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	)	

PETITION TO DENY OF CELLULAR SOUTH, INC.

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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") and § 1.939(a)(2) of the Commission's Rules ("Rules"), hereby petitions the Commission to deny the above-captioned application of AT&T Inc. ("AT&T") and Deutsche Telekom AG ("DT") for Commission consent to the transfer of control of wireless radio services licenses held by certain subsidiaries of T-Mobile USA ("T-Mobile"). In support thereof, the following is respectfully submitted:

INTRODUCTION

Cellular South is the nation's largest privately-held wireless carrier. Through subsidiaries, Cellular South provides wireless services to approximately 880,000 customers throughout Mississippi, and in portions of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Tennessee and Virginia.[1]

[1] Cellular South provides cellular service in nine Cellular Market Areas ("CMAs") in Mississippi, consisting of two Metropolitan Statistical Areas ("MSAs") and seven Rural Service Areas. Cellular South also provides Personal Communications Service ("PCS") in twelve Mississippi Basic Trading Areas. In addition, Cellular South holds authorizations to provide PCS, Advanced Wireless Service and/or 700 MHz Service in portions of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, and Virginia.

Cellular South is an active proponent of regulations to preserve effective competition in the mobile wireless services marketplace in the face of the increasing industry concentration and the market power wielded by the nation's two largest wireless carriers, AT&T and Verizon Wireless. On the rulemaking front, Cellular South has urged the Commission to promulgate rules in accordance with the notice-and-comment requirements of the Administrative Procedure Act ("APA")[2] that mandate data roaming,[3] ban exclusive handset agreements,[4] and require interoperable 700 MHz mobile devices.[5] And Cellular South was extremely pleased when the Commission recently adopted — over the strenuous objections of AT&T and Verizon Wireless — the data roaming requirements of new § 20.12(e) of the Rules.[6]

Cellular South has not been so successful on the adjudicatory front. For nearly three years, Cellular South has intervened in Title III merger cases to assert its due process right to have the Commission abide by the procedural requirements of § 309(d) of the Act and its own ex parte rules.[7] Cellular South has maintained that the quasi-rulemaking procedures that the

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[2] *See* 5 U.S.C. § 553.

[3] *See, e.g.*, Letter from Eric B. Graham to Marlene H. Dortch, WT Docket No. 05-265, at 1-3 (Feb. 9, 2011); Comments of Cellular South, Inc., WT Docket No. 05-265, at 4-23 (June 14, 2010).

[4] *See, e.g.*, Comments of Cellular South, Inc., WT Docket No. 09-66, at 8-17 (June 15, 2009); Reply Comments of Cellular South, Inc., RM No. 11497, at 2-15 (Feb. 20, 2009).

[5] A subsidiary of Cellular South was one of the four Lower 700 MHz Band block A ("A Block") licensees that petitioned the Commission to initiate a rulemaking to generally prohibit anticompetitive 700 MHz mobile equipment design and procurement practices, and to specifically require that all mobile devices for the 700 MHz band be capable of operating on all of the paired, commercial 700 MHz frequency blocks. *See Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, 25 FCC Rcd 1464, 1464 n.1 (2010).

[6] *See Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, FCC 11-52, at 7 (Apr. 7, 2011).

[7] *See* Petition for Expedited Reconsideration of Cellular South, Inc., WT Docket No. 09-121, at 4-25 (Sept. 29, 2009); Petition for Expedited Reconsideration of Cellular South, Inc., WT Docket

Commission employs in merger cases not only deprive petitioners of their statutory and constitutional rights, but they unfairly favor AT&T and Verizon.

Cellular's South's procedural arguments have been rejected three times by the Commission[8] and once by the Wireless Telecommunications Bureau ("WTB").[9] But the Commission has never passed on the fundamental issue of whether it has been delegated the authority by Congress to employ rulemaking procedures in a Title III adjudication under § 309(d). Cellular South will exercise its standing under § 309(d)(1) to request that the Commission fulfill its statutory duty[10] to remedy the violation of § 309(d) that has already tainted this proceeding.[11]

STANDING

By AT&T's count, Cellular South competes with AT&T in 66 CMAs.[12] Cellular South's

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No. 09-1350, at 4-24 (July 20, 2009); Petition for Reconsideration of Cellular South, Inc., WT Docket No. 08-246, at 4-15 (Jan. 15, 2009); Reply of Cellular South, Inc. to Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, at 14 n.36 (Aug. 26, 2008). *See also* Letter from David L. Nace to James D. Schlichting, WT Docket No. 08-95, at 2-4 (Sept. 24, 2008).

[8] *See AT&T INC. and Cellco Partnership d/b/a Verizon Wireless*, 25 FCC Rcd 8704, 8769-72 (2010) ("*AT&T/VZW*"); *AT&T Inc. and Centennial Communications Corp.*, 24 FCC Rcd 13915, 13976-78 (2009) ("*AT&T/Centennial*"); *Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, 23 FCC Rcd 17444, 17540-41 (2008) ("*VZW/Atlantis*").

[9] *See Cellco Partnership d/b/a Verizon Wireless and AT&T, Inc.*, 25 FCC Rcd 10985, 11019-21 (WTB 2010) ("*VZW/AT&T*").

[10] *See* 47 U.S.C. § 151 (the Commission "shall execute and enforce the provisions of [the Act]").

11 One month *before* AT&T and DT filed their transfer of control applications, the WTB announced that the Commission would entertain oral ex parte presentations on the merits of the applications. *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 (WIB Apr. 14, 2011).

[12] *See* File No. 0004669383, Description of Transaction, Public Interest Showing and Related Demonstrations, App. B at 13-14, 16, 21-23, 29, 31, 33-34, 37, 42-43, 45-48, 51-53, 57, 67-70, 72, 99-102, 106-07, 116-22, 173-78, 193, 223, 225-26, 232, 237, 239-43, 245, 250-51, 253-55, 257-59, 262-63, 265, 272-74, 276, 303, 308-09, 319-22, 329, 370, 372-74 (Apr. 21, 2011)

status as a direct and current competitor provides it with standing to file a petition to deny the AT&T/DT applications under *FCC v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940) and its progeny. *See New World Radio, Inc. v. FCC,* 294 F.3d 164, 170 (D.C. Cir. 2002). Consistent with S*anders Brothers,* the Commission developed a "generous" standing policy in assignment and transfer cases "so as to enable a competitor to bring to the Commission's attention matters bearing on the public interest because its position qualifies it in a special manner to advance such matters." *Stoner Broadcasting System, Inc.,* 74 F.C.C. 2d 547, 548 (1979). *See WLVA, Inc. v. FCC,* 459 F.2d 1286, 1298 n.36 (D.C. Cir. 1972) (standing under § 309(d)(1) "liberally conferred" where a competitor alleges economic injury). Under that policy, Cellular South clearly has standing under § 309(d)(1) to petition to deny the AT&T/DT applications. *See, e.g., Channel 32 Hispanic Broadcasters, Ltd.,* 15 FCC Rcd 22649, 22651 (2000).

Despite recognizing that the administrative standard for establishing standing under § 309(d)(1) is "less stringent" than the judicial standard for establishing Article III standing to appeal, *see Paxson Management Corp. and Lowell W. Paxson,* 22 FCC Rcd 22224, 22224 n.2 (2007), and that Article III does not apply at all to administrative standing, *see Sagittarius Broadcasting Corp.,* 18 FCC Rcd 22551, 22554 n.20 (2003), the Commission nevertheless has applied the test for Article III standing to petitioners in transfer of control cases. *See, e.g., Shareholders of Tribune Co.,* 22 FCC Rcd 21266, 21268 (2007).[13] In the unlikely event it does so again in this case, the Commission should recognize Cellular South's Article III standing.

At a cost of approximately $192 million, Cellular South acquired 24 Lower 700 MHz

("Public Interest Showing").

[13] To establish Article III standing, a party must allege specific facts showing that: (1) it will suffer injury-in-fact; (2) there is a "causal link" between the proposed transfer and the injury-in-fact; and (3) the injury-in-fact would be prevented if the transfer application is not granted. *See Shareholders of Tribune Co.,* 22 FCC Rcd at 21268.

authorizations, including fourteen Block A authorizations, to deploy a 700 MHz LTE network that will operate in all or portions of 62 CMAs in direct competition with mobile broadband services that AT&T will provide over its national LTE network. Consequently, Cellular South is likely to suffer injury-in-fact if AT&T acquires control of T-Mobile. According to AT&T, consummation of the transaction will give the combined company the scale, resources, and spectrum it needs to increase its LTE deployment and "intensify broadband competition" with Cellular South.[14]

If the Commission approves AT&T's proposed $39 billion acquisition of T-Mobile, Cellular South will suffer the economic consequences of competing with the combination of two of the nation's four largest facilities-based wireless service providers.[15] That injury can be redressed if the Commission: (1) dismisses the AT&T/DT applications without prejudice to resubmission in a form that complies with the requirements of § 308 of the Act,[16] and (2) permits Cellular South to exercise its statutory rights as a party in interest under § 309(d)(1) by acting on the resubmitted AT&T/DT applications in accordance with §§ 309 and 310(d).

Inasmuch as it has a statutory right as a party in interest under § 309(d)(1) to petition the Commission to deny the AT&T/DT applications, s*ee Springfield Television Broadcasting Corp. v. FCC*, 328 F.2d 186, 187-88 (D.C. Cir. 1964), Cellular South also has standing to raise "any relevant question of law." *Sanders Brothers Radio Station*, 309 U.S. at 698. Cellular South alleges that the Commission has violated § 309(d) and that violation will deprive Cellular South of its statutory right as a party in interest to have its allegations disposed of by the Commission

[14] *See* Public Interest Showing, at 1, 18-19, 90-91.

[15] *See Implementation of § 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 25 FCC Rcd 11407, 11438-39 (2010) ("*Fourteenth Competition Report*").

[16] *See* 47 U.S.C. § 308.

in accordance with the adjudicatory procedures mandated by Congress in Title III of the Act. Because it has been accorded a procedural right under § 309(d) to protect its "concrete interest" in preventing AT&T's anticompetitive conduct, Cellular South has standing to assert that right "without meeting all the normal standards for redressability and immediacy." *Lujon v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). *See Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1261-62 (D.C. Cir. 2004); *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1356 (D.C. Cir. 1990), *cert. denied*, 502 U.S. 907 (1991).

FACTS

On March 20, 2011, AT&T entered into an agreement to purchase T-Mobile for $39 billion to be paid by $25 billion in cash and $14 billion in AT&T stock.[17] Before the necessary applications for Commission consent to the transaction were even signed by the parties, the WTB notified the public that it had initiated a proceeding in WT Docket No. 11-65 to consider AT&T's proposed acquisition of T-Mobile. The WTB announced that until the transfer of control applications were filed, "discussions with Commission staff regarding the proposed transaction will *continue* to be exempt from any *ex parte* limitations or requirements."[18] The WTB also announced that, once the applications were actually filed, the proceeding would "be governed by permit-but-disclose *ex parte* procedures that are applicable to non-restricted proceedings under [§] 1.1206 of the [Rules]."[19]

Anticipating that "proprietary or confidential information" either will be filed in the proceeding or "will be necessary to develop a more complete record on which to base the

[17] *See* File No. 0004669383, FCC Form 603, Ex. 3, Stock Purchase Agreement, at 16 (Apr. 21, 2011) ("FCC Form 603").

[18] *Commission Opens Docket*, DA 11-673, at 1 (emphasis added).

[19] *Id.*

Commission's decision," the WTB issued a protective order on April 14, 2011 to prevent the improper disclosure of "Confidential Information," which it defined as "information that is not otherwise available from publicly available sources and that is subject to protection under [the Freedom of Information Act ("FOIA")] and the Commission's implementing rules."[20]

On April 18, 2011, the WTB notified the public that the Commission's review of AT&T's proposed acquisition of T-Mobile would include the examination of "information contained in the Numbering Resource Utilization and Forecast ("NRUF") reports filed by wireless telecommunications carriers and disaggregated, carrier-specific local number portability ("LNP") data related to wireless telecommunications carriers."[21] On the same day, the WTB issued a second protective order under which "parties participating in the proceeding" could gain access to the information from the NRUF reports and the LNP data that the Commission would consider as part of the "complete record" on which it would base its decision.[22]

On April 21, 2011, the same day AT&T and DT signed the lead T-Mobile transfer of control application, the WTB announced the permit-but-disclose *ex parte* procedures had been triggered by the filing of the AT&T/DT applications.[23] Also on that same day, the first notification of an *ex parte* presentation was filed under the Commission's permit-but-disclose procedures.[24]

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[20] *AT&T Inc. and Deutsche Telekom AG*, DA 11-674, at 1 (WTB Apr. 14, 2011).

[21] *Proposed Transfer of Control of T-Mobile USA, Inc. and Its Subsidiaries from Deutsche Telekom AG to AT&T Inc.*, DA 11-710, at 1 (Apr. 18, 2011) (footnote omitted).

[22] *AT&T Inc. and Deutsche Telekom AG*, DA 11-711, at 1 (WTB Apr. 14, 2011).

[23] *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).

[24] *See infra* Ex. 1.

AT&T and DT responded to the WTB's invitation to withhold information from the public by filing a heavily-redacted set of applications for inclusion in the public record. The lead transfer of control application alone encompassed 1,250 pages of material, including a 226-page FCC Form 603 (and four exhibits) and the supporting 1,024-page Public Interest Showing.[25]

AT&T and DT filed their Stock Purchase Agreement ("Acquisition Agreement") as Exhibit 3 to the lead FCC Form 603. The Acquisition Agreement included the Shareholder's Agreement between AT&T and DT as Exhibit A and six annexes.[26] The entire agreement between AT&T and DT consisted of the Acquisition Agreement (including the Shareholder's Agreement and the six annexes) and so-called Seller Disclosure Letter, Purchaser Disclosure Letter, and Confidentiality Agreement.[27] AT&T and DT redacted the six annexes and withheld the two disclosure letters and their confidentiality agreement.

The Public Interest Showing included seven declarations and three appendices.[28] AT&T and DT made no less than 308 separate redactions from the Public Interest Statement that they made available for public inspection. Moreover, as noted by Free Press, the Public Interest Showing and the declarations include references to numerous academic studies and economic analyses, as well as investment bank and analyst reports, which are not publicly available and were not provided.[29]

Apparently at the behest of AT&T and/or DT, the WTB issued yet another protective

[25] *See infra* Ex. 2.

[26] *See* FCC Form 603, Ex. 3, Stock Purchase Agreement at iii.

[27] *See* Acquisition Agreement at 74 (§ 8.5).

[28] *See* Public Interest Statement at iii.

[29] *See infra* Ex. 3 at 1-2 (Letter from Aparna Sridhar to Marlene H. Dortch, WT Docket No. 11-65 (May 24, 2011)).

order on April 27, 2011.[30] The order was designed to provide the public with even "more limited access to certain especially competitively sensitive information that may be filed."[31] In actuality, the order was intended to protect information or documents referenced in the already-filed Acquisition Agreement that AT&T or DT allegedly "kept strictly confidential" and claimed to be among "its most sensitive business data."[32] The WTB defined "Highly Confidential Information" as follows:

> [I]nformation that is not otherwise available from publicly available sources; that the Submitting Party *has kept strictly confidential*; that is subject to protection under FOIA and the Commission's implementing rules; that the Submitting Party *claims constitutes some of its most sensitive business data* which, if released to competitors or those with whom the Submitting Party does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations; and that it is described in Appendix A … as the same may be amended from time to time.[33]

Appendix A provided that "only information and documents set forth in this Appendix … may be designated as Highly Confidential" and that it "will be updated as necessary."[34] Among the enumerated list of "Highly Confidential Documents" set forth in the appendix is Annex F to the Acquisition Agreement,[35] which contains the terms of the roaming agreement that AT&T is obligated to enter into with T-Mobile in the event the proposed transaction craters.[36] Also on the WTB's list are Schedule 3.2q to the Seller Disclosure Letter to the extent it discloses customer data disaggregated by local

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[30] *See AT&T Inc. and Deutsche Telekom AG*, DA 11-753 (WTB Apr. 27, 2011) ("*Third Protective Order*").

[31] *Id.* at 1.

[32] *Third Protective Order*, DA 11-753, at 2.

[33] *Id*. (emphasis added).

[34] *Id*. at 7.

[35] *See id*.

[36] *See* Acquisition Agreement at 70-71 (§ 7.5(b)).

markets; Schedule 4.16 to the Seller Disclosure Letter to the extent it describes future business plans; and Schedules 4.6(b)(i) and 4.6(b)(ii) to the Purchaser Disclosure Letter.[37]

On April 28, 2011, having already released three public notices and issued three protective orders, the WTB announced the "pleading cycle" that it had established for the filing of petitions to deny.[38] The WTB prescribed the following schedule:

> Interested parties must file petitions to deny no later than May 31, 2011. Persons and entities that file petitions to deny become parties to the proceeding. They may participate fully in the proceeding, including seeking access to any confidential information that may be filed under a protective order, seeking reconsideration of decisions, and filing appeals of a final decision to the courts. Oppositions to such pleadings must be filed no later than June 10, 2011. Replies to such pleadings must be filed no later than June 20, 2011.[39]

Consistent with the Commission's policy of seeking public comment on transfer of control applications involving large providers of wireless telecommunications services,[40] the WTB invited comments on the T-Mobile transfer applications to be filed electronically through the Commission's Electronic Comment Filing System ("ECFS") or by hand-delivery.[41] Among the other *ad hoc* procedures adopted by the WTB were the following:

> To allow the Commission to consider fully all substantive issues regarding the Applications in as timely and efficient a manner as possible, petitioners and commenters should raise all issues in their initial filings. New issues may not be raised in responses or replies. A party or interested person seeking to raise a new issue after the pleading cycle has closed must show good cause why it was not possible for it to have raised the issue previously. Submissions after the pleading cycle has closed that seek to raise new issues based on new facts or newly

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[37] *See Third Protective Order*, DA 11-753, at 7.

[38] *AT&T Inc. and Deutsche Telecom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, DA 11-799, at 1 (Apr. 28, 2011) ("*Comment Public Notice*").

[39] *Id*. at 3.

[40] *See AT&T/VZW*, 25 FCC Rcd at 8770; *AT&T/Centennial*, 24 FCC Rcd at 13977; *VZW/Atlantis*, 23 FCC Rcd at 17540. *See also VZW/AT&T*, 25 FCC Rcd at 11020.

[41] *See Comment Public Notice*, DA 11-799, at 4.

> discovered facts should be filed within 15 days after such facts are discovered. Absent such a showing of good cause, any issues not timely raised may be disregarded by the Commission.[42]

The WTB explicitly urged parties to use the ECFS to file *ex parte* submissions.[43] To facilitate oral *ex parte* presentations, the WTB provided a link to the Internet and a telephone number so requests for meetings with Commission staff could be made online or by telephone.[44]

A week before the deadline for filing petitions to deny, the WTB issued its fifth public notice.[45] The WTB announced its intention to place into the record monthly carrier-to-carrier LNP Data provided by NeuStar, Inc. for all wireless telecommunications carriers for the period January 1, 2007 through December 31, 2010.[46] The day after announcing that it would be putting additional information into the record to "assist the Commission in assessing the competitive effects of the [AT&T/DT] transaction," the WTB denied a motion filed by a non-profit organization — that represents the disadvantaged and has limited resources[47] — seeking a 30-day extension of the deadline for filing a petition to deny so that the organization would have sufficient time to develop the facts necessary to frame a petition to deny.[48]

Two days later, the WTB exercised its authority under § 308(b) of the Act[49] to obtain additional facts from AT&T and DT to enable the Commission to determine whether to grant its

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[42] *Id*. at 3-4.

[43] *Comment Public Notice*, DA 11-799, at 3.

[44] *See id*.

[45] *See Proposed Transfer of Control of T-Mobile USA, Inc. and Its Subsidiaries from Deutsche Telekom AG to AT&T Inc.*, DA 11-945 (May 24, 2011)

[46] *See id*. at 1-2.

[47] *See* Greenling Institute, Motion for Extension of Time, WT Docket No. 11-65, at 1-2 (May 20, 2011).

[48] *See AT&T Inc. and Deutsche Telekom AG*, DA 11-952, at 1 (WTB May 25, 2010).

[49] 47 U.S.C. § 308(b)

consent to the transfer of control of T-Mobile.[50] It propounded discovery requests that called on AT&T and DT to provide written responses to interrogatories and respond to the requests for the production of documents no later than June 10, 2011.[51] AT&T is to respond to a set of 50 multiple-part discovery requests,[52] while DT merely has to respond to 47 such requests.[53]

At least 26,089 items were posted in the record through May 31, 2011.[54] On May 26, 2011 alone, more than 10,000 items were placed in the record.[55] The record indicates that between April 27, 2011 and May 25, 2011, at least sixteen oral *ex parte* presentations were made to Commission decision-makers,[56] including three to Chairman Genachowski,[57] and at least one to Commissioners Copps, Baker and Clyburn.[58]

ARGUMENT

I. THE COMMISSION IS UNDER A MANDATORY STATUTORY DUTY TO EXECUTE AND ENFORCE THE PROVISIONS OF §§ 309 AND 310(d)

In some instances, the Commission has the discretion to choose to proceed by adjudication or by rulemaking.[59] It also has the discretion under § 4(j) of the Act[60] to fashion

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[50] *See* Letter from Ruth Milkman to William R. Drexel, WT Docket No. 11-65, at 1 (May 27, 2011) ("AT&T Letter"); Letter from Ruth Milkman to Dan Menser, WT Docket No. 11-65, at 1 (May 27, 2011) ("DT Letter").

[51] *See* AT&T Letter at 1; DT Letter at 1.

[52] *See* Information and Discovery Request for AT&T Inc., WT Docket No. 11-65, at 1-10 (May 27, 2011)

[53] *See* Information and Discovery Request for Deutsche Telekom AG, WT Docket No. 11-65, at 1-8 (May 27, 2011).

[54] *See infra* Ex. 4.

[55] *See id*. at 30.

[56] *See infra* Ex. 1 at 1; Ex. 5 at 1, 3, 5, 6, 7, 8, 11, 14, 16, 18, 20.

[57] *See infra* Ex. 5 at 1, 3, 16.

[58] *See id*. at 5, 6, 11.

[59] *See Central Texas Telephone Cooperative, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005); *Cassell v. FCC*, 154 F.3d 478, 486 (1998); *SBC Communications Inc. v. FCC*, 138 F.3d 410, 421

rules of procedure in the absence of congressionally prescribed procedures.[61] But the Commission has no discretion with respect to the procedures required by § 309(d). *See RKO General, Inc. v. FCC,* 670 F.2d 215, 233 (D.C. Cir. 1981), *cert. denied,* 456 U.S. 927 (1982). That section establishes the "statutory framework" within which the Commission must dispose of a petition to deny a Title III application which is subject to §§ 307(a), 308 and 309. *Gencom Inc. v. FCC,* 832 F.2d 171, 180 (D.C. Cir. 1987).

It would seem axiomatic to say that the Commission must abide by the procedures specified by its enabling statute. However, in light of the Commission's manifest unwillingness to comply with the mandates of § 309 of the Act in major wireless merger cases, as corroborated by its failed attempt to forbear from applying §§ 309 and 310(d) at all under § 1.948(j) of the Rules,[62] Cellular South will show that the Commission is under a statutory duty to adhere to the procedural requirements set forth in §§ 301, 307(a), 308, 309 and 310(d).

To determine whether the Commission exceeded its authority, a reviewing court will follow the two-step approach marked out by the Supreme Court in *Chevron, USA v. NRDC,* 467 U.S. 837, 842-43 (1984). Under *Chevron* step one, a court must determine "whether Congress

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(D.C. Cir. 1998); *Busse Broadcasting Corp. v. FCC,* 87 F.3d 1456, 1463 (D.C. Cir. 1996).

[60] *See* 47 U.S.C. § 154(j) (the Commission "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice").

[61] *See FCC v. WJR, The Goodwill Station, Inc.,* 337 U.S. 265, 277-78 (1949).

[62] In 2004, the Commission decided to forbear from applying the "prior notice and individualized Commission review requirements of [§§] 309(b) and 310(d)" with respect to license assignment and transfer of control applications that fall within the scope of its "forbearance authority" under § 10 of the Act, 47 U.S.C. § 160, and do not raise certain "potential public interest concerns." *Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets,* 19 FCC Rcd 17503, 17556-57 (2004) ("*Secondary Markets Order*"). Thus, it promulgated § the "immediate approval procedures" of a new § 1.948(j)(2) of the Rules. *See id.* at 17585. However, the Office of Management and Budget ("OMB") failed to approve § 1.948(j)(2) and it did not go into effect. *See Certain Changes Announced to the Universal Licensing System to Implement the Commission's Secondary Market Rules and Procedures,* 20 FCC Rcd 4091, 4091 WTB 2005); 47 C.F.R. § 1.948, Effective Date Note.

has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43. In making that determination, a court will employ "traditional tools of statutory construction." *Id.* at 843 n.9. Application of a *Chevron* step one analysis makes it absolutely clear that the Commission is under a statutory duty to apply, and comply with, the petition to deny procedures of § 309(d) in this case.

We begin with § 1 of the Act, which we read to both provide the Commission with subject matter jurisdiction and impose a limit on its authority. The Commission has interpreted § 1 as a jurisdiction-conferring provision of the Act.[63] We find the imposition of a limitation on the § 1 grant of authority in its unambiguous language that the Commission "*shall* execute and enforce the provisions of [the Act]."[64] The word "shall" means "must" or "is obligated to."[65] The plain meaning of the word "execute" is "to carry out," "accomplish," or "to perform or do."[66] The word "enforce" means "to put or keep in force" or "compel obedience to."[67] By employing the word "shall," Congress imposed a mandatory duty on the Commission to carry out, and compel obedience to, the provisions of the Act. *See, e.g., Southwestern Bell Corp. v.*

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[63] *See, e.g., Preserving the Open Network*, 25 FCC Rcd 17905, 17966-67 (2010).

[64] 47 U.S.C. § 151 (emphasis added).

[65] Random House Webster's Unabridged Dictionary 1757-58 (2d ed. 2001). "As used in statutes … this word is generally imperative or mandatory. In common or ordinary parlance … the term 'shall' is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion." Black's Law Dictionary 1375 (6th ed. 1990).

[66] Random House, *supra*, at 676. In law, the word means "[t]o complete; to make; to sign; to perform; to do; to follow out; to carry out according to its terms; to fulfill the command or purpose of." Black's, *supra*, at 567.

[67] Random House, *supra*, at 644. The legal definition of "enforce" is "[t]o put into execution; to cause to take effect; to make effective; as, to enforce a particular law …; to compel obedience to." Black's, *supra*, at 528.

FCC, 43 F.3d 1515, 1521 (D.C. Cir. 1995).

The provisions of §§ 1 and 4(i) of the Act are *in pari materia* and should be construed together. *See Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2003). Under the heading "Duties and powers,"[68] § 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Act], as may be necessary in the execution of its functions."[69] The word "execution" means "the act or process of executing."[70] Construing §§ 1 and 4(i) together, it is clear that the Commission's *power* to take actions, make rules, and issue orders under its Title I ancillary jurisdiction is limited to those that are necessary to fulfill its *duty* under § 1 to carry out, and compel obedience to, the provisions of the Act.

Finally, § 303(r) appears to be the Title III counterpart to § 201(b), which gives the Commission the rulemaking authority "carry out the provisions of this [Act]."[71] Under the heading "Powers and duties of the Commission," § 303(r) provides in pertinent part:

> Except as otherwise provided in [the Act], the Commission from time to time, as public convenience, interest, or necessity requires *shall* … [m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of [the Act] ….[72]

Because Congress expressly delegated rulemaking authority to the Commission in §§ 4(i) and 303(r), and since both confer powers and duties on the Commission, the two provisions are

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[68] The "section heading enacted by Congress" is considered "in conjunction with statutory text" to determine the meaning of the statute. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 441 n.89 (5th Cir. 1999) (quoting *United States v. Wallington*, 889 F.2d 573, 577 (5th Cir. 1989)).

[69] 47 U.S.C. § 154(i).

[70] Random House, *supra*, at 676. The word also means "[c]arrying out some act or course of conduct to its completion." Black's, *supra*, at 568.

[71] 47 U.S.C. § 201(b); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 378 (1999).

[72] 47 U.S.C. § 303(r) (emphasis added).

also *in pari materia* and should be construed together. Moreover, §§ 1, 4(i) and 303(r) must be read "harmoniously" under the rules of statutory construction that require meaning be given to every statutory provision and that such provisions be interpreted to be consistent. *See, e.g., Barnes v. Holder*, 625 F.3d 801, 806 (6th Cir. 2010). Thus, they must be read to limit the Commission's Title III power to take actions, make rules, and issue orders to those that are necessary to fulfill its *duty* to carry out, and compel obedience to, the "special provisions relating to radio" set forth in §§301- 399b of the Act, obviously including § 309.

We submit that Congress has spoken directly and affirmatively to the precise question of whether the Commission has a duty to carry out the provisions of Title III as they apply to the applications for its consent to transfer the control of T-Mobile. We turn now to whether the Act authorizes the Commission to relieve itself of that duty.

II. THE COMMISSION IS WITHOUT AUTHORITY TO FORBEAR FROM APPLYING §§ 309 AND 310(d) IN THIS PROCEEDING

The Commission has the authority under § 10 to forbear from enforcing any provision of the Act with the possible exception of the §§ 251(c) and 271.[73] In pertinent part § 10(a) provides:

> [T]he Commission *shall forbear* from applying … any provision of [the Act] to a telecommunications carrier or telecommunications service, or a class of telecommunications carriers or telecommunications services, *in any or some of its or their geographic markets*, if the Commission determines that … forbearance from applying such provision … is consistent with the public interest.[74]

The Commission has found that the word "forbear" in § 10 means "to desist from" or "cease."[75] The Commission has not determined that it would cease applying § 310(d) either to

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[73] *See* Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommications Law* § 3.14, at 319 (2d ed. 1999); 47 U.S.C. § 160(d).

[74] 47 U.S.C. § 160(a) (emphasis added).

[75] *Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, 20 FCC Rcd 9361, 9363 (2005), *remanded on other grounds, AT&T Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006).

AT&T or to any class of telecommunications carrier which includes AT&T in any or some of its or their geographic markets. To the contrary, the Commission has applied § 310(b) to AT&T repeatedly.[76] And no determination has been made by it to desist from applying § 310(d) to Part 24 Personal Communications Services ("PCS") or Part 27 Advanced Wireless Service ("AWS-1") or to any class of telecommunications service that includes PCS or AWS-1 in any geographic market. Again, § 310(d) has been applied when AT&T was acquiring PCS and AWS-1 spectrum.[77] Finally, a determination has been made to apply § 310(d) to AT&T's acquisition of T-Mobile and its PCS and AWS-1 operations.[78]

We respectfully submit that the Commission cannot forbear from applying § 310(d) in "conglomerate wireless merger" cases,[79] or those that involve one of the "four national" wireless telecommunications carriers,[80] over which the Commission shares merger-review authority with the Department of Justice under §§ 7 and 11 of the Clayton Act.[81] The Commission can forbear from applying § 310(d) only if it determines, *inter alia*, that "forbearance from applying such provision … is consistent with public interest."[82] When making that determination § 10(b) mandates:

> [T]he Commission *shall* consider whether forbearance from enforcing the provision … will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications

[76] *See VZW/AT&T*, 25 FCC Rcd at 10995; *AT&T/VZW*, 25 FCC Rcd at 8770; *AT&T/Centennial*, 24 FCC Rcd at 13927.

[77] *See AT&T/Centennial*, 24 FCC Rcd at 13916 n.1.

[78] *See Comment Public Notice*, DA 11-799, at 1.

[79] Huber, *supra*, § 7.5.4.2 at 636.

[80] *Fourteenth Competition Report*, 25 FCC Rcd at 11440.

[81] *See* 15 U.S.C. §§ 18, 21(a). *See also* Huber, *supra*, § 7.3.1 at 601-02.

[82] 47 U.S.C. § 160(a)(3).

services.[83]

The prerequisite § 10(b) determination simply cannot be made with respect to § 310(d), because it is the jurisdiction-conferring provision that authorizes the Commission to review a wireless telecommunications merger in the first place. Moreover, it is under § 310(d) that the Commission "examines the competitive impact"[84] of such a merger and determines whether the transaction "will enhance, rather than merely preserve, existing competition."[85] Therefore, the Commission cannot make the determination necessary to forbear from applying § 310(d) unless it applies § 310(d).

If it cannot forbear from applying § 310(d), the Commission cannot forbear from applying §§ 308 and 309. Section 310(d) plainly provides that any transfer of control or assignment application "*shall* be disposed of as if the proposed transferee or assignee were making application under [§] 308 … for the … license in question."[86] Under the heading "Requirements for license," § 308(a) provides that subject to three exceptions that are not relevant here, the Commission "may grant … station licenses … *only* upon written application therefor received by it."[87] And, finally, below the heading "Application for license," § 309(a) specifies that "each application filed with [the Commission] to which [§] 308 applies" is [s]ubject to the provisions of this section."[88]

Because §§ 310(d), 308 and 309 are *in pari material* and must be interpreted to be

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[83] 47 U.S.C. § 160(b) (emphasis added).

[84] *AT&T/Centennial*, 24 FCC Rcd at 13928.

[85] *VZW/AT&T*, 25 FCC Rcd at 10996; *AT&T/VZW*, 25 FCC Rcd at 8717; *AT&T/Centennial*, 24 FCC Rcd at 13928-29.

[86] 47 U.S.C. § 310(d) (emphasis added).

[87] *Id.* § 308(a) (emphasis added).

[88] *Id*. § 309(a).

consistent, and since the Commission cannot forbear from applying § 310(d), the Commission cannot forbear from applying §§ 308 and 309 when it disposes of transfer of control and assignment applications. That construction of §§ 308 and 309 also comports with the plain language of § 10(a) which provides that the Commission "shall forbear from applying … any provision of [the Act] to a telecommunications carrier … or class of telecommunications carriers … in any or some of its or their geographic markets," if it determines that:

> (1) *enforcement* of such … provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunication carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) *enforcement* of such … provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision … is consistent with the public interest.[89]

The phrases "applying … any provision" or "applying such provision" in § 10(a) must have the same meaning as the phrase "enforcement of such … provision"[90] Thus, § 10 authorizes the Commission to cease the enforcement of a provision of the Act with respect to a wireless telecommunications carrier or class of carriers in any of its or their geographic markets if the Commission determines that (1) enforcing that provision is not necessary (a) to ensure that carrier "charges, practices, classifications, or regulations … are just and reasonable" and (b) "for the protection of consumers" and (2) it would be "consistent with the public interest" by promoting competition. So understood, § 10 forbearance does not apply to § 309 of the Act.

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[89] 47 U.S.C. § 160(a) (emphasis added).

[90] The word "apply" means "to put to use" or "to put into effect." Random House, *supra*, at 102. The word "apply" is used in connection with statutes in two ways: when construing a statute, to describe "the class of persons, things or functions within its scope," or when discussing the use made of a statute to refer to "the process by which the statute is made operative." Black's, *supra*, at 99. The word "enforcement" means "[t]he act of putting something such as a law into effect," or "the execution of a law," or "the carrying out of a mandate or command." *Id.* at 528.

By their plain terms, the provisions of § 309 do not apply to, or are not enforced with respect to, a telecommunications carrier or class of carriers in any geographic market. Rather, they apply to, or are enforced with respect to, the Commission's consideration of an application for a license under § 301 to which § 308 applies.[91] Therefore, the provisions of § 309 are not subject to the Commission's § 10 forbearance authority.

Recall that the word "forbear" means "to desist from" or "cease."[92] If its forbearance authority reached the provisions of § 309, the Commission would be authorized to desist from, or to cease, putting to use the procedures required by § 309(d). Thus, the § 10 authority to forbear does not authorize the Commission to substitute its own *ad hoc* procedures for those crafted by Congress in § 309(d). Moreover, the forbearance authority given the Commission under § 10 was "[c]ritical to Congress's deregulatory strategy" in enacting the Telecommunications Act of 1996.[93] It does violence to that strategy, and to the plain meaning of § 10, for the Commission to exercise its forbearance authority not to *deregulate*, but to *regulate* in a manner wholly inconsistent with the Act.

The procedures that the Commission is employing in this case are truly *ad hoc*. They not only violate the procedural requirements of § 309(d), but they are grossly inconsistent with the general approval procedures that would apply to the T-Mobile transfer of control applications under the Commission's suspect rules.[94]

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[91] *See supra* note 88 and accompanying text.

[92] *See supra* note 75 and accompanying text. *See also AT&T*, 452 F.3d at 834.

[93] *AT&T*, 452 F.3d at 832.

[94] *Compare* 47 C.F.R. § 1.948(j)(1) *with Comment Public Notice*, DA 11-799, at 1-4. By adopting the "[g]eneral approval procedures" of § 1.948(j)(1) of the Rules, the Commission "streamlined" its approval process with respect to transfer of control and assignment applications that were *not* subject to its forbearance authority under § 10. *Secondary Markets Order*, 19 FCC Rcd at 17557. The provisions of § 1.948(j)(1) conflict with those of § 1.939 that apply to

III. THE COMMISSION HAS ACTED UNLAWFULLY BY EMPLOYING *AD HOC* PROCEDURES THAT ARE GROSSLY INCONSISTENT WITH §§ 308 AND 309

The word "rule" was defined by Congress in § 4(b) of the Administrative Procedure Act ("APA") to mean in part "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."[95] The APA definition of the term "rule making" is the "agency process for formulating, amending or repealing a rule."[96] In order to formulate a rule, the Commission must comply with the notice-and-comment procedures set forth in § 4 of the APA[97] and §§ 1.411-429 of the Rules.[98] Under § 4 of the APA and § 1.415(a) of the Rules, after a notice of proposed rulemaking is issued, the Commission must give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.[99]

The notice-and-comment requirements of § 4 of the APA reflect Congress' "judgment that … informed administrative decisionmaking require[s] that agency decisions be made only after affording interested persons" an opportunity to communicate their views to the agency. *Chrysler Corp. v. Brown,* 441 U.S. 281, 316 (1979). The requirements improve the quality of the Commission's rulemaking by exposing regulations to diverse public comment, ensuring fairness to affected parties, and providing a well-developed record that enhances the quality of judicial

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petitions to deny filed under § 309(d)(1) of the Act. *Compare* 47 C.F.R. § 1.948(j)(1)(iii)-(vii) *with id*. § 1.939(a)(2) & (f).

[95] 5 U.S.C. § 551(4).

[96] *Id.* § 551(5).

[97] *See id.* § 553(b)-(e).

[98] *See* 47 C.F.R. §§ 1.411-429.

[99] *See* 5 U.S.C. § 553(c); 47 C.F.R. § 1.415(a).

review. *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003). The Commission permits *ex parte* presentations to Commission decision-makers in informal rulemaking proceedings conducted pursuant to APA § 4 under its permit-but-disclose procedures of § 1.1206 of its Rules.[100]

The word "order" is defined by the APA to mean "the whole or a part of a final disposition … of an agency in a matter other than rule making but including licensing."[101] In turn "licensing" is defined to include the "agency process respecting the grant, renewal, denial, revocation … or conditioning of a license."[102] And, finally, the word "adjudication" is defined to mean the "agency process for the formulation of an order."[103] Thus, under the APA "licensing" is an adjudicatory process for the formulation of an order or final disposition with respect to, *inter alia,* the grant of a license.

Because § 310(d) mandates that the AT&T/DT transfer of control applications be disposed of by the Commission as if AT&T were making applications for the licenses under § 308, this proceeding constitutes licensing under the APA, or an adjudication of an order disposing of the T-Mobile transfer of control applications. Also because § 310(d) mandates that § 308 applies, the Commission must employ the adjudicatory procedures required by §§ 308 and 309, which in turn preclude it from utilizing notice-and-comment rulemaking procedures. And since the AT&T/DT applications are "for authority under Title III," this is a "restricted"

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[100] 47 C.F.R. § 1.1206. The Commission's permit-but-disclose procedures had their genesis in the Commission's attempt to reconcile the decisions of two different panels of the D.C. Circuit in *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir.), *cert. denied,* 434 U.S. 829, 477 (1977) on the issue of whether *ex parte* contacts should be barred in informal rulemakings. *See Ex Parte Communications in Rulemaking Proceedings,* 78 F.C.C. 2d 1384, 1385 (1980).

[101] 5 U.S.C. § 551(6).

[102] *Id.* § 551(9).

[103] *Id.* § 551(7).

proceeding in which *ex parte* presentations are prohibited "until the proceeding is no longer subject to administrative reconsideration or review or judicial review."[104]

We submit that the Title III licensing provisions are clear and unambiguous. They begin with § 301, which provides, "No person *shall* use or operate any apparatus for the transmission of energy or communications or signals by radio … except under and in accordance with [the Act] and with a license in that behalf granted under the provision of [the Act]."[105] Section 307(a) in turn provides that "the Commission, if the public convenience, interest, or necessity will be served thereby, subject to the limitations of [the Act], *shall* grant to any applicant therefor a station license provided for by [the Act]."[106] The mandatory provisions of §§ 301 and 307(a) set the stages for the controlling provisions of §§ 308 and 309. They provide as follows.

> **§ 308. Requirements for license**
>
> **(a) Writing; exceptions**
>
> The Commission may grant … station licenses, or modifications or renewal thereof, *only upon written application* therefor received by it.…[107]
>
> **(b) Conditions**
>
> All applications for station licenses … *shall* set forth such facts as the Commission by regulation may prescribe.… The Commission, at any time after the filing of such original application … may require from the applicant … further *written statements of fact* to enable it to determine whether such original application should be granted or denied.… Such application and/or such statement of fact *shall* be signed by the applicant … in any manner or form, including by electronic means, as the Commission may prescribe by regulation.[108]
>
> **§ 309. Application for license**

[104] 47 C.F.R. § 1.1208.

[105] *Id.* § 301 (emphasis added).

[106] *Id.* § 307(a) (emphasis added).

[107] *Id.* § 308(a) (emphasis added).

[108] 47 U.S.C. § 308(b) (emphasis added).

(a) Considerations in granting application

Subject to the provisions of this section, the Commission *shall* determine, in the case of *each* application filed with it to which [§] 308 of [Title III] applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon *consideration of such other matters as the Commission may officially notice, shall* find that the public interest, convenience, and necessity will be served by the granting thereof, it *shall* grant such application.[109]

(b) Time of granting application

Except as provided in subsection (c) of this section, no such application—

> **(1)** for an instrument of authorization in the case of a station in the broadcasting or common carrier services …

Shall be granted by the Commission earlier than 30 days following issuance of public notice by the commission of the acceptance for filing of such application or of any substantial amendment thereof.

* * * * *

(d) Petition to deny application; time; contents; reply; findings

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which [§ 309(b)] applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof).… The petitioner *shall* serve a copy of such petition on the applicant. The petition *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 [§ 309(a)].… Such allegations of fact *shall, except for those of which official notice may be taken*, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant *shall* be given the opportunity to file a reply in which allegations of fact or denials thereof *shall* similarly be supported by affidavit. [110]

(2) If the Commission finds on the basis of the application, the pleadings filed, or other *matters it may officially notice* that there are no substantial and material

[109] *Id*. § 309(a) (emphasis added).

[110] 47 U.S.C. § 309(d)(1) (emphasis added).

> questions of fact and that a grant of the application would be consistent with [§ 309(a)] … it *shall* make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement *shall* dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [§ 309(a)] … it *shall* proceed as provided in [§ 309(e)].[111]

(e) Hearings; Intervention; evidence; burden of proof

> If, in the case of any application to which [§ 309(a)] applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it *shall* formally designate the application for hearing on the ground or reasons then obtaining and *shall* forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. * * * * Any hearing subsequently held upon such application *shall* be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission. [112]

Examination of the statutory procedures set forth above, which are all couched "in the language of command,"[113] clearly shows that Congress limited the Commission to considering: (1) the written applications filed by AT&T and DT setting forth the facts that are required by the Rules;[114] (2) further signed written statements of the facts from AT&T and/or DT as required by the Commission;[115] (3) such matters as the Commission may officially notice;[116] and, if a

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[111] 47 U.S.C. § 309(d)(2) (emphasis added).

[112] *Id.* § 309(e) (emphasis added).

[113] *See supra* note 65. *See also C.J. Community Services, Inc. v. FCC,* 246 F.2d 660, 664 & n.7 (D.C. Cir. 1957) (Congress "surely knows" that the word "shall" is the "language of command").

[114] *See supra* notes 107 & 108 and accompanying text.

[115] *See supra* note 108 and accompanying text.

[116] *See supra* note 109 and accompanying text.

petition to deny is filed by a party in interest, (4) the petitioner's specific allegations of fact that are either subject to official notice or supported by affidavit upon personal knowledge;[117] (5) the response to the petition to deny filed by AT&T and DT which includes allegations of fact or denials supported by affidavits upon personal knowledge;[118] and (6) other matters the Commission may officially notice.[119]

To date, the WTB has violated §§ 308 and 309 in numerous material respects. First, on April 14, 2011, the WTB disclosed that there had been continuing *ex parte* discussions regarding the proposed T-Mobile merger, and it announced that once the T-Mobile transfer applications were filed the licensing proceeding would be "governed by permit-but-disclose ex parte procedures." That announcement was unlawful.

The Commission is not authorized to consider oral presentations of fact in this Title III licensing case unless and until the T-Mobile transfer applications are designated for a "full hearing" under § 309(e),[120] whereupon the Commission can ultimately consider the transcripts of oral testimony taken in discovery or at the hearing.[121] Moreover, §§ 308 and 309 limit the Commission to considering the written T-Mobile transfer of control applications, written statement of facts that it requested and are signed by AT&T and DT, and any petition to deny and the responses thereto. All such written material must be placed in the public record by AT&T and DT and, after a petition to deny is filed, served on the petitioner.[122] Since all

[117] *See supra* note 110 and accompanying text.

[118] *See id.*

[119] *See supra* note 111 and accompanying text.

[120] 47 U.S.C. § 309(e).

[121] *See* 47 C.F.R. §§ 1.202, 1.243(a), (c) & (e), 1.254, 1.260, 1.312(d).

[122] *See id.* § 1.927(i). The Commission must employ procedures for the resolution of issues in adjudicatory proceedings under § 309(d) that permit "meaningful participation by petitioners."

statutorily-authorized filings are subject to service requirements, any *ex parte* written presentation on the merits of the T-Mobile applications would violate the statute. Finally, because *ex parte* presentations are prohibited in Title III licensing cases that are subject to § 309(d), the Commission is without authority to permit *ex parte* presentations in such cases by regulation.[123]

The WTB violated §§ 308 and 309 repeatedly when it issued a series of anticipatory protective orders. Under § 308(b), AT&T and DT were only obliged to submit transfer of control applications that "set forth such facts as the Commission by regulation may prescribe."[124] Therefore, AT&T and DT only had to satisfy the requirements of § 1.948 of the Rules. As best we can tell, AT&T and DT were merely required to file "substantially complete" FCC Forms 603 that contained all the information and certifications called for by that form,[125] and to make the disclosures required by §§ 1.2111 and 1.2112 of the Rules.[126] None of the Commission's filing requirements compelled either AT&T or DT to submit information that would be subject to

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Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.3d 621, 634 (D.C. Cir. 1978) (*en banc*). Thus, any information the Commission obtains for the resolution of issues "must be placed in the public record, and a stated reasonable time allowed for response and rebuttal by petitioners." *Id.*

[123] Note 2 to 47 C.F.R. § 1.1208 provides that the Commission or its staff may specify that a restricted proceeding not designated for hearing may be governed by permit-but-disclose procedures if it determines that the proceeding "involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties." Thus, the Commission arguably may apply permit-but-disclose procedures in "proceedings involving amendments to the broadcast table of allotments" and some "waiver proceedings." 47 C.F.R. § 1.1208, Note 2. However, it may do no such thing in a Title II licensing case where *ex parte* presentations are banned by statute. In any event, the notion that applications for Commission consent to AT&T's $39 billion acquisition of T-Mobile can be effectively treated as a rulemaking to resolve "issues of broadly applicable policy" is both laughable and precluded by the APA.

[124] *See supra* note 108 and accompanying text.

[125] *See* 47 C.F.R. § 1.948(c), (j)(1)(i).

[126] *See id.* § 1.948(h).

FOIA Exemption 4 ("trade secrets" or "commercial or financial information" that either would be subject to an evidentiary privilege or could cause competitive harm if made public).[127] Nevertheless, if they decided that confidential information would help them carry their burden of proof,[128] AT&T and DT were free to waive confidentiality and disclose the information in their applications. On the other hand, if they wished to maintain the confidentiality of relevant information, AT&T and DT were under no legal compulsion to do otherwise. In either case, AT&T and DT were not empowered to materially alter the nature of the adjudicatory process under §§ 308 and 309 by the simple expedient of making 308 separate redactions of allegedly "Confidential Information" from their Public Interest Statement.[129]

Congress did not expressly authorize the Commission to issue protective orders in Title III licensing cases that have not been designated for hearing. Predictably, the WTB claimed ancillary jurisdiction under § 4(i) (in conjunction with 310(d)) to issue protective orders *sua sponte* in order to permit AT&T and DT to make off-the-record factual presentations to Commission decision-makers.[130] Obviously, however, the issuance of the protective orders were not *necessary* to dispose of the T-Mobile applications in accordance with § 310(d) and the orders were inconsistent with the adjudicatory procedures of §§ 308 and 309 that call for the on-the-record adduction of evidence.

The WTB clearly violated §§ 308 and 309 when it employed notice-and-comment rulemaking procedures in a Title III licensing case. By inviting public comment on the T-Mobile

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[127] *See* 5 U.S.C. § 552(b)(4); Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise § 5.10 at 202-03 (3d ed. 1994).

[128] "The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest." *E.g., VZW/AT&T*, 25 FCC Rcd at 10995.

[129] *See supra* p. 8.

[130] See, e.g., *Third Protective Order*, DA 11-753, at 6.

transfer of control applications, the WTB opened the floodgates to the more than 26,000 comments that now clog the record in this proceeding.[131] Indeed, there were at least 2,546 filings that were posted in the record on the day that petitions to deny were due to be filed.[132] Congress obviously did not craft the procedures specified in § 309(d) for "the purpose of seeking comment" or "to invite information from a variety of perspectives regard broad public policy concerns, as well as to adduce potential benefits and harms the transaction may cause."[133]

Congress chose to limit the parties to § 309(d) proceedings to those that can demonstrate their standing as a "parties in interest." The classes of parties which have standing to file a petition to deny under § 309(d)(1) have been "closely circumscribed" by the courts. *National Broadcasting Co. v. FCC,* 362 F.2d 946, 954 (D.C. Cir. 1966). For example, standing has been conferred on those alleging some economic injury, such as Cellular South, because they have a concrete interest in conveying "information bearing on the qualifications of licensees and potential licensees to the Commission." *Faulkner Radio, Inc. v. FCC,* 557 F.2d 866, 875 (D.C. Cir. 1977). In enacting § 309, Congress chose not to provide a forum for members of the general public to express their opinions from a variety of perspectives on whether the grant of a Title III application would serve the public interest. That left the WTB without statutory authority to invite public comment on the T-Mobile transfer applications, much less to invite *ex parte* presentations from the public.

Finally, the WTB is clearly without authority to engage in pre-designation-for-hearing discovery. Yet, the WTB promulgated extensive discovery requests on AT&T and DT before the deadline for parties in interest to petition the Commission to designate the T-Mobile transfer

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[131] *See infra* Ex. 4.

[132] *See id.* at 32.

[133] *AT&T/Centennial*, 24 FCC Rcd at 13977.

applications for hearing. The process that Congress codified in § 309 is for the Commission to decide whether a full hearing is necessary in this case on the basis of the application, the pleadings filed, or other matters it may officially notice. If the Commission decides to designate the T-Mobile transfer applications for hearing, the parties and the WTB will be able to take discovery.[134] Until such time, the WTB is pursuing discovery prematurely and without statutory authority.

CONCLUSION

For all the foregoing reasons, Cellular South respectfully requests that the Commission dismiss the redacted applications of AT&T and DT as defective without prejudice to their resubmission for disposition in accordance with the procedures set forth in §§ 308, 309 and 210(d) of the Act.

Respectfully submitted,

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[134] *See* 47 C.F.R. §§ 1.311-1.325.