

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

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| In re Applications of |) | |
| |) | |
| AT&T INC. and CELLCO PARTNERSHIP |) | |
| D/B/A VERIZON WIRELESS |) | DA 09-1350 |
| |) | WT Docket No. 09-104 |
| For Consent to Assign or Transfer Control of |) | |
| Licenses and Authorizations and to Modify a |) | |
| Spectrum Leasing Arrangement |) | |
| |) | |
| File Nos. 0003840313 <i>et al.</i> |) | |

PETITION TO DENY OF CELLULAR SOUTH, INC.

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.

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SUMMARY

Cellular South, Inc. (“Cellular South”) filed a petition to deny the applications that Cellco Partnership d/b/a Verizon Wireless (“VZW”) filed for Commission consent to its acquisition of the wireless systems operated by ALLTEL Corporation (“ALLTEL”). After VZW disclosed that it had made an offer to the Department of Justice (“DOJ”) that it would divest overlapping properties in 85 of the Cellular Market Areas (“CMAs”) in which ALLTEL operated, Cellular South argued that the Commission cannot grant the applications subject to the condition that VZW divest any of the transferred licenses, because the imposition of the divestiture condition constitutes a Commission finding that it is unable to make the public interest determination required by § 309(d)(2) of the Communications Act of 1934 (“Act”). Cellular South went on to argue that: (1) §§ 308(a) and 310(d) of the Act prohibited the Commission from granting its consent to the transfer of control of licenses to VZW when it had been prohibited from exercising such control by the DOJ; (2) § 310(d) prohibits the Commission from considering whether the public interest might be served by the transfer of control to a “management trustee” or any entity other than VZW; and (3) the Commission is without authority to consent to a transfer of control on the condition that VZW cannot exercise the rights conveyed by the Commission.

Disregarding Cellular South’s legal arguments, the Commission granted its consent to have VZW assume control over licensed radio systems operating in 390 CMAs on the condition that VZW not control the operations in up to 105 of those markets. VZW took control of the ALLTEL operations on January 9, 2009. Four months later, VZW agreed to sell AT&T operations in 79 CMAs that are subject to divestiture for \$2.35 billion in cash. Sixty five of the licenses to be sold were just acquired by VZW in its merger with ALLTEL.

The Commission never authorized VZW to hold the licenses for the 65 markets it proposes to resell to AT&T nor found VZW qualified to provide service under those licenses to the public in those particular markets. The Commission permitted VZW to obtain those authorizations for the sole and specific purpose of reselling them. The Commission could not have intended for VZW to resell the authorizations for a profit for that would constitute trafficking under § 1.948(i) of the Commission's rules ("Rules").

The proposed transaction must be reviewed for trafficking since the authorizations for 65 of the 71 markets were unquestionably acquired by VZW for the sole purpose of resale. VZW must be required to disclose in accordance with § 1.948(i)(2) of the Rules whether the \$2.35 billion sale price for the 71 markets will allow it to resell the authorizations it acquired from ALLTEL at a profit. The Commission cannot be viewed as having authorized VZW to purchase licensed facilities on the condition that it promptly resell the facilities — and not use them to serve the public — and then allowing VZW to resell the facilities to AT&T at a profit. If VZW fails to carry its burden of proving that it is not trafficking, the Commission must designate the matter for hearing.

If it is permitted to compete with Cellular South, AT&T will be able to offer customers handsets with a variety of features that ALLTEL was not able to offer and Cellular South cannot offer. Because of its exclusive dealing arrangements with the handset manufacturers, AT&T alone can offer potential customers two of the most popular handsets: Apple's iPhone and Research in Motion's Blackberry Bold. That will give AT&T an overwhelming competitive advantage over Cellular South since most customers primarily choose their service provider on the basis of its handset offerings. The Commission should exercise its authority to regulate the exclusive dealing contracts of wireless telecommunications carriers under §§ 4(i), 201(b),

211(b), 215(c), and 303(r) of the Act by approving the proposed transfer of control only on the condition that AT&T make the commitment to forbear from enforcing its anti-competitive exclusive dealing arrangements with handset manufacturers.

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PETITION TO DENY OF CELLULAR SOUTH, INC.

Cellular South, Inc. (“Cellular South”), by its attorneys and pursuant to § 309(d)(1) of the Communications Act of 1934, as amended (“Act”), 47 U.S.C. § 309(d)(1), § 1.939(a)(2) of the Commission’s Rules (“Rules”), 47 C.F.R. § 1.939(a)(2), and the Public Notice, DA 09-1350, 2009 WL 1723990 (June 19, 2009), hereby petitions the Commission to deny the above-captioned applications of Cellco Partnership d/b/a Verizon Wireless (“VZW”) and AT&T Inc. (“AT&T”) for Commission consent to the assignment or transfer of control of certain wireless licenses and related authorizations from VZW and its subsidiaries to AT&T. In support thereof, the following is respectfully submitted:

INTRODUCTION

Cellular South is the nation’s largest privately-held wireless carrier. It is a regional CDMA carrier serving over 700,000 customers primarily in rural areas. It provides cellular service in nine Cellular Market Areas (“CMAs”) in Mississippi consisting of two Metropolitan Statistical Areas (“MSAs”) and seven Rural Service Areas (“RSAs”). It also provides Personal Communications Services (“PCS”) in twelve Mississippi Basic Trading Areas. In addition,

Cellular South holds authorizations to provide PCS, Advanced Wireless Service and/or 700 MHz Service in portions of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Tennessee and Virginia.

Cellular South was among the parties that filed petitions to deny the applications that VZW filed for Commission consent to its acquisition of the wireless systems operated by ALLTEL Corporation (“ALLTEL”). *See Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 174584 (2008) (“VZW/ALLTEL”). VZW had agreed to acquire ALLTEL and its licensed operations in 390 Cellular Market Areas (“CMAs”) for approximately \$28.1 billion, including about \$5.9 billion in cash.¹ However, the Department of Justice (“DOJ”) made the preliminary assessment that the merger could substantially lessen competition in violation of the Clayton Act. Prior to the filing of the petitions to deny, VZW notified the Commission that it had already made the offer to the DOJ that it would divest overlapping properties in 85 of the CMAs in which ALLTEL operated.² By the time the Commission acted on the VZW/ALLTEL merger, VZW had entered into a settlement with the DOJ under which it would divest operations in 100 of the 390 ALLTEL CMAs.³

In its petition to deny the VZW/ALLTEL merger applications, Cellular South argued that the Commission cannot grant the applications subject to the condition that VZW divest any of the transferred licenses, because the imposition of the divestiture condition/remedy constitutes a Commission finding that it is unable to make the public interest determination required by §

¹ *See* ALLTEL, SEC Form 10-Q, at 15 (Sept. 30, 2008).

² *See* Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95, at 1 (July 22, 2008).

³ *See* VZW/ALLTEL, 23 FCC Rcd at 17458-59.

309(d)(2) of the Act.⁴ Cellular South went on to argue that:

(1) The Commission cannot issue a reasoned decision explaining how the grant of its consent to the transfer of control of licenses to VZW would serve the public interest when VZW had been prohibited from acquiring such control by the DOJ;

(2) §§ 308(a) and 310(d) of the Act prohibit the Commission from granting its consent to the transfer of a controlling interest in an operating licensee to an entity that is ineligible to exercise licensee control;

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

(4) The Commission is prohibited by § 310(d) from considering whether the public interest might be served by the transfer of a controlling interest in a licensee to a “management trustee” or any entity other than VZW; and,

(5) The Commission is without authority to consent to a transfer of control, or to issue any license under Title III of the Act, to an entity on the condition that the entity cannot exercise the rights conveyed by the Commission.⁵

Disregarding Cellular South’s legal arguments as to its divestiture authority,⁶ the

⁴ See Petition to Deny of Cellular South, Inc., WT Docket No. 08-95, at 18 (Aug. 11, 2008) (“Petition”).

⁵ See Reply of Cellular South, Inc. to Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, at 12-15 (Aug. 26, 2008).

⁶ The Commission never responded directly to Cellular South’s arguments. It simply stated its conclusion that Cellular South failed to present “material questions of fact warranting a hearing in this matter.” *VZW/ALLTEL*, 23 FCC Rcd at 17497 n.375. The Commission did respond to another matter raised by Cellular South. Because it was requiring VZW and ALLTEL to file applications for short-term *de facto* transfer spectrum leasing arrangements for the so-called “divestiture assets” with a management trustee, the Commission saw “no need to dismiss the applications without prejudice as suggested by Cellular South.” *Id.* at 17540.

Commission granted the VZW/ALLTEL merger applications on November 10, 2008, subject to the condition that VZW divest licenses and related operational assets in five CMAs in addition to the 100 CMAs that VZW had already agreed to divest.⁷ Thus, the Commission granted its consent to have VZW assume control over licensed radio systems operating in 390 CMAs on the condition that VZW not control the operations in up to 105 of those markets. Nevertheless, VZW took control of the ALLTEL operations on January 9, 2009.⁸

On May 8, 2009, VZW agreed to sell AT&T operations in 79 CMAs that are subject to the Commission's divestiture order for \$2.35 billion in cash.⁹ Consequently, VZW is back asking for the Commission's consent to sell former ALLTEL systems (principally those previously controlled by WWC Holding Co., Inc.) in 65 CMAs that apparently have been operated under the day-to-day control of a management trustee (W. Stephen Cannon). *See infra* Ex. 1. In short, VZW is asking for the Commission to approve a for-profit sale of licenses it was never found qualified to hold and licensed facilities it was prohibited from operating.

STANDING

If the Commission approves the sale, AT&T will compete for the first time in 49 CMAs, including the Dothan, Alabama (CMA246) MSA and the Alabama 7 – Butler (CMA313) RSA (“Alabama 7”).¹⁰ AT&T will compete directly with Cellular South in those two markets.

“[W]ith its national network, array of services, rate plans, handsets and resources,” AT&T promises to provide “more vigorous competition” than ALLTEL was able to muster to Cellular South, VZW and the other competitors in the Dothan and Alabama 7 markets. If

⁷ *See VZW/ALLTEL*, 23 FCC Rcd at 17516-17.

⁸ *See Verizon 10-Q*, at 32.

⁹ *See Verizon Communications, Inc.*, SEC Form 10-Q, at 7 (Mar. 31, 2009) (“Verizon 10-Q”).

¹⁰ *See File No. 0003840313*, Ex. 1, Appendix B at 1-2, 18 (“VZW/ALLTEL Ex. 1”).

AT&T's claim that it will be "a more vibrant competitor" than ALLTEL proves to be true, the increased competition can be expected to cause Cellular South to sustain economic injury that is direct, tangible and immediate.

Cellular South's status as a direct and current competitor provides it with standing to file a petition to deny the subject applications ("Transfer Applications") under *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940) and its progeny. See *New World Radio, Inc. v. FCC*, 294 F.3d 164, 170 (D.C. Cir. 2002). Consistent with *Sanders Brothers*, the Commission developed a "generous" standing policy in assignment and transfer cases "so as to enable a competitor to bring to the Commission's attention matters bearing on the public interest because its position qualifies it in a special manner to advance such matters." *Stoner Broadcasting System, Inc.*, 74 F.C.C. 2d 547, 548 (1979). See *WLVA, Inc. v. FCC*, 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972) (standing under § 309(d)(1) "liberally conferred" where a competitor alleges economic injury). Under that policy, Cellular South clearly has standing under § 309(d)(1) to petition to deny the Transfer Applications. See, e.g., *Channel 32 Hispanic Broadcasters, Ltd.*, 15 FCC Rcd 22649, 22651 (2000).

Despite recognizing that the administrative standard for establishing standing under § 309(d)(1) is "less stringent" than the judicial standard for establishing Article III standing to appeal, see *Paxson Management Corp. and Lowell W. Paxson*, 22 FCC Rcd 22224, 22224 n.2 (2007), and that Article III does not apply at all to administrative standing, see *Sagittarius Broadcasting Corp.*, 18 FCC Rcd 22551, 22554 n.20 (2003), the Commission nevertheless has applied the test for Article III standing to petitioners in transfer of control cases. See, e.g., *Shareholders of Tribune Co.*, 22 FCC Rcd 21266, 21268 (2007).¹¹ If it does so again in this

¹¹ To establish Article III standing, a party must allege specific facts showing that: (1) it will

case, the Commission should recognize Cellular South's Article III standing.

Cellular South is likely to suffer injury-in-fact if it is forced to compete with AT&T and VZW, the two largest national carriers.¹² Like VZW, AT&T will be able to offer customers handsets with a variety of features that ALLTEL was not able to offer and Cellular South cannot offer. Because of its exclusive dealing arrangements with the handset manufacturers, AT&T alone can offer potential customers two of the most popular handsets: Apple's iPhone and Research in Motion's ("RIM") Blackberry Bold. That will give AT&T an overwhelming competitive advantage over Cellular South since most customers primarily choose their service provider on the basis of its handset offerings. So long as AT&T maintains that advantage in the marketplace, Cellular South can expect to lose customers in Dothan and Alabama 7.

The fact that AT&T promises to be a stronger competitor than ALLTEL obviously establishes a causal link between the Transfer Applications and the competitive injury-in-fact that Cellular South stands to suffer. It is equally obvious that the injury to Cellular South would be prevented if the Commission either does not grant the Transfer Applications or grants them subject to conditions that would prevent AT&T from acting anticompetitively.¹³

Cellular South made a similar showing to establish its statutory and Article III standing to petition to deny the VZW/ALLTEL merger applications. The Commission clearly found that Cellular South was a party in interest in that proceeding.¹⁴ Having recognized Cellular South's

suffer injury-in-fact; (2) there is a "causal link" between the proposed transfer and the injury-in-fact; and (3) the injury-in-fact would be prevented if the transfer application is not granted. *See Shareholders of Tribune Co.*, 22 FCC Rcd at 21268.

¹² *See* VZW/AT&T Ex. 1 at 11.

¹³ The attached declaration of Eric B. Graham attests to the fact that Cellular South has standing as a party in interest under § 309(d)(1) to petition to deny the Transfer Applications.

¹⁴ *See* VZW/ALLTEL, 23 FCC Rcd at 17458 n.119, 17476 nn.247, 248, 251, 252, 17497 n.375, 17526 & nn.629-632, 17539-40 & nn.746-49, 763, 17548.

standing to protest VZW's acquisition of the Dothan and Alabama 7 licenses, the Commission should find that Cellular South has standing to oppose VZW's attempt to immediately sell those two licenses to AT&T.

ARGUMENT

I. THE COMMISSION CANNOT ALLOW VZW TO PROFIT FROM THE SALE OF LICENSES IT WAS FOUND UNQUALIFIED TO HOLD

The hearing procedures that the Commission must follow in every Title III licensing case are specified in § 309(e) of the Act: "If ... a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding [of public interest, convenience, and necessity] ..., it shall formally designate the application for hearing on the ground or reasons then obtaining." 47 U.S.C. § 309(e); *United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980). *See also* 47 U.S.C. § 309(d)(2). Even in wireless merger cases, the Commission has repeatedly recognized its obligation to designate an application for hearing if it cannot make the requisite public interest finding for any reason.¹⁵ It did so again in *VZW/ALLTEL*.¹⁶

In the *VZW/ALLTEL* proceeding, the Commission concluded that Cellular South had not succeeded in presenting a substantial and material question of fact that warranted a hearing.¹⁷ But the Commission chose not to address whether it was precluded from making its public interest finding by reason of §§ 308(a), 309 and 310(d) of the Act. And the fact of the matter is that the Commission did not make several of the statutorily required findings necessary to grant its consent to the transfer of control of the *ALLTEL* operations to *VZW*.

The Commission acknowledged that § 310(d) required it to consider the *VZW/ALLTEL*

¹⁵ *See, e.g., AT&T, Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20302 (2007).

¹⁶ *See VZW/ALLTEL*, 23 FCC Rcd at 17461.

¹⁷ *See supra* note 6.

merger applications as if VZW were applying for the licenses for the 390 CMAs directly under § 308.¹⁸ Consequently, the VZW/ALLTEL applications had to set forth facts as to “the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station[s]” and the “ownership and location[s]” of the stations. 47 U.S.C. § 308(b). The 95 so-called “Section 310 applications” filed by VZW and ALLTEL¹⁹ set forth facts both as to VZW’s qualifications to operate the stations and the ownership and the locations of the stations. By the time the Commission acted on the applications, however, at least 19 of the 95 applications did not even identify the person who would operate the stations, much less establish the operator’s qualifications. *See infra* Ex. 1. Nor did those applications set forth facts to identify the ownership, or to ascertain the locations, of the stations in 105 of the 390 CMAs.

The Act flatly prohibits the Commission from considering whether the public interest would be served if control of the stations were transferred “to a person other than the proposed transferee.” 47 U.S.C. § 310(d). Nevertheless, the Commission permitted control of ALLTEL’s stations to pass to VZW on the condition that day-to-day control over stations operating in 105 CMAs be transferred to an unnamed, yet-to-be-appointed “management trustee” and possibly to a “divestiture trustee.”²⁰

The statute also prohibits the transfer of any rights under a station license “except upon application to the Commission and upon finding by the Commission that the public interest ... will be served thereby.” *Id.* But the Commission did not require the management trustee to file an application for § 310(d) authority prior to assuming *de facto* control over the so-called

¹⁸ *See VZW/ALLTEL*, 23 FCC Rcd at 17460 n.136.

¹⁹ *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 10004, 10005-07 (WTB 2008).

²⁰ *See VZW/ALLTEL*, 23 FCC Rcd at 17518-19.

“divestiture assets.” Indeed, the Commission appeared to invite the trustee to assume such control with the release of its *VZW/ALLTEL* order.²¹ Rather than directing that the divestiture assets be placed in trust after obtaining § 310(d) authority, the Commission merely required that the licenses be transferred to the trust no later than the consummation of the *VZW/ALLTEL* merger (January 9, 2009).²²

The Commission explained that it could not find that the “transaction-specific public interest benefits” to be derived from the *VZW/ALLTEL* merger outweighed the “significant competitive harm” the merger would cause in 105 markets unless *VZW* divested operations in those markets.²³ The Commission explicitly found that its consent to the proposed transfer of control of licenses in 390 CMAs would serve the public interest only if *VZW* divested unidentified licensed operations in more than 25 percent of those markets.²⁴ Conspicuously, but understandably missing from the *VZW/ALLTEL* order, is any Commission finding either that the unnamed management trustee is qualified to operate the divestiture assets or that the transfer of control to *VZW* and the trustee would serve the public interest in any of the 105 CMAs. Nor, finally, did the Commission point to any legal authority under which it could consent to a merger subject to a condition that is wholly inconsistent with §§ 308(b) and 310(d) of the Act.

Abdicating its authority to the DOJ to protect the public interest, the Commission declined to impose any significant conditions on the sale of the licenses for the CMAs subject to

²¹ *See VZW/ALLTEL*, 23 FCC Rcd at 17519.

²² *See id.*

²³ *See id.* at 17515.

²⁴ *See id.* at 17515-16.

divestiture.²⁵ The Commission made it clear that it permitted VZW to obtain the licenses for the 105 markets for the principal purpose of effectuating the sale of licenses for those particular markets. What was not clear until the Transfer Applications were filed was whether VZW would sell licenses under which it had operated or would resell the licenses that it had just acquired from ALLTEL. That distinction is of decisional significance.

Exhibit 1 highlights the 65 CMAs that VZW acquired in its merger with ALLTEL on January 9, 2009 and agreed to sell to AT&T on May 8, 2009. The Commission never authorized VZW to hold the licenses for the 65 markets it proposes to resell to AT&T nor found VZW qualified to provide service under those licenses to the public in those particular markets. The Commission permitted VZW to obtain those authorizations for the sole and specific purpose of reselling them. The Commission could not have intended for VZW to resell the authorizations for a profit for that would constitute trafficking under § 1.948(i) of the Rules.

Under § 1.948(i), which applies to all wireless services,²⁶ “[t]rafficking consists of obtaining or attempting to obtain an authorization for the principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunications service to the public or for the licensee’s own private use.” 47 C.F.R. § 1.948(i)(1). The Commission’s anti-trafficking policy embodied in § 1.948(i) “protects the integrity of the licensing process, as well as eliminates certain regulatory expenses and the passing through of the cost of trafficking

²⁵ See *id.* at 17518. Under the settlement agreement between VZW, ALLTEL and the DOJ, the divestiture assets were to be transferred to a buyer “who, in DOJ’s sole judgment, has the intent and capability of being an effective competitor to [VZW].” *Id.* at 17459.

²⁶ See *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone and other Commercial Mobile Radio Services*, 17 FCC Rcd 18401, 18437 (2002).

to the public.”²⁷ Accordingly, the Commission has reserved its authority to review transfer of control applications “to determine if the transaction is for the purposes of trafficking.” *Id.* § 1.948(i). In the course of such review, the Commission may require the submission of “an affirmative, factual showing, supported by affidavit of persons with personal knowledge thereof,” to demonstrate that the transferor did not acquire the authorization for the purpose of trafficking. 47 C.F.R. § 1.938(i)(2). Clearly, the Transfer Applications must be reviewed for trafficking considering that the authorizations for 65 of the 71 markets were unquestionably acquired for the sole purpose of resale.

VZW must be required to disclose in accordance with § 1.948(i)(2) of the Rules whether the \$2.35 billion sale price for the 71 markets will allow it to resell the authorizations it acquired from ALLTEL at a profit. The Commission cannot be viewed as having authorized VZW to purchase licensed facilities on the condition that it promptly resell the facilities — and not use them to serve the public — and then allowed VZW to resell the facilities to AT&T at a profit. If VZW does not carry its burden to prove that it is not trafficking,²⁸ or if the Commission for any reason cannot make the finding that the resale of the licenses would serve the public interest, the Transfer Applications must be designated for hearing. *See* 47 U.S.C. § 309(e).

II. AT&T’S EXCLUSIVE DEALING AGREEMENTS WITH HANDSET MANUFACTURERS ARE ANTI-COMPETITIVE AND MUST BE PROHIBITED

Cellular South has been in the forefront of the movement to outlaw the practice of AT&T, VZW and the other large national wireless carriers of entering into exclusive dealing arrangements with handset manufacturers. Cellular South is a member of the Rural Cellular Association (“RCA”), which was the first to urge the Commission to prohibit exclusive handset

²⁷ *Contemporary Digital Services, Inc.*, 59 Rad. Reg. 2d (P&F) 617, 619, 1985 WL 260144, at *2 (1985).

²⁸ *See id.*

arrangements involving the nation's "Big 4" wireless carriers.²⁹ Cellular South was among the 24 rural wireless providers who asked VZW to eliminate its exclusive handset agreements with LG and Samsung. It also has provided testimony before Congress on the anti-competitive effects of such arrangements³⁰ and has urged the DOJ to investigate the matter. In addition, Cellular South has petitioned the Commission to impose merger conditions that would prohibit VZW and AT&T from maintaining their exclusive handset agreements.³¹

Cellular South's efforts before Congress and the DOJ apparently have had some success as evidenced by the recent letter of the Chairman of the Senate's Antitrust Subcommittee urging the Commission and the DOJ to investigate handset exclusivity arrangements³² and by the report that the DOJ has launched such an investigation.³³ The collective efforts of Cellular South and the other rural wireless carriers finally led VZW to announce that any new exclusivity arrangement it enters into with handset makers after July 17, 2009, will last no longer than six months with respect to small wireless carriers.³⁴ However, no such announcement has come from AT&T.

To assist it in the preparation of its annual report to Congress on the state of CMRS competition, the Wireless Telecommunications Bureau ("Bureau") recently solicited information

²⁹ See *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, 23 FCC Rcd 14873 (2008).

³⁰ See Written Statement of Victor "Hu" Meena on "The Consumer Wireless Experience" before the Senate Committee on Commerce, Science and Transportation (June 17, 2009).

³¹ See Petition, at 19-20; Petition to Deny of Cellular South, Inc., WT Docket No. 08-246, at 7-8 (Jan. 15, 2009).

³² See *infra* Ex. 2 (Letter from Senator Herb Kohl to Christine Varney and Julius Genachowski (July 6, 2009)).

³³ See Amol Sharma, *Telecoms Face Antitrust Threat*, Wall St. J., July 7, 2009, at 1.

³⁴ See *infra* Ex. 3 (Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 09-66 (July 17, 2009)).

“on the role that handsets play in the extent of competition in the CMRS marketplace.”³⁵ The Bureau collected substantial data that demonstrates that a carrier’s handset offering is now the primary factor behind a customer’s decision to subscribe to a particular carrier.³⁶ RCA provided data showing the top 50 handsets sold in May 2009 were subject to exclusive arrangements and each of the 45 exclusive agreements were with one of the four largest wireless carriers, obviously including AT&T.³⁷ If small or regional carriers such as Cellular South are prevented from offering the most desirable handsets, such as Apple’s iPhone and RIM’s Blackberry Bold, they simply will not remain competitive with carriers such as AT&T.

The Commission has the authority to prohibit the exclusive dealing contracts between wireless carriers and handset manufacturers that have a substantial adverse effect on the provision of wireless telecommunications service or result in an impairment of CMRS competition.³⁸ However, the Commission has suggested that it would be improper for a party to

³⁵ *Wireless Telecommunications Bureau Seeks Comment on CMRS Market Competition*, 24 FCC Rcd 5618, 5626 (WTB 2009).

³⁶ *See Reply Comments of Rural Cellular Association*, WT Docket No. 09-66, at 2-7 (July 13, 2009).

³⁷ *See id.* at 6.

³⁸ CMRS providers are common carriers subject to Title II of the Act. *See* 47 U.S.C. § 332(c)(1)(A); *Orloff v. FCC*, 352 F.3d 415, 419 (D.C. Cir. 2003). Wireless carriers must comply with thirteen Title II sections, specifically including §§ 201 and 202. *See* 47 C.F.R. § 20.15(a). Accordingly, all practices of cellular carriers “for and in connection with” their communications services are subject to the Commission’s Title II jurisdiction. *See* 47 U.S.C. §§ 201(b) & 202(a). The Commission’s authority to require the filing of carrier contracts under § 211(b) of the Act gives it authority to modify the terms of such contracts. *See Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999). It also has explicit authority under § 215(c) to regulate “[e]xclusive dealing contracts,” 47 U.S.C. § 215(c), under §§ 154(i), 201(b) and 303(r) of the Act. *See GTE Service Corp. v. FCC*, 474 F.2d 724, 731 n.9 (2d Cir. 1972). Agreements for exclusive marketing of specific handsets in supply contracts between wireless carriers and handset manufacturers are clearly “exclusive dealing contracts” within the meaning of § 215(c) since they prevent the manufacturers from supplying handsets to other carriers.

request the imposition of a merger condition that would prevent the enforcement of existing exclusive handset arrangements. *See Sprint Nextel Corp. and Clearwire Corp.*, 23 FCC Rcd 17570, 17607 (2008). The Commission found that such conditions “are not narrowly tailored to prevent a transaction-specific harm and are more appropriate for a rulemaking proceeding when all interested parties have the opportunity to file comments.” *Sprint Nextel*, 23 FCC Rcd at 17607. However, the Commission has long engaged in such “*de facto* rulemaking” or “regulation by condition,”³⁹ and perhaps never more so than in *VZW/ALLTEL*.

The Commission approved the *VZW/ALLTEL* merger subject to conditions that were far from merger-specific. In addition to the divestiture condition, *VZW* was compelled to accede to conditions that required it to: (1) not only honor *ALLTEL*’s existing roaming agreements, but agree not to raise *ALLTEL*’s roaming rates for four years;⁴⁰ (2) phase out its competitive eligible telecommunications carrier high-cost universal service support over a five-year period;⁴¹ and (3) meet heightened wireless E911 location accuracy standards.⁴² If it was appropriate to impose such new regulatory requirements on *VZW* by merger conditions, it would be entirely appropriate for the Commission to condition its grant of the Transfer Applications — if they can be granted — on AT&T’s commitment to forbear from enforcing its existing exclusivity

³⁹ It is common for the Commission to negotiate “commitments from merging parties to comply with all sorts of regulatory mandates that the FCC will not or cannot (for jurisdictional or statutory reasons) promulgate in the form of rules generally applicable to all.” Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 7.3.4, at 609-10 (2d ed. 1999). That “backdoor regulatory tool gives the FCC almost unlimited — though little noted — power to regulate as it pleases.” *Id.*

⁴⁰ *See VZW/ALLTEL*, 23 FCC Rcd at 17524.

⁴¹ *See id.* at 17532.

⁴² *See id.* at 17533.

arrangements with Apple and RIM and not to enter into such agreements in the future. Cellular South respectfully requests that the Commission impose such a condition.

REQUEST FOR RELIEF

For all the foregoing reasons, Cellular South respectfully requests that the Commission: (1) require VZW to show that it is not engaging in trafficking and, if it fails to carry its burden of proof, (2) designate the Transfer Applications for hearing, or, in the alternative, (3) grant the applications subject to the condition proposed herein.

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

**VZW/ALLTEL APPLICATIONS THAT INVOLVED THE 105
MARKETS (CMAs) THAT WERE SUBJECT TO DIVESTITURE**

(The licenses in the 105 CMAs subject to divestiture are identified by call signs, CMA numbers, and CMA names. Licenses proposed to be sold to AT&T are identified in bold font. Licenses not subject to divestiture are identified only by call signs.)

| FILE NO. | TRANSFEROR | CALL SIGN | CMA | MARKET |
|------------|----------------------------|----------------|------------|--------------------------|
| 0003463892 | ALLTEL Communications, LLC | KNKA257 | | |
| | | KNKA275 | | |
| | | KNKA276 | | |
| | | KNKA278 | | |
| | | KNKA281 | | |
| | | KNKA283 | | |
| | | KNKA293 | | |
| | | KNKA330 | | |
| | | KNKA387 | | |
| | | KNKA398 | | |
| | | KNKA407 | | |
| | | KNKA415 | | |
| | | KNKA429 | | |
| | | KNKA432 | | |
| | | KNKA433 | | |
| | | KNKA436 | 166 | Hickory, NC |
| | | KNKA489 | | |
| | | KNKA505 | 158 | Lima, OH |
| | | KNKA514 | | |
| | | KNKA524 | | |
| | | KNKA537 | | |
| | | KNKA543 | 246 | Dothan, AL |
| | | KNKA548 | 231 | Mansfield, OH |
| | | KNKA565 | 261 | Albany, GA |
| | | KNKA581 | | |
| | | KNKA599 | | |
| | | KNKA613 | 227 | Anderson, SC |
| | | KNKA614 | | |
| | | KNKA634 | | |
| | | KNKA643 | | |
| | | KNKA682 | | |
| | | KNKA690 | | |
| | | KNKA711 | | |
| | | KNKA729 | | |
| | | KNKA752 | | |
| | | KNKA794 | | |
| | | KNKN245 | 353 | CO 6 - San Miguel |
| | | KNKN251 | | |
| | | KNKN390 | | |
| | | KNKN405 | 625 | SC 1 - Oconee |

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|--|--|----------------|------------|-----------------------|
| | | KNKN415 | | |
| | | KNKN434 | | |
| | | KNKN493 | 428 | KS 1 - Cheyenne |
| | | KNKN495 | | |
| | | KNKN501 | | |
| | | KNKN535 | | |
| | | KNKN542 | 429 | KS 2 - Norton |
| | | KNKN543 | | |
| | | KNKN584 | | |
| | | KNKN585 | 433 | KS 6 - Wallace |
| | | KNKN587 | 383 | GA 13 - Early |
| | | KNKN590 | | |
| | | KNKN591 | | |
| | | KNKN602 | | |
| | | KNKN609 | | |
| | | KNKN617 | | |
| | | KNKN641 | | |
| | | KNKN643 | | |
| | | KNKN645 | | |
| | | KNKN650 | | |
| | | KNKN681 | | |
| | | KNKN686 | | |
| | | KNKN690 | | |
| | | KNKN702 | 434 | KS 7 - Trego |
| | | KNKN725 | 313 | AL 7 - Butler |
| | | KNKN736 | | |
| | | KNKN752 | | |
| | | KNKN758 | 650 | TN 8 - Johnson |
| | | KNKN767 | | |
| | | KNKN770 | | |
| | | KNKN772 | 438 | KS 11 - Hamilton |
| | | KNKN789 | | |
| | | KNKN797 | | |
| | | KNKN799 | | |
| | | KNKN801 | 439 | KS 12 - Hodgeman |
| | | KNKN811 | | |
| | | KNKN813 | | |
| | | KNKN815 | 440 | KS 13 - Edwards |
| | | KNKN686 | | |
| | | KNKN872 | 376 | GA 6 - Spalding |
| | | KNKN877 | 382 | GA 12 - Liberty |
| | | KNKN883 | 376 | GA 6 - Spalding |
| | | KNKN884 | | |
| | | KNKN913 | 376 | GA 6 - Spalding |
| | | KNKN927 | | |
| | | KNKN929 | | |
| | | KNKN931 | | |
| | | KNKN932 | | |
| | | KNKN933 | | |
| | | KNKN934 | | |
| | | KNKN944 | | |
| | | KNKN951 | | |

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|------------|--|----------------|------------|--------------------------|
| | | KNKN952 | | |
| | | KNKN954 | | |
| | | KNKN962 | | |
| | | KNKN967 | | |
| | | KNKN969 | 627 | SC 3 - Cherokee |
| | | KNKN976 | 379 | GA 9 - Marion |
| | | KNKN977 | 379 | GA 9 - Marion |
| | | KNKN979 | | |
| | | KNKN982 | 566 | NC 2 - Yancey |
| | | KNKN987 | 586 | OH 2 - Sandusky |
| | | KNKN988 | 631 | SC 7 - Calhoun |
| | | KNKN989 | 626 | SC 2 - Laurens |
| | | KNKN991 | | |
| | | KNKN992 | | |
| | | KNKQ264 | 380 | GA 10 - Bleckley |
| | | KNKQ265 | 377 | GA 7 - Hancock |
| | | KNKQ270 | 380 | GA 10 - Hancock |
| | | KNKQ291 | | |
| | | KNKQ292 | | |
| | | KNKQ294 | 379 | GA 9 - Marion |
| | | KNKQ296 | | |
| | | KNKQ297 | 569 | NC 5 - Anson |
| | | KNKQ310 | 569 | NC 5 - Anson |
| | | KNKQ329 | | |
| | | KNKQ330 | | |
| | | KNKQ355 | | |
| | | KNKQ366 | | |
| | | KNKQ416 | | |
| | | KNKR220 | | |
| | | KNLG298 | 246 | Dothan, AL |
| | | | 313 | AL 7 - Butler |
| | | KNLG328 | 313 | AL 7 - Butler |
| 0003464396 | ALLTEL Communications of Mich. RSAs, Inc. | KNKN698 | | |
| | | KNKN910 | 476 | MI 5 - Manistee |
| 0003464416 | ALLTEL Communications of S. Mich. Cell. LP | KNKA271 | | |
| | | KNKA300 | | |
| | | KNKA466 | | |
| | | KNKA503 | | |
| | | KNKA506 | 181 | Muskegon, MI |
| | | KNKA539 | | |
| | | KNKA639 | | |
| | | KNKA915 | | |
| 0003465051 | Midwest Wireless Iowa LLC d/b/a ALLTEL | KNKN314 | | |
| | | KNKN351 | | |
| | | KNKN362 | | |
| | | KNKN364 | | |
| | | KNKN642 | | |
| | | KNKQ267 | | |
| | | KNKQ308 | | |
| | | KNLG861 | | |
| | | KNLG863 | 253 | Sioux City, IA-NE |
| | | KNLG864 | | |

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|------------|---|----------------|------------|--------------------------|
| | | KNLG872 | | |
| | | KNLG875 | | |
| | | KNLG876 | | |
| | | WPOM853 | 427 | IA 16 - Lyon |
| 0003465096 | Cellular Mobile Systems of MI RSA #7 LP | KNKQ319 | 319 | MI 7 - Newaygo |
| 0003465064 | Georgia RSA #8 Partnership | KNKN899 | 378 | GA 8 - Warren |
| 0003465053 | Midwest Wireless Communications, L.C.C. | KNKN740 | | |
| | | KNKN290 | 490 | MN 9 - Pipestone |
| | | KNKN403 | 491 | MN 10 - Le Sueur |
| | | KNKN416 | | |
| | | KNKN422 | 489 | MN 8 - Lac qui Parle |
| | | KNKN482 | 488 | MN 7 - Chippewa |
| | | KNLF368 | | |
| | | KNLF485 | 427 | IA 16 - Lyon |
| | | | 490 | MN 9 - Pipestone |
| | | KNLG882 | 267 | Sioux Falls, SD |
| | | KNLG884 | 427 | IA 16 - Lyon |
| | | | 490 | MN 9 - Pipestone |
| | | KNLG950 | | |
| | | WPOJ773 | | |
| | | WPOJ774 | | |
| | | WPOK679 | | |
| 0003464848 | ALLTEL Communications of VA No. 1, LLC | KNKA511 | | |
| | | KNKA655 | 262 | Danville, VA |
| | | KNKN622 | 688 | VA 8 - Amelia |
| | | KNKA704 | | |
| | | KNKA785 | | |
| | | KNKN791 | 681 | VA 1 - Lee |
| | | KNKN922 | | |
| | | KNKN986 | | |
| | | KNKQ285 | | |
| 0003464833 | Ohio RSA 6 Limited Partnership | KNKN955 | 590 | OH 6 - Morrow |
| 0003464836 | Ohio RSA 2 Limited Partnership | KNKN993 | 586 | OH 2 - Sandusky |
| 0003464834 | Ohio RSA 5 Limited Partnership | KNKN942 | 589 | OH 5 - Hancock |
| 0003464839 | Ohio RSA #3 Limited Partnership | KNKQ312 | 587 | OH 3 - Ashtabula |
| 0003464814 | Southern Illinois RSA Partnership | KNKN506 | 401 | IL 8 - Washington |
| | | KNKN820 | 402 | IL 9 - Clay |
| 0003464786 | WWC Holding Co., Inc. | KNKA571 | 276 | Grand Forks, ND |
| | | KNKA592 | 298 | Bismarck, ND |
| | | KNKA670 | 268 | Billings, MT |
| | | KNKA732 | 297 | Great Falls, MT |
| | | KNKA764 | | |
| | | KNKA790 | 299 | Casper, WY |
| | | KNKA822 | 221 | Fargo, ND |
| | | KNKN218 | 677 | UT 5 - Carbon |
| | | KNKN255 | 532 | MT 10 - Prairie |
| | | KNKN276 | 719 | WY 2 - Sheridan |
| | | KNKN278 | 355 | CO 8 - Kiowa |
| | | KNKN283 | 530 | MT 8 - Beaverhead |
| | | KNKN285 | 580 | ND 1 - Divide |
| | | KNKN286 | 678 | UT 6 - Piute |
| | | KNKN308 | 527 | MT 5 - Mineral |

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|--|--|---------|-----|----------------------|
| | | KNKN312 | 718 | WY 1 - Park |
| | | KNKN343 | 583 | ND 4 - McKenzie |
| | | KNKN372 | 351 | CO 4 - Park |
| | | KNKN380 | 523 | MT 1 - Lincoln |
| | | KNKN381 | 524 | MT 2 - Toole |
| | | KNKN382 | 531 | MT 9 - Carbon |
| | | KNKN409 | 356 | CO 9 - Costilla |
| | | KNKN430 | 529 | MT 7 - Fergus |
| | | KNKN431 | 528 | MT 6 - Deer Lodge |
| | | KNKN432 | 526 | MT 4 - Daniels |
| | | KNKN441 | 389 | ID 2 - Idaho |
| | | KNKN448 | 352 | CO 5 - Elbert |
| | | KNKN451 | | |
| | | KNKN522 | 482 | MN 1 - Kittson |
| | | KNKN554 | 354 | CO 7 - Saquache |
| | | KNKN782 | 584 | ND 5 - Mineral |
| | | KNKQ281 | 581 | ND 2 - Bottineau |
| | | KNKQ347 | 676 | UT 4 - Beaver |
| | | KNKQ383 | 675 | UT 3 - Juab |
| | | KNKQ449 | 721 | WY 4 - Niobrara |
| | | KNKR256 | | |
| | | KNKR258 | 722 | WY 5 - Converse |
| | | KNKR296 | 390 | ID 3 - Lemhi |
| | | KNKR311 | | |
| | | KNKR312 | 530 | MT 8 - Beaverhead |
| | | KNKR320 | | |
| | | KNLF934 | 483 | MN 2 - Lake of Woods |
| | | KNLF940 | 580 | ND 1 - Divide |
| | | | 583 | ND 4 - McKenzie |
| | | KNLG247 | 635 | SD 2 - Corson |
| | | | 636 | SD 3 - McPherson |
| | | | 637 | SD 4 - Marshall |
| | | KNLG760 | 639 | SD 6 - Haakon |
| | | | 640 | SD 7 - Sully |
| | | | 641 | SD 8 - Kingsbury |
| | | KNLG768 | | |
| | | KNLG773 | 639 | SD 6 - Haakon |
| | | | 640 | SD 7 - Sully |
| | | | 641 | SD 8 - Kingsbury |
| | | | 642 | SD 9 - Hanson |
| | | KNLG786 | 637 | SD 4 - Marshall |
| | | KNLG874 | | |
| | | KNLG880 | | |
| | | KNLG948 | | |
| | | KNLG952 | 637 | SD 4 - Marshall |
| | | KNLG953 | | |
| | | KNLG955 | | |
| | | KNLH737 | 483 | MN 2 - Lake of Woods |
| | | KNLH770 | | |
| | | KNLH771 | 490 | MN 9 - Pipestone |
| | | WPRU654 | | |
| | | WPSJ965 | | |

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| | WPSJ966 | | |
| | WPTM983 | 221 | Fargo, ND |
| | WPVV301 | 582 | ND 3 - Barnes |
| | WPYL297 | 583 | ND 4 - McKenzie |
| | WPYL298 | 634 | SD 1 - Harding |
| | WPZA503 | 527 | MT 5 - Mineral |
| | | 528 | MT 6 - Deer Lodge |
| | WPZA504 | 530 | MT 8 - Beaverhead |
| | WPZA505 | 523 | MT 1 - Lincoln |
| | WPZA506 | | |
| | WPZA507 | 523 | MT 1 - Lincoln |
| | WPZA508 | 523 | MT 1 - Lincoln |
| | | 527 | MT 5 - Mineral |
| | WPZA509 | 527 | MT 5 - Mineral |
| | | 528 | MT 6 - Deer Lodge |
| | | 530 | MT 8 - Beaverhead |
| | WPZA510 | 268 | Billings, MT |
| | WPZA512 | 354 | CO 7 - Saguache |
| | | 678 | UT 6 - Piute |
| | WPZA513 | 675 | UT 3 - Juab |
| | | 677 | UT 5 - Carbon |
| | | 678 | UT 6 - Piute |
| | WPZA514 | 351 | CO 4 - Park |
| | | 352 | CO 5 - Elbert |
| | | 354 | CO 7 - Saguache |
| | | 355 | CO 8 - Kiowa |
| | | 356 | CO 9 - Costilla |
| | WPZA798 | 221 | Fargo, ND |
| | | 276 | Grand Forks, ND |
| | | 482 | MN 1 - Kittson |
| | | 483 | MN 2 - Lake of Woods |
| | | 488 | MN 7 - Chippewa |
| | | 489 | MN 8 - Lac qui Parle |
| | | 490 | MN 9 - Pipestone |
| | | 581 | ND 2 - Bottineau |
| | | 582 | ND 3 - Barnes |
| | | 584 | ND 5 - Kidder |
| | WPZI386 | 523 | MT 1 - Lincoln |
| | WQBG798 | 523 | MT 1 - Lincoln |
| | | 524 | MT 2 - Toole |
| | | 526 | MT 4 - Daniels |
| | | 527 | MT 5 - Mineral |
| | | 528 | MT 6 - Deer Lodge |
| | | 529 | MT 7 - Fergus |
| | | 530 | MT 8 - Beaverhead |
| | | 531 | MT 9 - Carbon |
| | | 532 | MT 10 - Prairie |
| | WQBI461 | 298 | Bismark, ND |
| | | 482 | MN 1 - Kittson |
| | | 483 | MN 2 - Lake of Woods |
| | | 488 | MN 7 - Chippewa |
| | | 489 | MN 8 - Lac qui Parle |

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| | | | 490 | MN 9 - Pipestone |
| | | | 581 | ND 2 - Bottineau |
| | | | 582 | ND 3 - Barnes |
| | | | 584 | ND 5 - Kidder |
| | | WQBI463 | 351 | CO 4 - Park |
| | | | 352 | CO 5 - Elbert |
| | | | 354 | CO 7 - Saguache |
| | | | 355 | CO 8 - Kiowa |
| | | | 356 | CO 9 - Costilla |
| | | | 677 | UT 5 - Carbon |
| | | | 718 | WY 1 - Park |
| | | | 719 | WY 2 - Sheridan |
| | | | 721 | WY 4 - Niobrara |
| | | | 722 | WY 5 - Converse |
| | | WQBI467 | 354 | CO 7 - Saguache |
| | | | 678 | UT 6 - Piute |
| | | WQBI468 | 675 | UT 3 - Juab |
| | | | 677 | UT 5 - Carbon |
| | | | 678 | UT 6 - Piute |
| | | WQBI471 | 527 | MT 5 - Mineral |
| | | | 528 | MT 6 - Deer Lodge |
| | | WQBI472 | 527 | MT 5 - Mineral |
| | | | 528 | MT 6 - Deer Lodge |
| | | | 530 | MT 8 - Beaverhead |
| | | WQBK375 | 523 | MT 1 - Lincoln |
| | | WQBK376 | 523 | MT 1 - Lincoln |
| | | WQFA856 | | |
| | | WQFA858 | | |
| | | WQFA859 | | |
| 0003464784 | WWC License L.L.C. | KNKA573 | 253 | Sioux City, IA-NE |
| | | KNKA574 | | |
| | | KNKA597 | 267 | Sioux Falls, SD |
| | | KNKA731 | 289 | Rapid City, SD |
| | | KNKA784 | | |
| | | KNKN209 | 341 | CA 6 - Mono |
| | | KNKA212 | | |
| | | KNKN214 | 544 | NV 2 - Lander |
| | | KNKN215 | 547 | NV 5 - White Pine |
| | | KNKN217 | 558 | NM 6 - Lincoln |
| | | KNKN224 | | |
| | | KNKN230 | | |
| | | KNKN269 | | |
| | | KNKN272 | 641 | SD 8 - Kingsbury |
| | | KNKN273 | 642 | SD 9 - Hanson |
| | | KNKN298 | 640 | SD 7 - Sully |
| | | KNKN333 | 636 | SD 3 - McPherson |
| | | KNKN384 | 637 | SD 4 - Marshall |
| | | KNKN429 | 639 | SD 6 - Haakon |
| | | KNKN436 | 419 | IA 8 - Monona |
| | | KNKN443 | | |
| | | KNKN446 | 638 | SD 5 - Custer |
| | | KNKA451 | 483 | MN 2 - Lake Woods |

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|--|----------------|------------|--------------------------|
| | KNKN471 | | |
| | KNKN549 | 635 | SD 2 - Corson |
| | KNKN745 | | |
| | KNKQ381 | 634 | SD 1 - Harding |
| | KNKQ447 | | |
| | KNKR310 | | |
| | KNKR314 | | |
| | KNLF919 | | |
| | KNLG748 | | |
| | KNLH756 | | |
| | KNLH761 | | |
| | WPYQ934 | | |
| | WPYQ935 | | |
| | WPYQ936 | | |
| | WPYQ937 | | |
| | WPYQ938 | | |
| | WPYQ939 | | |
| | WPYQ940 | | |
| | WPYQ941 | | |
| | WPYQ942 | 253 | Sioux City, IA |
| | | 419 | IA 8 - Monona |
| | | 642 | SD 9 - Bon Homme |
| | WPYQ9434 | | |
| | WPYQ944 | 558 | NM 6 - Lincoln |
| | WPYW214 | | |
| | WPYW360 | 419 | IA 8 - Monona |
| | | 537 | NE 5 - Boone |
| | WPZA511 | | |
| | WPZA814 | 634 | SD 1 - Harding |
| | | 638 | SD 5 - Custer |
| | | 639 | SD 6 - Haakon |
| | WPZA815 | 558 | NM 6 - Lincoln |
| | WPZA816 | 547 | NV 5 - White Pine |
| | WPZI371 | | |
| | WPZI372 | | |
| | WPZI377 | 635 | SD 2 - Corson |
| | | 636 | SD 3 - McPherson |
| | | 637 | SD 4 - Marshall |
| | | 639 | SD 6 - Haakon |
| | | 640 | SD 7 - Sully |
| | | 641 | SD 8 - Kingsbury |
| | | 642 | SD 9 - Hanson |
| | WPZI378 | | |
| | WPZI379 | | |
| | WPZI380 | 558 | NM 6 - Lincoln |
| | WPZI381 | | |
| | WPZI382 | | |
| | WPZI383 | | |
| | WPZI384 | | |
| | WPZI385 | | |
| | WPZI387 | | |
| | WPZI388 | | |

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|------------|---|---------|-----|-------------------|
| | | WQAD514 | | |
| | | WQAD515 | 641 | SD 8 - Kingsbury |
| | | | 642 | SD 9 - Hanson |
| | | WQAD516 | | |
| | | WQBI448 | | |
| | | WQBI449 | | |
| | | WQBI450 | | |
| | | WQBI452 | | |
| | | WQBI453 | 558 | NM 6 - Lincoln |
| | | WQBI454 | 635 | SD 2 - Corson |
| | | | 636 | SD 3 - McPherson |
| | | | 637 | SD 4 - Marshall |
| | | | 639 | SD 6 - Haakon |
| | | | 640 | SD 7 - Sully |
| | | | 641 | SD 8 - Kingsbury |
| | | | 642 | SD 9 - Hanson |
| | | WQBI455 | 558 | NM 6 - Lincoln |
| | | WQBI457 | | |
| | | WQBI459 | 634 | SD 1 - Harding |
| | | | 638 | SD 5 - Custer |
| | | | 639 | SD 6 - Haakon |
| | | WQBI460 | | |
| | | WQBI462 | | |
| | | WQBI464 | | |
| | | WQBI465 | 558 | NM 6 - Lincoln |
| | | WQBI466 | 547 | NV 5 - White Pine |
| | | WQBI473 | | |
| | | WQBK368 | 419 | IA 8 - Monona |
| | | | 537 | NE 5 - Boone |
| | | WQBK369 | | |
| | | WQBK374 | | |
| | | WQBK377 | | |
| | | WQDG563 | | |
| | | WQDG564 | 641 | SD 8 - Kingsbury |
| | | | 642 | SD 9 - Hanson |
| | | WQGM465 | | |
| 0003464406 | ALLTEL Communications of New Mexico, Inc. | KNKN216 | 557 | NM 5 - Grant |
| | | KNKN247 | | |
| | | KNKN270 | 553 | NM 1 - San Juan |
| | | KNKN297 | | |
| 0003464404 | ALLTEL Communications of Nebraska, Inc. | KNKN392 | 537 | NE 5 - Boone |
| | | KNKA295 | | |
| | | KNKA435 | | |
| | | KNKN365 | | |
| | | KNKN404 | | |
| | | KNKN423 | | |
| | | KNKN424 | | |
| | | KNKN504 | | |
| | | KNKN579 | | |
| | | KNKN615 | | |
| | | KNKN651 | | |
| | | KNKN802 | | |

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| 0003464703 | ALLTEL Communications of the Southwest L.P. | KNKN206 | 322 | AZ 5 - Gila |
| | | KNKA303 | | |
| | | KNKA321 | | |
| | | KNKA332 | | |
| | | KNKA340 | | |
| | | KNKQ379 | | |
| 0003465057 | Las Cruces Cellular Telephone Company | KNKA605 | 285 | Las Cruces, NM |

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

July 6, 2009

Hon. Christine Varney
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Washington, D.C.

Hon. Julius Genachowski
Chairman
Federal Communications Commission
Washington, D.C.

Dear Assistant Attorney General Varney and Chairman Genachowski:

I am writing regarding competition in the cell phone market. Wireless telephones have become a vital means of communications for the vast majority of Americans, with over 270 million subscribers nationwide. Recently, we on the Antitrust Subcommittee have become concerned with emerging barriers to competition in an already highly concentrated market. Four carriers control over 90% of the cell phone market, and two of them collectively have a market share of 60%. I therefore believe it is vitally important that the FCC and Justice Department take action to enhance competition in this market and to remove barriers to competition preventing the emergence of new competitors.

On June 16, the Antitrust Subcommittee held hearings on rising text message prices and the state of competition in the cell phone industry generally. Our hearing came after a doubling of text message prices charged by the four largest carriers on a per message basis from 2006 to 2008. In the span of two years, the four leading carriers raised text messaging prices charged on per message basis from 10 to 20 cents per message. These lockstep price increases occurred despite the fact that it did not appear to be justified in any respect by rising costs in delivering text messages, which an expert at our hearing testified cost about 0.3 cents per message to transmit.

The cell phone companies testified that they did not coordinate their price increases in any way, and we received no evidence to contradict this testimony. Nonetheless, these identical price increases are hardly consistent with the vigorous price competition we hope to see in a competitive marketplace. Indeed, these price increases may represent a warning sign for the state of competition in the cell phone market. I am concerned that the concentrated nature of the cell phone marketplace could lead to future price increases for this and other cell phone services relied upon by millions of Americans.

I therefore urge that the Justice Department and FCC take action to ensure that the wireless telephone market is open to competition, and to remove undue barriers to entry and expansion by new competitors. With respect to the FCC, these actions include:

(i) **Strengthening Roaming Requirements** – It is essential that competitive cell phone carriers have reasonable access to interconnect with the networks of the established carriers (generally referred to as “roaming”) in order to have a fair chance to compete. In 2007, the FCC clarified that automatic roaming is a common carrier service that must be provided on just, reasonable, and nondiscriminatory terms. See Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817 (2007). But the FCC limited its decision in two critical respects, both of which are the subject of additional pending proceedings.

First, the FCC implemented the so-called “in-market exception” that permits carriers to refuse roaming agreements where the requesting carrier holds an overlapping spectrum license or lease. Because a number of licenses purchased by small and regional carriers in recent auctions are quite large, they will take years to build out -- meaning that the in-market exception in many cases results in a severe limitation or outright denial of roaming service to consumers (particularly underserved consumers whose primary access to wireless service is through small and mid-sized carrier flat-rate offerings). Several carriers have filed petitions for reconsideration in WT Docket No. 05-265 that are primarily focused on eliminating the in-market exception, and those petitions are still pending. Except for AT&T and Verizon, the entire wireless industry (including Sprint, T-Mobile, Cricket, MetroPCS, US Cellular, and hundreds of rural carriers) supports repeal of the in-market exception. I urge the FCC to repeal this exemption

Second is the issue of “data roaming,” the ability of carriers to gain roaming for data – such things as internet connections and email. These applications are essential to building a competitive cell phone service, given the millions of consumers who use “smart phones” for these applications. To date, the FCC has declined to impose any obligation for data roaming for wireless broadband. The FCC has instead sought further comment on whether automatic roaming should apply to data, but so far it has not taken any action on that score. An automatic data roaming obligation is critical to the continued growth of competitive wireless service offerings that will discipline the pricing and services of the large incumbent wireless operators. I urge the FCC to require carriers to provide data, as well as voice roaming, on just, reasonable and nondiscriminatory terms.

(ii) **Spectrum Constraints** In the 1990s, the FCC allocated a considerable amount of new spectrum for wireless services and adopted regulations to ensure that the spectrum was allocated among a range of wireless providers. Since 2001, however, the FCC has taken a more “hands-off” approach, and consequently, the nation's largest carriers have systematically absorbed smaller providers and acquired the lion's share of spectrum made available at auction. Most recently, AT&T and Verizon dominated the 700 MHz auction, paying approximately \$16 billion for new licenses -- or 84 percent of auction revenues. Small and mid-sized carriers have urged the FCC (i) to identify and

allocate additional spectrum to meet the growing demand for wireless voice, broadband and other advanced data services, and (ii) to adopt auction eligibility regulations to ensure that licenses are assigned to a range of different providers to promote competition and prevent the nation's largest providers from stockpiling even more spectrum. I urge the FCC to adopt pro-competitive spectrum policies so that new and emerging cell phone carriers can compete with established carriers.

(iii) **Handset exclusivity.** The practice of the large cell phone companies gaining exclusive deals to the most in-demand cell phones is a serious barrier to competition. Consumers are unlikely to obtain cell phone service from companies if they cannot obtain desired handsets. In 2008, the Rural Cellular Association petitioned the FCC to begin a rulemaking to evaluate exclusivity arrangements between wireless carriers and handset manufacturers. *See Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (May 20, 2008).* Earlier this month, then Acting Commissioner Copps stated in a speech that he "agree[s] that [the FCC] should open a proceeding to closely examine handset exclusivity arrangements that have reportedly become more prevalent in recent years," and instructed the Wireless Bureau "to begin crafting such an item." *Remarks of FCC Acting Chairman Michael J. Copps, Pike & Fischer's Broadband Policy Summit V (June 18, 2009).* I concur with this view and urge the FCC to examine this issue closely, and take action to prevent the dominant cell phone providers from gaining exclusive access to the most in-demand cell phones.

(iv) **Early termination fees.** With many consumers signing two year contracts, expensive early termination fees can constitute a substantial barrier to competition. Early termination fees should be prorated, so that consumers do not face substantial penalties for switching to a different cell phone providers. At our June 16 hearing, for example, AT&T testified that in a two year contract the \$ 175 early termination fee was reduced by \$ 5 per month, leaving a \$ 60 balance owed if the consumer terminated the contract with one month remaining. Early termination fees that are not pro-rated in proportion to the time remaining on the contract are effectively a penalty to consumers who wish to switch cell phone providers.

(v) **Special Access.** It is essential that the FCC take action to ensure with respect to reform of special access regulations. Wireless competitors depend on reasonable special access rates to the incumbent phone companies' networks in order to connect their calls. A GAO Report issued on November 26, 2006 found that little competition existed for special access connections in much of the country. In 2005, the FCC released a Notice of Proposed Rulemaking to examine the regulatory framework to apply a price cap on interstate special access services. *See Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005).* In 2007, the Commission asked the parties to refresh the record with additional information. *See FCC Public Notice, Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking, 22 FCC Rcd 13352 (2007).* The

Commission has not yet acted on that issue. I urge the FCC to take action so that special access rates do not constitute an additional barrier to competition.

(vi) Commercial Mobile Radio Service Competition Report. The FCC is currently conducting its annual review of the wireless market. In preparing the Fourteenth Annual report, we strongly urge the FCC to consider a broader range of factors within its current standard framework for evaluating competition. Specifically, in considering the market structure, the FCC should conform to traditional antitrust conclusions regarding appropriate HHI levels for determining the existence of competition. The choices that matter most to consumers are the plans and providers available to them in their area. The FCC should also examine the impact of HHIs at the regional level.

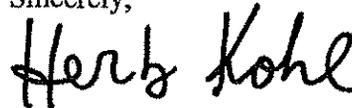
In considering the conduct of cell phone companies, the FCC should examine parallel pricing and parallel conduct from providers. In evaluating consumer behavior and choice, the FCC should consider the impact of early termination fees, lengthy contracts, and handset exclusivity arrangements. Finally, it is critical that the Commission take a close look at substantial barriers to entry and growth in the wireless markets, including limited access to spectrum, excessive costs for special access services, and loopholes in the existing roaming regulations.

FCC action on these items can remove unnecessary barriers to competitive and ensure a competitive cell phone market for the benefit of consumers. I look forward to working with the FCC on these issues.

With respect to the Justice Department, we urge that the Antitrust Division closely examine the cell phone industry to insure that dominant carriers do not take action to stifle competition or engage in conduct contrary injurious to competition in violation of antitrust law. I urge the Department to take all actions necessary to ensure that the market remain open to competition. I also urge that the Department closely scrutinize any future mergers or acquisitions proposed in this industry to ensure that they are not likely to cause any substantial injury to competition.

Thank you both for your attention to this matter.

Sincerely,



HERB KOHL

Chairman, Subcommittee on
Antitrust, Competition Policy, and
Consumer Rights

John T. Scott, III
Vice President &
Deputy General Counsel
Regulatory Law



Verizon Wireless
1300 I Street, N.W.
Suite 400 West
Washington, DC 20005

Phone 202 589-3760
Fax 202 589-3750
john.scott@verizonwireless.com

July 17, 2009

Written Ex Parte Presentation

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

Re: RM-11497, Rural Cellular Association Petition for Rulemaking Regarding
Exclusivity Arrangements Between Commercial Wireless Carriers and Handset
Manufacturers

WT Docket No. 09-66, Fourteenth Annual Report and Analysis of Competitive
Market Conditions with Respect to Commercial Mobile Services

Dear Ms. Dortch:

Enclosed herewith for filing in the above-referenced dockets are copies of letters from Lowell C. McAdam, President and Chief Executive Officer of Verizon Wireless, to Representative Rick Boucher, Senator John F. Kerry and Senator John D. Rockefeller IV. The letters set forth Verizon Wireless's new policy on handset exclusivity arrangements.

Pursuant to Section 1.1206 of the Commission's Rules, this ex parte presentation is being filed electronically in these proceedings. Should you have questions regarding this filing, please contact the undersigned.

Respectfully submitted,

A handwritten signature in black ink that reads "John T. Scott, III" with a stylized flourish at the end.

John T. Scott, III

Enclosures

Lowell C. McAdam
President & Chief Executive Officer



Verizon Wireless
One Verizon Way
VC48E080
Basking Ridge, NJ 07920

Phone 908 559-7310
Fax 908 559-7526

July 17, 2009

The Honorable Rick Boucher
Chairman
Subcommittee on Communications, Technology and the Internet
House Committee on Energy and Commerce
U.S. House of Representatives
2187 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Boucher:

Last February, a group of 24 small wireless providers asked Verizon Wireless to eliminate long-term exclusive handset agreements with LG and Samsung. We agreed to do so for those small providers. Today I am writing to reaffirm that commitment and to let you know that Verizon Wireless is taking an even bolder step to transform exclusive handset arrangements. Effective immediately for small wireless carriers (those with 500,000 customers or less), any new exclusivity arrangement we enter with handset makers will last no longer than six months – for all manufacturers and all devices.

This new approach is fair to all sides. Exclusivity arrangements promote competition and innovation in device development and design. We work closely with our vendors to develop new and exciting devices that will attract customers. When we procure exclusive handsets from our vendors we typically buy hundreds of thousands or even millions of each device. Otherwise manufacturers may be reluctant to make the investments of time, money and production capacity to support a particular device. This of course constitutes a major risk for us, because if the device is not popular in the marketplace we end up with excess inventory and potential competitive losses. On the other hand, if the device does well in the market, six months is a reasonable time for us to earn the benefit of our risk and investment.

Moreover, we have no objection to small carriers having full access to any manufacturer's portfolio of prototypes and products in development, without being informed which may have been selected by Verizon Wireless. Obviously our pre-launch product selections are proprietary and must remain confidential between us and our vendors.

Our actions today are consistent with our long track record of leading the vibrant, highly competitive wireless industry in new and innovative directions that benefit consumers. We would be happy to meet with you or your staff to discuss this further.

Sincerely,

A handwritten signature in black ink, appearing to read "L. C. McAdam". The signature is fluid and cursive, with the first name "L." and last name "McAdam" clearly distinguishable.

Lowell C. McAdam

cc: Chairman Waxman
Ranking Member Barton
Ranking Member Stearns

Lowell C. McAdam
President & Chief Executive Officer



Verizon Wireless
One Verizon Way
VC43E030
Basking Ridge, NJ 07920

Phone 908 559-7310
Fax 908 559-7528

July 17, 2009

The Honorable John F. Kerry
Chairman
Subcommittee on Communications, Technology and the Internet
Committee on Commerce, Science and Transportation
United States Senate
Room 218, Russell Office Building
Washington, D.C. 20510

Dear Chairman Kerry:

Last February, a group of 24 small wireless providers asked Verizon Wireless to eliminate long-term exclusive handset agreements with LG and Samsung. We agreed to do so for those small providers. Today I am writing to reaffirm that commitment and to let you know that Verizon Wireless is taking an even bolder step to transform exclusive handset arrangements. Effective immediately for small wireless carriers (those with 500,000 customers or less), any new exclusivity arrangement we enter with handset makers will last no longer than six months – for all manufacturers and all devices.

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Sincerely,

A handwritten signature in cursive script, appearing to read "L. C. McAdam".

Lowell C. McAdam

cc: Ranking Member Ensign

Lowell C. McAdam
President & Chief Executive Officer



Verizon Wireless
One Verizon Way
VC43E030
Basking Ridge, NJ 07920

Phone 908 559-7310
Fax 908 559-7326

July 17, 2009

The Honorable John D. Rockefeller IV
Chairman
Committee on Commerce, Science and Transportation
United States Senate
Room 531, Hart Office Building
Washington, D.C. 20510

Dear Chairman Rockefeller:

Last February, a group of 24 small wireless providers asked Verizon Wireless to eliminate long-term exclusive handset agreements with LG and Samsung. We agreed to do so for those small providers. Today I am writing to reaffirm that commitment and to let you know that Verizon Wireless is taking an even bolder step to transform exclusive handset arrangements. Effective immediately for small wireless carriers (those with 500,000 customers or less), any new exclusivity arrangement we enter with handset makers will last no longer than six months – for all manufacturers and all devices.

This new approach is fair to all sides. Exclusivity arrangements promote competition and innovation in device development and design. We work closely with our vendors to develop new and exciting devices that will attract customers. When we procure exclusive handsets from our vendors we typically buy hundreds of thousands or even millions of each device. Otherwise manufacturers may be reluctant to make the investments of time, money and production capacity to support a particular device. This of course constitutes a major risk for us, because if the device is not popular in the marketplace we end up with excess inventory and potential competitive losses. On the other hand, if the device does well in the market, six months is a reasonable time for us to earn the benefit of our risk and investment.

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Our actions today are consistent with our long track record of leading the vibrant, highly competitive wireless industry in new and innovative directions that benefit consumers. We would be happy to meet with you or your staff to discuss this further.

Sincerely,

A handwritten signature in black ink, appearing to read "L. C. McAdam". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lowell C. McAdam

cc: Ranking Member Hutchison

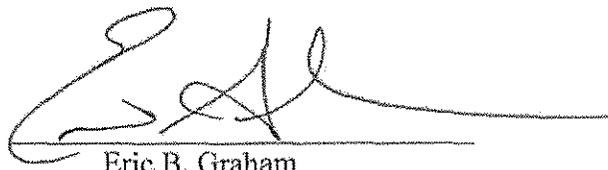
DECLARATION

I, Eric B. Graham, declare and state the following:

1. I am the Vice President of Government Relations for Cellular South, Inc. ("Cellular South"), a wireless telecommunications carrier that provides cellular and/or Personal Communications Service in portions of Mississippi, Alabama, Florida and Tennessee and holds authorizations to provide services in additional states. Cellular South's address is 1018 Highland Colony Parkway, Suite 300, Ridgeland, MS 39157.

2. I am familiar with the facts alleged by Cellular South in the foregoing petition to deny the applications of AT&T, Inc. and Cellco Partnership d/b/a Verizon Wireless ("VZW") for the Commission's consent to the transfer of control or assignment of the various radio stations authorizations and spectrum leases held by VZW. All such facts, except for those of which official notice may be taken by the Commission or those based on the representations of the applicants, are true and correct of my own personal knowledge.

3. I certify under penalty of perjury that the foregoing is true and correct. Executed on July 20, 2009.


Eric B. Graham

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 20th day of July, 2009, copies of the foregoing PETITION TO DENY 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