[Verizon/RCC](#)
[XM/Sirius](#)

[Archived Transactions](#)
[Major Transaction Decisions](#)
Issues:
[How to Access Public Documents](#)
[How to File Public Comments](#)
[How to File Applications](#)
[Transaction Team Public Notices](#)
AT&T and Centennial***WT Docket No. 08-246***
[Timeline](#) | [Orders & Public Notices](#) | [Record Documents](#) | [Applications](#) | [Contacts](#)

AT&T Inc. ("AT&T") and Centennial Communications Corp. ("Centennial") have filed a series of applications pursuant to Sections 214 and 310(d) of the Communications Act of 1934, as amended, and Section 2 of the Cable Landing License Act, seeking Commission approval of the transfer of control to AT&T of licenses, authorizations, and *de facto* transfer spectrum and spectrum manager leasing arrangements held by Centennial and its subsidiaries. AT&T is a leading provider in the United States of wireless, high-speed Internet access, video, and local and long distance voice services. Centennial is a regional wireless telecommunications service provider, serving approximately 660,000 retail customers in small cities and rural areas in mainland United States and approximately 440,000 customers in Puerto Rico and the U.S. Virgin Islands. Centennial also provides broadband service, mostly to business customers, in Puerto Rico. [See the Public Notice for more information.](#)

Timeline**7/17/09 - Day 213****Timeclock History | Transaction Timeline Description**

- green indicates timeline clock is running; red indicates timeline clock is stopped - [Click for History](#) -



- click on or between the numbers above for generic descriptions of timeline dates and intervals -
 - click on the blue filled-in sections of the timeline to go to the related items -

Orders & Public Notices

6/10/09

Public Notice: [Word](#) | [Acrobat](#)

5/27/09

Second Protective Order: [Word](#) | [Acrobat](#)

3/3/09

Numbering Resource Utilization and Forecast Reports and Local Number Portability Reports Placed into Record.

Public Notice: [Word](#) | [Acrobat](#)

3/3/09

Protective Order: [Word](#) | [Acrobat](#)

3/3/09

Protective Order: [Word](#) | [Acrobat](#)

12/16/08

AAT&T Inc. and Centennial Communications Corp. Seek FCC Consent to Transfer Control of Licenses, Leasing Arrangements, and Authorizations; Pleading Cycle Established.

Public Notice: [Word](#) | [Acrobat](#)

Record Documents

Below is a list of record documents in reverse chronological order.

6/1/09

[Response to Request for Information, filed by Puerto Rico Telephone Company, Inc.](#)

6/1/09

[Response to Request for Information, filed by America M6vil, S.A.B. de C. V.](#)

6/1/09

[Request for Extension of Time, filed by Puerto Rico Telephone Company, Inc.](#)

5/28/09

[Redacted Sections of Response to General Information Request dated April 30, 2009, filed by AT&T Inc. and Centennial Communications Corp.](#)

5/28/09

[Response to General Information Request dated April 30, 2009, filed by AT&T Inc. and Centennial Communications Corp.](#)

[[1](#) | [2](#) | [3](#) | [4](#)]

5/28/09

[Notice of Ex Parte Communication, filed by AT&T and Centennial Communications Corp.](#)

5/22/09

[Letter, filed by T-Mobile](#)

5/22/09

[Notice of Ex Parte Communication, filed by Sprint Nextel Corporation](#)

5/21/09

[Response to Request for Information, filed by AT&T Inc. and Centennial Communications Corporation](#)

5/19/09

[Notice of Ex Parte Communication, filed by Centennial Communications Corp., and AT&T Inc.](#)

5/18/09

[Notice of Ex Parte Communication, filed by Centennial Communications Corp.](#)

5/18/09

[Request Issuance of a Second Protective Order, filed by AT&T Inc. and Centennial Communications Corp.](#)

5/15/09

[Request for Extension of Time, filed by T-Mobile USA, Inc.](#)

5/15/09

[Notice of Ex Parte Communication, filed by AT&T Inc., and Centennial Communications Corp.](#)

5/15/09

[Response to April 30, 2009 Letter, filed by Vitelcom Cellular, Inc.](#)

5/14/09

[Letter re Response to Request for Information, filed by Sprint Nextel Corporation](#)

5/13/09

[Letter, filed by Puerto Rico Telephone Company, Inc.](#)

5/12/09

Letter, filed by America Movil, S.A.B. de C.V.

5/11/09

Notice of Ex Parte Communication, filed by Centennial Communications Corp.

5/11/09

Letter, filed by America Movil, S.A.B. de C.V.

5/11/09

Notice of Ex Parte Communication, filed by AT&T

[1 | 2]

5/8/09

Letter, filed by AT&T

5/8/09

Response to Request for Information, filed by PRWireless, Inc.

3/18/09

Acknowledgments of Confidentiality, filed by Centennial Communications Corp.

3/17/09

Acknowledgments of Confidentiality, filed by Centennial Communications Corp.

3/13/09

Acknowledgments of Confidentiality, filed by AT&T Inc.

2/2/09

Reply to Joint Opposition to Petition to Deny, filed by Cellular South, Inc.

[1 | 2]

2/2/09

Reply Comments, filed by Sprint Nextel Corporation

2/2/09

Reply to Joint Opposition to Petitions to Deny or Condition Consent, filed by Cincinnati Bell Wireless LLC

1/26/09

Joint Opposition to Petitions to Deny or to Condition Consent, and Reply to Comments and Petition for Reconsideration, filed by AT&T Inc. and Centennial Communications Corp.

1/23/09

Supplement to Petition for Reconsideration, filed by Cellular South, Inc.

1/23/09

Motion for Leave to File a Supplement to Its Petition for Reconsideration, filed by Cellular South, Inc.

1/15/09

Petition for Reconsideration, filed by Cellular South, Inc.

1/15/09

Petition to Deny, filed by NEATT Wireless Inc.

1/15/09

Comments, filed by Rural Cellular Association

1/15/09

Petition to Deny, filed by Cellular South, Inc.

1/15/09

Petition to Condition Consent or Deny Application, filed by Cincinnati Bell Wireless

1/15/09

Comments, filed by Sprint Nextel Corp.**Application Documents**

- 4/30/09
Request for Information
[[1](#) | [2](#) | [3](#) | [4](#) | [5](#) | [6](#)]
- 12/11/08
[AT&T, Inc.](#)
- 12/11/08
[AT&T, Inc.](#)
- 12/10/08
[AT&T, Inc.](#)
- 11/26/08
[Centennial Puerto Rico License, Corp.](#)
- 11/24/08
Centennial Communications Corp.
[[1](#) | [2](#)]
- 11/21/08
 - [Lead Application](#)
 - [Public Interest Statement](#)
 - [Spectrum Aggregation Chart](#)
 - [Chart of Competitors](#)
 - Declarations of Corporate Officers [[1](#) | [2](#) | [3](#) | [4](#)]
 - [Economists' Declaration](#)
 - [Statement of No Environmental Impact](#)
- 11/21/08
AT&T
[[1](#) | [2](#) | [3](#) | [4](#) | [5](#) | [6](#) | [7](#)]
- 11/21/08
Lafayette Cellular Telephone Company
[[1](#) | [2](#) | [3](#) | [4](#) | [5](#)]
- 11/21/08
[Elkhart Metronet, Inc.](#)
- 11/21/08
[Centennial Southeast License Company](#)
- 11/21/08
[Centennial Michiana License Company](#)

Contacts

- **Erin McGrath**, Mobility Division, Wireless Telecommunications Bureau: (202) 418-2042

- **Susan Singer**, Spectrum Competition and Policy Division, Wireless Telecommunications Bureau: (202) 418-1340

This page contains an indexed unofficial listing of and electronic links to most materials in this docket. The applications and any associated documents are also available for public inspection and copying during normal reference room hours at the [FCC Reference Center](#). Copies of the applications and any subsequently-filed documents in this matter also may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, 1-800-378-3160 (voice), fcc@bcpiweb.com (e-mail), and most are also accessible through the Commission's [Electronic Comment Filing System](#). To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

last reviewed/updated on July 17, 2009

[FCC Home](#) | [Search](#) | [Updates](#) | [E-Filing](#) | [Initiatives](#) | [For Consumers](#) | [Find People](#)

Federal Communications Commission
445 12th Street SW
Washington, DC 20554
[More FCC Contact Information...](#)

Phone: 1-888-CALL-FCC (1-888-225-5322)
TTY: 1-888-TELL-FCC (1-888-835-5322)
Fax: 1-866-418-0232
E-mail: fccinfo@fcc.gov

- [Privacy Policy](#)
- [Website Policies & Notices](#)
- [Required Browser Plug-ins](#)
- [Freedom of Information Act](#)

EXHIBIT 2

AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless, 2009 WL 1723990, at *3 (WTB June 19, 2009)

AT&T Inc. and Centennial Communications Corp., 23 FCC Rcd 17966, 17968 (WTB 2008)

Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, 23 FCC Rcd 10004, 10008 (WTB 2008)

Sprint Nextel Corp. and Clearwire Corp., 23 FCC Rcd 9988, 9992 (WTB 2008)

Alaska Digital, LLC, AKD Holdings, LLC, and GCI, Inc., 23 FCC Rcd 753, 754 (WTB 2008)

General Communication, Inc and United Companies, Inc., 22 FCC Rcd 21006, 21008 (WTB 2007)

AT&T Mobility II LLC and Aloha Spectrum Holdings Co. LLC, 22 FCC Rcd 20078, 20079 (2007)

T-Mobile USA, Inc. and Suncom Wireless Holdings, Inc., 22 FCC Rcd 18863, 18865 (WTB 2007)

Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp, 22 FCC Rcd 18356, 18358 (WTB 2007)

AT&T Inc. and Dobson Communications Corp., 22 FCC Rcd 13659, 13660-61 (WTB 2007)

ALLTEL Corp. and Atlantis Holdings LLC, 22 FCC Rcd 11472, 11476-77 (WTB 2007)

AT&T Inc. and Clearwire Spectrum Holdings II LLC, 22 FCC Rcd 6799, 6800 (WTB 2007)

Bachow/Coastel LLC and Petrocom License Corp., 22 FCC Rcd 3328, 3329 (WTB 2007)

ALLTEL Communications, Inc. and Cingular Wireless LLC, 21 FCC Rcd 7809, 7811 (WTB 2006)

NTT DoCoMo, Inc., Guam Cellular and Paging, Inc., and Guam Wireless Tel. Co., 21 FCC Rcd 4835, 4838 (WTB 2006)

AT&T Inc. and BellSouth Corp., 21 FCC Rcd 4245, 4251 (WTB 2006)

Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc., 20 FCC Rcd 19834, 19835 (WTB 2005)

Urban Comm-North Carolina, Inc., Suncom Wireless, Inc. and Cellco Partnership d/b/a Verizon Wireless, 20 FCC Rcd 7652, 7654 (WTB 2005)

Verizon Communications Inc. and MCI, Inc., 20 FCC Rcd 6293, 6296 (WTB 2005)

SBC Communications Inc. and AT&T Corp., 20 FCC Rcd 5268, 5271 (WTB 2005)

Nextel Communications, Inc. and Sprint Corp., 20 FCC Rcd 4119, 4122-23 (WTB 2005)

ALLTEL Corp. and Cingular Wireless LLC, 20 FCC Rcd 3480, 3482 (WTB 2005)

Western Wireless Corp. and ALLTEL Corp., 20 FCC Rcd 2337, 2238 (WTB 2005)

Cingular Wireless LLC and Triton PCS Holdings, Inc., 20 FCC Rcd 1568, 1569 (WTB 2005)

Cellco Partnership d/b/a Verizon Wireless and NextWave Telecom, Inc., 19 FCC Rcd 23797, 23798 (WTB 2004)

AT&T Wireless PCS, LLC, Triton PCS License Co. L.L.C., and Lafayette Communications Co., L.L.C., 19 FCC Rcd 16276, 16277 (WTB 2004)

Qwest Wireless, LLC and Cellco Partnership d/b/a Verizon Wireless, 19 FCC Rcd 13319, 13320 (WTB 2004)

Cingular Wireless Corp. and T-Mobile USA, Inc., 19 FCC Rcd 13059, 13061 (WTB 2004)

Arch Wireless, Inc. and Metrocall Holdings, Inc., 19 FCC Rcd 8491, 8493 (WTB 2004)

AT&T Wireless Services, Inc. and Cingular Wireless Corp., 19 FCC Rcd 6185, 6190 (WTB 2004)

WORLDCOM, Inc. and Nextel Spectrum Acquisition Corp., 18 FCC Rcd 19313, 19316 (WTB 2003)

WORLDCOM, Inc. and MCI, Inc., 18 FCC Rcd 14179, 14184 (WTB 2003)

Northcoast Communications, LLC and Cellco Partnership d/b/a Verizon Wireless, 18 FCC Rcd 719, 720 (WTB 2003)

Arch Wireless, Inc. and Nextel Communications, Inc., 16 FCC Rcd 4684, 4685 (WTB 2001)

Repeater Communications Corp. and Nextel Communications, Inc., 16 FCC Rcd 2931, 2933 (WTB 2001)

Cingular Wireless LLC and VoiceStream Wireless Corp., 16 FCC Rcd 1028, 1029 (WTB 2001)

Price Communications Corp. and Cellco Partnership d/b/a Verizon Wireless, 16 FCC Rcd 989, 991 (WTB 2001)

Mobex License Co. and Nextel Communications, Inc., 16 FCC Rcd 3804, 3806 (WTB 2001)

VoiceStream Wireless Corp. and Cook Inlet Region, Inc., 15 FCC Rcd 20388, 20392 (WTB 2000)

Motorola, Inc. And Nextel Communications, Inc., 15 FC C Rcd 20195, 20196 (WTB 2000)

SBC Communications Inc., Ameritech Wireless Communications, Inc., AT&T Wireless PCS, LLC, and Indiana Acquisition, L.C.C., 15 FCC Rcd 15126, 15128 (WTB 2000)

SBC Communications Inc and ALLTEL Communications, Inc., 15 FCC Rcd 15120, 15122 (WTB 2000)

TLA Spectrum, LLC and Saco River Tel. and Tel. Co., 15 FCC Rcd 15072, 15074 (WTB 2000)

PrimeCo PCS, LP and Joseph J. Simons, 15 FCC Rcd 12890, 12891 (WTB 2000)

Chicago 20 MHz, LLC, GTE Wireless Cincinnati LLC, and BGV License Co., LLC, 15 FCC Rcd 12876, 12877 (WTB 2000)

TeleCorp PCS, Inc. and Tritel, Inc., and Indus, Inc., 15 FCC Rcd 12784, 12787 (WTB 2000)

GTE Corp. and SBC Communications Inc., 15 FCC Rcd 12762, 12764 (WTB 2000)

DiGiPH PCS, Inc. and Eliska Wireless Ventures License Subsidiary I, L.L.C., 15 FCC Rcd 11437, 11439 (WTB 2000)

E.N.M.R. Tel. Cooperative, Plateau Telecommunications, Inc., and Corpus Christi SMSA L.P., 15 FCC Rcd 9543, 9544 (WTB 2000)

FleetTalk Partners, LLC and FCI 900, Inc., 15 FCC Rcd 9137, 9138 (WTB 2000)

Richmond 20 MHz, LLC and Virginia RSA 6 L.P., 15 FCC Rcd 9116, 9117 (WTB 2000)

SBC Communications Inc. and BellSouth Corp., 15 FCC Rcd 10411, 10417 (WTB 2000)

Neoworld License Holdings, Inc., Hughes Electronics Corp., and Wilmington Trust Co., 15 FCC Rcd 10381, 10382-82 (WTB 2000)

Bell Atlantic Corp., GTE Corp., and Vodafone AirTouch Plc, 15 FCC Rcd 25354, 25356 (WTB 2000)

Bell Atlantic Corp. and GTE Corp., 15 FCC Rcd 16477, 16485 (WTB 2000)

Bell Atlantic Corp., GTE Corp., and ALLTEL Corp., 15 FCC Rcd 4695, 4700 (WTB 2000)

New York RSA 2 Cellular Partnership and United States Cellular Operating Co., 15 FCC Rcd 4278, 4279 (WTB 2000)

Bell Atlantic Corp., Vodafone AirTouch Plc, and ALLTEL Corp., 15 FCC Rcd 2833, 2836 (WTB 2000)

Voicestream Wireless Holding Corp. and Aerial Communications, Inc., 15 FCC Rcd 189, 192 (WTB 2000)

Arch Communications Group, Inc. and Paging Network, Inc., 15 FCC Rcd 103, 113 (WTB 1999)

SBC Communications Inc. and Radiofone, Inc., 14 FCC Rcd 21400, 21403 (WTB 1999)

Omnipoint Corp. and Cook Inlet/VS GSM II PCS, LLC, 15 FCC Rcd 3456, 3457 (WTB 1999)

American Cellular Corp., Dobson Communications Corp., and AT&T Wireless Services, Inc., 14 FCC Rcd 19356, 19359 (WTB 1999)

BCP Commnet, L.P. and Vodafone AirTouch Plc, 15 FCC Rcd 6825, 6827 (WTB 1999)

Frontier Corp. and Bell Atlantic Corp., 15 FCC Rcd 6764, 6766 (WTB 1999)

Qwest Communications Internat'l, Inc. and US West, Inc., 14 FCC Rcd 14070, 14071 (WTB 1999)

Skytel Communications, Inc. and MCI WORLDCOM, Inc., 14 FCC Rcd 11589, 11591 (WTB 1999)

Geotek Communications, Inc. and FCI 900, Inc., 14 FCC Rcd 8640, 8640-41 (WTB 1999)

Frontier Corp. and Global Crossing Ltd., 14 FCC Rcd 7481, 7481 (WTB 1999)

Ameritech Corp. and GTE Corp., 14 FCC Rcd 7478, 7478 (WTB 1999)

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 20th day of July, 2009, copies of the foregoing PETITION FOR EXPEDITED RECONSIDERATION were sent by e-mail, in pdf format, to the following:

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

Erin McGrath
Mobility Division
Wireless Telecommunications Bureau
erin.mcgrath@fcc.gov

Stacy Ferraro
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau
stacy.ferraro@fcc.gov

Linda Ray
Broadband Division
Wireless Telecommunications Bureau
linda.ray@fcc.gov

David Krech
Policy Division
International Bureau
david.krech@fcc.gov

Jim Bird
Office of General Counsel
jim.bird@fcc.gov

Neil Dellar
Office of General Counsel
neil.dellar@fcc.gov

Nancy J. Victory
Wiley Rein LLP
(Attorney for Cellco Partnership d/b/a Verizon Wireless)
nvictory@wileyrein.com

Michael P. Goggin
AT&T Mobility LLC
mg7268@att.com

[s] filed electronically

Linda J. Evans