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

In re Applications of)
)
AT&T INC. and)
DEUTSCHE TELEKOM AG) WT Docket No. 11-65
) DA 11-799
For Consent to Assign or Transfer)
Control of Licenses and Authorizations)
)
Lead Application File No. 0004669383)

REPLY OF CELLULAR SOUTH, INC. TO JOINT OPPOSITION OF AT&T INC.,
DEUTSCHE TELEKOM AG, T-MOBILE USA, INC. TO PETITIONS TO DENY

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SUMMARY

Cellular South, Inc. (“Cellular South”) is challenging the unexplained decision of the Wireless Telecommunications Bureau (“WTB”) to utilize permit-but-disclose *ex parte* procedures in this restricted proceeding involving the applications of AT&T Inc. (“AT&T”) for Commission consent to acquire control of the licenses held by T-Mobile USA, Inc. (“T-Mobile”).

The WTB’s decision and the ad hoc procedures that it has put into effect have: (1) allowed more than 36,000 items to be posted in the record; (2) permitted at least 34 oral *ex parte* presentations to have been made to Commission decision-makers; (3) resulted in having all five commissioners and 60 of the Commission’s decision-making personnel hear the oral *ex parte* presentations; (4) encouraged AT&T to make 370 redactions of allegedly “confidential information” and 30 redactions of “highly confidential information” from its 235-page opposition to petitions to deny its applications; and (5) afforded AT&T seemingly unlimited *ex parte* access to decision-makers.

Cellular South submits that the Commission’s statutory duty to execute and enforce the provisions of §§ 308 and 309 of the Communications Act, which expressly call for the written presentation of the facts, left the WTB without discretion to permit, *inter alia*, oral *ex parte* presentations to Commission decision-makers.

The Commission must address the issue of whether its statutory duty as an adjudicator under §§ 308 and 309 to decide a licensing case on facts set forth in writing by applicants and parties in interest, and on a record consisting of applications, pleadings, and matters of which it can take official notice, permits it to have the discretion under one of its own rules to decide such a case on facts presented in oral *ex parte* presentations. Consideration of that issue alone should

cause the Commission to cease its well established administrative practice of not complying with § 309(d) of the Act and § 1.1208 of its own rules.

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Cellular South, Inc. (“Cellular South”), by its attorneys and pursuant to § 309(d)(1) of the Communications Act of 1934, as amended (“Act”), § 1.939(f) of the Commission’s Rules (“Rules”), and the pleading cycle established for this proceeding by Public Notice, DA 11-799 (Apr. 28, 2011), submits its reply to the joint opposition filed by AT&T Inc. (“AT&T”), Deutsche Telekom AG (“DT”), and T-Mobile USA, Inc. (“T-Mobile”)¹ to the petitions to deny their above-captioned applications for Commission consent to the transfer of control of wireless licenses held by subsidiaries of T-Mobile.

INTRODUCTION

As a result of the *ad hoc* procedures apparently developed by the General Counsel’s “Transaction Team” and employed by the Wireless Telecommunications Bureau (“WTB”), the record in this adjudicatory proceeding can be characterized as nothing less than chaotic. As of

¹ See Joint Opposition of AT&T Inc., Deutsche Telekom AG, and T-Mobile USA, Inc. to Petitions to Deny and Reply to Comments, WT Docket No. 11-65 (June 10, 2011) (“Jt. Opp.”).

today, there have been at least 36,838 items posted in the record of this docket,² up 10,749 from the day Cellular South filed its petition to deny.³ Among these filings are thousands of comments submitted by a vast array of individuals and organizations, none of whom have a legally cognizable interest — much less standing under § 309(d)(1) of the Act — with respect to the T-Mobile transfer of control applications. Moreover, the adjudicatory record balloons incalculably as the WTB/Transaction Team continues to collect relevant information pursuant to three protective orders, one of which was substantially overhauled after the protest deadline.⁴ Meanwhile, the record indicates that at least 34 oral *ex parte* presentations have been made to Commission decision-makers since April 21, 2011,⁵ when the WTB announced that permit-but-disclose *ex parte* procedures were in effect.⁶ By our count, oral presentations have been heard by all five commissioners and 60 other decision-makers.⁷

In its petition to deny, Cellular South employed the so-called *Chevron* step one analysis⁸ to demonstrate the WTB's *ad hoc* procedures violated the Commission's statutory duty to execute and enforce the provisions of §§ 308, 309 and 310(d) of the Act. It addressed several material violations of the Act committed by the WTB, including the initiation of pre-designation-

² See *infra* Ex. 1.

³ See Petition to Deny of Cellular South, Inc., WT Docket No. 11-65, at 12 & Ex. 4 (May 31, 2011) (“Pet.”).

⁴ See *infra* Ex. 2 (Letter from Ruth Milkman to Peter J. Schildkraut & Nancy J. Victory, DA 11-1037 (June 9, 2011)).

⁵ See *infra* Exs. 3 & 4.

⁶ See *Commission Announces that the Applications Proposing the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries from Deutsche Telekom AG to AT&T Inc. Have Been Filed and Permit-But-Disclose Ex Parte Procedures Now Apply*, DA 11-722, at 1 (Apr. 21, 2011).

⁷ See *infra* Ex. 4.

⁸ See *Chevron, USA v. NRDC*, 467 U.S. 837, 842-43 (1984).

for-hearing discovery⁹ and the issuance of three protective orders that effectively invited AT&T and DT to make off-the-record factual presentations to the Commission.¹⁰ Cellular South's arguments obviously fell on deaf ears.

Perhaps unaware of Cellular South's statutory objections, the WTB expanded the scope of its discovery efforts in this case on June 6, 2011, when it served written interrogatories and requests for the production of documents on Cellular South¹¹ as well as six other competitors of AT&T and T-Mobile.¹² If it did so with knowledge of Cellular South's objection to pre-designation discovery, the WTB demonstrated both a prejudgment of the issue that Cellular South formally raised in its petition to deny and a willingness to force Cellular South to acquiesce to a procedure it deems unlawful. Regardless, the WTB has been notified that the circumstances will not permit Cellular South to comply with the WTB's discovery requests.¹³

On June 9, 2011, the WTB disregarded Cellular South's argument that §§ 301, 307(a), 308, 309 and 310(d) of the Act prohibit the Commission from issuing anticipatory protective

⁹ See Pet. at 29-30.

¹⁰ See Pet. at 27-28.

¹¹ See Letter from Ruth Milkman to Robert J. Irving, Jr. & James H. Barker, WT Docket No. 11-65, at 1 (June 6, 2011).

¹² See Letter from Ruth Milkman to Robert J. Irving, Jr. & James H. Barker, WT Docket No. 11-65, at 1 (June 6, 2011) (Leap Wireless International, Inc. & Cricket Communications, Inc.); Letter from Ruth Milkman to Mark A. Stachiw & Carl W. Northrop, WT Docket No. 11-65, at 1 (June 6, 2011) (MetroPCS Communications, Inc.); Letter from Ruth Milkman to Lawrence R. Krevor & Regina M. Keeney, WT Docket No. 11-65, at 1 (June 6, 2011) (Sprint Nextel Corporation); Letter from Ruth Milkman to John Gockley & Peter M. Connolly, WT Docket No. 11-65, at 1 (June 6, 2011) (United States Cellular Corporation); Letter from Ruth Milkman to John T. Scott III, WT Docket No. 11-65, at 1 (June 6, 2011) (Verizon Wireless).

¹³ Cellular South informed the WTB that it cannot comply with the discovery requests "unless it receives assurances that the Commission will not assert Cellular South's responses to the requests as a waiver of its statutory argument or as acquiescence to the procedures the [WTB] adopted for Docket 11-65." Letter from Russell D. Lukas to Ruth Milkman, WT Docket No. 11-65, at 1 (June 14, 2011). Cellular South has yet to receive such assurances.

orders in a Title III licensing case that has not been designated for hearing,¹⁴ and acceded to the requests of AT&T and DT to substantially enlarge the scope of its “Second Protective Order.”¹⁵ As with the WTB’s decision to initiate discovery with respect to petitioners and non-applicants, Cellular South had no opportunity until now to address the lawfulness of the WTB’s expanded second protective order.

AT&T and DT have blessed the record with a 1,016-page opposition consisting of a 235-page pleading and 781 pages of declarations. By our count, there are 370 redactions of allegedly “confidential information,” and 30 redactions of “highly confidential information,”¹⁶ a new classification of information neither recognized under the Freedom of Information Act (“FOIA”) nor the Rules.¹⁷ Luckily, there were no redactions from the two paragraphs that AT&T and DT devoted to Cellular South’s statutory arguments.¹⁸ We turn to the substance of those two paragraphs next.

ARGUMENT

I. THE COMMISSION HAS NOT PASSED ON CELLULAR SOUTH’S STATUTORY ARGUMENTS

¹⁴ See Pet. at 22-28.

¹⁵ Ex. 2, *infra*, at 1. See Letter from Nancy J. Victory to Marlene H. Dortch, WT Docket No. 11-65, at 1-24 (June 7, 2011); Letter from Peter J. Schildkraut to Marlene H. Dortch, WT Docket No. 11-65, at 1-18 (June 6, 2011).

¹⁶ See Jt. Opp. at 48, 161, 199; Decl. of Parley Castro at 2 (¶ 2), 7-8 (¶13); Decl. of David Christopher at 15-16 (¶ 24); Reply Decl. of William Hogg, Ex. A at 1-3, 4-5; Decl. of Keven Peters at 13 (¶ 34); Decl. of David A. Mayo at 2 (¶ 3), 4 (¶ 6), 5 (¶ 7), 5-6 (¶ 8), 6 (¶ 9); Reply Decl. of Dennis W. Carlton, Allan L. Shampine & Hal S. Sider at 29 (Fig. 5), 32 (Fig. 7), 63 (¶ 116); Reply Decl. of Robert D. Willig, Jonathan M. Orszag & Jay Ezrielev, at 54 (¶ 94).

¹⁷ Protection is afforded to confidential commercial or financial information under FOIA Exemption 4 and § 0.457(d) of the Rules. See 5 U.S.C. § 552(b)(4); 47 C.F.R. § 0.457(d)(2). No additional protection is afforded to allegedly “highly confidential” commercial or financial information. See *id.*

¹⁸ See Jt. Opp. at 226-27.

Citing *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless*, 25 FCC Rcd 8704 (2010) (“*AT&T/VZW*”) and *AT&T Inc. and Centennial Communications Corp.*, 24 FCC Rcd 13976 (2009) (“*AT&T/Centennial*”), AT&T and DT contend that the Commission already has rejected Cellular South’s arguments that the procedures put in place in this case by the WTB violate, *inter alia*, §§ 307, 308 and 309 of the Act.¹⁹ Cellular South freely admitted that it made procedural arguments that were rejected by the Commission in *AT&T/VZW* and *AT&T/Centennial*.²⁰ But it also made it clear that the Commission did not pass on the “fundamental issue” of whether the provisions of §§ 307, 308 and 309 of the Act can be construed to authorize it to employ rulemaking procedures in a Title III adjudication.²¹

In *AT&T/VZW* and *AT&T/Centennial*, the Commission belatedly denied petitions for reconsideration that Cellular South had addressed to the WTB at the outset of the proceedings. As the Commission saw the issues in both cases, Cellular South “object[ed] to the *ex parte* status of the proceeding,” and asserted that the WTB’s decision to employ permit-but-disclose procedures violated § 1.1208 of the Rules and § 309(d) of the Act, as well as procedural and due process rights.²² Thus, the Commission’s decisions were limited to the issue of whether permit-but-disclose *ex parte* procedures could be employed in otherwise restricted “major transaction proceedings.”²³

In this case, Cellular South again challenges the WTB’s unexplained decision —

¹⁹ See Jt. Opp. at 226 & n.472.

²⁰ See Pet. at 3 & n.8.

²¹ See *id.* at 3.

²² *AT&T/VZW*, 25 FCC Rcd at 8769; *AT&T/Centennial*, 24 FCC Rcd at 13976.

²³ *AT&T/VZW*, 25 FCC Rcd at 8770; *AT&T/Centennial*, 24 FCC Rcd at 13977.

announced a week *before* the T-Mobile transfer applications were even filed²⁴ — to employ permit-but-disclose procedures. But unlike in *AT&T/VZW* and *AT&T/Centennial*, Cellular South based its challenge on a *Chevron* step one analysis of the plain language of the statute.²⁵ And AT&T and DT do not dispute Cellular South’s construction of §§ 1, 4(i), 301, 303(r), 307(a), 308, 309 and 310(d).

The Commission’s holding in *AT&T/VZW* and *AT&T/Centennial* does not suggest that the agency considered its § 1 duty to execute and enforce the Title III provisions that apply to its adjudication of transfer of control applications.²⁶ Under those provisions, the Commission’s consideration of the T-Mobile transfer applications constitutes “licensing,” which is an “adjudication” under the Administrative Procedure Act (“APA”).²⁷ Moreover, §§ 308 and 309 mandate that the Commission adjudicate the matter based on: (1) the *facts* set forth in the “written application[s],”²⁸ (2) any “further written statements of facts” that it requires,²⁹ (3) “specific allegations of fact” contained in the pleadings filed,³⁰ (4) the consideration of such

²⁴ See Pet. at 26-27. Once again, the WTB did not make the determination that the proceeding involved “primarily issues of broadly applicable policy.” See *Commission Opens Docket for Proposed Transfer of Control of T-Mobile USA, Inc. and Its Subsidiaries from Deutsche Telekom AG to AT&T Inc.*, DA 11-673, at 1 (WTB Apr. 14, 2011). Nor could the WTB make that determination based on the substance of the T-Mobile transfer applications. The WTB announced that permit-but-disclose procedures would apply on April 14, 2011, but the transfer applications were not filed until April 21, 2011. Cellular South erred when it stated that the WTB’s decision to entertain *ex parte* presentations was made a month before the applications were filed. See Pet. at 3 n.11.

²⁵ See Pet. at 13-27.

²⁶ See *id.* at 14-16.

²⁷ See *id.* at 22.

²⁸ 47 U.S.C. § 308(a). See Pet. at 23, 25.

²⁹ 47 U.S.C. § 308(b). See Pet. at 23, 25.

³⁰ 47 U.S.C. § 309(d)(1). See Pet. at 24, 26.

other matters as it “may officially notice,”³¹ and, if necessary, (5) a “full hearing”³² in which *ex parte* presentations would be banned under the APA.³³ Cellular South’s claim in this case is that the Commission’s statutory duty to execute and enforce the provisions of §§ 308 and 309, which expressly call for the written presentation of the facts, left the WTB without discretion to permit, *inter alia*, oral *ex parte* presentations to Commission decision-makers.³⁴

The Commission has never addressed the issue of whether its statutory duty as an adjudicator under §§ 308 and 309 to decide a licensing case on facts set forth in writing by applicants and parties in interest, and on a record consisting of applications, pleadings, and matters of which it can take official notice, permits it to have the discretion under one of its own rules to decide such a case on facts presented in oral *ex parte* presentations. Consideration of that issue alone should cause the Commission to overrule *AT&T/VZW* and *AT&T/Centennial*, and to cease its “well established administrative practice” of not complying with § 309(d) of the Act and § 1.1208 of the Rules.³⁵

II. THE COMMISSION SHOULD OVERRULE *AT&T/VZW* AND *AT&T/CENTENNIAL*

AT&T and DT urge the Commission to follow *AT&T/VZW* and *AT&T/Centennial* and to reject Cellular South’s statutory argument that §§ 307, 308 and 309 “prescribe the procedures that the Commission must follow in license proceedings and preclude [it] from employing additional procedures that will permit greater participation.”³⁶ As alluded to by AT&T and DT,

³¹ 47 U.S.C. § 309(a) & (d)(2). *See* Pet. at 24-25, 26.

³² 47 U.S.C. § 309(e). *See* Pet. at 25, 26.

³³ *See* 5 U.S.C. §§ 554(a), 556(a), 557(d)(1).

³⁴ *See* Pet. at 26.

³⁵ *AT&T/VZW*, 25 FCC Rcd at 8770; *AT&T/Centennial*, 24 FCC Rcd at 13977.

³⁶ Jt. Opp. at 226.

the Commission no longer feels constrained by statutory procedures, as evident from the Transaction Team's web page.

It appears that the Transaction Team has been empowered to "improve" the process by which the Commission reviews applications for its consent to major wireless transactions.³⁷ One of its procedural innovations was to develop its own web page "to provide the public with a transparent and easily accessible source for relevant information about various transactions."³⁸ Major transactions are given their own web page by the team, especially if they: (1) present novel or complex issues of law or policy; (2) are likely to have a significant impact on the public; (3) involve business, economic, legal, or regulatory issues that are likely to elicit significant public comment; or (4) are likely to produce a record that will be of significant public interest.³⁹

To promote "transparency and predictability" in the process, the Transaction Team developed an informal timeline to ensure that applications filed pursuant to § 310(d) of the Act "are processed within 180 days after the Commission has sought comment from the public."⁴⁰ And the team has even adopted procedures by which the public may file comments on pending applications. It has publicly announced, "You may file comments on pending transactions electronically in those cases where the transaction has been put on the Commission's docket, and you may file comments on paper in all cases."⁴¹

The Transaction Team's new procedures have become the Commission's procedures. When Cellular South had the temerity to point out that those procedures were contrary to those

³⁷ Ex. 5, *infra*, at 1.

³⁸ Ex. 5, *infra*, at 1.

³⁹ *See id.*

⁴⁰ *Id.* at 1-2.

⁴¹ *Id.* at 3.

selected by Congress, the Commission held:

[T]he Commission and its staff have the discretion to apply permit-but-disclose *ex parte* procedures under [§] 1.1206 if the agency or its staff determine that the proceeding “involves primarily issues of broadly applicable policy.” * * * * The Commission has previously determined that transactions like the proposed merger “involve[] broad public policy issues and we reaffirm that judgment here.” For example, our major transaction proceedings generally include consideration of wireless competition issues and the possible effects on actual and potential customers. We note that permit-but-disclose *ex parte* procedures have been applied in the majority of recent merger cases. The public policy determination underlying the decision to use permit-but-disclose *ex parte* procedures for significant transactions is thus reflected in a well-established administrative practice. It does not imply ... that the *ex parte* rules have been ignored.

We further find that the use of permit-but-disclose procedures in this proceeding does not violate the requirement of [§] 309(d) that allegations of fact in petitions to deny be supported by an affidavit. The affidavit requirement ... requires an affidavit only for petitions to deny and the applicant’s reply to such petitions. The affidavit requirement does not apply to other filings and does not preclude the Commission from considering other filings. Moreover, *the purpose in seeking public comment is to invite information from a variety of perspectives regarding broad public policy concerns, as well as to adduce potential benefits and harms the transaction may cause.* We do not believe that [§] 309(d) precludes us from doing this. The requirement for a supporting affidavit * * * * does not apply to “matters which [the Commission] may officially notice.” We believe that we may take official notice of the kind of policy-related concerns raised by the *ex parte* filings.⁴²

We will examine the common holding of *AT&T/VZW* and *AT&T/Centennial* closely in light of the statute and show that it is wholly inconsistent with law as it still exists today. In the process, we also will show that §§ 307, 308 and 309 preclude the Commission from employing *ad hoc* procedures in the interests of “transparency” to transform this restricted adjudicatory proceeding into what appears to be a permit-but-disclose informal rulemaking.

A. The Commission Cannot Employ APA Rulemaking Procedures in a § 309 Adjudicatory Proceeding

⁴² *AT&T/VZW*, 25 FCC Rcd at 8769-70 (emphasis added); *AT&T/Centennial*, 24 FCC Rcd at 13976-77 (emphasis added).

Under the “clear scheme of the APA ... [a]dministrative action ... is either adjudication or rulemaking.” *Association of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1160 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). Adjudication is the “agency process for the formulation of an order,” 5 U.S.C. § 551(7), whereas rulemaking is the “agency process for formulating, amending, or repealing a rule.” *Id.* § 551(7). Adjudication includes “licensing” but it cannot be rulemaking, because the APA defines “order” to mean “the whole or a part of a final disposition ... of an agency in a matter *other than rule making but including licensing.*” *Id.* § 551(6). In contrast, a “rule” is defined as “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” *Id.* § 551(4).

Under the APA, rulemaking and adjudication may be conducted pursuant to either formal or informal procedures.⁴³ Informal rulemaking requires the agency to provide “interested persons an opportunity to participate in the rule making through submission of written data, views or arguments.” 5 U.S.C. § 553(c). Informal adjudication only requires the agency to satisfy the “minimal requirements” set forth in the APA, *see id.* § 555, and those of due process. *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

The procedural requirements of the APA apply in the absence of procedures required by an agency’s governing statute.⁴⁴ The Act mandates no specific procedures for informal rulemakings, so the Commission conducts such rulemakings under the notice-and-comment provisions of § 4 of the APA. *See* 47 C.F.R. § 1.399. But the Act specifically mandates the

⁴³ Formal rulemaking is invoked when “rules are required by statute to be made on the record after opportunity for an agency hearing.” 5 U.S.C. § 553(c). Formal adjudication arises in “every case of adjudication required by statute to be determined on the record after opportunity for agency hearing.” *Id.* § 554(a).

⁴⁴ *See, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 n.21 (1978).

adjudicatory procedures that were to apply when AT&T and DT filed their transfer of control applications. When those procedures were enacted in 1960, Congress was not interested in transparency, and it certainly was not interested in facilitating greater public participation in the process.

The source of the language of the pre-grant procedures of § 309 was draft legislation jointly submitted to Congress by the Commission and the Federal Communications Bar Association (“FCBA”).⁴⁵ The new more rigorous provisions of § 309, including the so-called “affidavit requirement,” were aimed at avoiding “serious and disruptive procedural abuses” that had been reported initially by the FCBA.⁴⁶ Congress created the “device of the petition to deny,”⁴⁷ as “an integral part of a system of pre-grant procedures, including the publication of notice and the 30-day waiting period established by [§] 309(d)(1) ... before applications to which [§] 309(b) applies can be granted or designated for hearing.”⁴⁸ Congress believed that the new “procedural safeguards will provide an adequate opportunity for *proper parties* to protect their interests in an *orderly and logical manner* without subjecting the Commission procedures to the abuses which are inherent in the present protest procedure.”⁴⁹

The 1960 rewrite of § 309 included the provision that the Commission could not grant an application “earlier than thirty days following issuance of public notice ... of the acceptance for filing of such application.” 47 U.S.C. § 309(b). The purpose of the public notice requirement is not to “invite information from a variety of perspectives” — including, for example, the

⁴⁵ See *WTWV, Inc.*, 45 F.C.C. 2d 664, 665 (1974).

⁴⁶ *WLVA, Inc. v. FCC*, 459 F.2d 1286, 1293 (D.C. Cir. 1972).

⁴⁷ *Id.*

⁴⁸ *WTWV*, 45 F.C.C. 2d at 665.

⁴⁹ H.R. Rep. No. 86-1800, at 3 (1960), *reprinted in*, 1960 U.S.C.C.A.N. 3516, 3517 (emphasis added).

perspective of the New Zealand Ministry of Economic Development⁵⁰ — “regarding broad public policy concerns.” The § 309(b) notice requirement was “designed specifically to give interested parties an opportunity to learn of the application and to file a ‘petition to deny.’”⁵¹

Perhaps it is a wonderful idea to make it easy for 30,000 people to electronically submit comments supporting or opposing the grant of the T-Mobile transfer of control applications. But Congress did not authorize the Commission to conduct a public referendum on AT&T’s proposed acquisition of T-Mobile. It authorized parties to file with the Commission a petition that “*shall* contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with the [public interest].”⁵² Until it obtains statutory authority to employ notice-and-comment procedures to dispose of § 310(d) applications, the Commission is obliged to “execute and enforce” the provisions of § 309 of the Act. 47 U.S.C. § 151.

B. Major Transaction Proceedings Primarily Adjudicate the Rights of the Applicants Rather than Resolving Issues of Broadly Applicable Policy

Assuming *arguendo* that there are circumstances under which it can apply permit-but-disclose *ex parte* procedures after a petition to deny has been filed in accordance with § 309(d)(1), the Commission cannot do so upon the mere finding that a major wireless merger case “involve[d] broad public policy issues.”⁵³ The test the Commission adopted is that a restricted proceeding not designated for hearing may be conducted in accordance with permit-but-disclose

⁵⁰ See *infra* Ex. 6 (Letter from Robert Clarke to Secretary, FCC, WT Docket No. 11-65 (May 31, 2011)).

⁵¹ H.R. Rep. No. 86-1800, at 4.

⁵² 47 U.S.C. § 309(d)(1) (emphasis added).

⁵³ *AT&T/VZW*, 25 FCC Rcd at 8769; *AT&T/Centennial*, 24 FCC Rcd at 13976-77.

procedures if the proceeding “involves *primarily* issues of broadly applicable policy *rather than the rights and responsibilities of specific parties.*” 47 C.F.R. § 1.1208, Note 2 (emphasis added). *See General Motors Corp. and Hughes Electronics Corp.*, 23 FCC Rcd 3131, 3136 (2008). If the test has viability, it requires a prior determination that a proceeding involves primarily issues of broadly applicable policy *not* the rights and responsibilities of specific parties.⁵⁴ Therefore, the test is whether the proceeding is primarily a rulemaking rather than an adjudication. *See supra* p. 10.

Wireless “competition issues” and the “possible effects” of major transactions “on actual and potential customers” are not primarily “broadly applicable policy” issues. They are simply issues that the Commission may consider if it was to prescribe policy of broad applicability and future effect. But they are issues that the Commission must consider to determine “the rights and responsibilities of the specific parties” that have sought its approval of major transactions. The fact that the Commission’s decision on a major transaction may establish a precedent that could have “general applicability” and future effect does not transform the decision-making process into a rulemaking. Otherwise, every adjudication would be treated as a rulemaking.

The Commission certainly recognized that the major transaction proceedings in *AT&T/VZW* and *AT&T/Centennial* did not primarily involve issues of general applicability when it followed its policy of imposing conditions “only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to [its] responsibilities under the ... Act and related statutes.”⁵⁵ Therefore, it declined to impose conditions on its approval of the transactions that were “not narrowly tailored to prevent a transaction-specific harm.” It found

⁵⁴ As used in Note 2 to § 1.1208 of the Rules, the word “rather” means “on the contrary.” Random House Webster’s Unabridged Dictionary 1602 (2d ed. 2001).

⁵⁵ *AT&T/VZW*, 25 FCC Rcd at 8747; *AT&T/Centennial*, 24 FCC Rcd at 13969.

that the proposed conditions would “apply broadly across the industry and are therefore more appropriate for a Commission proceeding where all interested parties have an opportunity to file comments.”⁵⁶ That finding flatly contradicts the Commission’s suggestion that the *AT&T/VZW* and *AT&T/Centennial* proceedings involved *primarily* issues of broadly applicable policy.

The bottom line is that the current proceeding primarily involves a determination of the issue of whether the public interest would be served by allowing AT&T to exercise its contractual *right* to purchase control of T-Mobile for \$39 billion. The Commission’s final order disposing of the issue will directly determine the rights and responsibilities of AT&T, DT and T-Mobile. As the court noted in *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1100 (D.C. Cir. 2009), adjudicatory orders issued in merger cases do not impose “*any* obligations or restrictions on parties ... other than those directly involved in the mergers.”

C. Permit-But-Disclose *Ex Parte* Procedures Cannot Be Applied in Restricted Title III Proceedings that Are Subject to § 309(d)

The foregoing was merely a divergence from the real issue of whether the Commission has any discretion to permit parties to make oral *ex parte* presentations to agency decision-makers in a restricted adjudicatory proceeding that is subject to the procedural requirements of § 309. The Commission side-stepped that issue in *AT&T/VZW* and *AT&T/Centennial* by treating the proceedings as *quasi*-rulemakings. Obviously, *ex parte* presentations to decision-makers that are permitted in informal rulemakings are prohibited in informal adjudications. “Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among ‘conflicting private claims to a valuable privilege,’ the insulation of the decision-maker from *ex parte* contacts is justified by basic notions of due process to the parties involved.” *Sierra Club v. Costle*, 657 F.3d 298, 400 (D.C. Cir. 1981).

⁵⁶ *AT&T/VZW*, 25 FCC Rcd at 8747; *AT&T/Centennial*, 24 FCC Rcd at 13969.

The Commission has insulated its decision-makers from *ex parte* contacts in restricted proceedings on due process grounds since the *ex parte* rules were adopted in 1965.⁵⁷ Thirty years later, the Commission offered the following explanation for those rules:

The rules regulating *ex parte* presentations to the Commission represent an important means for preserving the public's confidence in the integrity of the Commission's processes. They are intended to ensure that the Commission's decisions are based on a publicly available record rather than influenced by off-the-record communications between decision-makers and outside persons. This objective is grounded on basic tenets of fair play and due process.⁵⁸

The Commission has prescribed its current *ex parte* rules “[t]o ensure the fairness and integrity of its decision-making.” 47 C.F.R. § 1.1200(a). And those rules still prohibit *ex parte* presentations to and from Commission decision-makers in proceedings involving applications for authority under Title III of the Act. *See id.* § 1.1208. It would seem axiomatic that the Commission should invariably adhere to the letter of rules that it adopted to ensure the fairness and integrity of its decision-making process in adjudicatory proceedings. Be that as it may, Commission adherence to its prohibition of oral *ex parte* presentations in restricted Title III cases becomes a matter of *statutory due process* in a proceeding that is governed by the § 309(d) requirements that the parties present the facts in written pleadings and the Commission renders a decision on the basis of a publicly-available record that consists entirely “of the application, the pleadings filed, or *other* matters which it may officially notice.” 47 U.S.C. § 309(d)(2).

The text of § 309(d) cannot be read to authorize the Commission to employ permit-but-disclose *ex parte* procedures in this case that allowed AT&T's executives and attorneys to have face-to-face discussions on the merits with Commission decision-makers despite the pendency of

⁵⁷ *See Rules Governing Ex Parte Communications in Hearing Proceedings*, 1 F.C.C. 2d 49, 49-50 (1965).

⁵⁸ *Amendment of 47 C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations in Commission Proceedings*, 10 FCC Rcd 3240, 3240 (1995).

petitions to deny.⁵⁹ And the Commission will not be able to credibly claim that § 309(d) allows it to take “official notice of the kind of policy-related concerns” that are being discussed by its decision-making personnel and the parties at meetings and in telephone conversations.⁶⁰ As it recognized in *AT&T/VZW* and *AT&T/Centennial*, the Commission can only take official notice of “‘legislative facts’ within its special knowledge.”⁶¹ Since they have special knowledge of the legislative facts, Commission decision-makers have no need to hear oral *ex parte* presentations of those facts. Regardless, the facts being discussed privately in this proceeding are not legislative facts.

Legislative facts are “those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or a ruling by a judge or court or in the enactment of a legislative body.”⁶² A legislative fact “is ordinarily general, without reference to specific parties.”⁶³ Adjudicative facts, on the other hand, “are simply the facts of the particular case.”⁶⁴ They are the “facts concerning the immediate parties” and “those to which the law is applied in the process of adjudication.”⁶⁵ To be subject to official notice, an adjudicative fact

⁵⁹ See *infra* Ex. 3 at 27, 30, 32, 38, 40, 45, 61.

⁶⁰ See *supra* p. 10. See also *Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc.*, 25 FCC Rcd 10985, 11020 (WTB 2010) (“VZW/AT&T”).

⁶¹ *AT&T/VZW*, 25 FCC Rcd at 8771 n.551 (citing *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 298 (2000)); *AT&T/Centennial*, 24 FCC Rcd at 13977 n.520 (same). See *VZW/AT&T*, 25 FCC Rcd at 11020 n.279 (same). In *City of Erie*, the Supreme Court analogized to the administrative agency context,” where “it is well established that, as long as a party has an opportunity to respond, an administrative agency may take official notice of such ‘legislative facts’ within its special knowledge, and is not confined to the evidence in the record in reaching its expert judgment.” 529 U.S. at 298.

⁶² Fed. R. Evid. 201 advisory committee’s note.

⁶³ *Nat’l Advertisers*, 627 F.2d at 1161.

⁶⁴ Fed. R. Evid. 201 advisory committee’s note.

⁶⁵ *Nat’l Advertisers*, 627 F.2d at 1161.

“must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction ... or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”⁶⁶

It is absolutely clear that adjudicative facts were presented to, or discussed with, Commission decision-makers *ex parte* by representatives of AT&T and DT.⁶⁷ Any suggestion that the Commission could take official notice of the matters discussed would be frivolous, especially since some of the discussions have apparently concerned information that AT&T and DT claim are confidential.⁶⁸ Some of the facts that have been discussed were not only subject to reasonable dispute, but were disputed by petitioners to deny.⁶⁹ Such *ex parte* communications with respect to contested, material adjudicative facts should never be allowed, much less be the subject of official notice.⁷⁰

Finally, it is fundamentally unfair and particularly prejudicial for the Commission to lift its ban on *ex parte* presentations in restricted major transaction proceedings that involve the nation’s two largest wireless carriers. Again, by our count, AT&T has 5 in-house counsel and 52 outside counsel (assisted by six legal assistants and paralegals) from four prestigious law firms law all working on this case.⁷¹ In addition, AT&T employs the services of 28 outside consultants from two consulting firms to assist it in this proceeding.⁷² Moreover, it has the financial

⁶⁶ Fed. R. Evid. 201(b).

⁶⁷ *See infra* Ex. 3 at 25-26, 27-28, 30, 32-33, 34-35, 36, 38, 40, 42, 45-46, 61.

⁶⁸ *See id.* at 25-26, 27-28, 30, 32-33, 34-35.

⁶⁹ *See id.*

⁷⁰ *See* Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, § 8.4 at 391 (3d ed. 1994).

⁷¹ *See infra* Ex. 7 at 3-5 (Letter from Peter J. Schildkraut to Marlene H. Dortch, WT Docket No. 11-65 (June 17, 2011)).

⁷² *See id.* at 4.

wherewithal to muster no less than five attorneys from three law firms to assist it in making an oral ex parte presentation to decision-making personnel of the Commission.⁷³ On June 1, 2011, AT&T was able to confer with no less than 23 Commission decision-makers about the facts at issue in this case.⁷⁴ It was certainly unfair and potentially prejudicial to the petitioners to deny for the WTB to employ permit-but-disclose procedures in this proceeding that afforded AT&T seemingly unlimited *ex parte* access to Commission decision-makers. Needless to say, the thought that a group of 23 decision-makers made themselves available to take part in an off-the-record discussion of the adjudicative facts with AT&T has shaken Cellular South's confidence in the integrity of the Commission's processes.

In light of its duty to execute and enforce the adjudicatory provisions of Title III, the Commission must overrule *AT&T/VZW* and *AT&T/Centennial*, remedy the WTB's violations of the procedures mandated by Congress in § 309, and take whatever actions are necessary to *remove the taint of the ex parte contacts in this proceeding*.

III. NO COURT HAS UPHELD THE USE OF PROCEDURES REMOTELY SIMILAR TO THOSE EMPLOYED BY THE WTB IN THIS CASE

AT&T and DT cite *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) and *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (en banc) as upholding Commission decisions in licensing proceedings in which the Commission employed procedures similar to those adopted by the WTB here.⁷⁵ In both cases, however, the Commission complied with the pre-grant procedural requirements of § 309(d) and the issue on appeal was whether the Commission was obliged to hold an evidentiary hearing under § 309(d). *See SBC*, 56 F.3d at

⁷³ *See infra* Ex. 3 at 30.

⁷⁴ *See id.* at 27-28.

⁷⁵ *See Jt. Opp.* at 227 n.473.

496-97; *United States*, 652 F.2d at 90. In *SBC*, the issue was a hearing was necessary to resolve “disputed factual issues,” 56 F.3d at 426; in *United States*, the issue was whether a hearing was necessary on the ground that the Commission “lacked sufficient data on which to make an informed decision.” 652 F.2d at 90. Indeed, the procedural challenges in *SBC* were over the manner in which the Commission handled documents produced under a protective order. *See* 56 F.3d at 426. In this case, Cellular South challenges whether the WTB had the authority to issue the protective orders in the first place.

In this case, the WTB commenced its own off-the-record evidentiary inquiry before the parties had presented their specific allegations of fact in accordance with § 309(d)(1). Indeed, the WTB even attempted to take discovery from Cellular South. The WTB had the authority to require “further written statements of fact” from AT&T and DT. 47 U.S.C. § 308(b). But Cellular South is not an applicant in this proceeding, and the WTB was without authority to require Cellular South to provide answers to interrogatories or to produced documents at this stage of the adjudication.

Respectfully submitted,

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