Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
ATLANTIS HOLDINGS LLC, Transferor,	)	
	)	
and	)	WT Docket No. 08-95
	)	
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, Transferee	)	
	)	
For Consent to the Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act	)	

PETITION TO DENY OF LEAP WIRELESS INTERNATIONAL, INC.

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August 11, 2008

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OF LEAP WIRELESS INTERNATIONAL, INC.

Leap Wireless International, Inc. ("Leap")[1] hereby petitions to deny the proposed transfer of control of the radio authorizations, spectrum leases and section 214 authorizations of ALLTEL Corporation ("ALLTEL") from Atlantis Holdings LLC ("Atlantis") to Cellco Partnership d/b/a Verizon Wireless ("Verizon"). Leap is also a member of a coalition of wireless carriers and licensees that depend upon the availability of roaming services, and joins in the comments filed today by that coalition.

[1] Leap is a leading regional carrier using Code Division Multiple Access ("CDMA") modulation technology that operates in 23 states and holds wireless licenses in 35 of the top 50 U.S. markets. It will be directly affected by a proposed merger between the nation's first and third largest CDMA carriers, not least because Leap depends on roaming agreements with other CDMA carriers to provide its customers with nationwide roaming service. Leap is therefore a "party in interest" within the meaning of section 309(d) of the Communications Act, 47 U.S.C. § 309(d).

I. INTRODUCTION AND SUMMARY

The applicants request that, in evaluating the transaction, the Commission change the rules for evaluating transactions of this kind. They ask for a radical rewrite of the standards that the Commission is then supposed to apply to find that their transaction is in the public interest. The Commission should decline this invitation. A rulemaking proceeding is the appropriate procedural route to examine the changes requested by the applicants. The Commission should not continue to alter the rules of the game with each wireless transaction that is presented for its approval. This is especially the case here because, first, the Commission has recently rejected many of the changes requested by the applicants. Second, these issues are intermeshed with a competitive analysis of the entire industry that is ill-suited for *ad hoc* consideration in one merger proceeding.

The applicants want the Commission to more than double the range of available spectrum that the Commission considers in gauging the effects of a consolidation. They accordingly want the Commission to, in effect, raise the soft spectrum screen from 95 MHz to over 200 MHz, which will allow the effects of the Verizon/ALLTEL transaction to go unexamined in numerous markets. These issues trigger a domino effect, as a myriad of interrelated questions also need to be considered.

For example, not all spectrum is created equal. An aggregation of 95 MHz of spectrum that does not include "beachfront property" in the 700 and 800 MHz bands may be as much of a concern as, say, a 85 MHz aggregation that does include such spectrum. And what if, in light of that recognition, a *lower* spectrum screen is in fact appropriate instead of a higher one? Markets where the merger threatens an abrupt increase in concentration, such as Norfolk and Richmond, Virginia (CMAs 43 and 59), would fall under the radar of the 95 MHz screen (because Verizon's Advanced Wireless Service ("AWS") spectrum is not counted); such markets would probably

fall under the radar under Verizon's approach too (because AWS spectrum would be considered, but the screen would go up). What if the public interest also turns out to warrant reinstatement of a hard spectrum cap, as requested by Rural Telecommunications Group, Inc. ("RTG")? And how do these concentration standards interplay with the Commission's anti-warehousing policies? Let us assume that the Commission agrees with the applicants that a higher screen is appropriate. Should a merger be allowed to go forward so long as it falls short of this new screen in a particular area, even if the applicants have failed to put to use the spectrum that is licensed to them already? These questions all demand an answer, and one can only be developed in a rulemaking proceeding. The Commission should expeditiously notice RTG's petition, and promptly conduct a rulemaking on this broad range of questions before acting in this proceeding.

As for the public interest calculus proposed by the applicants, the benefits from the transaction appear more illusory, and the anti-competitive effects of this transaction far more pronounced, than the applicants' rather perfunctory analysis suggests. The applicants' discussion of benefits boils down to the proposition that Verizon does many things well – good management, advanced EvDO technology – and that the merger will also allow ALLTEL's operation to benefit from these good things. The applicants do not dwell much, however, on the fact that (as they admit) ALLTEL has already planned to upgrade EvDO technology itself, without the merger.

As for the competitive effects, the applicants start by positing a national geographic market, notwithstanding that the Commission recently rejected that idea in *AT&T/Dobson*. The applicants point to national pricing, presumably as a constraint on local price increases. But their economist's discussion lacks conviction and brims with qualification (Verizon has engaged in national pricing "increasingly," local promotions exist but are understood to be "rare"). The

applicants also suggest that, in markets where they compete, Verizon and ALLTEL are not "next best" substitutes for one another based on the results of an undisclosed diversion study. Even setting aside a slew of methodological questions about the study, the numbers invite scrutiny instead of providing comfort: almost twenty percent of consumers churning out of (or into) Verizon, end up with (or start from) ALLTEL.

Perhaps most importantly, the applicants discount the effect of the transaction in the market for local CDMA roaming. This has special importance for Leap, a CDMA provider like both Verizon and ALLTEL. In all of the overlapping Verizon/ALLTEL areas, the merger will eliminate one of the few remaining independent sources for CDMA roaming. In fact, in most of these markets the transaction would reduce the number of CDMA providers from three to two or (even worse) two to one, or a literal monopoly in that market – proverbial examples of cases that warrant especially high antitrust scrutiny and divestiture. As for Verizon's commitment to honor existing roaming agreements, it is a vow of faithfulness for all of one month (the effective term of many roaming agreements). In addition to structural conditions where appropriate, the conditions requested today by the coalition of carriers concerned about roaming, of which Leap is a member, are nothing less than essential. The Commission should close the huge loophole of the "in-market exclusion" from roaming requirements, and should extend roaming obligations to data. It should do so preferably for the entire industry, but unequivocally for the applicants in this proceeding.

Finally, Leap is not able to comment fully on the effects of this transaction because crucial information – on local pricing, on diversions between Verizon and ALLTEL, on Verizon's use and non-use of its already licensed spectrum and need for more spectrum, on roaming – is conspicuous by its absence from the application. In short, there is no question that

the application as it stands does not allow a conclusion that the transaction serves, and will not harm, the public interest. The applicants should be asked to supplement it. Among other things, the applicants should submit copies of their roaming agreements in all overlapping markets (the ones they say they will observe), evidence of their efforts to develop their licensed but yet unbuilt spectrum, and agreements for the purchase of CDMA equipment and technology. Any legitimate confidentiality requests can be addressed by a protective order, as is ordinary and indeed routine for such transactions. Leap reserves the right to comment on the additional information that is submitted.

The laconic *ex parte* letter that Verizon has sprung upon the Commission only recently exacerbates this lack of information rather than curing it. The Commission reasonably granted an extension of time to allow review of this eleventh-hour filing, but the problem is that there is not much in it *to* review. The Commission and commenters are asked to accept Verizon's say-so that the transaction's competitive problems will be cured by divestiture in only 85 overlapping markets. The Commission should ask Verizon for a fully documented explanation of its divestiture proposal and, upon receiving it, place the application anew on public notice.

II. THE PROPOSED TRANSACTION RAISES QUESTIONS OF BROAD POLICY IMPORTANCE THAT ARE BEST SUITED FOR A RULEMAKING PROCEEDING

The applicants request fundamental changes to the "soft" Commercial Mobile Radio Service ("CMRS") spectrum cap used by the Commission to identify the markets for which a proposed wireless merger may have anticompetitive effects, including changing the formula for the cap to include over 300 MHz of Broadband Radio Service/Educational Radio Service

("BRS/ERS"), Advanced Wireless Service (AWS-1 and, potentially, AWS-3) and mobile satellite spectrum.[2]

It is, of course, well-settled that an agency generally enjoys flexibility in deciding whether to proceed by adjudication or rulemaking.[3] It is also true that the Commission has previously altered its soft cap formula to include the 700 MHz spectrum in the course of reviewing the *AT&T/Dobson* merger.[4] But it is equally well settled that such flexibility is not without bounds,[5] and that a rulemaking is the more appropriate procedural route for questions of broad policy importance.[6] The time has come to remove such rules from the realm of *ad hoc* adjudication. A rulemaking is appropriate, and indeed necessary, here for a number of reasons.

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[2] Application at 41-42 (requesting, at least, the addition of 186 MHz of BRS/EBS, 90 MHz of AWS-1 and 90 MHz of Mobile-Satellite Service Ancillary Terrestrial Component ("MSS ATC") spectrum into the soft cap formula).

[3] *See SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[4] *Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd 20295, at ¶ 17 (2007) ("*AT&T/Dobson*") ("our initial spectrum screen for the proposed transaction is 95 MHz, rather than 70 MHz that we previously have used."). *See also Cellco Partnership d/b/a/ Verizon Wireless and Rural Cellular Corp.*, FCC 08-181, Memorandum Opinion and Order, WT Docket No. 07-208, at ¶¶ 43, 47 (rel. Aug. 1, 2008) ("*Verizon/RCC*") (applying same 95 MHz screen as in *AT&T/Dobson*).

[5] *See NLRB v. Bell Aerospace*, 416 U.S. at 294 ("there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act"); *Patel v. INS*, 638 F.2d 1199, 1204-05 (9th Cir. 1980) (reversing INS's decision to apply new criterion to immigrant in adjudication because it was an "improper circumvention of rulemaking procedures" and because it was an "abuse of discretion"); *Ford Motor Company v. Federal Trade Commission*, 673 F.2d 1008, 1010 (9th Cir. 1981), *cert. denied, FTC v. Francis Ford, Inc.*, 459 U.S. 999 (1982).

[6] *See License & Auth. to Operate in the 2155-2175 MHz Band*, 22 FCC Rcd 16563, at ¶ 28 (2007) ("Although the Commission has wide latitude to choose whether it will proceed by adjudication (*e.g.*, waiver proceedings) or by rulemaking, it is nevertheless the case that guidance from the courts indicates that issues of general applicability are more suited to rulemaking than to adjudication."); *SEC v. Chenery*, 332 U.S. at 202 ("The function of filling in the interstices of

First of all, when a standard keeps being revised, each time on an *ad hoc* basis, each time to allow approval of a particular transaction, the Commission's review risks becoming effectively standardless. It would be remarkable to change the rules of football even as a game is unfolding, just as it would be extraordinary for the Justice Department to change its Herfindahl-Hirschman Index ("HHI") standards in the course of evaluating a particular merger, instead of considering a general revision to its merger guidelines first. Yet that is precisely what the applicants are requesting in this transaction when they say, for example: "developments in the wireless marketplace require reevaluating and expanding the relevant market to be examined both geographically and with respect to the spectrum assets."[7] While the applicants proceed to examine the transaction "on the traditional CMA basis,"[8] here too they request a rewrite of the soft cap rules: "The current spectrum screen does not take account of the full range of available spectrum and therefore no longer provides a meaningful trigger for engaging in competitive analysis."[9] As noted above, the applicants are requesting that the Commission add more than 300 MHz to the total spectrum available for CMRS, resulting in a total of more than 600 MHz. Implicitly, they are also requesting an increase of the soft cap, perhaps from 95 MHz to over 200

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the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."); *Telocator Network of America v. FCC*, 691 F.2d 525, 551 (D.C. Cir. 1982) ("It is well-settled that the Commission may elect to utilize its rulemaking power in lieu of adjudication when the pertinent issues involve legislative rather than adjudicative facts, and have prospective effect and classwide applicability."); *National Small Shipment Traffic Conf. v. I.C.C.*, 725 F.2d 1442, 1447-48 (D.C. Cir. 1984) ("Trial-like procedures are particularly appropriate for retrospective determination of specific facts ... [while] [n]otice-and-comment procedures ... are especially suited to determining legislative facts and policy of general, prospective applicability.").

[7] Application at 2.

[8] *Id*. at 5.

[9] *Id*.

MHz, as the Commission has previously set the soft cap at approximately one-third of the total available CMRS spectrum.[10] The Commission should not alter the yardstick by which this transaction will be measured in the course of evaluating the transaction itself. A general rulemaking is needed first.[11]

This is all the more so because the relaxation requested by Verizon comes on top of several successive changes to the standard, all from the strict to the lenient, from the "hard" cap to the "soft" and progressively "softer" screen, initially by rulemaking, subsequently by adjudication.[12] This continuous softening of an already "soft" cap is only made worse by the Commission's recent decision to include the 68 MHz of recently auctioned 700 MHz spectrum in the denominator of the cap, but not to include any of the spectrum that Verizon won at that auction in the numerator because licenses for that spectrum have not been issued yet.[13] The

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[10] *See AT&T/Dobson* at ¶ 30 ("we revise the spectrum aggregation screen to 95 MHz, approximately one-third of the 280 MHz of the spectrum suitable for mobile telephony today.").

[11] *See Verizon/RCC* (Statement of Commissioner Michael J. Copps, Approving in Part, Dissenting in Part) ("[W]e have already been cavalier in applying this altered spectrum screen to prior transactions and we ought not put the cart before the horse yet again in an effort to encourage still more consolidation in the wireless industry. . . . In the years ahead, we will certainly need to consider the appropriate time and manner to account for certain spectrum bands that, like the 700 MHz band, are being transitioned into uses that include CMRS. *But we must conduct this inquiry in a reasonable, careful and systematic manner . . . .*").

[12] *See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7988 (1994) ("*1994 Spectrum Cap Order*") (establishing a "hard" CMRS spectrum aggregation limit); *2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services*, 16 FCC Rcd 22668 (2001) ("*2001 Spectrum Cap Order*") (abolishing the "hard" CMRS spectrum aggregation limit, effective January 1, 2003); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, 19 FCC Rcd 215122, at ¶ 109 (2004) ("*Cingular/AT&T*") (establishing a "soft" cap of 70 MHz to perform an initial screen of wireless markets for potential anticompetitive effects); *AT&T/Dobson*, at ¶ 30 (increasing the "soft" cap from 70 MHz to 95 MHz based on the addition of spectrum in the 700 MHz band).

[13] *See Verizon/RCC* at ¶ 55. *See also AT&T/Dobson* at ¶ 31.

practical reality is that the spectrum won by Verizon is not currently available to anyone else, and therefore should be included in Verizon's numerator. One wonders whether it can be true that the CMRS markets have been becoming more competitive in pace with this continuous process of relaxation. In fact, as seen below, some recent measurements suggest a reversal of the trend. In any event, the deliberation offered by the rulemaking process is necessary to judge further revisions.

Second, the changes to the soft cap that applicants are requesting have very broad implications for competition in CMRS markets across the nation and trigger a domino effect of questions that simply cannot be answered in an adjudication. As the Commission's Eleventh *CMRS Competition Report* shows, market concentration in all of the top-25 CMRS markets has reversed trend and has begun to increase again.[14] At least one of the major pillars for the Commission's 2001 decision – increasing competition in CMRS markets[15] – may no longer be true as CMRS markets have matured and consolidated. This troubling development would appear to militate for the reverse change from that requested from the applicants – a lower screen rather than a higher one. Take markets such as Norfolk, Virginia, and Richmond, Virginia (CMAs 43 and 59). The CMRS spectrum licensed to the merger applicants there would be a total of 92 MHz (below the cap). This means that, if the market share concentration increase is

[14] *See* Rural Telecommunications Group, Inc., Petition for Rulemaking to Impose a Spectrum Aggregation Limit on all Commercial Terrestrial Wireless Spectrum Below 2.3 GHz, at 11-12 (filed Jul. 16, 2008) ("*RTG Petition*"); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eleventh Annual Report, 21 FCC Rcd 10947, at app. A, tbl. 3 (2006).

[15] *See 2001 Spectrum Cap Order* at ¶ 30 ("Various indicators confirm the presence of meaningful economic competition in markets for CMRS. As we described in the Sixth Annual CMRS Competition Report, and as commenters generally agree, mobile telephony markets have experienced and continue to experience strong growth, increased competition, and active innovation.").

below the HHI caps, these markets might attract no scrutiny, despite the additional 20 MHz in AWS spectrum controlled by Verizon in each of them. Nor would they be scrutinized under Verizon's proposed approach – Verizon wants to include the AWS spectrum in the denominator but also wants to increase the threshold for scrutiny.

The increase in concentration may also suggest more broadly that the Commission's "soft" cap policy may not be working and may need to be revisited in its entirety. The reversal in market trends also suggests that reinstatement of a "hard" spectrum cap – *i.e.*, an absolute spectrum aggregation limit, as requested by RTG,[16] may warrant consideration.

This also heightens the relevance of the Commission's anti-warehousing policies. Should a wireless company be allowed to amass additional spectrum if it has not even started the buildout necessary to put its licensed spectrum to use, or if it has unreasonably delayed this buildout? The anti-competitive implications of such activities are tremendous, effectively allowing larger carriers to starve out of existence smaller, innovative carriers who have demonstrated an ability to bring dramatic value and lower prices to consumers, essentially robbing the public of the benefits of lower prices and instead enabling the larger carriers to extract higher prices from consumers by creating an artificial scarcity of spectrum. Such major policy decisions should be made in a rulemaking proceeding rather than in *ad hoc* adjudications.

Moreover, many of the changes requested by the applicants have recently been rejected by the Commission. For instance, the Commission in *Verizon/RCC* and *AT&T/Dobson* declined to include the AWS-1 and BRS spectrum in the soft cap.[17] The Commission has also declined to include satellite carriers, wireless VoIP providers, mobile virtual network operators ("MVNOs"),

[16] *See RTG Petition*.

[17] *Verizon/RCC* at ¶¶ 44-45; *AT&T/Dobson* at ¶¶ 32-34.

and resellers when computing initial measures of market concentration.[18] The applicants would have the Commission depart from these decisions.[19] The applicants do not offer any new facts or arguments to justify a different result, however, and certainly no change should be made without more deliberative review.

Rather than support continuing development of the soft cap on a case-by-case basis, the *AT&T/Dobson* case illustrates the pitfalls of doing so and the patent need for a rulemaking to revisit the Commission's CMRS spectrum rules and policies. Presciently, Commissioner Adelstein noted in dissent against an increase in the soft cap: "we do not know what the complete impact of the 700 MHz auction will be, how that spectrum will be distributed and whether any single party, including the acquiring party in this proceeding, might get a disproportionate share of the spectrum."[20] As it turned out, AT&T and Verizon (the applicant in this proceeding) acquired enough spectrum in the 700 MHz auction to exceed the 95 MHz soft cap "in eight of the top 10 markets and 17 of the top 25 markets."[21] *AT&T/Dobson*, of course, involved just a 25 MHz increase in the soft cap from 70 MHz to 95 MHz.[22] As mentioned, the applicants here are effectively requesting an increase to over 200 MHz.

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[18] *See Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc.*, 21 FCC Rcd 11526, at ¶ 33 (2006).

[19] Application at 33-36 (BRS), 36-37 (AWS), 37-39 (satellite, MVNOs), 41-42 (requesting revision of soft cap to include BRS/EBS, AWS-1 and MSS ATC spectrum).

[20] *See AT&T/Dobson* at 20352 (Statement of Commissioner Jonathan S. Adelstein).

[21] *See Oversight of the Federal Communications Commission: The 700-MHz Auction; Hearing of the Telecommunications and the Internet Subcommittee of the House Energy and Commerce Committee*, 110th Cong. ___, at ___ (Apr. 15, 2008) (opening remarks of Rep. Markey), *available at* http://www.fednews.com.

[22] *AT&T/Dobson* at ¶ 17.

A rulemaking into the Commission's CMRS spectrum policy can and should address the following interrelated issues, all of which could impact how the proposed transaction should be evaluated:

1. *When new spectrum should be added to the soft cap.* Encouraged no doubt by the Commission's decision to add 80 MHz of 700 MHz spectrum to the soft cap formula in the *AT&T/Dobson* case, the applicants now propose a change of almost four times that magnitude – the addition of over 300 MHz of BRS/ERS, AWS, and MSS ATC spectrum to the formula.[23] Some questions that need to be answered in this regard include:

- What standards must be met before such spectrum is added to the denominator of the soft-cap formula? How suitable for CMRS must the spectrum be? Should the numerator continue to be set at about one third of the available and suitable spectrum?

- What if there are differences in suitability for CMRS among the different CMRS frequencies? It would be counter-intuitive for example, to ascribe equal value to Verizon's 700 and 800 MHz frequencies and to 2 GHz MSS ATC spectrum, which can be used for terrestrial service only on an "ancillary" basis; it would be even more remarkable to decide to do so in this proceeding as the applicants are requesting. How should such differences, which can lead to dramatic differences in a carrier's operating costs, be taken into account in establishing the cap?

- When must spectrum be available for CMRS use (if it is not immediately available) for it to be included in the cap? If the Commission were to count spectrum not immediately available for CMRS use, how can the Commission be sure that such spectrum will be licensed to persons other than the merging parties? Is it appropriate to count new frequencies in the denominator without taking into account the spectrum in that band that has been won by one of the merger applicants but not yet licensed (as the Commission did in *Verizon/RCC* with the 700 MHz band)?

- At what percentage of the total CMRS spectrum available should the soft cap be set? How much (and what kinds of) other spectrum needs to be available in the market for others to compete effectively? How is this to be determined?

[23] Application at 42.

2. *Whether the existing competitive analysis of at-risk markets identified using the soft cap needs to be revised.* With the Herfindahl-Hirschman Index ("HHI") of concentration rising again in all of the top 25 CMRS markets and likely in other markets too, has consolidation in the industry reached a stage such that the Commission must apply a more rigorous competitive analysis of the at-risk markets identified using the soft cap?

3. *Whether it is advisable to reinstate a "hard" spectrum cap.* As noted above, the recent reversal in CMRS market trends suggests taking a new close look at the justifications for abolishing the Commission's previous "hard" cap on spectrum aggregation, which may no longer be valid. Leap does not take a position on whether a cap should be reinstated and, if so, what it should be.[24] Indeed, Leap lacks many of the data necessary to reach a conclusion on this issue. But the data need to be adduced, and the issue studied. In that regard, Leap supports placing on Public Notice the Petition for Rulemaking recently filed by the RTG and promptly conduct a rulemaking. Leap does believe that the rulemaking should cover the entire range of questions identified above instead of being confined to that of reinstating the cap – indeed, the spectrum cap reinstatement cannot be effectively considered without also evaluating these interrelated questions.

4. *Whether it is necessary for CMRS providers to show that they are making productive use of existing spectrum assigned to them before the Commission will approve the acquisition of more spectrum via merger.* There is concern that the largest wireless carriers have been aggressively acquiring new CMRS spectrum auctioned by the Commission with little or no intention of using it for commercial service, at least in the near future. The public does not know, for example, to what extent Verizon has been aggressively building the networks needed

[24] Leap does believe that, in any spectrum calculation either for a cap or for a screen, different spectrum should be weighted differently based on its qualities.

to exploit its 20 MHz of AWS-1 spectrum covering a population of nearly 200 million.[25] Possible warehousing has significant adverse effects on the regional carriers, which need additional spectrum to expand their networks so as to better compete with their larger rivals. One way to avert warehousing may be to reinstate a spectrum cap – indeed, the purpose of the original CMRS spectrum cap was to limit the opportunities for such behavior.[26] Another way would be to require the largest national carriers to show that they are actively taking steps to use the spectrum they already have before they are allowed to acquire more spectrum through a merger or similar transaction. The standards for when such a showing would be needed, and the showing that must be made, are best set as part of a rulemaking.

III. THE TRANSFER OF CONTROL APPLICATION DOES NOT MAKE AN ADEQUATE SHOWING THAT THE PROPOSED TRANSACTION IS IN THE PUBLIC INTEREST

A. The asserted benefits and efficiencies do not appear compelling

The applicants assert that the proposed transactions will result in a number of public interest benefits and efficiencies. These asserted benefits mostly boil down to the proposition that Verizon does many things well (good management, advanced EvDO technology), and that therefore the merger will expand all of these good things to the network and operations of

[25] *See* Verizon Communications, Inc., 2006 Form 10-K, at 47 (2007).

[26] *See 1994 Spectrum Cap Order* at ¶ 258 ("The purpose of the cap is to prevent licensees from artificially withholding capacity from the market.").

ALLTEL.[27] This syllogism, however, falls far short of what it takes to prove cognizable efficiencies under orthodox merger analysis.[28]

For one thing, Verizon devotes barely any discussion to which of these benefits ALLTEL could achieve without the merger. The applicants acknowledge, for example, that ALLTEL already "plans to offer its customers EvDO Rev.A,"[29] and stake their claim on the proposition that, unaided by the merger, "widespread commercial availability through ALLTEL's network is a number of years away."[30] So that particular efficiency claim is one of speed – that the merger will save time in bringing the benefits about. The applicants, however, do not offer any evidence to support that assertion – they do not even discuss, for example, how much time will be saved.

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[27] *See* Application at 11-14 (good management, advanced technology), 14-22 (improved quality of service, network coverage, increased variety of services, content, devices and plans). The Application also identifies a number of benefits to Verizon customers and other benefits. *Id.* at 22-25 (greater broadband and network roll-out), 25-27 (synergies and cost-savings); 27-29 (stronger CMRS competitor).

[28] *See, e.g.*, *AT&T/Dobson* at ¶ 76 ("The Commission applies several criteria in deciding whether a claimed benefit should be considered and weighed against potential harms. First, the claimed benefit must be transaction- or merger-specific. This means that the claimed benefit 'must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.' Second, the claimed benefit must be verifiable. Because much of the information relating to the potential benefits of a merger is in the sole possession of the applicants involved in such a transaction, they are required to provide sufficient evidence supporting each claimed benefit so that the Commission can verify its likelihood and magnitude. In addition, as the Commission has noted, 'the magnitude of benefits must be calculated net of the cost of achieving them.' Furthermore, as the Commission has previously explained, 'benefits that are to occur only in the distant future may be discounted or dismissed because, among other things, predictions about the more distant future are inherently more speculative than predictions about events that are expected to occur closer to the present.' Third, the Commission has stated that it 'will more likely find marginal cost reductions to be cognizable than reductions in fixed cost.' The Commission has justified this criterion on the ground that, in general, reductions in marginal cost are more likely to result in lower prices for consumers.") (internal citations omitted).

[29] Application at 13.

[30] *Id.*

Other efficiency claims that they make are equally suspect. With respect to the deployment of Long Term Evolution ("LTE") networks, they say that "[u]sing the greenfield 700 MHz spectrum enables Verizon Wireless to move more quickly with LTE deployment in the primarily rural ALLTEL markets and also enables the provision of higher data rates to more customers on the LTE system."[31] This assertion could be relevant if Verizon needed the ALLTEL acquisition to secure access to the 700 MHz spectrum. Verizon possesses that spectrum already, however, so this would not appear to be a merger-specific benefit.[32]

B. The competitive analysis ignores the truly relevant markets and downplays the current extent of competition between Verizon and ALLTEL

The applicants begin their competitive analysis by positing a national geographic market.[33] In this claimed market, however, one of the two merger partners, ALLTEL, not being one of the four "national" carriers, is not even a participant. Even if the Commission had not already rejected the idea in *AT&T/Dobson*, a national market would only be appropriate if ALLTEL did not compete with Verizon. Of course, there are many local markets in which Verizon and ALLTEL are both offering services and competing with one another, as the Carlton Declaration's own diversion statistics show.

The applicants also do not document the claim that Verizon "increasing[ly]" engages in national pricing.[34] What does "increasingly" mean? The Carlton Declaration confines itself to this assertion: "While there may be minor regional differences in loyalty bonuses for renewing

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[31] *Id*. at 13-14.

[32] *See AT&T/Dobson* at ¶ 76.

[33] Application at 31-32.

[34] *See* Declaration of Dennis Carlton, Allan Shampine and Hal Sider at ¶ 37, *filed in* WT Docket No. 08-95 (Jun. 13, 2008) ("Carlton Declaration").

customers (e.g., awards of 'free minutes') as well as occasional local handset promotions, we understand that such regional differences are rare and small in magnitude."[35] This is no different than the assertions made in *AT&T/Dobson* in support of a national market, and rejected there by the Commission. AT&T had specifically asserted that it "establishes its rate plans and pricing on a national basis," and while it "sometimes adjusts prices in local markets," such instances "are relatively rare."[36] The Commission found that these arguments "[did] not undercut the finding of a local geographic market" and continued to analyze the merger on a CMA basis.[37]

Much more evidence than this would be needed from the applicants to establish that Verizon's conduct in local markets would be disciplined by national pricing, either now or after the merger. Moreover, regardless of Verizon's current conduct, Carlton Declaration does not persuasively establish that market forces will compel Verizon to continue to price its services nationally.

C. The Carlton Declaration's discussion of substitutability actually suggests that the two merger partners are close substitutes for one another in their overlapping markets

While the Carlton Declaration claims that ALLTEL and Verizon "are not next best substitutes in the provision of wireless services in the areas in which both firms provide service," his own evidence belies, or at least questions the accuracy of, that conclusion. Here is the analysis from the Carlton Declaration:

> For 2008 (through April) in 33 areas served by both ALLTEL and Verizon Wireless for which share data are available, less than 20 percent [17.9%] of new Verizon Wireless subscribers are drawn from ALLTEL and less than 20 percent [19.0%] of subscribers

[35] *Id*.

[36] *AT&T/Dobson* at ¶ 24.

[37] *Id*. at ¶ 25.

> leaving Verizon Wireless go to ALLTEL. If flows into and from Verizon Wireless occurred prorata based on market shares alone in these overlap areas, roughly 22 percent of such churn would involve ALLTEL. These data indicate that new customers moving to or from Verizon Wireless from ALLTEL do so less often than would be suggested based on ALLTEL's overall share of subscribers.[38]

Eighteen and nineteen percent are churn rates that show very high substitutability between the two companies. The fact that these numbers are marginally lower than the subscriber share of ALLTEL (excluding Verizon Wireless subscribers) does not prove as much as Carlton Declaration claims it does.[39] A crucial question that is left unanswered, for example, is how other carriers that are present in each of these markets fare under that analysis. Also, how many subscribers churn out to, or in from, unknown destinations or sources, and how are they accounted for? More generally, properly conducted diversion studies are complicated exercises whose methodological integrity depends on controlling for several variables to isolate out causes of diversion that have nothing to do with the extent of rivalry among wireless companies in a particular market. Professor Carlton should fully explain and document his methodology, including all of the variables and assumptions he or others have used and any alternative or trial runs they have made using different variables or assumptions.

IV. LEAP WOULD BE PARTICULARLY AGGRIEVED AS THIS TRANSACTION WILL ELIMINATE AN INDEPENDENT CDMA PROVIDER

A. The roaming services market is specific to CDMA or GSM modulation

The applicants give short shrift to the effect that the proposed transaction will have on the roaming services market, where regional carriers purchase local roaming services from other carriers to ensure seamless nationwide service for their subscribers. Verizon states only that it

[38] Carlton Declaration at ¶ 43, tbl. 1.

[39] *Id*.

"will continue to provide roaming services to customers of other wireless carriers" and "will honor all of the terms of those CDMA and GSM roaming agreements."[40] This is a vow of faithfulness for all of one month, the effective term of many roaming agreements. If anything, this most short-lived of commitments would seem to underscore disconcertingly how much Verizon values having maximum flexibility in connection with roaming.

The effect of the transaction on roaming markets will be particularly pronounced in light of the fact that Verizon and ALLTEL are among the few extant U.S. wireless companies using CMDA modulation. It is of particular concern for Leap, which uses CDMA technology too. As the Commission has recognized, "TDMA/GSM carriers do not have the ability to roam with CDMA carriers, and vice versa."[41] This means that, in most of the markets where Verizon and ALLTEL overlap, they are (with Sprint) among the only three possible sources of CDMA roaming. In other overlapping markets, they are the only two. This kind of consolidation justifies especially high antitrust scrutiny. Indeed, 3-to 2 (let alone 2-to-1) consolidations are paradigmatic cases for the Commission to require divestiture.[42]

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[40] Application at 17. *See also* Letter from John T. Scott, III, Vice President & Deputy General Counsel, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, at 2, *filed in* WT Docket No. 08-95 (Jul. 22, 2008) ("*Verizon Ex Parte*").

[41] *Cingular/AT&T* at ¶ 175.

[42] *See AT&T/Dobson* at ¶ 56 ("The following four markets, which are the markets where we are requiring business unit divestitures, represent all the markets in which the acquisition will reduce the number of fully constructed operators from three to two, or (in one case) from two to one."); *Cingular/AT&T* (requiring divestiture of operating units in geographic markets where merger would have reduced the number competitors from 3 to 2, or 2 to 1); *Applications of Western Wireless Corporation and ALLTEL Corporation*, 20 FCC Rcd 13053 (2005) (same). *See also SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 18290 (2005) (requiring divestiture of indefeasible rights-of-use to certain buildings where merger would have reduced from 2 to 1 the number of providers directly connected to those buildings); *Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd 18433 (2005) (same); *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd 5662 (2007) ("*AT&T/BellSouth*") (same).

Leap could be directly affected by this reduction in the number of potential CDMA roaming partners, as it will likely leave Verizon/ALLTEL unfettered by market forces in the 3-to-2 markets, and certainly in the 2-to-1 markets. In that regard, Leap is a member of the Roaming Coalition, a group of wireless carriers and licensees that depend upon the availability of roaming services. As discussed more extensively in the Roaming Coalition's Petition to Deny, also filed today, Leap supports the need for a Commission ruling that the roaming obligations, at least of Verizon/ALLTEL and preferably of all CMRS providers, are not qualified by the so-called in-market exclusion.[43] It also joins the Roaming Coalition in requesting that the Commission specifically extend roaming obligations to data roaming. Unqualified roaming obligations are essential to protect the public interest here. But even these measures will not be enough to cure the particular problem of 2-to-1 and 3-to-2 CDMA roaming markets. Imposing only conduct restrictions to police such a major increase in concentration is inadequate. For these reasons, therefore, Leap believes that nothing short of the full-fledged roaming obligations requested by the Roaming Coalition, coupled with the structural remedy of divestiture is necessary to ameliorate the competitive effects of this transaction.

B. The fact that both applicants use CDMA technology has an effect on the market for purchasing CDMA technology and equipment

The applicants also neglect to mention the effect of the transaction on yet another CDMA-specific market – the upstream market where wireless providers purchase CDMA technology and equipment. While that market *is* national in scope, here too, the increase in concentration which will be brought about by the transaction would be steep. Verizon may already be the largest purchaser of CDMA equipment in the country, but the acquisition of

[43] The far-reaching effects of such a reduction in the number of roaming partners is analyzed and explored in more detail in the Petition to Deny filed in this proceeding by the **[**Coalition**]**. Leap will not repeat that analysis here.

ALLTEL will give it at least 80 million out of an estimated 140 million North American CDMA subscribers, or 57% of North American CDMA subscribers (and therefore an even larger proportion of U.S. CDMA subscribers).[44] This would create an overwhelmingly dominant purchaser that can very much dictate its own terms, ensure preferential treatment and raise the costs of rival purchasers, such as Leap.

The Commission should be familiar with the problem of the dominant purchaser, which arises regularly in the multichannel video programming distributor ("MVPD") market. Cable operators are often the largest MVPD in any given local market, which gives them purchasing power when negotiating with video programming providers wishing to reach MVPD subscribers in those markets. Cable operators have used such purchasing power in the past to negotiate exclusive or discriminatory agreements with programmers in an effort to exclude rivals or to raise their costs. Both Congress and the Commission have recognized this problem and taken steps to curb cable's purchasing power. In 1992, Congress enacted section 628 of the Communications Act[45] to reserve competition by prohibiting cable operators and cable-affiliated programmers from entering into certain unfair, exclusive and discriminatory programming agreements. As recently as last year, the Commission decided that the 70% average market share enjoyed by cable operators warranted an extension of the Congressional ban on certain exclusive programming agreements for an additional five years.[46]

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[44] *See* Application at 2 (Verizon serves over 67 million customers), at 4 (ALLTEL serves over 13 million customers); http://www.cdg.org/worldwide/cdma_world_subscriber.asp#cdma (last visited Jul. 25, 2008) (reporting over 140 million North American CDMA subscribers, as of March 2008).

[45] 47 U.S.C. § 548.

[46] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Sunset Of Exclusive Contract Prohibition*, 22 FCC Rcd 17791 (2007).

Accordingly, in light of the dominant purchasing position in the CDMA technology and equipment market that Verizon/ALLTEL will attain as a result of this transaction, the Commission should inquire into the likelihood of competitive harm that might flow from abuse of that position.

V. THE APPLICATION AND VERIZON'S SUBSEQUENT EX PARTE LETTER RAISE MORE QUESTIONS THAN THEY ANSWER

As noted above, the application raises many questions but answers very few of them. Accordingly, the Commission should ask the applicants to supplement their application with additional information and documents, including:

1. CMA-level market share data (by revenues, subscribers and spectrum holdings) for Verizon and ALLTEL for all markets in which both are present.

2. Excel format version of the market-by-market competitor and spectrum charts that were filed with the application (Exhibits 4 and 5), and an Excel version of the competitor chart showing only the markets in which both applicants are present.

3. A list of all markets in which the Verizon and ALLTEL merger would result in the number of CDMA carriers in that market being reduced from 3-to-2 and 2-to-1.

4. More extensive and detailed diversion studies on substitutability between Verizon and ALLTEL.

5. The work papers of the authors of the Carlton Declaration.

6. Verizon's plans for its licensed-but-unused spectrum. Before it acquired 8.5 billion MHz/POPs in this year's 700 MHz auction,[47] Verizon acquired 20 MHz of AWS spectrum covering a population of nearly 200 million in the 2006 AWS-1 auction. Verizon

[47] *See Verizon Nearly Lost Bid for National C-Block License*, COMM. DAILY, Mar. 25, 2008.

ought to document its build-out activities and its plans to put that AWS spectrum to productive use, including without limitation by providing evidence of all band-clearing activities and coordination with governmental entities to achieve relocation.

7. Copies of roaming agreements between Verizon and other CDMA carriers, and between ALLTEL and other CDMA carriers, plus a copy of the roaming agreement between Verizon and ALLTEL.

8. Copies of Verizon's and ALLTEL's CDMA technology and equipment contracts.

9. Copies of all documents submitted as part of the parties' pre-merger Hart-Scott-Rodino Act ("HSR") notification, including without limitation all material submitted pursuant to Item 4(c) of the HSR notification form and pursuant to any requests for evidence that have been or may be issued.

In addition, the laconic *ex parte* letter that Verizon has sprung upon the Commission only recently exacerbates the lack of information rather than curing it.[48] The Commission reasonably granted an extension of time to allow review of this eleventh-hour filing,[49] but the problem is that there is not much in it *to* review. The Commission and commenters are asked to accept Verizon's say-so that the transaction's competitive problems would be cured by divestiture in only 85 overlapping markets.[50] The letter contains no analysis of the market conditions in these or any other markets, and contains no explanation of why divestiture is necessary or ameliorative in those markets but not others. Verizon states only that it is "offer[ing] to accept divestiture

[48] *See Verizon Ex Parte*.

[49] *Atlantis Holdings LLC and Cellco Partnership d/b/a Verizon Wireless*, DA 08-1733, Order, WT Docket No. 08-95 (rel. Jul. 24, 2008) (extending time for petitions to deny, oppositions and replies).

[50] *Id*. at 1, 3-5.

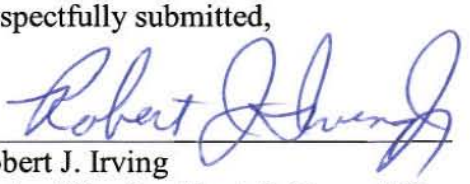
requirements" in the 85 listed markets "[f]ollowing initial discussions with the Department of Justice." One can only guess why, for example, the list does not include markets where the applicant's spectrum may be somewhat below the screen but Verizon also owns AWS spectrum.

The Commission should ask Verizon for a fully documented explanation of its divestiture proposal and, upon receiving it, place the applications anew on public notice.

VI. CONCLUSION

For all of these reasons, the Verizon/ALLTEL transaction should not be approved without extensive inquiry into matters of broad policy importance and matters specific to this particular transaction, and then only with meaningful ameliorative conditions. Leap reserves its rights to supplement its comments based on the ample additional information that the applicants should be asked to admit.

Respectfully submitted,



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August 11, 2008

DECLARATION OF ROBERT J. IRVING

I , Robert J. Irving, declare under penalty of perjury that the allegations of fact in the foregoing are true and correct to the best of my information, knowledge and belief.

Executed on Aug. 11, 2008

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