

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

In the Matter of)
)
Atlantis Holdings LLC,) **WT Docket No. 08-95**
Assignor/Transferor) **FCC ULS File Nos. 0003463892, et al.¹**
)
And)
)
Cellco Partnership d/b/a Verizon)
Wireless,)
Assignee/Transferee)
)
For Commission Consent to The)
Proposed Transfer Of Licenses And)
Other Authorizations Held By)
Subsidiaries and Partnerships of)
ALLTEL Corporation)

To: Chief, Wireless Telecommunications Bureau

PETITION TO DISMISS OR DENY

North Dakota Network Co. (“NDNC”), by its attorneys and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended, Section 1.939 of the Commission’s Rules, and the Commission’s *Public Notice*, entitled “Verizon Wireless and Atlantis Holdings LLC Seek FCC Consent to Transfer of Licenses, Spectrum Manager and *De Facto* Transfer Leasing Arrangements, and Authorizations, and Request Declaratory Ruling on Foreign Ownership,” Mimeo DA 08-1481, released June 25, 2008, hereby requests the Commission to dismiss or deny the captioned transfer of licenses applications filed by Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”) and Atlantis Holdings LLC (“Atlantis”) encompassing licenses and other authorizations held

¹ This file number has been designated the lead application. See *Public Notice*, Mimeo DA 08-1481, released June 25, 2008 at page 2 footnote 3.

by ALLTEL Corporation subsidiaries and partnerships (collectively “ALLTEL”). In support hereof, the following is shown:

I) Standing

1. NDNC is a small, Tier III Commercial Mobile Radio Service carrier serving a predominately rural area in the State of North Dakota. NDNC is the licensee of Broadband Personal Communications Service (“PCS”) Stations KNLH232 (Channel Block D) and KNLH234 (Channel Block F), licensed to serve Basic Trading Area (“BTA”) 299, Minot, North Dakota BTA. NDNC would be aggrieved, and its interests adversely affected, by grant of the applications for four separate and distinct reasons: (a) NDNC competes for local customers with ALLTEL subsidiary WWC Holding Co., Inc.’s (“WWC’s”) Stations WPSJ966 (Broadband PCS Channel Block C, BTA 299, Minot, North Dakota BTA) and KNKN285 (Cellular Channel Block A, CMA 580, North Dakota 1 – Divide RSA),² and similarly competes with existing Verizon Wireless affiliates licensed to provide cellular service;³ (b) upon closing of the proposed transaction, WWC’s local customers will have nationwide roaming privileges as Verizon Wireless customers on Verizon Wireless’ national network;⁴ (c) Verizon Wireless will be able to leverage this access to roaming on its national network to increase its local customer base in the Minot BTA; and (d) Verizon Wireless has refused to enter into an intercarrier

² WWC Holding Co., Inc.’s Station WPSJ966 and Station KNKN285 licenses are part of the Verizon Wireless/Atlantis transaction which is the subject matter of this proceeding. See FCC ULS File No. 0003464786.

³ In a July 22, 2008 *ex parte* filing, Verizon Wireless stated that, following initial discussions with the U.S. Department of Justice (“DOJ”), it intends to divest unspecified interests in 85 cellular markets (presumably in licenses held by current cellular affiliates), including markets in the State of North Dakota. At this point, it seems that markets may be added to or deleted from the list as the discussions with DOJ progress, so whether all or part of the divestitures in North Dakota will occur is, at this point, speculative. In addition, the applications have not been amended to formally commit Verizon Wireless to any specific divestitures, so the issue of divestitures is not properly before the Commission at this time.

⁴ The parties note that the merger will eliminate roaming costs between ALLTEL and Verizon Wireless. See Application Exhibit 1, pp. 25-26.

roaming agreement with NDNC at prices that are just, reasonable and non-discriminatory. Accordingly, the potential economic injury through loss of revenues to NDNC is direct, immediate and substantial. Therefore, NDNC has standing to file this petition. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); NBC v. FCC, 132 F.2d 545, 548-549 (D.C. Cir.) *aff'd* 318 U.S. 239 (1943); Northco Microwave, Inc., 1 F.C.C.2d 350 (1965).

II) The Application Fails To Demonstrate That Commission Approval Of The Proposed Transaction Will Serve The Public Interest, Convenience And Necessity

2. Section 310(d) of the Communications Act of 1934, as amended, requires the Commission to determine whether a proposed transfer of control or assignment of licenses will serve the public interest, convenience and necessity. In making this determination, the Commission is required to “assess whether the proposed transactions comply with specific provisions of the Communications Act, the Commission’s rules and federal communications policy.”⁵ The Commission considers whether a proposed transaction “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.”⁶ To do this, the Commission employs “a balancing test weighing any potential public interest

⁵ See, e.g., ALLTEL-Midwest Order, 21 FCC Rcd. 11,535 (2006) at Para. No. 16; SBC-AT&T Order, 20 FCC Rcd. 18,290 (2005) at Para. No. 16; Verizon-MCI Order, 20 FCC Rcd. 18,433 (2005) at Para. No. 20; Sprint-Nextel Order, 20 FCC Rcd. 13,967 (2005) at Para. No. 20; ALLTEL-WWC Order, 20 FCC Rcd. 13,035 (2005) at Para. No. 17; and Cingular-AT&T Wireless Order, 19 FCC Rcd. 21,522 (2004) at Para. No. 20.

⁶ Alltel-Midwest Order, at Para. No. 16; SBC-AT&T Order, at Para. No. 16; Verizon-MCI Order, at Para. No. 16; Sprint-Nextel Order at Para. No. 20.

harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest.”⁷

3. In the merger context, the Commission has explained that mergers “raise competitive concerns when they reduce the availability of choices to the point that the merged firm has the incentive and the ability, either by itself or in coordination with other firms, to raise prices.”⁸ Stated another way, regulatory concerns are triggered by market power, and the analysis of market power begins “by determining the appropriate market definitions to employ for the analysis, as well as identifying relevant market participants.”⁹ In past merger proceedings, the Commission has consistently defined the relevant market as Cellular Market Areas (“CMAs”), *i.e.*, cellular Metropolitan Statistical Areas and Rural Service Areas;¹⁰ and most recently has held that the 280 MHz of spectrum in the Cellular, Broadband PCS, Specialized Mobile Radio (“SMR”) and 700 MHz Band constitutes the universe on spectrum available for mobile telephony for purposes of assessing a proposed merger’s effect on competition.¹¹

4. In this case, Verizon Wireless and Atlantis state that the proposed merger will allow Verizon Wireless to enter eleven (11) new CMAs, and parts of forty-three (43) other CMAs, where ALLTEL is licensed and Verizon Wireless holds no cellular or

⁷ *ALLTEL-Midwest Order*, at Para. No. 16; *SBC-AT&T Order*, at Para. No. 16; *Verizon-MCI Order*, at Para. No. 16; *Sprint-Nextel Order*, at Para. No. 20; *ALLTEL-WWC Order*, at Para. No. 17; *Cingular-AT&T Wireless Order*, at Para. No. 40.

⁸ *ALLTEL-Midwest Order*, at Para. No. 22; *Sprint-Nextel Order*, at Para. No. 20; *ALLTEL-WWC Order*, at Para. No. 22; *Cingular-AT&T Wireless Order*, at Para. No. 68.

⁹ *ALLTEL-Midwest Order*, at Para. No. 25; *Sprint-Nextel Order*, at Para. No. 32; *ALLTEL-WWC Order*, at Para. No. 24; *Cingular-AT&T Wireless Order*, at Para. No. 70.

¹⁰ *ALLTEL-Midwest Order*, at Para. No. 29; *Sprint-Nextel Order*, at Para. No. 57; *ALLTEL-WWC Order*, at Para. Nos. 44-45; *Cingular-AT&T Wireless Order*, at Para. Nos. 104-105. The component parts of the various CMAs are as set forth in the Commission’s *Public Notice*, entitled “Cellular MSA/RSA Markets and Counties,” Mimeo DA 92-109, 7 FCC Rcd. 742 (1992).

¹¹ *AT&T-Dobson Order*, 22 FCC Rcd. 20,295 (2007) at Para. Nos. 27, 30.

Broadband PCS spectrum.¹² However, the applicants have not analyzed the proposed merger under the criteria laid down by the Commission. Instead of defining the relevant geographic market area as CMAs, the applicants have argued that the relevant market definition is the nationwide market and have proceeded to analyze the proposed merger under that self-serving standard.¹³ While the applicants claim to have also analyzed the proposed merger under the Commission-endorsed CMA market standard, a review of the application reveals that they have render only lip service to this claim as the application is devoid of any meaningful analysis based on CMA market definitions.¹⁴

5. Under the CMA-based standard, the Commission measures effects on competition if, post-merger, the merged entity will hold 95 MHz or more of spectrum,¹⁵ and, as noted previously, measures this against a base of 280 MHz of spectrum deemed available for mobile telephony. The nationwide analysis (and the cryptic CMA analysis) contained in the application does not employ the “280 MHz of spectrum” figure endorsed by the Commission for use in merger analyses. Indeed, the analyses proffered (be they nationwide or CMA-based) are undercut because the applicants have not limited themselves to the 280 MHz of spectrum available for mobile telephone endorsed by the Commission for use in merger analyses, but have instead performed the analysis on the basis of 646 MHz of available spectrum – a standard which the Commission has never endorsed.¹⁶ This 646 MHz consists of 50 MHz of Cellular spectrum, 120 MHz of Broadband PCS spectrum, Sprint’s 10 MHz G Block, 80 MHz of 700 MHz, 20 MHz of

¹² Application Exhibit 1, pg. 10.

¹³ Application Exhibit 1, pp. 29-51.

¹⁴ Application Exhibit 1, pp. 31, 46-48.

¹⁵ *AT&T-Dobson Order*, at Para. No. 40; *ALLTEL-Midwest Order*, at Para. No. 36; *ALLTEL-WWC Order*, at Para. No. 46; *Cingular-AT&T Wireless Order*, at Para. No. 106.

¹⁶ Application Exhibit 1, pp. 33-42.

enhanced Specialized Mobile Radio (“SMR”) spectrum, 186 MHz of Broadband Radio Service/Educational Broadband Service (“BRS/EBS”) spectrum, 90 MHz of Advanced Wireless Service 1 (“AWS-1”) spectrum, and 90 MHz of Mobile Satellite Service (“MSS”) ATC spectrum.

6. In summary, Verizon Wireless and Atlantis have submitted a competitive effects analysis in support of the proposed merger which does not comply with the Commission’s previously articulated standards. Therefore, they have failed to demonstrate that the proposed merger will have no adverse effects on competition. As a result, the applicants have failed to show that Commission grant of the applications would serve the public interest, convenience and necessity.

III) Verizon Wireless Lacks the Legal Qualifications To Acquire Control Of The ALLTEL Properties

7. Verizon Wireless lacks the legal qualifications to acquire control of the ALLTEL subsidiaries and partnerships because it has refused to enter into an intercarrier roaming agreement with NDNC at prices that are just, reasonable, and non-discriminatory, as required by the Commission’s decision in *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rule Making, FCC 07-143, 22 FCC Red. 15,817 (rel. August 16, 2007) (“CMRS Roaming Order”)*.

8. In the *CMRS Roaming Order*, the Commission determined that “automatic roaming is a common carrier obligation for commercial mobile radio service (CMRS) carriers, requiring them to provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis pursuant to Sections 201

and 202 of the Communications Act.”¹⁷ Roaming is deemed to be “a common carrier service because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.”¹⁸ According to the Commission, “when a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier must provide automatic roaming to the requesting carrier outside of the requesting carrier’s home market, consistent with the protections of Sections 201 and 202 of the Communications Act.”¹⁹ Services “covered by the automatic roaming obligation are limited to real-time, two-way switched voice and data services, provided by CMRS carriers, that are interconnected with the public switched network and utilize an in-network switching facility that enables the provider to reuse frequencies and accomplish seamless hand-offs of subscriber calls.”²⁰

9. Here, NDNC’s systems (like the Verizon Wireless network) employ the Code Division Multiple Access (“CDMA”) air interface and, consequently, their respective systems are technically compatible. NDNC requested from Verizon Wireless an intercarrier roaming agreement for two-way switched services, but Verizon Wireless has refused to negotiate in good faith with respect to the rates. Instead, Verizon has insisted upon a roaming rate of \$0.20 per minute, when the prevailing roaming rate nationally is between \$0.05 and \$0.10 per minute. Upon information and belief, Verizon charges its favored roaming partners a rate in the \$0.05 per minute range. Verizon Wireless’ inflexible position clearly violates its obligations under the CMRS Roaming Order by demanding rates in excess of the \$0.05 to \$0.10 per minute industry norm.

¹⁷ See, CMRS Roaming Order, at Para. Nos. 1 and 23.

¹⁸ See, CMRS Roaming Order, at Para. Nos. 1 and 25.

¹⁹ See, CMRS Roaming Order, at Para. No. 2.

²⁰ See, CMRS Roaming Order, at Para. Nos. 1 and 23.

10. While the Commission has declined “to impose a price cap or any other form of rate regulation on the fees carriers pay each other when one carrier’s customer roams on another carrier’s network,” it nevertheless has held that the rates for roamer service are “subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.”²¹ Section 201(b) of the Communications Act requires that all charges, practices, classifications, and regulations for common carrier service must be just and reasonable; and provides that any charge, practice, classification, and regulation that is unjust and unreasonable is unlawful. Section 202(a) of the Communications Act prohibits unjust or unreasonable discrimination in charges, practices, classifications, and services by common carriers in connection with any “like” communications service; and also prohibits undue or unreasonable preferences or advantages.

11. NDNC submits that a charge two to four times the industry norm is *per se* unlawful under Sections 201(b) and 202(a) of the Communications Act. It is clearly unjust and unreasonable within the meaning of Section 201(b); and clearly constitutes unjust or unreasonable discrimination in the provision of like services within the meaning of Section 202(a). Similarly, it constitutes an unreasonable preference or advantage in favor of Verizon Wireless and its preferred roaming partners (to the disadvantage of NDNC and similarly situated carriers), in violation of Section 202(a).

12. Thus, Verizon Wireless lacks the legal qualifications to acquire control of the subject ALLTEL properties.

²¹ CMRS Roaming Order, at Para. No. 37.

**IV) The Commission Should Condition Any Grant
On The Provision Of 3G And Other Broadband Roaming Service**

13. NDNC recognizes that the provision of 3G and other broadband services on an automatic roaming basis is presently pending before the Commission in the Further Notice of Proposed Rulemaking portion of the CMRS Roaming Order. Nevertheless, NDNC respectfully submits that the provision of such 3G and other broadband services on an automatic roaming basis is of such a critical nature to the development and preservation of competitive markets for the provision of wireless service that the Commission should condition any approval of the instant merger on requiring Verizon Wireless to provide 3G and other broadband services on an automatic roaming basis to promote truly competitive markets in the provision of such services.

14. Verizon Wireless should not be allowed to leverage its national coverage advantage over smaller carriers to suppress competition in the provision of 3G or other broadband services on either a local or a roaming basis. In the event this merger is approved, Verizon Wireless will be able to offer 3G and other broadband services in the Minot BTA over the facilities of ALLTEL Broadband PCS Station WPSJ966 (presently licensed to ALLTEL subsidiary WWC Holding Co., Inc.), and those Minot customers will be able to obtain 3G services anywhere within the Verizon Wireless network. Given these facts, denying 3G or other broadband automatic roaming service to NDNC's customers outside NDNC's Minot coverage area will enable Verizon Wireless to leverage regulated facilities used in the provision of local service in the Minot BTA to capture customers that would otherwise obtain service from NDNC. This is clearly an impermissible use of regulated facilities to lessen or suppress competition in the wireless

industry sector. It is vital that the customers of small, rural carriers be able to utilize 3G and other broadband data services when traveling outside their respective provider's coverage area. Otherwise, the wireless marketplace will be whittled down to two or three nationwide carriers, creating an oligopoly with little incentive to provide wireless coverage to truly rural areas.

15. Thus, any Commission approval of the proposed merger should be conditioned as requested herein.²²

WHEREFORE, NDNC requests that this petition be granted; and that the Verizon – Atlantis transfer of licenses applications be dismissed or denied.

Respectfully submitted,

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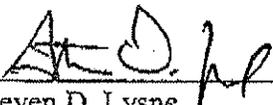
²² The Commission's public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction. See Section 309(r) of the Communications Act. See also *Sprint-Nextel Order*, at Para. No. 23; *ALLTEL-WWCs Order*, at Para. No. 22; *Cingular-AT&T Wireless Order*, at Para. No. 43 and *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to Section 303(r) authority).

DECLARATION UNDER PENALTY OF PERJURY

I, Steven D. Lysne, hereby state the following:

1. I am the Chief Executive Officer of North Dakota Network Co.
2. I have read the foregoing "Petition to Dismiss or Deny." With the exception of those facts of which official notice can be taken, all facts set forth therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 30th day of July, 2008.



Steven D. Lysne

CERTIFICATE OF SERVICE

I hereby certify that I am an attorney with the law offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP and that on July 31, 2008 I caused to be sent by electronic mail (e-mail), a copy of the foregoing "**Petition to Dismiss or Deny**" to the following:

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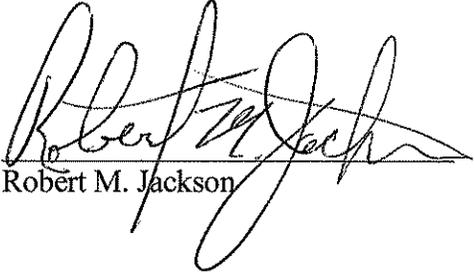
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