

**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>)	

**REPLY OF CELLULAR SOUTH TO JOINT OPPOSITION OF
VERIZON WIRELESS AND AT&T INC. TO PETITION TO DENY**

Cellular South, Inc. (“Cellular South”), by its attorneys, hereby replies to the joint opposition filed by Cellco Partnership d/b/a Verizon Wireless (“VZW”) and AT&T Inc. (“AT&T”) to the petition to deny filed with respect to the above-captioned applications (“Centennial Spin-Off Applications”) by Cellular South.¹ In reply thereto, the following is respectfully submitted:

I. **VZW’S FAILURE TO COMPLY WITH ROAMING OBLIGATIONS MUST NOT BE REWARDED WITH APPROVAL TO ACQUIRE AN OPERATING CELLULAR SYSTEM IN A MARKET SERVED BY CELLULAR SOUTH**

VZW acknowledges that Cellular South elected to rely upon its current roaming agreement with VZW, and not Cellular South’s more limited roaming agreement with ALLTEL, in exchanging traffic with post-merger VZW.² In fact, it was just one week after the VZW-ALLTEL merger was completed, that Cellular South, on January 16, 2009, sent a letter to VZW formally requesting to add the former ALLTEL markets to the VZW-Cellular South roaming

¹ See Joint Opposition of VZW and AT&T to Petition to Deny, WT Docket No. 09-121 (October 13, 2009) (“Jt. Opp.”).

² Jt. Opp. At 4-5.

agreement that includes automatic data roaming (unlike the ALLTEL-Cellular South roaming agreement which did not due to ALLTEL's refusal to permit EVDO data roaming despite the compatibility of the two carriers' networks).

In the Joint Opposition VZW claims that it is "currently working with Cellular South to implement data roaming in the former ALLTEL territory."³ VZW then states that it "is waiting for Cellular South to determine which deployment path it prefers (i.e., 1xRTT via MIP or 1xRTT via L2TP)" and thereafter, once that is decided, the implementation of data roaming in the former ALLTEL territory "cannot occur overnight and involves significant time and resources to integrate and upgrade ...[both companies'] networks."⁴

At this point it is essential to eliminate any confusion that might result from VZW's statements about which company has made diligent efforts to implement data roaming in the former ALLTEL markets. Cellular South has been prompt and persistent in its efforts to make all necessary arrangements for data roaming by Cellular South customers in the former ALLTEL markets, and by former ALLTEL customers in Cellular South markets. Following Cellular South's January 16th election, Cellular South was in contact with VZW personnel responsible for roaming affairs on each of the following dates to request action to implement an exchange of data roaming traffic: 2/13/09; 2/27/09; 3/2/09; 3/18/09; 3/19/09; 3/20/09; 4/28/09; 5/14/09; 5/15/09; 5/20/09; 6/2/09; 6/16/09; 6/19/09; 7/7/09; 7/15/09; 7/17/09; 7/24/09; 8/3/09; 8/7/09; 9/3/09; 9/10/09; 9/16/09; 9/21/09; 9/22/09; 9/23/09; 10/1/09; and 10/2/09. Availability of data roaming in the adjoining state of Arkansas where ALLTEL operated and now VZW owns a robust wireless network is an urgent matter for Cellular South's customers and an important competitive issue in the MS 8 market that VZW would acquire from Centennial, via AT&T. But

³ Jt. Opp. at 5 (fn. omitted)

⁴ Jt. Opp. at 5.

it was not until Cellular South highlighted in this proceeding the lack of progress in implementing data roaming that VZW began the process of working through the basic technical matters that need to be addressed to make data roaming a reality for Cellular South and former ALLTEL customers. Cellular South has responded quickly to each question recently asked by VZW, and the remaining technical details are not difficult to resolve. Cellular South urges the Commission to be aware that, by all indications, it is the desire by VZW to obtain Commission consent in this proceeding that has motivated the recent but minimal progress, after 7 1/2 months of delay by VZW. As the Commission considers approving the assignment of licenses and other assets to an entity that is failing to meet a roaming condition previously imposed by the Commission, Cellular South respectfully asks the Commission to delay action on the applications until VZW has taken all steps necessary to facilitate data roaming with Cellular South in the former ALLTEL markets. At a minimum, there should be a condition in any consent granted in this proceeding to require VZW to certify completion of all actions necessary on its part to facilitate data roaming with Cellular South in the former ALLTEL markets before it consummates acquisition of the MS 8 license at issue in this proceeding.⁵

II. NO NEW DEVICE EXCLUSIVITY AGREEMENTS SHOULD BE PERMITTED WHILE THE COMMISSION CONSIDERS A PROHIBITION ON SUCH AGREEMENTS

AT&T and VZW continue to discourage competition and limit consumer choice by monopolizing devices through the use of exclusivity agreements. Barely a week passes without

⁵ In the Jt. Opp., n. 11, VZW comments on its delay in responding to Cellular South's requests to extend the current automatic roaming agreement for voice and data services between VZW and Cellular South. After repeated requests by Cellular South over more than 6 months for a written extension agreement, an unsigned document was recently sent by VZW for signature by Cellular South which promptly signed and returned the extension to VZW. VZW's signature on the document has been received by Cellular South.

an announcement by AT&T or Verizon, or a press release by a device manufacturer, of a new exclusivity arrangement involving one of those two carriers.

AT&T and VZW argue that this matter is “unrelated to the transaction under review” and that the Commission should summarily dismiss Cellular South’s call for a condition relating to device exclusivity agreements upon any grant of consent to the proposed transaction.⁶ And yet the impact of these agreements upon competition among carriers and the ability to use devices on the network of their choice is undeniable. The Commission would be well within proper bounds to defer action on the Centennial Spin-Off Applications until it has resolved the issues surrounding exclusive device agreements in the pending inquiry of the matter. Alternatively, by a condition attached to grant of consent to the applications the Commission could prohibit AT&T and VZW from entering into any new agreements for device exclusivity until the general inquiry is completed.⁷

III. THE CENTENNIAL SPIN-OFF APPLICATIONS SHOULD BE DESIGNATED FOR AN EVIDENTIARY HEARING ON A TRAFFICKING ISSUE

A. Designation for Hearing Would Partially Remedy an AT&T Unlawful Acquisition of the Centennial Properties

Despite AT&T’s attempt to justify a different conclusion, the Commission must consider evidence of trafficking when making a public interest determination under §§ 308 and 310(d) of the Act when the application is subject to a § 309(d) petition to deny. The Centennial Spin-Off Applications must undergo particularly strict scrutiny for trafficking because AT&T has not been found qualified to hold the Centennial licenses that it now seeks to resell to VZW. The Commission should partially remedy its failure to hold a hearing on AT&T’s applications to

⁶ Jt. Opp. at 7.

⁷ The Commission’s practice of dealing with harmful conduct by condition is a recognized and well established tool in its regulatory toolbox. See Petition to Deny of Cellular South, Inc. (“Petition”) at n. 8.

acquire these licenses by holding a hearing on AT&T's qualifications to transfer the licenses.

B. The Anti-Trafficking Rule Applies to the Proposed Sale of Licenses that AT&T is Unqualified to Hold and Systems It Was Unqualified to Operate

The Commission's public interest analysis begins with an assessment of whether the proposed transaction complies with the applicable provisions of the Act and the Rules, *see VZW/ALLTEL*, 23 FCC Rcd at 17460, including the threshold determination of whether the applicants have "the requisite qualifications to hold and transfer licenses" under § 310(d) and the Rules. *See id.* at 17464. The most applicable rule is § 1.948, which specifically governs the Commission's consideration of transfer of control and assignment applications of licenses in the Wireless Radio Services. *See* 47 C.F.R. § 1.948. And that rule both makes trafficking in licenses contrary to the public interest and makes attempting to traffic in licenses relevant to an applicant's qualifications to hold and transfer the authorizations. *See id.* § 1.948(i).

VZW and AT&T contend that "the anti-trafficking rules are not aimed at subsequent sales of *constructed* facilities *acquired at a market price* as is the case here."⁸ However, the language of § 1.948(i) is not limited to the subsequent sale of unconstructed facilities that were acquired at market price. Moreover, AT&T has disclosed neither the prices it will pay for the Centennial facilities nor the prices at which it is proposing to sell those facilities to VZW.

The anti-trafficking rule applies to obtaining an "authorization" for the "principal purpose of speculation or profitable resale of the authorization rather than for the provision of telecommunications services to the public." 47 C.F.R. § 1.948(h). A license for an operating wireless telecommunications system is no less of an "authorization" than is a bare construction

⁸ *Jt. Opp.*, at 8 (emphasis in original) (footnotes omitted).

permit.⁹ And the application of the anti-trafficking rule was not limited by the two cases cited by VZW and AT&T.¹⁰

AT&T's conduct falls squarely under the purview of the anti-trafficking rule. It is beyond dispute that AT&T proposes to obtain the authorizations for the Centennial systems for the purpose of reselling the authorizations rather than providing telecommunications services to the public. Consequently, the only remaining question of fact under § 1.948(i)(1) is whether the grant of the Centennial Spin-Off Applications will result in the profitable resale of the licensed systems AT&T will acquire from Centennial but has not operated.¹¹

C. A Hearing Is Required to Determine Whether AT&T Seeks to Profit from the Resale of the Centennial Properties

The Commission's anti-trafficking rule is a properly-promulgated legislative rule. Therefore, under the *Accardi* doctrine,¹² the Commission must respect and enforce its anti-trafficking rule so long as it remains in force. See *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir.

⁹ Ritter Communications, Inc. & Central Arkansas Rural Cellular LP, Reply to Joint Opposition, WT Docket No. 08-95, at 10 (Aug. 26, 2008).

¹⁰ VZW and AT&T rely on the Commission's decisions in *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other CMRS*, 17 FCC Rcd 18401 (2002) (“2000 Regulatory Review”) and *Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, 15 FCC Rcd 17414 (2000) (“2000 Forbearance Order”). See Jt. Opp., at 8 n.22. In *2000 Regulatory Review*, the Commission found that the cellular-specific anti-trafficking rule was unnecessary “given the presence of the anti-trafficking provisions of [§] 1.948(i), which is applicable to all services.” 17 FCC Rcd at 18438. The *2000 Forbearance Order* is even less helpful to VZW and AT&T. There, the Commission declined to eliminate § 1.948(i) or to limit its scope. See 15 FCC Rcd at 17429. The Commission did note that it expected that it would “rarely” review assignments or transfers of authorizations that were assigned through auction, because the auction process safeguarded against speculation by requiring the initial licensees to pay market value for their authorizations. *Id.* In this case, AT&T is not the initial licensee of the Centennial systems and it did not acquire the licenses in auction.

¹¹ See Petition, at 9.

¹² See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) and its progeny. As applied to the Commission, the *Accardi* principle that “agencies must abide by their rules” was expressed as a “precept that lies at the foundation of the modern administrative state.” *Reuters Ltd. v. FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986).

1985). Therefore, when faced with evidence that an applicant is trafficking, the Commission must review the application in accordance with § 1.948(i).

The anti-trafficking rule plainly states that applications for authority under § 310(d) of the Act “may be reviewed by the Commission to determine if the transaction is for the purposes of trafficking in service authorizations.” 47 C.F.R. § 1.948(h). AT&T and VZW correctly note that the Commission interpreted § 1.948(i) to give it the discretion to require an applicant to make a showing under § 1.948(i)(2). *See* Jt. Opp., at 8 (citing *VZW/ALLTEL*, 23 FCC Rcd at 17536). Thus, in the normal case, the Commission has some discretion in deciding whether there is sufficient evidence of trafficking to warrant an inquiry into the matter. However, a review for trafficking becomes mandatory when trafficking is alleged in a formal petition to deny. At the very least, the Commission must address the merits of the allegation in order to comply with the requirements of § 309(d)(2) of the Act.

Cellular South’s petition to deny contained a specific allegation of fact that was sufficient to show that the grant of the Centennial Spin-Off Applications would be *prima facie* inconsistent with the anti-trafficking rule. The Petition contained the allegation that AT&T is proposing to sell the five Centennial systems to VZW having never operated those systems to provide telecommunications services to the public.¹³ VZW and AT&T did not dispute that allegation.

AT&T would be guilty of trafficking if it obtained “an authorization for the principal purpose of ... profitable resale of the authorization rather than for the provision of telecommunications services to the public.” 47 C.F.R. § 1.948(h). AT&T proposes to resell licensed wireless systems in five Cellular Market Areas (“CMAs”) that are currently Centennial systems. The only remaining question of fact is whether the grant of the Centennial Spin-Off

¹³ *See* Petition, at 8-10.

Applications will result in the profitable resale of these licensed systems that AT&T has not operated. Under the circumstances, the Commission would abuse its discretion under § 1.948(h) of the Rules and § 309(d) of the Act if it fails to elicit the facts necessary to resolve the issue of whether AT&T will profit from the resale of the Centennial systems.

There should be no need for the Commission to require a § 1.948(i)(2) showing. In contested licensing cases such as this, applicants carry the burden of producing the information in their sole possession that is relevant to the Commission's public interest determination. *See, e.g., VZW/ALLTEL*, 23 FCC Rcd at 17496. Thus, it was incumbent on AT&T to come forward with a candid statement of the facts necessary to determine whether it stands to profit from the resale of the Centennial properties.

IV. THE COMMISSION MUST PASS ON CELLULAR SOUTH'S PETITION FOR RECONSIDERATION BEFORE ACTING ON THE CENTENNIAL SPIN-OFF APPLICATIONS

The Wireless Telecommunications Bureau ("WTB") has never had the authority to declare a Commission rule unconstitutional. Nevertheless, in *21st Century Telesis Joint Venture*, 15 FCC Rcd 25113 (2000), *reconsideration denied*, 16 FCC Rcd 17257 (2001), the Commission refused to consider a claim that one of its rules was unconstitutional because the issue was first presented in a supplement to a petition for reconsideration by one of the WTB's divisions. *See id.*, 15 FCC Rcd at 25113 n.4, 16 FCC Rcd at 17262-64. That draconian ruling was upheld on appeal. *See 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003). Thus, the petitioner in *21st Century Telesis* lost its right to administrative and judicial review because its constitutional claim not presented initially in a petition for reconsideration by a WTB division that could not act on the claim. Aware of such precedent, Cellular South asked the WTB to reconsider its decision to entertain *ex parte* presentations in this proceeding despite the

ban imposed on such presentations under § 1.1208 of the Commission’s Rules (“Rules”) and § 309(d) of the Communications Act of 1934, as amended (“Act”).¹⁴

Cellular South asked for WTB reconsideration on September 29, 2009. Because the WTB’s decision to entertain *ex parte* presentations threatens the integrity of the Commission’s decision-making process in this proceeding, Cellular South asked the WTB to expedite its reconsideration of the matter.¹⁵ Should it fail to do so it will be left for the Commission to address the issues of whether its decision-making process will be tainted by any *ex parte* presentations or whether due process rights will be violated if *ex parte* presentations occur. *See generally Press Broadcasting Co., Inc. v. FCC*, 59 F.3d 1365, 1369 (D.C. Cir. 1995).

No party formally opposed Cellular South’s petition for reconsideration. However, in a footnote of their opposition to Cellular South’s petition to deny, AT&T and VZW ask that the Commission dismiss the petition for WTB reconsideration because it rejected “similar claims” made by Cellular South in *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444 (2008) (“VZW/ALLTEL”) and “made clear” that the WTB has the authority under § 1.1200(a) of the Rules to “assign the permit-but-disclose procedures to a merger proceeding.” *Jt. Opp.*, at 1 n.1.¹⁶ Needless to say, VZW and AT&T cannot oppose a petition for WTB reconsideration in a footnote in a pleading directed to the Commission.

¹⁴ *See* Petition for Expedited Reconsideration, WT Docket No. 09-121, at 4-15 (September 29, 2009) (“Recon. Pet.”).

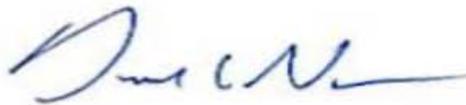
¹⁵ *See id.* at 5-6.

¹⁶ Cellular South also asked the WTB to reconsider its practice of issuing anticipatory protective orders in adjudicatory proceedings governed by §§ 309(d) and 310(d) of the Act. *See* Recon. Pet., at 15-22. Cellular South argued that the practice is grossly inconsistent with the Freedom of Information Act (“FOIA”), Title III licensing procedures, § 0.459(a) of the Rules, and the policy adopted by the Commission in *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998), *reconsideration denied*, 14 FCC Rcd 20128 (1999). *See id.* at 18. Cellular South made no such claims in VZW/ALLTEL. AT&T and VZW responded to the FOIA claim, albeit in conclusory fashion. *See Jt. Opp.*, at 1-2 n.1.

The purpose of § 405 of the Act is to “afford the Commission the initial opportunity of correcting any errors, considering any newly discovered evidence, and generally passing upon all matters prior to their presentation to a reviewing court.” *Action for Children’s Television v. FCC*, 564 F.2d 458, 468-69 (D.C. Cir. 1977). Cellular South has given the WTB the initial opportunity to correct its error. Should it not want to be heard on the matter, the WTB is free to refer consideration of Cellular South’s petition for reconsideration to the Commission. All Cellular South asks is that the Commission address the due process issues when it takes up the Centennial Spin-Off Applications.

In order to preserve its due process arguments for appeal, Cellular South need only give the Commission a fair opportunity to pass on the issues. *See, e.g., Time Warner Entertainment Co., L.P. v. FCC*, 144 F.3d 75, 79 (D.C. Cir. 1998); 47 U.S.C. § 405(a). If the Commission ultimately elects not to take the opportunity to reform its process, Cellular South will be free to seek judicial reformation.

Respectfully submitted,



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October 20, 2009

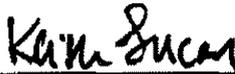
DECLARATION

I, Keith Lucas, declare and state the following:

1. I am the Manager for Carrier 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 portion of the foregoing "Reply of Cellular South to Joint Opposition of Verizon Wireless and AT&T Inc. to Petition to Deny" that relates to Cellular South's efforts to secure an extension of its automatic roaming agreement with Verizon Wireless, and Cellular South's efforts to obtain data roaming in the former ALLTEL markets. All such facts 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 October 20, 2009.



Keith Lucas

CERTIFICATE OF SERVICE

I, Linda J. Evans, hereby certify that on this 20th day of October, 2009, copies of the foregoing REPLY OF CELLULAR SOUTH TO JOINT OPPOSITION OF VERIZON WIRELESS AND AT&T INC. TO PETITION TO DENY were sent by e-mail, in pdf format, to the following:

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