

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

In re Applications of)	
)	
AT&T INC. and CELLCO PARTNERSHIP)	
D/B/A VERIZON WIRELESS)	DA 09-1978
)	WT Docket No. 09-121
For Consent to Assign or Transfer Control of)	
Licenses and Authorizations and Request a)	
Declaratory Ruling on Foreign Ownership)	
)	
File Nos. 0003888718 <i>et al.</i>)	

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 09-1978, (August 31, 2009), hereby petitions the Commission to deny the above-captioned applications of AT&T Inc. (“AT&T”) and Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless” or “VZW”) (the “Centennial Spin-Off Applications”). 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 800,000 customers primarily in rural areas. ¹

The Centennial Spin-Off Applications relate to the still-pending applications for consent

¹ Cellular South 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.

to allow AT&T to acquire control of the same licenses and authorizations from Centennial Communications Corp. and its subsidiaries (jointly “Centennial”) (the “Centennial-AT&T Applications”). On January 15, 2009, Cellular South filed a petition to deny the Centennial-AT&T Applications.² For reasons shown in that petition, the Commission should deny the applications and then dismiss as moot the instant Centennial Spin-Off Applications, Even if the Commission were to conditionally approve the Centennial-AT&T Applications it should not allow VZW to acquire control of the licenses that are the subject of the instant applications, or it should condition the approval as Cellular South will request herein.

STANDING

If the Commission consents to the Centennial Spin-Off Applications VZW will acquire, among other assets, the Block A cellular system and subscribers in the Mississippi 8 – Claiborne CMA (“MS 8 CMA”) and enhance its ability to compete directly with Cellular South in that market where Cellular South provides cellular service on Block B under the call sign KNKN644.

Verizon Wireless claims that it will be “...a stronger and more effective competitor” in the CMAs at issue if the Commission approves the proposed transactions.³ With current spectrum holdings of 72 MHz in four of the six counties that comprise the MS 8 CMA, and somewhat lesser holdings in the other two counties,⁴ there is little doubt that VZW would become a more vibrant competitor than Centennial in the MS 8 CMA and the increased competition can be expected to cause Cellular South to sustain economic injury that is direct, tangible and immediate.

² See, WT Docket No. 08-246, DA 08-2713, File Nos. 0003652447 et al.

³ Centennial Spin-Off Applications, Exhibit 1, p. 9.

⁴ Centennial Spin-Off Applications, Exhibit 3, p. 1.

Cellular South’s status as a direct and current competitor provides it with standing to file a petition to deny the Centennial Spin-Off 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 Centennial Spin-Off 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).⁵ If it does so again in this 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 Verizon Wireless

⁵ To establish Article III standing, a party must allege specific facts showing that: (1) it will 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.

as the Block A cellular operator in the MS 8 CMA. VZW will be able to offer customers handsets with a variety of features that Centennial was not able to offer and Cellular South cannot offer. Because of its exclusive dealing arrangements with the handset manufacturers, Verizon Wireless alone can offer potential customers some of the most popular handsets, including Research in Motion's ("RIM") Blackberry Storm[®]. That will give VZW a significant competitive advantage over Cellular South since many customers primarily choose their service provider on the basis of its handset offerings. So long as VZW maintains that advantage in the marketplace, Cellular South can expect to lose customers in the MS 8 CMA.

The fact that Verizon Wireless promises to be a stronger competitor than Centennial obviously establishes a causal link between the Centennial Spin-Off 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 Centennial Spin-Off Applications or grants them subject to conditions that would prevent VZW from acting anticompetitively.⁶

ARGUMENT

I. VERIZON WIRELESS HAS NOT COMPLIED WITH A ROAMING CONDITION IN THE VZW/ALLTEL MERGER APPROVAL

VZW and Cellular South are parties to an automatic roaming agreement that includes, among other things, terms by which each company is to provide data roaming to the subscribers of the other carrier on an automatic basis. After VZW acquired ALLTEL, the terms of that roaming agreement should apply equally to both the longstanding VZW service areas and also VZW's newly acquired ALLTEL service areas. That is because the Commission, upon approving VZW's acquisition of ALLTEL, included an explicit condition that each "...regional,

⁶ 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 Centennial Spin-Off Applications.

small, and/or rural carrier that currently has roaming agreements with both ALLTEL and Verizon Wireless [will have] the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless.”⁷ The merger was completed on January 9, 2009 and, despite numerous written and verbal requests by Cellular South, VZW has still not allowed Cellular South’s customers to obtain wireless data services when roaming on CDMA systems that were previously ALLTEL’s.⁸ This situation has serious competitive implications for Cellular South and service implications for its customers who frequently travel from Mississippi markets served by Cellular South into nearby Arkansas markets that were served by ALLTEL.

Since January of this year, Cellular South has also repeatedly requested VZW to negotiate in good faith for extension of the current automatic roaming agreement for voice and data services, on reasonable terms and conditions. Those requests had been met with delay by VZW until Friday, September 29, when Cellular South received an unsigned document from VZW which, if signed by VZW, would extend the term of the companies’ roaming agreement. Without an automatic roaming agreement in place that lasts beyond the current expiration, Cellular South is limited in its ability to plan and make financing arrangements for expansion and upgrades to its network.

At a minimum, if the Centennial Spin-Off Applications are granted, conditions should be imposed that will require Verizon Wireless to honor a condition in the VZW-ALLTEL merger approval order that would allow Cellular South customers to benefit from data roaming service while in the former ALLTEL markets, consistent with the agreement in place between Cellular

⁷ See *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17524 (2008) (“VZW/ALLTEL”)

⁸ Cellular South also had a roaming agreement with ALLTEL but ALLTEL had refused to provide for automatic data roaming in that agreement.

South and VZW. And Cellular South respectfully requests that the Commission require VZW to honor its commitment to extend current roaming arrangements.

II. VZW'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 arrangements involving the nation's "Big 4" wireless carriers.⁹ 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 arrangements.¹⁰ 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.¹¹

Cellular South's efforts before Congress 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 Department of Justice to investigate handset exclusivity arrangements.¹² The collective efforts of Cellular South and the other rural wireless carriers finally led VZW to

⁹ 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).

¹⁰ See Written Statement of Victor "Hu" Meena on "The Consumer Wireless Experience" before the Senate Committee on Commerce, Science and Transportation (June 17, 2009).

¹¹ See Petition, at 19-20; Petition to Deny of Cellular South, Inc., WT Docket No. 08-246, at 7-8 (Jan. 15, 2009).

¹² See *infra* Ex. 2 (Letter from Senator Herb Kohl to Christine Varney and Julius Genachowski (July 6, 2009)).

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.¹³ However, VZW's voluntary concession is retractable, and no similar 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 "on the role that handsets play in the extent of competition in the CMRS marketplace."¹⁴ 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.¹⁵ 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.¹⁶ 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 Storm, they simply will not remain competitive with carriers such as AT&T and VZW.

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.¹⁷ However, the Commission has suggested that it would be improper for a party to

¹³ See *infra* Ex. 3 (Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 09-66 (July 17, 2009)).

¹⁴ *Wireless Telecommunications Bureau Seeks Comment on CMRS Market Competition*, 24 FCC Rcd 5618, 5626 (WTB 2009).

¹⁵ See Reply Comments of Rural Cellular Association, WT Docket No. 09-66, at 2-7 (July 13, 2009).

¹⁶ See *id.* at 6.

¹⁷ 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

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,”¹⁸ and perhaps never more so than in *VZW/ALLTEL*.

III. THE COMMISSION CANNOT ALLOW AT&T TO PROFIT FROM THE SALE OF LICENSES IT SHOULD BE 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

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.

¹⁸ 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.*

public interest finding for any reason.¹⁹ It did so again in *VZW/ALLTEL*.²⁰

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). The Commission has made no findings as to AT&T’s qualifications to acquire control of the Centennial licenses that are now the subject of the Centennial Spin-Off Applications. Indeed there are sound reasons why the Commission should not find AT&T qualified to acquire control of the Centennial licenses in general and the MS 8 CMA license in particular.²¹

The Commission never authorized AT&T to hold the licenses for the 5 markets it now proposes to resell to VZW nor found AT&T qualified to provide service under those licenses to the public in those particular markets. And the Commission should not permit AT&T to obtain those authorizations for the purpose of reselling them. The Centennial Spin-Off Applications include no representations that can allow the Commission to conclude that AT&T will not resell the authorizations to VZW for a profit, a situation that would constitute trafficking under § 1.948(i) of the Rules.²²

¹⁹ See, e.g., *AT&T, Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295, 20302 (2007).

²⁰ See *VZW/ALLTEL*, 23 FCC Rcd at 17461. 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.²⁰ 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.

²¹ See, Cellular South’s Petition to Deny the Centennial-AT&T applications, pp. 5-10.

²² Under § 1.948(i), which applies to all wireless services,²² “[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 to the public.”²² Accordingly, the Commission has reserved its authority to review transfer of control applications “to determine if the

AT&T must be required to disclose in accordance with § 1.948(i)(2) of the Rules whether the sale price for the 5 markets will allow it to profit from resale of the licenses to VZW. If AT&T does not carry its burden to prove that it is not trafficking,²³ or if the Commission for any reason cannot make the finding that the resale of the licenses would serve the public interest, the Centennial Spin-Off Applications must be designated for hearing. *See* 47 U.S.C. § 309(e).

REQUEST FOR RELIEF

For the reasons explained in Cellular South's petition regarding the Centennial-AT&T Applications, the Commission should deny those applications and then dismiss as moot the instant Centennial Spin-Off Applications. Alternatively, it is requested that the Commission (1) designate the Centennial Spin-Off Applications for hearing and require AT&T to show that it is not engaging in trafficking or, in the alternative, (2) grant the applications subject to the conditions requested herein.

Respectfully submitted,



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September 30, 2009

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 Centennial Spin-Off Applications must be reviewed for trafficking in licenses potential.

²³ *See id.*

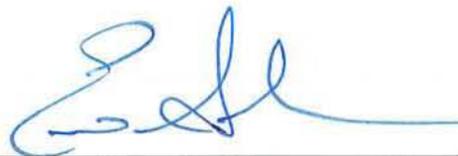
DECLARATION

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

1. I am the Vice President - Government Relations of 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 certain licenses and authorizations AT&T Inc. expects to acquire from Centennial Communications Corp. and subsidiaries. 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 September 28, 2009.



Eric B. Graham

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 30th day of September, 2009, copies of the foregoing PETITION TO DENY OF CELLULAR SOUTH, INC. were sent by e-mail, in pdf format, to the following:

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