



1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wileyrein.com

March 19, 2010

Nancy J. Victory
202.719.7344
nvictory@wileyrein.com

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Written Ex Parte Communication
WT Docket Nos. 09-104 & 08-95

Dear Ms. Dortch:

In its recent *ex parte* letter, the Oglala Sioux Tribe, the Tribal Utilities Commission, and the Tribal Economic Development Office (jointly, the “Tribe”) request that the Commission withhold approval of the pending “transfer of spectrum” from Verizon Wireless to AT&T until the Oglala Sioux Tribal Court (“Tribal Court”) can resolve a contractual dispute between the Tribe and a subsidiary of Verizon Wireless.¹ The letter mischaracterizes the terms of the underlying commercial service agreement as well as the state of discussions between the parties. However, the letter makes clear that the Tribe’s request seeks to have the Commission withhold approval of the transaction until the private contractual dispute is resolved. Agency precedent is both plentiful and clear that such an action is not appropriate in a license transfer proceeding. The underlying contract provides a mechanism for dispute resolution and Verizon Wireless and the Tribe are actively working to resolve their dispute in other fora. Given its well established policies, the Commission should reject the Tribe’s request and expeditiously approve the proposed transaction, thereby allowing consumers to enjoy fully the benefits of the transaction.

The Tribe’s dispute is grounded in the Tate Woglaka Service Agreement (“TWSA”), which sets forth the terms for Verizon Wireless’ provision of telecommunications services on the Pine Ridge Reservation (the “Reservation”).²

¹ Letter from Jonathan E. Canis, Arent Fox LLP, to Marlene H. Dortch, FCC, WT Docket Nos. 08-95 and 09-104 (filed Mar. 10, 2010) (“Oglala Sioux Tribe *Ex Parte*”).

² See Tate Woglaka Service Agreement, Attachment A to Oglala Sioux Tribe *Ex Parte*. Contrary to the assertions of the Tribe, the plain language of the TWSA makes clear that the Tribe has no ownership interest in the FCC licenses or network (*id.* at Section 19) and no right to acquire such ownership (*id.* at Sections 4(E), 19), that there is no obligation by Verizon Wireless to transfer

Marlene H. Dortch
March 19, 2010
Page 2

The Tribe requests that the Commission withhold approval of the transfer to AT&T of that portion of the former Alltel spectrum that covers Rural Service Areas (“RSAs”) 5 and 6 in South Dakota, which encompass the Reservation,³ until such time as the Tribal Court can hear and resolve the dispute.

However, these issues raised by the Tribe are among those the Commission traditionally and consistently has refused to consider in addressing the merits of a license transfer application. The Commission has long adhered to the fundamental principle that “the purpose of the [Communications] Act is to protect the public interest rather than provide a forum for the settlement of private disputes.”⁴ Allegations of breach of a contract are typical of the claims the Commission most often rejects, as they involve issues of commercial law in which the FCC has no special expertise and which do not raise matters germane to the agency’s authority.⁵

(Continued . . .)

ownership to the Tribe, and that the Tribe has no right to approve the transfer of the FCC licenses or network. Rather, the TWSA provides only that the Tribe has the right to approve any assignment of the agreement, “which [approval] shall not be unreasonably withheld or delayed.” *Id.* at Section 20(J). Consistent with the terms of the Agreement, on January 6, 2010, Verizon Wireless formally requested from the Tribe such approval to assign the TWSA.

³ Oglala Sioux Tribe *Ex Parte* at 1, 5-6. The Reservation’s exterior boundaries cover Shannon County and parts of Jackson and Bennett Counties – a relatively small portion of the 13 counties encompassed within these two RSAs. Thus, the Tribe’s proposed remedy would have an impact far beyond the Reservation’s boundaries.

⁴ *PCS 2000, L.P.*, 12 FCC Rcd 1681, 1691 (1997) (quoting *United Tel. Co. of Carolinas v. FCC*, 599 F.2d 720, 732 (D.C. Cir. 1977)). *See also Regents of University System of Georgia v. Carroll*, 338 U.S. 586, 602 (1950) (stating that the Commission is not the proper forum to litigate contract disputes between licensees and others); *Listeners’ Guild v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (confirming “the Commission’s long-standing policy of refusing to adjudicate private contract law questions”).

⁵ *See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17538 ¶ 216 (2008) (refusing to consider the question of whether the transaction would violate existing reseller agreements because it is a private contractual dispute); *A.L.Z. Broadcasting, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 23200, 23201 ¶ 3 (2000) (finding contractual dispute concerning payment obligations to be within the province of a court of competent jurisdiction, not the Commission) (citations omitted); *Applications of Verestar, Inc. (Debtor-In-Possession) for Consent to Assignment of Licenses to SES Americom, Inc.*, Memorandum Opinion, Order, and Authorization, 19 FCC Rcd 22750, 22756 ¶ 16 (IB & WTB

Marlene H. Dortch
March 19, 2010
Page 3

In addition, the agency has repeatedly refused to defer or delay action on assignment or transfer applications pending court litigation of contractual disputes.⁶ Consistent with this unwavering precedent, the Commission need not and should not address the Tribe's claims in the context of this proceeding.

The Commission has been particularly unwilling to insert itself into a private dispute when another process or forum exists to resolve the disagreement.⁷ While the Tribe suggests that the transfer of the FCC licenses and assets to AT&T would somehow deprive the Tribe of its "ability to pursue justice," nothing could be further from the truth.⁸ The TWSA specifically provides a mechanism for resolving

(Continued . . .)

2004) (declining to defer action on assignment applications pending resolution of litigation, noting it is "long-standing Commission policy not to involve itself with private contractual disputes:)" (citations omitted); *O.D.T. International, For Voluntary Assignment of License of Station KILU (FM), Paauilo, Hawaii*, File No. BALH-911216HO, 9 FCC Rcd 2575, 2576 ¶ 9 (1994) (*O.D.T. International*) (Commission has consistently held that it is not the proper forum for resolving contractual matters); *Bank America & SA, Assignor, and Customtronics, Assignee*, FCC File No. 0000321514, Memorandum Opinion and Order, 16 FCC Rcd 15772, 15773 ¶ 5 (PSPWD/WTB 2001) (*Bank America*) (declining to address merits of a petition in light of the Commission's long-standing policy of repudiating involvement in contractual disputes).

⁶ *Margaret Jackson and Ray Webb*, Memorandum Opinion and Order, 18 FCC Rcd 26403, 26404 (2003) (declining to defer action on transfer applications pending court litigation of contractual dispute); *Northwest Broadcasting, Inc. and Western Pacific, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 3289, 3294 (1997); *WWC Holding Co., Inc. and RCC Minnesota, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 6589, 6598 (WTB 2007); *Verestar, Inc.*, Memorandum Opinion and Order and Authorization, 19 FCC Rcd 22750, 22756 (IB, WTB 2004); *Elaine Hough and Chadmoore Wireless Group, Inc.*, Order, 18 FCC Rcd 1875, 1877 (WTB 2001); *Caribbean SMR, Inc.*, 16 FCC Rcd 15663, 15665 (WTB 2003); *Decatur Telecasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 8622, 8624 (MB 1992).

⁷ *See, e.g., Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting that the Commission will not "adjudicate private contract law questions for which a forum exists in the state courts"); *MCI Telecommunications Corporation, Assignor, and Echostar 110 Corporation, Assignee*, File No. SAT-ASG-19981202-0093, Order and Authorization, 16 FCC Rcd 21608, 21624 ¶ 30 (1999) (*MCI Telecommunications*) (noting that the Commission "will not adjudicate private contractual matters where an alternative forum exists to resolve the matter).

⁸ The Tribe's claims that Verizon Wireless' request to transfer assets to AT&T would unilaterally void the TWSA and that Verizon Wireless has not been acting in good faith are inaccurate. Verizon Wireless has made it abundantly clear in its correspondence with the Tribe that it has no intention of voiding the agreement. To the contrary, Verizon Wireless has made every effort to ensure a smooth transition and has formally requested the Tribe's approval to assign the



Marlene H. Dortch

March 19, 2010

Page 4

any disputes under the agreement. Section 17(B) makes clear that the parties have agreed that “all disputes, claims and controversies between them . . . arising from this Agreement . . . shall be resolved by binding arbitration pursuant to the Commercial Rules of the American Arbitration Association.”⁹ The provision emphasizes that the full array of remedies is available under this process. Such binding arbitration is plainly not “protracted litigation” and is the appropriate means to resolve the parties’ disagreement. As such, Commission intervention in this dispute is unnecessary and inappropriate.

(Continued . . .)

TWSA to AT&T. Indeed, at the very time the Tribe’s *ex parte* letter was filed on March 10, 2010, representatives from Verizon Wireless and AT&T were on their way to meet with representatives of the Tribal Council, the Tribal Utilities Commission, and the Tribal Economic Development office in an effort to resolve any disputes with the Tribe. Verizon Wireless has worked tirelessly toward addressing all of the Tribe’s concerns and reaching a negotiated resolution of any contractual disputes. Despite the mandated binding arbitration provision in the TWSA, the Tribe took the matter to Tribal Court. Verizon Wireless only went to Federal Court to enforce its rights. Federal Court dismissed Verizon Wireless’ request for a TRO only after the Tribe withdrew its Tribal Court hearing notice during the Federal Court hearing.

⁹ TWSA at Section 17(B). Contrary to the Tribe’s characterization, Verizon Wireless sought relief from the U.S. District Court in South Dakota in order to protect its arbitration rights under the TWSA. The TWSA is clear that disputes are to be resolved by arbitration, not by the Tribal Court.



Marlene H. Dortch
March 19, 2010
Page 5

For the foregoing reasons, the Commission should dismiss or deny the Tribe's request and move expeditiously to approve the proposed transaction. Please do not hesitate to contact the undersigned counsel for Verizon Wireless should you have any questions regarding the foregoing or should you require additional information.

Sincerely,

/s/ Nancy J. Victory

Nancy J. Victory

cc: Kathy Harris
Nese Guendelsberger
Monica DeLong
Stacy Ferraro
Stana Kimball
Neil Dellar
Joel Rabinovitz
Christina Clearwater
Brenda Boykin
Susan Singer
James Schlichting
Jonathan E. Canis, Arent Fox LLP