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May 13, 2010

VIA ECFS

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

Re: Notice of *Ex Parte* Presentation

Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement, WT Docket No. 09-104

Dear Ms Dortch:

On May 12, 2010, Tamara Preiss of Verizon, Michael Samsock of Verizon Wireless, Patrick Philbin and the undersigned, both counsel to Verizon Wireless, met with Commissioner Mignon Clyburn and Louis Peraertz, Acting Legal Advisor, Wireless, International, and Public Safety, to Commissioner Clyburn. The participants discussed the issues raised by the Oglala Sioux Tribe in the above-captioned proceeding relating to its contractual dispute with a subsidiary of Verizon Wireless.[1]

The Tribe requests that the Commission withhold approval of the transfer to AT&T of that portion of the former Alltel spectrum that covers the Pine Ridge Reservation until such time as the dispute is resolved. In the meeting, Verizon Wireless explained that 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 Reservation.[2] The participants emphasized that the private contractual issues raised by the Tribe are among those the

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[1] *See, e.g.,* Letter from Jonathan E. Canis, Arent Fox LLP, to Marlene H. Dortch, FCC, WT Docket No. 09-104 (filed May 5, 2010) ("*May 5 Ex Parte*"); 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) ("*Mar. 10 Ex Parte*").

[2] *See* Tate Woglaka Service Agreement, Attachment A to *Mar. 10 Ex Parte.*

Commission traditionally and consistently has refused to consider in addressing the merits of a license transfer application.[3] In addition, the agency has repeatedly refused to defer or delay action on assignment or transfer applications pending court litigation of contractual disputes.[4]

Verizon Wireless also explained that the Tribe has mischaracterized the terms of the TWSA. Specifically, the provisions of the agreement are clear that the Tribe has no ownership interest in the FCC licenses or network and no right to acquire such ownership.[5] Moreover, the agreement is clear that the Tribe has no right to Universal Service Funds received by Verizon Wireless.[6] 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."[7]

Finally, Verizon Wireless explained that the Tribe has mischaracterized the effect of the transaction on the provision of telecommunications services on the Reservation. By transferring the TWSA to AT&T, the transaction will ensure continuity of service. Indeed, it is only the Tribe's unreasonable refusal to consent to the assignment of the TWSA to AT&T that creates any uncertainty about continuity of service on the Reservation.

A copy of the written presentation used in the meeting is attached. Also attached are Verizon Wireless' formal request to the Tribe to assign the TWSA to AT&T and the Tribe's response.

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[3] *See* Letter from Nancy J. Victory, Wiley Rein LLP, to Marlene H. Dortch, FCC, WT Docket No. 09-104, at 2-3 (filed Mar 19, 2010).

[4] *Id*.

[5] *See* Tate Woglaka Service Agreement, Attachment A to *Mar. 10 Ex Parte,* Sections 4(E), 19, & Addendum 1.

[6] *See id.* at Section 5(D)(ii)(2).

[7] *Id.* at Section 20(J).

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.

Respectfully submitted,

/s/ Nancy J. Victory

Nancy J. Victory

cc: Commissioner Mignon Clyburn
Louis Peraertz

Verizon Wireless FCC Presentation

WT Docket No. 09-104

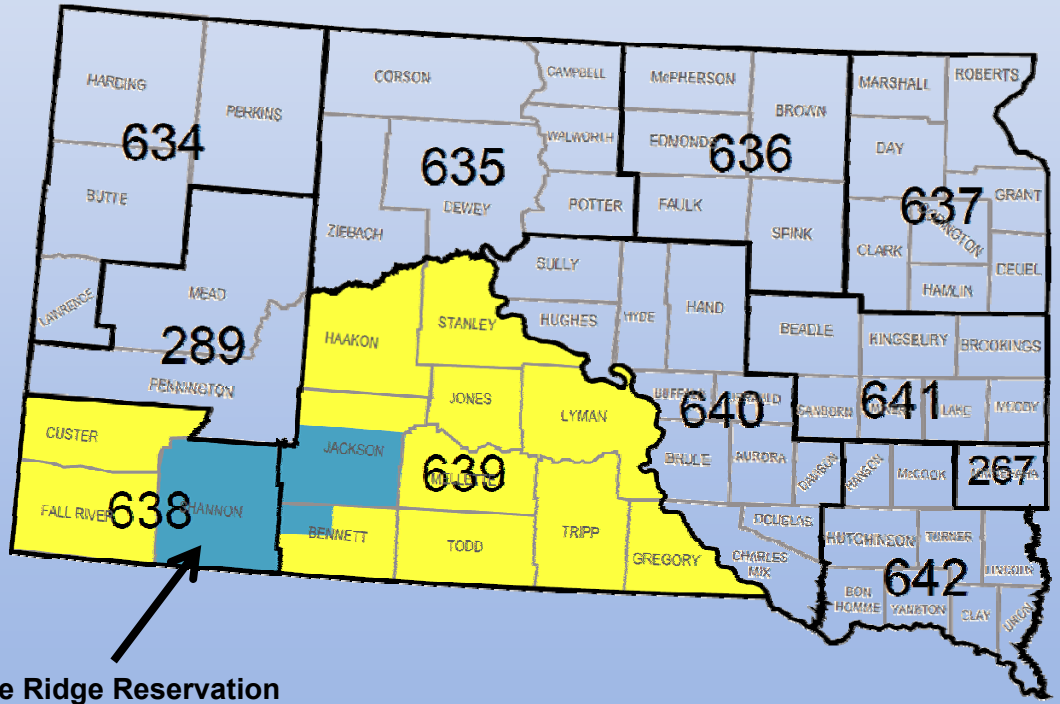
May 12, 2010

Summary

- The Tribe seeks to block a transfer of spectrum licenses based on a dispute over the meaning of a private contract, the Tate Woglaka Service Agreement (TWSA).
- The TWSA itself provides a mechanism for resolving such disputes: binding arbitration.
- This private contractual dispute is irrelevant to the FCC's public interest review.
- The Tribe misrepresents the terms of the TWSA in claiming that FCC approval would void the Tribe's rights under the agreement.
  - AT&T is obligated to take the TWSA under the terms of the purchase agreement with Verizon Wireless
  - The TWSA provides that AT&T, as assignee, is obligated to assume Verizon Wireless's obligations under the agreement
  - The only thing jeopardizing continuity of service on the Reservation and continuation of the TWSA is the Tribe's unreasonable refusal to consent to assignment to AT&T

Tribe is Attempting to Block the Transfer of CMAs 638 & 639

- CMAs 638 & 639 are made up on 13 counties in South Dakota – only two of which are on the Reservation.



Pine Ridge Reservation & Tribal Land Held in Trust (shaded in blue)

I. Private Contractual Dispute – Not a Matter for FCC Consideration

- Agency precedent is plentiful and clear that such a private contractual dispute is not appropriate for consideration in a license transfer proceeding.
- Terms of the TWSA specifically call for binding arbitration of "all disputes, claims and controversies." TWSA § 17(B).

17. DISPUTE RESOLUTION, CHOICE OF LAW AND JURISDICTION.

(B) Arbitration. The Parties agree that all disputes, claims and controversies between them, whether individual, joint, or class in nature, arising from this Agreement, the Other Agreements or otherwise in connection therewith, including, without limitation, contract disputes and tort claims, shall be resolved by binding arbitration pursuant to the Commercial Rules of the American Arbitration Association ("AAA").

II. The Tribe's Claim That Assignment Would Void the TWSA is False

- AT&T will assume all obligations under the TWSA

20. MISCELLANEOUS PROVISIONS.

(J) Assignment by Western Wireless. Subject to OGLALA SIOUX TRIBE's approval, which shall not be unreasonably withheld or delayed, Western Wireless may assign this Agreement upon written notice to OGLALA SIOUX TRIBE, to any person controlling, controlled by, or under common control with Western Wireless, or any person or entity that, after first receiving all necessary regulatory agency approvals, acquires Western Wireless's radio communications business and assumes all obligations of Western Wireless under this Agreement. Upon such assignment, Western Wireless shall be relieved of all liabilities and obligations hereunder and assignee shall assume all liabilities and obligations hereunder. OGLALA SIOUX TRIBE shall look solely to the assignee for performance under this Agreement and all obligations hereunder unless OGLALA SIOUX TRIBE reasonably determines that the assignee is not of equal or substantially similar credit worthiness. Western Wireless may otherwise assign this Agreement upon written approval of OGLALA SIOUX TRIBE, which approval shall not be unreasonably withheld or delayed.

- AT&T will become the service provider under the TWSA

2. DESCRIPTION OF SERVICES.

(A) Telecommunication Services. Western Wireless shall serve the telecommunication needs of the Reservation through its Telecommunications Services Plan. Western Wireless shall provide, at a minimum, the Universal Services required of ETCs pursuant to the Telecommunications Act. In addition, Western Wireless shall provide other services and functionalities important to the OGLALA SIOUX TRIBE, such as an expanded local calling area, Long Distance Service, prepaid services, and the Enhanced Services.

II. The Tribe's Claim That Assignment Would Void the TWSA is False

- The terms of the Asset Purchase Agreement require AT&T to assume the obligations of the TWSA. The TWSA is listed as one of the "material contracts" AT&T will assume as part of the transaction. APA § 3.20 & Schedule 3.20(a).
- At this point, it is only the Tribe's refusal to consent to assignment of the TWSA to AT&T that is jeopardizing continuity of service pursuant to the TWSA.

III. The Tribe Has Misrepresented the Terms of the TWSA

The Tribe has no right to the network assets or spectrum

- The Tribe claims that that "[t]he TWSA expressly calls for eventual Tribal ownership and control of the telecom network on the Reservation. (TWSA §§ 4(E) and Addendum 1)."
- But the TWSA clearly states that Western Wireless owns the telecommunications assets and spectrum.

19. OWNERSHIP OF CELLULAR TELECOMMUNICATIONS INFRASTRUCTURE.

OGLALA SIOUX TRIBE acknowledges and agrees (i) that Western Wireless retains all ownership of the Cellular Telecommunications Infrastructure which provides the Telecommunications Services on the Reservation; (ii) Cellular Telecommunications Infrastructure is a part of a larger cellular network which is used by Western Wireless's mobile cellular customers and will continue to be used by all Western Wireless's mobile cellular customers; (iii) Western Wireless retains all rights to all revenues generated by the Sites and Western Wireless's mobile cellular customers on the Reservation; and (iv) retains all rights to all licenses granted by the FCC and other Government Agencies.

III. The Tribe Has Misrepresented the Terms of the TWSA

The Tribe has no right to the network assets or spectrum

- TWSA § 4(E) does not "expressly call[] for eventual Tribal ownership and control of the telecom network."
  - TWSA § 4(E) merely requires parties to "hold annual meetings . . . to evaluate options for increasing [the Tribe's] role in the provisioning of telecommunications service."
  - That is not a right to acquire the assets.

- Addendum 1 does not "expressly call[] for eventual Tribal ownership and control of the telecom network."
  - Addendum 1 addresses the Tribe "assum[ing] responsibility for the installation and maintenance of On-Site Equipment."
  - "On-Site Equipment" is defined in the TWSA as customer premises equipment that was to be used for fixed wireless local loops.
  - Responsibility for "installation" and "maintenance" of CPE has nothing to do with <u>ownership</u> of the <u>network infrastructure</u>.

III. The Tribe Has Misrepresented the Terms of the TWSA

The Tribe has no right to a portion of Universal Service Funds

- The Tribe seeks an accounting of Universal Service Funds because it claims such funds should be shared with the Tribe under the TWSA.
- That is false.
- Revenue sharing is governed by Section 5(D).
- Section 5(D)(ii)(2) provides that Western Wireless is to retain "[a]ll Universal Service Funds."
- Sharing USF with the Tribe is against federal law and would jeopardize Western Wireless's ETC status. *See* 47 U.S.C. § 254(e), 47 C.F.R. § 54.7.

(D) Allocation of Revenues.

(i) Revenues to be paid by Western Wireless to the OGLALA SIOUX TRIBE at the end of each fiscal quarter:

1. All Customer Monthly Rates for Basic Services once the Customer base reaches and remains above 1000 monthly lines of Universal Service;

2. All Site Lease rental revenue for Sites located on the Reservation; and

3. All revenue from installation charges and customer service calls related to on-site installation and maintenance.

(ii) Revenues to be retained by Western Wireless:

1. All Long Distance Service charges appearing on the Customer's monthly bill;

2. All Universal Service Funds;

3. All revenue from the Enhanced Services;

4. All On-Site Equipment revenue;

5. All other revenue not specifically designated to be distributed to OGLALA SIOUX TRIBE; and

6. All revenues generated by parties or entities other than Customers.

IV. Verizon Has Not "Stonewalled" the Tribe

- Verizon has sought since last year to set up a meeting with the Tribe and AT&T.
- Until March 2010, the Tribe refused to meet with AT&T.
- In January 2010, after the Tribe identified certain issues it wanted addressed, Verizon provided written responses to all and made a generous cash settlement offer.
- The Tribe rejected Verizon's offer without explanation.
- Verizon attempted to meet with the Tribe in January and February 2010, but the Tribe refused to meet.

KIRKLAND & ELLIS LLP

AND AFFILIATED PARTNERSHIPS

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January 6, 2010

Via Email, Facsimile, and FedEx

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Oglala Sioux Tribe
Attn: Economic Development Office
P.O. Box 669
Pine Ridge, South Dakota 57770
(605) 867-5771
(f) (605) 867-1471

Re: *Oglala Sioux Tribe v. Alltel Communications, LLC, and Verizon Wireless, LLC*, Case No. 09-0673.

Dear Ms. Dubray and Tribal Representatives:

I am writing on behalf of my client, Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") regarding the Tate Woglaka Service Agreement ("Service Agreement"). As you know, Verizon Wireless has succeeded to Alltel Corporation ("Alltel") as the service provider under the Service Agreement. As you also know, the U.S. Department of Justice has required Verizon Wireless to divest all of Alltel's assets in South Dakota, including assets on the Pine Ridge Indian Reservation. Currently, regulatory approval is pending for a divestiture sale of Alltel's assets on the Reservation, along with all of its assets in South Dakota and 17 other states, to AT&T Mobility LLC ("AT&T").

Verizon Wireless intends to assign the Service Agreement to AT&T in the following manner. The Western Wireless subsidiary that was the original party to the Service Agreement, WWC License LLC ("WWC"), currently remains as the party to the Service Agreement, but it is now a subsidiary of Verizon Wireless. WWC will assign the Service Agreement to an affiliate, Abraham Divestiture Company LLC ("Newco"). Newco will assume all of WWC's liabilities and obligations under the Service Agreement, excluding any liabilities for breach of contract, for which WWC will remain responsible. Following this assignment, 100% of the equity interest in the sole member (owner) of Newco, Abraham Divestiture Parent, LLC, will be transferred to AT&T or one of its wholly-owned subsidiaries. As a result of these transactions, Newco will be the party to the Service Agreement and it will be a wholly-owned subsidiary of AT&T.

Verizon Wireless formally requests that the Tribe consent to the assignment of the Service Agreement as described above. *See* Service Agreement §20(J). As you know, the Service Agreement makes an assignment of the contract subject to the Tribe's approval, although the Tribe cannot unreasonably withhold or delay its approval, *id.*, and a lack of response within 45 days is deemed to be approval, *id.* §20(A).

AT&T brings considerable commercial and technical capabilities to ensure the continued provision of high quality wireless telecommunications services on the Reservation, and seamless roaming capabilities throughout South Dakota and its nationwide network. At meetings with the Tribe, Verizon Wireless representatives specifically asked about any concerns that the Tribe may have about the financial or technical capabilities of AT&T to meet its obligations under the Service Agreement and act as an eligible telecommunications carrier providing universal service on the Reservation. The Tribe has not identified any. Verizon Wireless has taken that as a positive sign that a smooth assignment of the Service Agreement to a provider with the established expertise and financial wherewithal of AT&T is in the best interests of tribal customers.

Please consent to the assignment of the Service Agreement as described in this letter by signing a copy of this letter in the space provided below and returning it to me. If you have questions or concerns about AT&T's capacity or ability to assume the obligations under the Service Agreement, representatives of Verizon Wireless would welcome the opportunity to address them or to arrange a meeting for the Tribe with AT&T representatives.

Sincerely,

Patrick F. Philbin

Cc: Talbot J Wieczorek, Esq.
Joseph RedCloud,
Office of Economic Development,
Oglala Sioux Tribe

Consent Given:

OGLALA SIOUX TRIBE, a federally recognized Indian Nation

By:_____

Name:_____

Title:_____

Date:_____

Oglala Sioux Tribe
UTILITIES COMMISSION

Joseph RedCloud
Utilities Commission Chairman
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Pine Ridge, South Dakota 57770

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Patrick F. Philbin
Kirkland & Ellis, LLP
655 Fifteenth Street, NW
Washington, D.C. 20005

Re: Tate Woglaka Service Agreement

January 13, 2010

Dear Mr. Philbin:

The Oglala Sioux Tribe has received the request of your client, Cellco Partnership d/b/a/ Verizon Wireless ("Verizon Wireless"), to assign the Tate Woglaka Service Agreement to Abraham Divestiture Company LLC, who will eventually be acquired by AT&T. The Tribe at this time cannot approve the assignment because significant questions remain about this transaction that, to date, have not been addressed, notwithstanding numerous efforts by the Tribe to obtain information from your client. In particular, on December 30, 2008, over one year ago, the Tribe specifically stated:

> Before the Tribe will be able to review and approve the sale of assets on the reservation, Alltel must appear before the Tribal Council and address, among other issues, the following:
>
> 1. Identification of the buyer of the assets on the reservation, their capabilities, and their commitments to serving the Pine Ridge reservation and meeting the obligations of a universal service provider.
> 2. A service improvement plan for the reservation, including the construction of new cell sites to fill-in gaps in service on the reservation.
> 3. An accounting of all universal service funding, including low-income support, received over the last 5 years for the provision of service on the reservation.
> 4. Plans to offer and make available to all residents advanced broadband services.
> 5. A plan for improving service quality and customer experience on the reservation.
> 6. Plans for sharing revenue generated from services offered on the reservation, as envisioned in the Tate Woglaka Service Agreement.

December 30, 2008 letter from Joseph RedCloud, Oglala Sioux Tribe, to Richard Massey, Alltel Corporation.

As stated on December 30, 2008 and repeated here, the Tribe has acted at all times in good faith and in a reasonable manner without delay, but it is your client that has failed to respond, to date, to the Tribe's request. The Tribe looks forward to your client's response.

Most Respectfully,

Joseph RedCloud (Jonathan E. Canis)

Joseph RedCloud, Chairman
Oglala Sioux Tribe Utilities Commission

cc:
Jonathan E. Canis
Partner
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339