

**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 OF  
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.  
TO CONDITION CONSENT OR DENY APPLICATION**

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Dated: August 11, 2008

## SUMMARY

Verizon's proposed acquisition of Alltel is the latest chapter in the consolidation of the wireless industry, which has been accelerating as a direct result of recent Commission policies that increasingly favor large carriers over mid-tier regional carriers, rural carriers, and new entrants. This consolidation has already lessened competition, and the smaller carriers are being squeezed out. The Commission's challenge in a consolidating industry is to assure that the inputs necessary for competition remain available to all carriers to maintain a level playing field and to foster competition, and this acquisition threatens to substantially impair those objectives. Unless the Commission steps in immediately by placing specific pro-competitive conditions on Verizon's acquisition of Alltel, competition will be harmed and consumers will suffer.

To ensure that competition continues in the wireless marketplace following the merger, the Commission must assure that all carriers – rural and regional mid-tier carriers as well as new entrants – have reasonable access to spectrum and the ability to offer their customers roaming services on just and reasonable rates. The best way to accomplish this critical public interest goal is to require the merged entity to provide automatic roaming at rates and on terms which will foster competition. The Commission also must ensure that divested markets and spectrum end up being acquired by entities which will preserve the competitive landscape and will be incented to offer automatic roaming to rural and regional mid-tier carriers and new entrants on just and reasonable rates.

The merged enterprise will have substantially greater spectrum resources than all but one of its competitors (over 85 MHz of spectrum in almost all metropolitan areas in the United States and in many rural areas as well), and will hold the vast majority of the most desirable spectrum in such markets. Most fundamentally, it will have the ability to control the market for automatic

roaming services for CDMA carriers. The acquisitions, if consummated without conditions, will have a devastating impact on the competition in the CMRS market generally by substantially reducing competition for a critical input to that market – the market for roaming services – particularly when combined with the current lack of an automatic roaming requirement for in-market roaming and wireless data services.

Unlike the retail wireless market, the roaming market is technology-delimited, and CDMA carriers cannot feasibly obtain roaming from a non-CDMA carrier. Verizon is one of only two national CDMA carriers, and Alltel is by far the largest of the regional CDMA carriers. Because of Alltel's market position, it has been willing to offer roaming at much more reasonable rates than Verizon, which charges roaming rates that often are a high multiple of those offered by Alltel. It is clear that Verizon already has significant market power in the CDMA roaming market – which will only be further cemented by the Alltel acquisition and the disappearance of Alltel as a competitive force in the wireless marketplace.

The increase of Verizon's already dominant market power will harm wireless consumers in several ways unless appropriate conditions are imposed on the proposed merger. *First*, it will drive up the rates that CDMA carriers other than the merged entity can offer to their customers since one of the key cost inputs for such carriers – the rates paid by their carriers for underlying roaming services – will certainly increase. *Second*, the ability of the merged entity to drive up rates will reduce competition in the local retail market and in the national retail market for CMRS service. *Third*, since the ability to obtain competitive roaming rates will have an effect on the desirability of a rural or regional mid-tier carrier's service, any increased ability of the merged entity to deny roaming where roaming is not mandated by the Commission can lead to reduced competition for retail CMRS services. *Fourth*, the incentives for the merged entity to

offer additional roaming services, such as 1xRTT data roaming and EVDO data roaming, will be substantially reduced – and this in turn will reduce competition in the retail markets in which the merged entity competes with the rural, regional and mid-tier carriers. *Fifth*, allowing the merged entity to charge rates well in excess of just and reasonable rates (which will result from an unconditioned acquisition) may have the effect of placing in doubt the very survival of certain of the rural and regional mid-tier and smaller carriers. Consumers will be harmed because it is the regional mid-tier and rural carriers which provide the market competition and spur to innovation that keep the market from sinking into oligopolistic stagnation.

There are five main conditions that should be placed by the Commission on its approval of this acquisition as minimal prophylactic measures to prevent the competitive harms described above. These are:

1. Require Verizon to provide automatic roaming on reasonable terms for all services offered by Verizon, to any requesting wireless carrier, in all areas, whether in-market or out-of-market. As such, automatic roaming would extend not only to voice and SMS services, but also to all data services, whether interconnected or not, including both 1xRTT, EVDO, and all future enhancements, including but not limited to Long Term Evolution (LTE). This obligation should commence at the consummation of the transaction and continue for a period of at least ten years after Verizon has entered into agreements with wireless carriers representing at least 30% of the CDMA customers (other than Verizon, Alltel, Rural Cellular, and their affiliates) in the United States. The Commission must also require Verizon to honor existing Alltel agreements for each roaming carrier, not only in Alltel territory and for their existing terms, but in all of the post-merger territory from the date of consummation of the transaction, until it enters into an agreement with such carrier that complies with the above stated conditions and with Condition 3 below.
2. Require Verizon to provide automatic roaming at rates that are the lower of: (a) the rate at which such automatic roaming services are offered by Verizon to any person, including Verizon's affiliates; and (b) \$0.05/minute from answer supervision (or equivalent) to call termination (or equivalent) for voice (with a corresponding reasonable level for data).
3. Require Verizon to make available any roaming arrangement, service, or function in any agreement or arrangement that Verizon or Alltel has with any person,

including Verizon's affiliates, to any wireless carrier on the same terms and conditions, including price, as those provided in the agreement or arrangement.

4. Require Verizon to provide to any CMRS provider, upon request, copies of any roaming agreement Verizon has with any other person under an appropriate Commission protective order.

5. Prohibit Verizon, in the event the Commission decides to require divestiture of any Verizon or Alltel assets (be they spectrum, facilities or customers), from selling such assets to (a) one of the three other national wireless carriers or (b) any person who does not both already offer wireless services and commit to own and operate such assets for at least five years from the closing. For any operating assets being divested, the Commission should further mandate CDMA divestitures (as opposed to divestitures of other technology) and should require that a priority be given to buyers who already operate the same technology.

If the Commission cannot or does not impose these conditions, it must deny the applications as contrary to the public interest.

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**PETITION OF  
METROPCS COMMUNICATIONS, INC. AND NTELOS INC.  
TO CONDITION CONSENT OR DENY APPLICATION**

MetroPCS Communications, Inc. (“MetroPCS”)<sup>1</sup> and NTELOS Inc. (“NTELOS”) (collectively, “Petitioners”), by their undersigned counsel and pursuant to the Federal Communications Commission’s (“Commission”) June 25, 2008 and July 24, 2008, *Public Notices* in the above-captioned proceeding, hereby respectfully petition the Commission to condition the above-captioned applications (the “Applications”) of Cellco Partnership d/b/a Verizon Wireless (“Cellco”) and its wholly-owned subsidiary AirTouch Cellular (“AirTouch”) (collectively, “Verizon”) and Atlantis Holdings LLC (“Atlantis”) (Verizon and Atlantis, collectively, the “Applicants”) as described in this Petition, or in the alternative to deny the Applications.

MetroPCS and NTELOS are two very different carriers – the first, a large regional carrier with a strategy of constructing and operating in major metropolitan areas and competing directly

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<sup>1</sup> For purposes of this Petition, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its Commission-licensed subsidiaries.

with national carriers in the heart of their markets for a mass market largely underserved by the large national carriers, and the second, a small rural carrier bringing service to users that the national carriers have neglected to serve. Their points of view and interests are very different on many issues. But on the appropriate disposition of the Applications of Verizon and Alltel, they come before the Commission in complete agreement: An unconditional grant of the Applications would severely impede competition in the Commercial Mobile Radio Services (“CMRS”) market by reducing competition for one of the most important inputs to the CMRS industry – the market for wholesale roaming services – thereby jeopardizing the market for critical roaming services and robbing consumers of the benefits of the competition they bring. It would also further concentrate ownership of the most desirable spectrum bands – cellular and 700 MHz – unless divestitures are ordered where the merged entity would control both of the cellular licenses. Accordingly, the Commission either must condition any grant of the Applications so as to prevent such competitive harm, or, if unable to do so, deny the Applications. In support hereof, the following is respectfully shown:

## **I. INTRODUCTION & SUMMARY**

In their Applications, the Applicants seek the Commission’s consent to transfer control of various common carrier and radio licenses and authorizations held by ALLTEL Corporation and various of its affiliates (collectively, “Alltel”) in connection with a proposed acquisition of Atlantis by Verizon. The proposed acquisition is the latest chapter in the consolidation of the wireless industry, which has been accelerating as a direct result of recent Commission policies that increasingly favor large national carriers over mid-tier regional carriers, rural carriers, and new entrants.<sup>2</sup> The effect of these acquisitions has been to change the wireless market from one

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<sup>2</sup> As MetroPCS and others have pointed out repeatedly, the Commission’s recent spectrum allocation decisions have favored certain carriers over mid-tier regional and rural carriers, and new entrants. Rural and

in which a number of mid-tier regional and rural carriers were vying to become major competitors – thereby assuring consumers of many competitive choices in a healthy marketplace – to one in which a very few gigantic entities enjoy unquestioned dominion and market power and are able to exercise their dominant power in the roaming market to decrease or eliminate competition for local retail wireless services. As a result, competition is lessened, the smaller carriers are being squeezed out, and consumers will suffer as the industry returns to an oligopoly with four or fewer carriers.

There are those who believe the trend toward such oligopolistic consolidation is inevitable and that the Commission has no choice but to let the process proceed. To be sure, some cycles of consolidation may be expected as an industry develops or as technology evolves, and are not necessarily bad, *so long as* a regulatory structure is in place that continues to foster competition by rural and mid-tier regional competitors in the very market that the Commission has repeatedly found relevant – the local retail service market. This would assure that competition, not oligopoly, rules the day. Allowing competition, rather than regulation, to protect consumers has been a long standing policy of the Commission and has served the public interest well. When competition has flourished, the rates for wireless services have fallen, the number and types of services have flourished, innovation abounds, and the choices for consumers multiply. The Commission’s challenge in a consolidating industry is to assure that the inputs necessary for local retail competition remain available to *all* carriers to maintain a level playing field in the market for local retail services and to foster competition. Unless the

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regional mid-tier carriers, which have been an extremely positive competitive influence in the wireless marketplace, have critical needs for additional spectrum resources in order to meet substantial existing and future market demand. The continuing need of these carriers for spectrum was resoundingly affirmed by the robust bidding for the Lower Band 700 MHz paired spectrum in the recently completed Auction 73. Unfortunately, many active rural, small, and regional bidders, as well as new entrants, came home empty-handed as a direct result of auction procedures and other Government-imposed requirements that favored large incumbent carriers.

Commission steps in immediately – starting at the very least by placing specific pro-competitive conditions on Verizon’s acquisition of Alltel – competition will be harmed and consumers will suffer.

To ensure that competition continues in the wireless marketplace, the Commission must assure that all carriers – rural and regional mid-tier as well as new entrants – have reasonable access to spectrum and the ability to offer their customers roaming services as part of their local retail services on just and reasonable rates. Not only is this good public policy that comports with earlier Commission policy, but it is also a statutory duty of the Commission under the Communications Act. The Petitioners are not in general against consolidation or even the proposed transaction – rather, the Petitioners want to assure that, as important competitors in the wireless industry and to the merged entity, they have access to a reasonable amount of spectrum and the necessary roaming inputs at just and reasonable rates to allow them to effectively compete with the merged entity. As discussed in further detail below, Petitioners believe that the best way to accomplish this critical public interest goal is to require the merged entity to provide automatic roaming at rates and on terms which will foster competition.<sup>3</sup> The Commission also must ensure that divested markets and spectrum end up being acquired by entities which will preserve the competitive landscape and will be incented to offer automatic roaming to rural and regional mid-tier carriers on just and reasonable rates.

To grant these Applications, the Commission must make an affirmative determination that the merger is in the public interest. In support of their Applications, the Applicants submitted a voluminous and multi-part “Description of Transaction, Public Interest Showing and

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<sup>3</sup> While Verizon has offered to allow carriers to choose whether to continue with their Alltel agreement or their Verizon agreement and to have the selected agreement apply over all Verizon markets, this promise is illusory since many of these arguments can be terminated after their initial short-term on relatively short notice and rates can also be raised on relatively short notice.

Related Requests and Demonstrations” (the “Public Interest Statement”). In the Public Interest Statement, the Applicants purport to show that the proposed acquisition is in the public interest, and in particular that it would not result in competitive harm to the CMRS market. In making this showing, however, the Applicants focus almost entirely on the impact of the proposed acquisition on market shares in the retail market in which CMRS services are offered to end users. This showing, however, is incomplete and inaccurate. The Application fails to take into account the effect of consolidation on the ability of competitors to compete with the merged enterprise in the local retail market, which is not measured solely by the increase in concentration of market share. The Applicants’ promise to extend Alltel’s agreements network-wide similarly fails to resolve this problem because the agreements generally are not long-term and may be terminated or not renewed on short notice.

The merged enterprise will have substantially greater spectrum resources than all but one of its competitors (e.g., over 85 MHz of spectrum in almost all metropolitan areas in the United States and in many rural areas as well). In many instances, it will hold both the A and B Block cellular licenses and 20 MHz or more of 700 MHz spectrum and accordingly, the entity will hold the vast majority of the most desirable spectrum in such markets. Most fundamentally, it will have the ability to control the market for automatic roaming services for CDMA carriers. Remarkably, the Public Interest Statement is bereft of any substantial showing as to the impact of the proposed acquisition on the *wholesale roaming* market or its effect on the ability of other CDMA carriers to compete with the merged entity in the local retail services market which requires in many instances that roaming services be included as part of the local retail service. As to the alleged “benefit” of the proposed transaction in the roaming context, the Applications indicate only that Alltel and Verizon currently are roaming partners and that they will save the

roaming fees they would otherwise pay each other. The “benefit” really accrues only to Verizon and the Applicants do not even attempt to show how the reduction in roaming partners serves the public interest. The only “public interest” commitment the Applicants make is to honor any term that remains on Alltel’s existing roaming arrangements with third parties. Because of the terms of Alltel’s existing roaming agreements, this is an illusory promise and one which does nothing to eliminate the core anticompetitive effect this merger would have on the roaming market.

Petitioners do not quarrel with the claim that the merger will benefit Verizon and Alltel with respect to roaming on each other’s networks, but, as will be shown below, the acquisitions, if consummated without conditions, will have a devastating impact on the competition in the CMRS market generally by substantially reducing competition for a critical input to that market – the market for roaming services – particularly when combined with the current lack of an automatic roaming requirement for in-market roaming and wireless data services.

Unlike the choices consumers have in the local retail services market, the roaming market – a key component of the t local retail services market – is technology-delimited. CDMA carriers such as MetroPCS and NTELOS cannot feasibly obtain roaming from a non-CDMA carrier because the handsets used by the CDMA carriers are, for the most part, incompatible with the service provided by the non-CDMA carrier. Verizon is one of only two national CDMA carriers (the other being Sprint).<sup>4</sup> Alltel is by far the largest of the regional CDMA carriers, covering nearly 80 million people, while the next-largest regional carrier in terms of covered population, Leap Wireless (“Leap”), has only just over half of Alltel’s population coverage.<sup>5</sup> By virtue of its size, Alltel has been a very important roaming partner for other rural and regional

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<sup>4</sup> See *In the Matter of 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*, Twelfth Report, WY Docket No. 07-71, FCC 08-28, Feb. 4, 2008 (“*Wireless Competition Twelfth Report*”) at para. 132.

<sup>5</sup> Public Interest Statement at 9; *Wireless Competition Twelfth Report* at para. 18.

mid-tier CDMA carriers. And because reciprocity with other rural and regional mid-tier carriers has been important for Alltel as well, Alltel has been willing to offer roaming at much more reasonable terms and conditions, including rates, than the national CDMA carriers.<sup>6</sup> By contrast, Verizon has insisted on roaming rates that often are a high multiple of those offered by Alltel, especially to carriers that Verizon does not need to complement its own footprint, and on more onerous terms such as limiting in-market roaming, limiting services offered, or charging excessive rates for the service. Standing alone, this disparity in rates, terms and services demonstrates that Verizon already has significant market power in the CDMA roaming market – and Verizon’s market power will only be further cemented by the Alltel acquisition and the disappearance of Alltel as a competitive force in the wireless marketplace.<sup>7</sup>

The increase of Verizon’s already dominant market power will harm wireless consumers in several ways unless appropriate conditions are imposed on the proposed merger. *First* and foremost, it will drive up the local service rates that CDMA carriers other than the merged entity can offer to their customers since one of the key cost inputs for such carriers – the rates paid by their carriers for underlying roaming services which in many instances are bundled into local service packages – will certainly increase.

*Second*, the ability of the merged entity to drive up rates and impose onerous terms will reduce competition in the local retail market and in the national retail market for CMRS service. Since many carriers include roaming minutes into their bundle of included minutes, any increase in cost of roaming could increase the cost of local retail service. *Third*, since the ability to roam

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<sup>6</sup> In addition, since Alltel had no reason to discriminate, Alltel could enter into agreements without long terms.

<sup>7</sup> Even though Verizon currently has significant market power in the roaming market, its behavior is constrained to a certain extent by the presence of Alltel in the market, as further discussed below. While this constraint is no substitute for vigorous competition, and still results in rates that are well above what competitive levels would be, it is still important and would be lost if the merger were allowed to proceed without conditions.

even without bundled minutes will have an effect on the desirability of a rural or regional mid-tier carrier's service, any increased ability of – or motivation for – the merged entity to deny roaming where roaming is not mandated by the Commission can lead to reduced competition for retail CMRS services. *Fourth*, with reduced competition in the roaming market, the incentives for the merged entity to offer additional roaming services, such as 1xRTT data roaming and EVDO data roaming, will be substantially reduced – and this in turn will reduce competition in the retail markets in which the merged entity competes with the rural, regional and mid-tier carriers.<sup>8</sup>

*Fifth*, and in the long run even more importantly, allowing the merged entity to charge rates well in excess of just and reasonable rates (which will result from an unconditioned acquisition) may have the effect of placing in doubt the very survival of certain rural regional mid-tier and smaller carriers. As these carriers' costs (and therefore prices) increase, consumers may flock to the two national carriers able to offer extensive coverage without roaming. In the end, however, consumers will be harmed because it is the rural and regional mid-tier carriers which provide the market competition and spur to innovation that keep the market from sinking into oligopolistic stagnation.

Accordingly, there are five main conditions that should be placed by the Commission on its approval of this acquisition as minimal prophylactic measures to prevent the competitive harms described above. These are:

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<sup>8</sup> Additionally, as a result of the transaction at issue here, smaller carriers and their customers face potential indirect harms that may not be immediately apparent. For example, CDMA handset manufacturers program one of three versions of software into each handset they make. One version is proprietary to Verizon; one version is proprietary to Sprint; and the third version of the software is used by all the remaining CDMA carriers including, for now, Alltel. Without Alltel in the mix, there is concern that at least some manufacturers will decide it is not worth their while to produce that third version of the handset software, and thus will limit the types of handsets available to rural and mid-tier regional carriers. This could have collateral effects such as reducing the ability of these carriers to obtain hearing-disabled compliant handsets or handsets with the newest features and technology. This could also increase Verizon's ability to dictate exclusive handset agreements.

1. Require Verizon to provide automatic roaming on reasonable terms for all services offered by Verizon, to any requesting wireless carrier, in all areas, whether in-market or out-of-market. As such, automatic roaming would extend not only to voice and SMS services, but also to all data services, whether interconnected or not, including both 1xRTT, EVDO, and all future enhancements, including but not limited to Long Term Evolution (LTE). This obligation should commence at the consummation of the transaction and continue for a period of at least ten years after Verizon has entered into agreements with wireless carriers representing at least 30% of the CDMA customers (other than Verizon, Alltel, Rural Cellular, and their affiliates) in the United States. The Commission must also require Verizon to honor existing Alltel agreements for each roaming carrier, not only in Alltel territory and for their existing terms, but in all of the post-merger territory from the date of consummation of the transaction, until it enters into an agreement with such carrier that complies with the above stated conditions and with Condition 3 below.

2. Require Verizon to provide automatic roaming at rates that are the lower of: (a) the rate at which such automatic roaming services are offered by Verizon to any person, including Verizon's affiliates; and (b) \$0.05/minute from answer supervision (or equivalent) to call termination (or equivalent) for voice (with a corresponding reasonable level for data).

3. Require Verizon to make available any roaming arrangement, service, or function in any agreement or arrangement that Verizon or Alltel has with any person, including Verizon's affiliates, to any wireless carrier on the same terms and conditions, including price, as those provided in the agreement or arrangement.

4. Require Verizon to provide to any CMRS provider, upon request, copies of any roaming agreement Verizon has with any other person under an appropriate Commission protective order.

5. Prohibit Verizon, in the event the Commission decides to require divestiture of any Verizon or Alltel assets (be they spectrum, facilities or customers), from selling such assets to (a) one of the three other national wireless carriers or (b) any person who does not both already offer wireless services and commit to own and operate such assets for at least five years from the closing. For any operating assets being divested, the Commission should further mandate CDMA divestitures (as opposed to divestitures of other technology) and should require that a priority be given to buyers who already operate the same technology.

The Commission's core obligation under Section 1 of the Communications Act of 1934, as amended,<sup>2</sup> is "to make available, so far as possible, to all the people of the United States... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with

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<sup>2</sup> 47 U.S.C. § 151 *et. seq.* (the "Act")

adequate facilities at reasonable charges.”<sup>10</sup> The obligation to foster this network extends to *all* wire and radio communication services regardless of whether they are classified as CMRS, telecommunications service, or information service, regardless of network speed, technology, or platform, and regardless of whether or not they are interconnected. These objectives of the Act would clearly be imperiled by allowing the proposed Verizon-Alltel combination to go forward without the above-described conditions. Consequently, Petitioners submit that imposing the conditions outlined above and further detailed herein is not merely authorized, but indeed is compelled by the mandate of the Act. If the Commission cannot or does not impose these conditions, it must deny the applications as contrary to the public interest.

## **II. INTEREST OF PETITIONERS**

Both Petitioners have a substantial interest in maintaining the competitiveness of the roaming market.

### **A. MetroPCS**

MetroPCS is a CDMA-based CMRS carrier which has been an active participant throughout the Commission proceedings dealing with automatic roaming and spectrum issues. MetroPCS owns or has access to licenses covering a population of approximately 149 million people in 14 of the 25 largest metropolitan areas in the United States, including New York, Philadelphia, Boston, Miami, Orlando, Sarasota, Tampa, Atlanta, Dallas, Detroit, Las Vegas, Los Angeles, San Francisco and Sacramento. As of June 30, 2008, MetroPCS had approximately 4.6 million subscribers and it currently offers service in the Miami, Orlando, Sarasota, Tampa, Atlanta, Dallas, Detroit, Los Angeles, San Francisco, Las Vegas, Philadelphia and Sacramento metropolitan areas.

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<sup>10</sup> Id. at § 151.

MetroPCS' service is a flexible, low-cost alternative targeted to mass market largely underserved by the large national wireless carriers. MetroPCS' service allows customers to place unlimited calls from within MetroPCS' service area and to receive unlimited calls from any area while in MetroPCS' service area, under simple, affordable, and flexible service plans starting as low as \$30 per month. For an additional \$5 to \$20 per month, MetroPCS' customers may select a service plan that offers additional services, such as unlimited voicemail, caller ID, call waiting, enhanced directory assistance, unlimited text messaging, mobile Internet browsing, push e-mail, location services, mobile instant messaging, picture and multimedia messaging, and the ability to place unlimited long distance calls from within MetroPCS' service area to any number in the continental United States. For additional fees, MetroPCS provides international long distance, international text messaging, ring tones, ring back tones, downloads, games and content applications, location services, unlimited directory assistance and other value added services. Existing and future *data* services offered by MetroPCS (some of which have already been mentioned) include:

- Services provided through the Binary Runtime Environment for Wireless, or BREW, platform, including ringtones, games and content applications;
- Text messaging services (domestic and international), which allow the customer to send and receive alphanumeric messages that the handset can receive, store and display on demand;
- Multimedia messaging services, which allow the customer to send and receive messages containing photographs;
- Mobile Internet browsing; and
- Push e-mail.

MetroPCS is a new entrant which brings competition to existing markets and also is expanding the market for wireless services by attracting new customers to wireless services. MetroPCS estimates that a significant number of its users are first-time wireless users. Further,

because of its pricing approach, the MetroPCS service has become a substitute for landline service for many of its customers. MetroPCS' data indicate that a substantial portion of MetroPCS subscribers use their MetroPCS wireless phone as their primary or exclusive telecommunications service. MetroPCS also provides outstanding service and customer care to its customers. For example, MetroPCS was recently recognized by J.D. Powers as providing the best customer service for a pre-paid wireless carrier.

In the markets where MetroPCS operates, other wireless carriers, such as Verizon and Alltel, offer service to their subscribers wherever those subscribers travel throughout the United States, either by virtue of a nationwide footprint or via automatic roaming in areas where they do not have spectrum. In order to compete, MetroPCS must be able to provide the same service to its customers.<sup>11</sup> At present, MetroPCS is party to certain automatic roaming agreements which cover broadband voice services, but do not extend to data services (other than SMS).<sup>12</sup> MetroPCS has an agreement with Verizon under which Verizon has agreed to provide to MetroPCS voice roaming service which enables the Company's customers to receive wireless telephone service while located in most of Verizon's cellular and PCS markets. MetroPCS also has an agreement with Alltel but this agreement can be terminated on relatively short notice after an initial term. If Verizon terminates the Alltel agreement, MetroPCS' customers will suffer significant increases in the costs they pay for roaming in many areas. While the specific roaming rates paid by MetroPCS to Verizon and Alltel are confidential, MetroPCS customers roaming in all Alltel areas pay MetroPCS \$0.24 per minute while MetroPCS customers roaming in Verizon

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<sup>11</sup> The Commission has recognized this reality, both in the *Automatic Roaming Order* (at paras. 3, 27-28) and the *Wireless Competition Twelfth Report* (at para. 18).

<sup>12</sup> The specific rates, terms and conditions of MetroPCS' roaming contracts are confidential, and MetroPCS is therefore unable to provide any specificity with respect to them in this Petition, even under seal, absent consent of the other party. Should the Commission request more specific information, MetroPCS would be willing to try to secure the necessary contractual consent procedures to comply.

areas pay MetroPCS either \$0.49 per minute (if the area is outside MetroPCS' existing markets) and \$0.79 per minute (if the area is inside MetroPCS' existing markets). These rate differentials reflect MetroPCS' higher costs to provide services in the different areas. Accordingly, Verizon has every incentive to terminate or not renew the MetroPCS/Alltel agreement and thereby increase the rates charged to MetroPCS and others absent Commission action.

Consequently, MetroPCS and its customers stand to be substantially adversely impacted by the proposed acquisition. MetroPCS and its customers also will be directly affected by the manner in which, and the extent to which, the combined entity will offer automatic roaming on a going forward basis.

## **B. NTELOS**

NTELOS holds PCS licenses to operate in twenty-nine basic trading areas with a total licensed population of approximately 8.8 million. NTELOS has built out its network in twenty of those basic trading areas and covers 5.2 million POPs. As of March 31, 2008, NTELOS served approximately 425,000 retail wireless subscribers representing nearly 8% penetration of NTELOS' total covered population.

NTELOS began acquiring PCS spectrum in western Virginia and West Virginia in the early 1990s and began operations in Virginia in late 1997, in West Virginia in late 1998, and in eastern Virginia (Richmond, Hampton Roads, Norfolk, Virginia Beach) in 2000. It is significant to note that much of NTELOS' PCS Spectrum was acquired after the first auction in partitions from Primeco (in western Virginia) and from GTE (in West Virginia). Indeed, NTELOS obtained two of the first three partitions of PCS spectrum licenses approved by the Commission. The larger carriers sold their entire PCS spectrum holdings in these markets to NTELOS. It was clear at the time that these carriers were focused on the urban areas and were not interested in

building out the more rural geography. NTELOS, on the other hand, has been steadily building out mountainous and relatively sparsely populated communities for many years.

Although NTELOS has been a PCS provider for over a decade, it continues to make significant investments in the wireless network. In 2005-2007, NTELOS added 186 new wireless cell sites to increase its total cell sites to 1,023. In 2008, NTELOS has committed to its most aggressive expansion ever, planning to increase its number of cell sites by 15%-18% by the end of this year. At the end of 2007, NTELOS had 75 company-owned retail stores and is adding nine more in 2008 in keeping with its long-standing strategy to be a part of local communities.

In August of 2007, NTELOS announced that it will upgrade virtually its entire network for mobile broadband services using EVDO Rev. A. In order to accomplish the EVDO upgrade, NTELOS has replaced the wireless switches in its western Virginia and West Virginia networks, and will be upgrading the existing switches in eastern Virginia and changing out equipment at over 1,000 cell sites. It is the largest capital project in the company's history. NTELOS will complete the EVDO deployment in western Virginia and West Virginia by the end of 2008 and will complete the upgrade of eastern Virginia before the end of 2009. In April 2008, the Company officially launched mobile broadband services to its customers in the Huntington/Ashland and Charleston markets in West Virginia and subsequently, in the Charlottesville, Staunton and Waynesboro, Virginia markets.

NTELOS offers a wide array of voice and data plans to meet the varying needs of postpay and prepay customers. Plans that offer unlimited calling on the NTELOS network are available to any customer. NTELOS also offers national plans to all of its customers, featuring nationwide long distance and no roaming via buckets of daytime, mobile-to-mobile, and night

and weekend minutes. NTELOS customers can choose from a variety of added-value features like integrated voicemail and data services such as location based services, text and picture messaging, games, ring-tones, ring-back tones, news, entertainment and hundreds of BREW applications. The introduction of EVDO services in April of this year especially enhances NTELOS' Mobile Web browsing, and Premium Messaging services. EVDO data services are at speeds 10 times faster than those available on NTELOS' 1x data network – the wireless equivalent of moving from dial-up to DSL.

**III. THE COMMISSION SHOULD REQUIRE VERIZON TO PROVIDE AUTOMATIC ROAMING FOR ALL SERVICES OFFERED BY VERIZON WHICH CAN BE TECHNICALLY PROVIDED, TO ANY WIRELESS CARRIER WHO REQUESTS IT**

**A. Verizon Must Be Required To Provide Automatic Roaming, Without An In-Market Exclusion, For All Services For At Least Ten Years.**

As has been made crystal clear in the Commission's docket on automatic roaming,<sup>13</sup> a competitive wholesale market for roaming services is absolutely vital to the health of the retail market for wireless, and thus to the welfare of consumers and the protection of the public interest. In that proceeding, the Commission has acknowledged the importance of roaming and the clear need to "safeguard wireless consumers' reasonable expectations of receiving seamless nationwide commercial telephony services through roaming."<sup>14</sup> The Commission has also recognized that CMRS providers must offer their subscribers nationwide service in order to compete effectively in the marketplace.<sup>15</sup> Moreover, it has explicitly recognized that roaming services in general, and automatic roaming in particular, are common carrier services. Accordingly, carriers have an obligation under Section 201(a) of the Act to provide automatic

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<sup>13</sup> *In the Matter of Roaming Obligations of Commercial Mobile Radio Service Providers, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 05-265, August 16, 2007 ("Automatic Roaming Order"). MetroPCS incorporates all of its comments in the *Automatic Roaming Docket* into this docket.

<sup>14</sup> *Id.* at para. 4.

<sup>15</sup> *Automatic Roaming Order* at paras. 3, 27-28; *Wireless Competition Twelfth Report* at para. 18.

roaming upon reasonable request.<sup>16</sup> The Commission determined not to apply rate regulation to automatic roaming services, however, relying on competitive market forces to maintain rates at just and reasonable levels.<sup>17</sup>

The Commission is correct that roaming services are vital to the health of the wireless market, and that Section 201(a) of the Act obligates carriers to provide automatic roaming upon reasonable request. But inexplicably, the Commission declined to extend both of these conclusions to two areas where the Commission's own logic requires them to apply. First, the Commission held that, if the carrier requesting automatic roaming services (the "Requesting Carrier") has a license to provide CMRS services in a particular area in which it requests automatic roaming services, the carrier to which it makes such request (the "Supplying Carrier") is entitled to treat such request for "in-market" services as not reasonable, and accordingly to deny such request.<sup>18</sup> This conclusion would hold even if the request was for an area in which the Requesting Carrier had not yet built out the facilities necessary to provide services, and even if it was impossible for the Requesting Carrier to have built out such facilities for technical, operational or financial reasons. The Commission did not explain why such request would in itself be an unreasonable burden on the Supplying Carrier, or why it would be reasonable to deny service to the Requesting Carrier's customers in such circumstances. Rather, the Commission speculated that this exception would incent the requesting carrier to build out its own facilities faster.<sup>19</sup>

Second, the Commission chose not to extend the obligation to data services other than SMS at this time, deferring the decision whether to ultimately do so to the Further Notice of

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<sup>16</sup> *Automatic Roaming Order* at paras. 23-28.

<sup>17</sup> *Id.* at paras. 37-40.

<sup>18</sup> *Automatic Roaming Order* at paras. 48-50.

<sup>19</sup> *Automatic Roaming Order* at para. 49.

Proposed Rulemaking (“*Roaming Further Notice*”), issued as part of the *Automatic Roaming Order*.<sup>20</sup> Here too it failed to adequately explain why the common carrier obligation should not apply to these services.

MetroPCS and a number of other commenters<sup>21</sup> have demonstrated in petitions for reconsideration in the Automatic Roaming Docket that the Commission’s exclusion of in-market roaming was both unwise and wrong as a matter of law. First, having decided that automatic roaming service is a common carrier service, the Commission cannot exclude in-market roaming absent an adequate justification. The suggestion that an in-market roaming request is *per se* unreasonable is incorrect and legally unsustainable. And the desire of the Commission to promote facility-based competition, standing alone, is not adequate to permit the Commission to ignore other important mandates found in the Communications Act. Second, the *Automatic Roaming Order* contains a flawed public interest analysis. The home roaming exclusion will harm consumers, reduce competition, and undermine the Commission’s objective to protect life and promote public safety. The in-market roaming restriction will be difficult if not impossible to implement given the number of different wireless service areas and service variations that exist in the market. Third, the home roaming exclusion will foster unreasonable discrimination by enabling incumbents with market power to disadvantage all other carriers, including new entrants and disruptive competitors.

In challenging the in-market roaming exception, these commenters noted that there are many good reasons why a licensee might not have built out its entire license area right away, and that that this reality was inherent in the fact that the Commission does not require such

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<sup>20</sup> *Automatic Roaming Order* at para. 60.

<sup>21</sup> MetroPCS Petition for Reconsideration, WT Docket No. 05-265, October 1, 2008 (“MetroPCS Reconsideration Petition”) at 4-9; Leap Wireless International Inc. Petition for Reconsideration, WT Docket No. 05-265, October 1, 2008 (“Leap Reconsideration Petition”) at 5-19; United States Cellular Comments on Petitions for Reconsideration and Further Notice of Proposed Rulemaking, WT Docket No. 05-265, October 29, 2008, at 1-7.

immediate build-out.<sup>22</sup> These reasons include technical and operational issues, and the brute economic fact that it is often necessary to build out core areas first to get a viable business started before it becomes economically feasible to build out other license areas. Further, small carriers and entrepreneurial carriers do not have unlimited financial resources and must therefore roll out service over time so that income generated in the initial service areas can be used to fund expansions. In these circumstances, the carrier has every intention of becoming a facility-based competitor, but the timetable is dictated by certain financial limitations. NTELOS is an excellent example. Through its actions, it has clearly demonstrated its firm commitment to building out underserved rural and mountainous areas, but it must phase its build out in a manner that makes economic sense. For many carriers, this need to stage build-out over time, is likely to increase due to the uneasiness in today's credit markets.

A Requesting Carrier may need in-market roaming for another reason: it may be using the spectrum in one of its home markets in a way or with a technology that is incompatible with its other systems. For example, a carrier offering CDMA voice services in multiple markets may acquire or deploy a WiMax network in a new market. It may therefore need CDMA roaming in its new market (and WiMax roaming in the old ones).

Finally, in many instances, licensees simply *cannot* build out portions of their service areas until incumbent users have been relocated to other spectrum, a process which may take a considerable amount of time.<sup>23</sup> Customers of these carriers deserve the ability to obtain service in licensed areas where these carriers have not yet built out just as much as in areas where the carriers do not have licenses. Moreover, they are equally entitled under the law to obtain such

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<sup>22</sup> MetroPCS Reconsideration Petition at 7-9.

<sup>23</sup> *Id.* at 7-8.

service from Supplying Carriers, and therefore the Requesting Carriers are equally entitled to obtain it on their behalf.<sup>24</sup>

Moreover, the Commission should not disincent applicants from participating in its auctions either to expand their existing service areas or to become facilities-based competitors. The Commission's policy has the absurd result of deterring existing carriers from expanding their service areas because as soon as they obtain licenses they could lose all roaming rights in the newly-licensed areas even though they could not build their systems for some time. Further, not only would the Commission's policies disincent acquisition of licenses, the Commission's policies on in-market roaming (especially in the context of the proposed acquisition) also threaten to result in perverse *disincentives* to build out. As an example, NTELOS has had a significant build out program in its region (primarily Virginia and West Virginia) in past years and it has aggressive build out plans for the next several years. As part of those plans, it identifies areas where it wants to serve and builds its own cell sites there in order to be less dependent "in market" on any of its roaming partners. This is exactly the kind of behavior the Commission is on the surface trying to incent.

By its all-or-nothing approach, however, the Commission would disincent this behavior, since the lack of in-market roaming would make it impossible for carriers to differentiate between high-volume and low-volume areas. Thus, carriers would be prevented from distinguishing between areas where it makes economic sense to build new facilities and areas where the building of such facilities would be wasteful and result in large amounts of idle capacity. Overall, NTELOS would be faced with the choice – particularly acute in rural areas like the ones NTELOS serves – of building large amounts of uneconomic capacity on the one hand or allowing its customers to go unserved in large amounts of its licensed area (and

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<sup>24</sup> *Id.* at 4-6.

ultimately likely losing such customers and its viability as a competitor) on the other. NTELOS has been able to avoid this fate today because it has been fortunate enough to deal with Supplying Carriers who have been willing to provide in-market roaming voluntarily, including Sprint and Alltel (as well as Verizon, at substantially higher rates). With the exit of Alltel from the market, Verizon will hold regulatory and market power cards that will enable it to either refuse in-market roaming to NTELOS altogether or to hike its rates even farther above competitive levels than (as will be seen below) they already are.

Alltel and Verizon have engaged in widely divergent courses of action regarding in-market roaming, and these contrasting courses clearly illustrate both Verizon's pervasive market power Alltel's more cooperative approach and the resulting serious damage to competition that would be posed by an unconditioned combination of the two. As a regional carrier, Alltel has considerable incentive, and has demonstrated its willingness, to enter into roaming arrangements with other regional carriers that provide some level of reciprocity and to set rates at more reasonable levels. Verizon, on the other hand, has an incentive to enter into fair agreements only with carriers whose footprints cover significant territory that Verizon's does not, and has demonstrated its willingness to use its market power to deny fair roaming agreements to those carriers who do not offer significant footprints that Verizon does not cover. While as noted above the details of Petitioners' arrangements with Alltel (and with Verizon) are confidential, it is noteworthy that Alltel offers the same rate for both in-market and out-of-market roaming, while Verizon provides in-market roaming only at rates that are greatly in excess of its rates for out-of-market roaming. Further, Verizon's rates even for out-of-market roaming are a substantial multiple of the unitary rate offered by Alltel. Thus, the disparity between Verizon's and Alltel's in-market rates is wide indeed. The Petitioners encourage the Commission to

require Verizon and Alltel to provide copies of all roaming agreements as part of the Commission's review of the Applications so the Commission can see for itself the magnitude of this problem.

This large disparity is ample *prima facie* evidence that Verizon's roaming rates are far in excess of both its costs and what a competitive rate would be. The only explanation for these rates is that Verizon has – and knows full well that it has – market power in the CDMA roaming arena. This is because the roaming marketplace is inherently technology-delimited since a subscriber with a handset provided by a CDMA-based carrier cannot generally obtain roaming services from a non-CDMA carrier.<sup>25</sup> Only two (Sprint and Verizon) of the four national wireless carriers are CDMA-based. Thus, Verizon's emphasis in its Public Interest Statement<sup>26</sup> on the overall competitiveness of the wireless consumer (retail) market is simply beside the point, leaving Verizon free to engage in duopolistic practices in the roaming (wholesale) marketplace – and it has done so with vigor.<sup>27</sup>

Further evidence of the wide disparity in rates in the wholesale roaming market – and its anticompetitive sources and effects – can be found in the market analysis conducted by the ERS Group and submitted with the Reply Comments of Leap in the Automatic Roaming proceeding.<sup>28</sup> They note that the data they submit

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<sup>25</sup> *Automatic Roaming Order* at para. 72; see also *id.*, Separate Statement of Commissioner Adelstein at 1. The sole exception is when a subscriber has a handset that can use more than one technology. But of course these handsets represent a small minority of the handsets deployed in the US market today.

<sup>26</sup> Public Interest Statement at 30-45.

<sup>27</sup> In WT Docket No. 05-265, Leap submitted an economic analysis by Dr. David S. Sibley, in which Dr. Sibley showed conclusively that wholesale roaming must be treated as separate from the retail CMRS market in order to carry out any meaningful analysis of competition for roaming services – and that, further, separate wholesale roaming markets exist in different regions and for different technologies. See Reply Comments of Leap Wireless International, Inc., Attachment A David S. Sibley, "The Existence of Regional, Technology-Specific Wholesale Antitrust Markets for Roaming Services," WT Docket No. 05-265, January 26, 2006.

<sup>28</sup> See Reply Comments of Leap Wireless International, Inc., Attachment B, ERS Group, "A Further Analysis of the Wholesale Pricing Methods of Nationwide Carriers Providing Commercial Mobile Radio Service," WT Docket No. 05-265, January 26, 2006, at 7-8.

demonstrate[] that affiliated carriers and MVNOs pay substantially less than unaffiliated regional carriers for the same service... . There is simply no plausible economic justification to explain these discriminatory roaming pricing practices, or for the charges for wholesale roaming far in excess of the average retail charges (revenues collected) of the nationwide providers. *The only reasonable conclusion is that nationwide carriers are abusing their market power to foreclose markets to potential competitors.*

*Id.* at 8 (emphasis added).

Verizon will cement its market power even further by acquiring Alltel. Verizon's acquisition of Alltel will not merely result in the gain of market share (though this in itself would increase Verizon's market power). As a major regional carrier whose footprint has by and large been complementary of, rather than overlapping, Verizon's footprint, Alltel has exerted a constraining influence (albeit far from perfect) on Verizon's behavior greatly in excess of what one would expect based on its market share alone. This is because Verizon has been incented to enter into arrangements with Alltel that are more truly reciprocal and reasonable in character than those it has entered into with Petitioners and other regional carriers with greater overlap.<sup>29</sup> Verizon needs Alltel to complete its nationwide footprint – and indeed this need, as the Applicants stress repeatedly in their Public Interest Statement, is the very *raison d'être* of the acquisition.<sup>30</sup> Inasmuch as Verizon too must offer nationwide service, in the absence of the merger it has had to come to terms with Alltel for roaming services.

Unfortunately, unlike Verizon rural and regional mid-tier carriers do not have a similar opportunity to expand their footprints into unserved areas. Indeed, even when these same carriers try to do exactly what the Commission finds in the public interest – *e.g.*, purchase spectrum – they are foreclosed from doing so by the very same carriers who are now

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<sup>29</sup> These arrangements too are confidential. Petitioners urge the Commission to require the filing of Verizon's agreements with Alltel so that interested parties can more readily determine the effect of these agreements on competition prior to the acquisition of Alltel by Verizon – and therefore the loss to competition when these arrangements go in-house after the acquisition.

<sup>30</sup> Public Interest Statement at 9-11, 14, 16-17, 22-26.

consolidating the industry. The results of the recently completed 700 MHz Band auction conclusively demonstrate that many rural and regional mid-tier carriers were unable to fulfill their immediate needs for broadband paired commercial spectrum in the 700 MHz Band auction. As a result, they have substantial unsatisfied demands for additional spectrum in order to continue to provide effective competition in the wireless industry. Most of the rural and regional mid-tier carriers were unsuccessful in meeting their spectrum needs in Auction 73 due to the relatively small number of channels that were suited to their business plans and the large spectrum appetites and financial wherewithal of certain large participants including Verizon. Although all of the mid-tiered carriers were qualified to bid, several major regional wireless carriers, such as Alltel Wireless and Leap Wireless, were completely shut out of the auction. And, others, such as MetroPCS and perhaps US Cellular, were able to acquire considerably less spectrum than they would have liked in the 700 MHz auction.<sup>31</sup>

As noted above, the presence of Alltel as a separate entity has had some constraining influence on Verizon's behavior, albeit not enough to entirely prevent Verizon from exercise of its already existing market power. The beneficial impact of Alltel on Verizon's roaming rates has been dampened further by the existing regulatory regime, and the same regime would enable Verizon to abuse its market power even further if it acquires Alltel without adequate conditions. Although the Commission has stated repeatedly that wireless carriers are bound by the non-discrimination obligation of the Act (as indeed they are as a matter of law), and stated that its complaint proceedings are open to those who believe they have been the victims of unlawful discrimination, the Commission has refused to require public filing of roaming contracts or publication of roaming rates, or to provide any other meaningful mechanism for Requesting

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<sup>31</sup> Indeed Petitioners suspect that Alltel's failure to secure additional spectrum may have been a significant impetus for Alltel to merge with Verizon.

Carriers to detect discrimination and assess whether it is just and reasonable. In this fashion, the Commission has made it very difficult if not impossible for Requesting Carriers to make the prima facie showing needed to file a complaint proceeding. Nevertheless, assuming that the legal barrier against discrimination has had some minimal effect even without a meaningful enforcement mechanism, it can be expected that Verizon's rates are lower than they would be were it not for Alltel's presence (even though, as shown below, they are still patently in excess of just and reasonable levels). With Alltel gone, Verizon would have both the power and the incentive to hike its rates even higher as soon as possible – and, unless the Commission prevents it, to cease providing in-market roaming altogether.

For these reasons, it is imperative as an interim measure until Verizon enters into agreements compliant with the conditions, to require Verizon to honor Alltel's existing agreements not just for the existing term, but also for some significant period of time. Because Alltel's agreements, unlike Verizon's, have been negotiated without market power on the side of the Supplying Carrier, Alltel's agreements represent an agreement closer to a competitive market for roaming services than Verizon's. Accordingly, all Requesting Carriers must be able to purchase under Alltel's agreements throughout Verizon's service area, not just in legacy Alltel territory.<sup>32</sup> And because Verizon will have enhanced market power well into the foreseeable future, this requirement should extend not just for the current term of those agreements, which in some cases, as for MetroPCS and NTELOS, are fixed for only a short time but for a significant period of time. As a regional carrier without market power, Alltel would have every incentive to

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<sup>32</sup> Verizon has already acknowledged that this last requirement is appropriate. In an ex parte letter to the Commission filed in this docket on July 22, 2008, it agreed that it would allow "regional, small and/or rural carriers" to purchase services under their Alltel agreements throughout the new Verizon territory rather than just in legacy Alltel territory. See Letter from John T. Scott to Commission, July 22, 2008 ("Verizon July 22 Ex Parte"). Verizon does not say whether its largesse here will apply to carriers like MetroPCS, which operates in multiple regions. Moreover, it commits only to making these contracts available during their current term, which as pointed out above is not sufficient to prevent competitive harm. *Id.*

extend the terms of its agreements in the ordinary course as they expire, while Verizon will be only too happy to be restored to its position of power and so will have no incentive to extend the Alltel agreements. Accordingly, this obligation to honor Alltel's agreements should continue beyond their current expiration dates for a period lengthy enough to give competition a fair chance to re-emerge. However, the Commission needs to go further than just to permit the Alltel agreements to be extended. Since those agreements were negotiated in an environment where the roaming market was already impaired by Verizon's market dominance, the Commission must go further and as proposed above adapt rate caps and require Verizon to offer roaming for all services. Petitioners also believe that it is absolutely critical here that such a requirement remain in place for a period of no less than ten years.

Of equal importance to any requirement that Verizon provide automatic roaming for ten years, is when such ten-year period commences to run. If the Commission adopts a time clock which merely begins to run upon the consummation date of this proposed transaction, Verizon will be incented to delay entering into any of the required agreements for as long as possible. Verizon also will be incented to refuse to abide by its obligations and to force carriers to file complaints with the Commission to seek redress. Since a firm start date incents Verizon to delay, the Commission should use a pegged start date which creates the proper incentives for Verizon to enter into these agreements. This can be achieved by making the ten-year period begin to run only when Verizon has entered into compliant agreements with a meaningful number of carriers who serve a meaningful number of subscribers. This will ensure that Verizon has the incentive to enter into agreements quickly in order to start the ten-year period as soon as possible. To prevent Verizon from merely entering into an isolated sweetheart deal, Verizon should be obligated to enter into agreements with a carrier or carriers who serve at least 30% of the CDMA

customers not served by Verizon or any affiliated companies and only then should the ten-year period begin to run. This will ensure that the terms of the agreements will be fully negotiated and reflect a truly arms-length arrangement. Further, such a requirement will allow other CDMA carriers to benefit from the earlier agreements if (as further discussed below) the Commission also requires Verizon be obligated to offer to all Requesting Carriers no less favorable terms and conditions for roaming than it provided to other carriers. By imposing such a minimum-contract requirement, combined with the most-favored-nation/opt-in requirements described below, the Commission can jump-start the process, enable smaller carriers and new entrants to receive the benefits of such a requirement as soon as possible and reduce the possibility for reduction in competition.<sup>33</sup> Further, Petitioners urge the Commission to allow Requesting Carriers to pick and chose the terms of the agreements to ensure that Verizon does not have the incentive to cram down unreasonable terms on carriers who have no real bargaining power.

Further, nothing in recent Commission Orders approving other CMRS carrier mergers would require the Commission to reach a different result here. The Commission's prior determination in *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation* not to impose any conditions related to roaming on that merger is not determinative in the context of this merger.<sup>34</sup> In the *Rural Cellular Order*, the Commission concluded that the proposed transaction "would not alter competitive market conditions in such a way as to harm consumers of mobile telephone services, including roaming services."<sup>35</sup> That finding, however, is not true of the instant Application. As demonstrated above, the grant of the Application would

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<sup>33</sup> If there is any gap that allows Verizon to force carriers into uneconomic roaming deals, the carriers will lose their customers to Verizon and will never be able to recover them even if in the future the roaming partners receive the relief sought here. The Commission's rules must prevent any such gap period.

<sup>34</sup> Application of Cellco Partnership of Cello Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, FCC 08-181 (August 1, 2008) ("Rural Cellular Order").

<sup>35</sup> *Id.* At ¶88.

cause the number of national or semi-national CDMA roaming partners to decrease dramatically and would also take out of the market a significant force in the CDMA roaming marketplace for reduced CDMA roaming rates. Further, unlike the roaming remedies proposed by the petitioners in the Rural Cellular proceeding,<sup>36</sup> the conditions sought by the Petitioners are closely and specifically tailored to the competitive harms caused by a grant of the instant Application. In that proceeding, the petitioners did not raise the issue whether the merger would have a deleterious effect on roaming service nationwide or that it would reduce competition in the national roaming market substantially. Here, the specific harm threatened by the merger – reduction of competition in the CDMA roaming market – is specifically addressed by and closely tied to the conditions sought by the Petitioners. The remedies of requiring Verizon to honor and extend Alltel’s existing agreements, to cap rates, and allow other carriers to opt into existing agreements are specifically and narrowly tailored to continue the current status quo, where Alltel has been a competitive force in the roaming markets, and to limit Verizon’s ability to impose supracompetitive roaming rates on the rest of the CDMA carriers in an exercise of its dominant market power.

Further, although divestitures in the *Rural Cellular* Order were seen to resolve many of the concerns raised by the petitioners in the Rural Cellular proceeding that will not be true here.<sup>37</sup> Although divestitures are required to continue competition in the markets being divested and to allow roaming opportunities in those markets, the problem is much bigger here. In the Rural Cellular merger, the amount of overlap between Verizon and Rural Cellular Corporation was relatively small. Here, the amount of overlap between Verizon and Alltel is extensive and the

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<sup>36</sup> *Id.* at ¶112.

<sup>37</sup> *Rural Cellular Order* at ¶88.

amount of divestitures being offered by Verizon is quite small when compared to the total overlap.

Finally, the Commission should impose conditions here even though it may not have done so in other recent transactions. Although the Commission has generally declined to impose broadbased conditions on many transactions, this case is different. The need for the relief is not designed to change the result reached by the Commission in its *Automatic Roaming Order*, but rather is carefully and narrowly tailored to take into account transaction-specific harms that would result from this merger under the Commission's existing rules. Under the *Automatic Roaming Order*, the Commission has presumed that the market will operate to ensure that rates charged by Verizon are just and reasonable. As demonstrated by the Petitioners, that will simply not be true after a grant of the Application.

**B. Verizon Must Be Required To Provide Automatic Data Roaming Services.**

Equally problematic for the future of wireless competition is the fact that Verizon is not currently subject to an automatic roaming requirement for data services. It is clear that today's wireless consumers expect seamless access to data services, just as they enjoy with voice services, both within and outside their carrier's territory. The Commission itself has noted the ever-increasing competitive importance of data services in today's evolving marketplace.<sup>38</sup> The Commission recently found that "EVDO/EVDO Rev. A networks cover 82 percent of the U.S. population, based on census blocks, and WCDMA/HSDPA networks cover 43 percent. As of December 31, 2006, 21.9 million mobile wireless devices capable of accessing the Internet at broadband speeds were in use in the United States, versus 3.1 million at the end of 2005."<sup>39</sup> Of course, penetration has only grown since then. Indeed, NTELOS is hearing from customers in

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<sup>38</sup> *Wireless Competition Twelfth Report* at paras. 133-51.

<sup>39</sup> *Id.* at para. 2.

rural areas who have broadband available in their homes for the first time using EVDO. These customers are in places where neither DSL nor cable modem were available.

As MetroPCS demonstrated in its Comments on the *Roaming Further Notice*, the same fundamental policy goal – “to make available, so far as possible, to all the people of the United States... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”<sup>40</sup> – extends to *all* wire and radio communication services regardless of whether they are classified as CMRS, telecommunications service or information service, regardless of their speed, technology, or platform, and regardless of whether or not they are interconnected.<sup>41</sup> As carriers who are rolling out advanced data services to their customers, MetroPCS and NTELOS both need to be able to offer those services – just as they need to offer voice and SMS – to their customers on a national basis.

This proposed requirement is not merely limited to high speed data services. For example, NTELOS been not able to conclude a 1xRTT or EVDO roaming arrangement with Verizon. This is a flagrant exercise of market power by Verizon since there is no reason, technical or otherwise, for Verizon to be unable to provide 1xRTT data services just as it does voice services. This inability prevents NTELOS customers from being able to use even the most rudimentary of data services – such as WAP access to the Internet – while they are roaming on Verizon’s networks. Moreover, creating artificial distinctions between voice and data services, leads to significant customer confusion and inconvenience which does not serve the public interest. As Commission Copps has said “[c]onsumers should not have to be amateur engineers

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<sup>40</sup> 47 U.S.C. at § 151.

<sup>41</sup> MetroPCS Comments on Further Notice of Proposed Rulemaking, WT Docket No. 05-265, at 4-13.

or telecom lawyers to figure out which mobile services they can expect to work when they travel.”<sup>42</sup>

In light of the exponentially increasing importance of data applications, the Commission’s inaction has emboldened carriers with market power – particularly Verizon – to cripple their competition by simply refusing to offer any form of data roaming. Verizon has slow-rolled requests from NTELOS for 1xRTT /EVDO roaming and there is no indication that it will mend its ways short of an order from the Commission (unless Verizon can extract draconian concessions from the Requesting Carriers and perhaps not even then). Alltel, by contrast, has agreed to provide roaming for 1xRTT /EVDO services to NTELOS.

Petitioners hope that the Commission will do the right thing in the *Roaming Further Notice* proceeding by clarifying that wireless carriers have common carrier automatic roaming obligations for all data services. But regardless of the outcome (or timing) of that proceeding, the Commission must prevent Verizon from taking advantage of its enhanced market power by requiring Verizon to provide automatic roaming for the same ten-year period as discussed above. As with in-market roaming, this obligation should extend throughout Verizon’s territory rather than just to legacy Alltel territory and should extend to all new data services as they are rolled out. And because of the nascency of data roaming, the Commission should make clear that Requesting Carriers who have not yet entered into agreements with Alltel covering data services are entitled to obtain them on the same terms and conditions.

Finally, automatic data roaming should not be limited to 1xRTT and the current technology of EVDO. As networks evolve, this requirement should follow the evolution into future technologies which are deployed by Verizon to provide high speed data. For example,

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<sup>42</sup> *Automatic Roaming Order*. Separate Statement of Commissioner Michael J. Copps, approving in part, concurring in part.

Verizon has publicly announced that it plans to deploy LTE as part of its long term high speed data strategy. Petitioners understand that LTE will start becoming commercially available in late 2009 and into 2010. In order for the data requirement to have any real value to rural and regional mid-tier carriers and therefore to competition, it must extend to all future technologies deployed by Verizon including but not limited to LTE.

**IV. THE COMMISSION SHOULD REQUIRE VERIZON'S AUTOMATIC ROAMING RATES TO BE THE LOWER OF: (A) THE LOWEST RATE AT WHICH SUCH AUTOMATIC ROAMING SERVICES ARE OFFERED BY VERIZON TO ANY PERSON AND (B) \$0.05/MINUTE FOR VOICE (WITH A CORRESPONDING REASONABLE LEVEL FOR DATA)**

As shown above, Verizon's roaming rates are far in excess of competitive levels. They are a substantial multiple of Alltel's rates, and it is clear that this disparity cannot be accounted for by cost differentials, for if it were, Verizon's underlying costs would be a large multiple of Alltel's – though the opposite is actually true – and this in turn would mean that either Verizon's retail rates would be much higher than Alltel's or Verizon would be suffering enormous losses – which is also untrue. Publicly available data bear out this conclusion. Verizon's cash cost per user ("CPU") was calculated for the first quarter of 2008 by Citibank at \$21.87<sup>43</sup>; the corresponding figure for Alltel was *higher* at \$33.72.<sup>44</sup> Clearly, Verizon is realizing huge – indeed monopolistic – margins on its roaming traffic.

The Commission declined in the *Automatic Roaming Order* to adopt rate regulation for roaming, citing its confidence that market forces would hold roaming rates at just and reasonable levels.<sup>45</sup> Despite the Commission's optimism, market forces clearly have failed to constrain Verizon's pricing and once the Alltel transaction is consummated there will be no constraining

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<sup>43</sup> See Citi, *Company Focus, Verizon Communications Inc.* April 28, 2008, ("*Citi Verizon Report*") page 10.

<sup>44</sup> <http://phx.corporate-ir.net/phoenix.zhtml?c=74159&p=irol-reports> (1Q 2008 Supplemental Financial Information).

<sup>45</sup> *Automatic Roaming Order* at paras. 37-38.

market force at all. As further demonstrated above, the effect of the acquisition will be to enable Verizon to consolidate its market power and to cast all caution to the winds in pricing roaming services going forward, unless the Commission prevents it from doing so.

The Commission can no longer rely on market forces (to the extent it ever could) to constrain Verizon's pricing after the merger. While it has understandably shied from full-blown rate regulation in this area, and Petitioners are not asking it to reconsider that decision, a less intrusive mechanism exists which can ensure that Verizon's rates remain reasonably near competitive levels. The Commission should condition its approval of the acquisition on an agreement by the Applicants to observe a price cap on roaming services at the lower of (a) the lowest rate Verizon or Alltel charges anyone else for roaming services, and (b) a rate that will give Verizon a fair opportunity to recover its costs as well as a reasonable profit. The condition proposed by Petitioners is meant to ensure both that rates are non-discriminatory and that Verizon is not able to extract monopoly (or oligopoly) rents in the provision of such services. In addition to a rate cap, to ensure that Verizon is not discriminating, Petitioners propose that Verizon be required to offer roaming services at rate no higher than Verizon offers such services to others. This requirement would merely extend to all service the already existing non-discrimination obligation that Verizon has under Sections 201 and 202 of the Communications Act for out of market roaming.

However, such a non-discrimination requirement needs to be extended to all services Verizon offers. One of the simplest ways to ensure that Verizon is not discriminating is to require Verizon to provide such services at a rate no higher than what Verizon charges others for the same services. Such a requirement would ensure that Verizon is fairly treating all carriers. Further, since this requirement would also extend to Verizon's affiliates, this would make sure

that Verizon is not able to subsidize one market at the expense of competitors in that market. Since many of the rural and regional mid-tier carriers are only in a few of Verizon's markets, if such a requirement is not in place, Verizon could increase the cost of roaming in certain markets to deter competition in those markets, while at the same time hold the rate low in other markets.

However, a non-discrimination requirement alone will not protect against Verizon extracting monopoly (or oligopoly) rents since Verizon would be extracting them from all carriers. Accordingly, in addition to a non-discrimination requirement, Verizon's rates should be capped at some rate that allows Verizon to receive a healthy rate of return, but not a supra-competitive rate. For voice service, a more than reasonable proxy for this cap level is Verizon's cost per user divided by its average minutes per user. Its cost per user, as noted above, is approximately \$22.00 per month. According to Wall Street estimates, its average minutes per user is approximately 825 per month. The result of dividing the first number by the second number is approximately 2.7 cents (\$0.027) per minute. Using this figure to calculate a roaming rate cap is extremely generous to Verizon because CPU typically contains a multitude of items not associated with roaming costs. NTELOS' CPU, for example, includes management overhead; data network and traffic costs; roaming payments; customer care costs; billing costs; OSS and IT costs; bad debt costs; taxes; professional fees (legal, accounting, etc); and rents and utilities (except for retail stores). And this is not an exhaustive list. Petitioners are confident that Verizon should be able to recover its costs actually associated with the roaming services it provides to others, as well as a hefty profit margin, if its prices for voice roaming (both in- and out-of-market) are capped at five cents (\$0.05) per minute. Indeed, based on Wall Street estimates Verizon's overall cash profit per unit is approximately 40-50%.<sup>46</sup> Accordingly, a roaming rate of \$0.05 per minute would still represent an 80+% margin. This rate would be

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<sup>46</sup> Citi Verizon Report at 4.

considerably in excess of what Verizon already earns for similar minutes from its retail customers and should be what the rate would be absent Verizon's market dominance and also would be considered just and reasonable.<sup>47</sup>

Of course, a similar hard cap should be set for data services (which should also be subject to the most favored nation requirement). Because of the fluidity of data service pricing, it is less straightforward to come up with a corresponding benchmark number for data services, but petitioners suggest \$0.50 per megabyte should be the absolute maximum level for this cap.

The Commission should adopt this cap for a period long enough to assure that Verizon cannot exercise its market power when the cap is lifted. Given the consolidation in the industry, this period should be longer rather than shorter, and petitioners believe that ten years is appropriate here as well.

The Commission frequently has adopted price caps in the past as a means of assuring that mergers and acquisitions do not result in harm to consumers by allowing the merged entity to charge supracompetitive rates. For example, in the AT&T-BellSouth merger, the Commission accepted voluntary conditions that imposed caps on AT&T's monthly rates to new subscribers for ADSL, prevented AT&T from seeking to increase state-regulated UNE rates, and capped certain local private line rates.<sup>48</sup> Similar conditions were imposed in the SBC-AT&T merger<sup>49</sup>

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<sup>47</sup> The reasonableness of this rate is further buttressed by Verizon's retail rates. Verizon's current Nationwide Basic Plan offers subscribers 1350 anytime minutes per month – with unlimited night and weekend calling – for \$79.99. See <http://www.verizonwireless.com/b2c/store/controller?item=planFirst&action=viewPlanList&sortOption=priceSort&typeId=1&subTypeId==19&catId=323>. This works out to an effective retail rate of 5.9 cents per minute. (Of course, users who take advantage of the unlimited night and weekend calling will pay an even lower average rate.) With this rate as a retail benchmark, a wholesale rate of 5 cents per minute is more than reasonable, given that the provision of roaming services does not entail a number of costs associated with retail offerings, as listed above. The Petitioners believe that the Commission could in fact impose a even lower cap equal to the same overall margin Verizon enjoys with its retail customers since in a fully competitive market Verizon should be relatively indifferent whether it received the revenue from end users or other service providers.

<sup>48</sup> See *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, FCC 05-183, WC Docket No. 05-65, Nov. 17, 2005, at Appendix F.

<sup>49</sup> See *In the Matter of AT&T Inc. and BellSouth Corporation Application for Approval of Transfer of Control, Memorandum Opinion and Order*, FCC 06-189, WC Docket No. 06-74, March 26, 2007, at Appendix F.

and the Verizon-MCI merger.<sup>50</sup> In each case, the condition was needed to prevent the combined entity from exercising market power to the detriment of its competitors – and ultimately to consumers.

The Commission must impose price caps on roaming services here to prevent the harm to consumers that would result from allowing Verizon to exercise its market power unimpeded. The five-cent-per-minute cap proposed herein will accomplish that goal while giving Verizon a more than fair opportunity to earn a reasonable profit on roaming traffic.

#### **V. THE COMMISSION SHOULD IMPOSE A MOST FAVORED NATIONS (MFN) REQUIREMENT ON VERIZON**

Since the passage of the Telecommunications Act of 1996, great strides have been made in the extent to which intercarrier interconnection agreements are being put in place by voluntary negotiation rather than through adjudication. Indeed, the progress has been so dramatic that certain carriers who previously thought that the entire intercarrier compensation system needed to be dramatically overhauled have changed their view and now are advocating retaining the *status quo*. In the experience of Petitioners, the two most important factors which make the voluntary negotiation process work are: (a) the requirement that incumbent local exchange carriers (LECs) file publicly a copy of every interconnection agreement entered into with a third party, regardless of whether it was entered into by negotiation or by arbitration; and (b) the ability of a requesting carrier to adopt a previously negotiated agreement and thereby to receive services on the same terms and conditions, including rates (a most favored nations, or MFN, right).

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<sup>50</sup> See *In the Matter of Verizon Communications Inc. and MCI Inc. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, FCC 05-184, WT Docket No. 05-75, Nov. 17, 2005, at Appendix G.* Most recently, price caps have been adopted as a condition in the XM-Sirius merger as well. News Release, “Commission Approves Transaction Between Sirius Satellite Radio Holdings Inc. And XM Satellite Radio Holdings, Inc. Subject To Conditions,” July 28, 2008.

The requirement that LECs must provide interconnection on the same terms and conditions as they provide to others has had significant public interest benefits. The ability of carriers to piggyback on the agreements and arrangements entered into others has allowed carriers to more quickly enter the market and to reduce the cost of negotiating these fundamental inputs to their business. A similar requirement in the roaming context can yield the same benefits. Indeed, as an interim measure, such a requirement would allow all carriers to receive immediate benefits and the competitive status quo to be maintained while the new roaming arrangements with Verizon compliant with the conditions are negotiated. Further, such a requirement will ensure that Verizon is acting in a non-discriminatory fashion. The best way to assure that services are being provided on a non-discriminatory basis and at a reasonable rate is to bring transparency to the process so that a requesting carrier has the information needed to determine whether or not roaming services are being provided fairly. At present, there is no transparency in the roaming agreement negotiation process. Roaming agreements are not filed or published, nor are they publicly available through other means, such as merger approvals. Worse yet, most Supplying Carriers insert confidentiality provisions into roaming agreements (and pursue protective orders in regulatory and judicial adjudications involving such agreements) that actively prohibit the other party from revealing the terms and conditions of the service to third parties. The result is a “black box” that leaves a Requesting Carrier without the basic information it needs to ascertain whether services are being offered on a competitively neutral basis. This means that the complaint procedures that are available under Section 208 of the Act are largely meaningless since a Requesting Carrier generally lacks sufficient information to determine whether it is being discriminated against or whether the charges being imposed are reasonable.

Petitioners appreciate the fact that CMRS services have been detariffed at the federal and state levels and that CMRS carriers are generally exempt from the requirement that they file with the Commission copies of contracts with other carriers. But these policies do not and should not prevent the Commission from requiring Verizon to make its roaming agreements available to Requesting Carriers upon request, and such requirement will serve the public interest. The detariffing of CMRS services, and the relaxation of contract filing requirements, were based on the finding that CMRS services were highly competitive and that marketplace forces were adequate to regulate carrier behavior. The earlier discussion establishes that there is not sufficient competition in the roaming segment of the market to rely solely upon marketplace forces to regulate conduct and assure that carrier practices are fair and reasonable. As a consequence, the Commission has the power based upon changed circumstances to require that roaming contracts be made available, and should do so.

Petitioners also appreciate that the Commission may not want to be the repository of such agreements and Verizon may not want to make such agreements available to the public at large through a public web site. Petitioners believe that such concerns can be addressed by narrowly tailoring the requirement. Petitioners propose that Verizon be obligated only to provide copies of such agreement to Requesting Carriers upon request and does not propose that it be required to file them with the Commission or post them on its website. Further, Petitioners do not think that non disclosure agreements are necessary, or that Verizon should be allowed to insist upon them as a condition to its provision of its roaming agreements, since the process of negotiating such a non disclosure agreement itself can be used by Verizon to frustrate a Requesting Carrier's ability to secure copies of the agreements. Petitioners are, of course, sensitive to the fact that Verizon (and the other counterparties to a roaming agreement) would not want to have these

agreements available generally to the public. Accordingly, the Commission should impose a protective rule that any recipient of a roaming agreement would be required not to disclose it other than to its business advisors. Such a rule will protect the sensitive nature of the agreements while preventing Verizon from using it to stonewall Requesting Carriers.

**VI. IN THE EVENT THE COMMISSION DECIDES TO REQUIRE DIVESTITURE OF ANY VERIZON OR ALLTEL ASSETS (BE THEY SPECTRUM, FACILITIES OR CUSTOMERS), IT SHOULD PROHIBIT SALES TO THE OTHER NATIONAL CARRIERS OR TO PURELY FINANCIAL INVESTORS WHO DO NOT COMMIT TO OPERATE THE BUSINESS.**

Petitioners note that in the past, the Commission has often required divestiture of facilities, spectrum and/or customers in areas of overlap in approving mergers of two wireless carriers with overlapping service areas. For example, this has been done in the AT&T-Dobson, Alltel-Midwest Wireless, Alltel-Western Wireless and AT&T-Cingular transactions,<sup>51</sup> and the Applicants appear to expect to divest certain assets here.<sup>52</sup> Indeed, on July 22, 2008 Verizon proposed, in an Ex Parte Letter to the Commission, to make just such divestitures here, though the exact details of its proposal are far from clear.<sup>53</sup> The Petitioners have not had sufficient time to analyze the specifics of that proposal.<sup>54</sup> However, the Commission should clearly require the divestiture of one of the 800 MHz cellular licenses if the merged entity would end up with both

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<sup>51</sup> *Applications of AT&T and Dobson Communications Corporation*, 22 FCC Rcd 20295 at paras. 88-102 (2007) (“AT&T/Dobson”); *Applications of Midwest Wireless Holdings, L.L.C. and ALLTEL Communications, Inc.*, 21 FCC Rcd 11526 at paras. 122-129 (2006) (“Midwest/ALLTEL”); *Applications of Western Wireless Corporation and ALLTEL Corporation*, 20 FCC Rcd 13053 at paras. 162-169 (2005) (“Western/ALLTEL”); *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, 19 FCC Rcd 21522 at paras. 254-264 (2004) (“AT&T/Cingular”).

<sup>52</sup> The Applicants expressly provided for such divestitures in their June 5, 2008, Agreement and Plan of Merger at Section 4.7(b) and 4.12. See <http://www.sec.gov/Archives/edgar/data/732712/000119312508131890/dex991.htm>

<sup>53</sup> See Verizon July 22 Ex Parte.

<sup>54</sup> Of course, Petitioners reserve the right to comment further on this proposal. One thing that is already clear is that the Commission and interested parties will need far more detail than Verizon has yet provided to assess the merits of this eleventh-hour proposal. But whatever the merits of the divestiture proposal in itself, the safeguards set forth in earlier sections of this petition will still be necessary to protect the market from Verizon’s market power, and the further conditions on divestiture set forth in this section will be needed to assure that the divestiture has pro-competitive effects.

of them in a geographic area.<sup>55</sup> And the Commission should structure any such divestitures in a way that allows rural and regional mid-tier carriers to have meaningful access to the spectrum and/or other assets to be divested – and maximizes the likelihood that the spectrum and facilities will be used to provide service immediately instead of being allowed to lie fallow.

As MetroPCS described in its comments in the 700 MHz proceeding, the Commission’s approach to spectrum allocation in recent years has had the unfortunate side effect of unfairly skewing the balance toward the very largest carriers in obtaining spectrum going forward, and in the case of the NextWave proceeding, of completely failing to get the spectrum into the hands of entities who would actually use it to provide service.<sup>56</sup> Similar concerns have been raised by many other mid-tier carriers, including United States Cellular, Leap, and others.<sup>57</sup>

In the *Wireless Competition Twelfth Report*, the Commission noted the key role of the mid-tier regional and rural carriers in the marketplace.<sup>58</sup> But in recent spectrum auctions, these carriers have effectively been squeezed out of the opportunity to obtain the additional spectrum they vitally need in order to grow their business and remain viable competitors. In Auction 73, for example, the spectrum configuration and market sizes acted to prevent these carriers from meaningfully participating. As a result, AT&T and Verizon ended up with about \$16 billion of the nearly \$19 billion of spectrum purchased, leaving only \$3 billion (or less than one-fifth of AT&T’s and Verizon’s total) for *all other carriers combined*.<sup>59</sup> Mid-tier regional and rural carriers cannot remain vigorous competitors if their ability to grow and develop is choked off by

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<sup>55</sup> *Midwest/ALLTEL* at para. 122; *Western/ALLTEL* at para. 162; *AT&T/Cingular* at para. 254.

<sup>56</sup> MetroPCS Comments, WT Docket No. 06-150, June 20, 2008, at 4-7, 27.

<sup>57</sup> Leap Cellular Comments, WT Docket No. 06-150, June 20, 2008, at 3-12; United States Cellular Comments, WT Docket No. 06-150, June 20, 2008, at 4-9.

<sup>58</sup> *Wireless Competition Twelfth Report* at para. 18-19 and *passim*.

<sup>59</sup> See MetroPCS Comments, WT Docket No. 06-150, filed June 20, 2008, at 10-11, and MetroPCS Ex Parte filed therein on April 7, 2008. This was by contrast to the earlier Advanced Wireless Service (“AWS”) proceeding, in which MetroPCS and other rural, regional, and mid-tier carriers were able to obtain more reasonable amounts of spectrum. *Id.*

a lack of meaningful access to spectrum. Further, based on the current inventory of spectrum held by the Commission, there is very little spectrum left. Indeed, only 20 MHz of paired spectrum remains and the Commission has proposed eliminating 10MHz of the 20 MHz to allow for a nationwide broadband Internet service.<sup>60</sup>

The Commission should therefore prohibit these assets from being sold to the other three large national carriers or purely financial players. In prior divestitures, AT&T and Verizon have entered into agreements with the other large national carriers to exchange spectrum. Although this accomplished the narrow goal of ensuring that the divesting company no longer held the assets, it did not satisfy the more fundamental goal of preventing market concentration from increasing. If the larger players merely exchange spectrum and properties between themselves rather than to other competitors, the merger will still increase market concentration to the detriment of competition and consumers generally. This problem of increasing concentration in the wireless market can be avoided simply by requiring any divested assets be sold to rural and regional mid-tier carriers who would be in the best position to offer roaming services to others. As rural and regional mid-tier carriers by definition do not have national footprints, they have natural incentives to offer roaming services to others in order to attract additional revenues. In addition, the divested spectrum would provide for an outlet for these same carriers to offer additional competition to existing carriers.

Further, the Commission should prohibit sales of the divested assets to parties who are solely financial investors that have not committed to own and operate the divested assets for at least five years. One of the main reasons for divestitures is to ensure that competition continues in the existing market and also to ensure that there are adequate choices for roaming partners for

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<sup>60</sup> Accordingly, there really is no realistic chance based on pending spectrum for significant additional new competitors to enter the CMRS market who could provide roaming alternatives.

rural, regional and mid-tier carriers. To the extent that divested assets are sold to financial investors without any conditions, the financial investors would be free to “flip” the divested assets to a large national carrier at any time , thereby circumventing the prohibition against sales to national carriers. The best way of eliminating this possibility, but still permitting financial investors to participate, is to condition the approval of any sale (and assignment of licenses to financial investors) on the requirement that the financial investors own *and* operate the divested assets for at least five years. In doing so, the Commission would ensure that competition would in fact occur in the divested markets – and that roaming using these assets would be available to rural and regional mid-tier carriers, since the buyer of the divested assets would have the incentive to enter into arm’s length commercial roaming agreements with rural and regional mid-tier carriers.<sup>61</sup>

Further, prohibiting sales to the other top three national carriers and purely financial investors will not detract from Verizon’s ability to divest itself of the properties. Given the substantial unmet demand for spectrum exhibited in the 700 MHz Auction (and the desirability of 800 MHz cellular spectrum which has similar characteristics to 700 MHz spectrum), the Commission and Verizon can be assured that there will be robust competition to acquire these assets. This is especially true if, as Petitioners urge, the Commission forces Verizon to divest itself of one of the 800 MHz cellular licenses in each market in which Verizon and Alltel together would otherwise hold both blocks of the 800 MHz cellular spectrum. These 800 MHz licenses, along with the recently auctioned 700 MHz licenses, are the optimum spectrum ranges for delivering mobile wireless services. The national carriers, and especially Verizon and AT&T, have the lion’s share of this “beachfront property” spectrum, leaving regional and smaller

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<sup>61</sup> Of course, if a financial player experienced financial problems, they could seek a waiver from the Commission.

carriers like Petitioners to compete using PCS and AWS band spectrum. The PCS and AWS bands generally have less favorable propagation characteristics in comparison to cellular and 700 MHz – and so require significantly more cell sites to achieve the same coverage and quality. NTELOS has faced this challenge through the years as it works to build out the mountainous regions of Virginia and West Virginia. In-building penetration is also more challenging in the PCS and AWS spectrum ranges. In-building coverage is a critical competitive factor as more and more customers “cut the cord” and so rely on their mobile phone service in their homes, offices and similar locations.

In addition, to assure the ability of mid-tier regional and rural carriers to meaningfully participate, the buyer should not be required to purchase the divestiture assets in their entirety but should be allowed to disaggregate them on at least a market-by-market basis for the purpose of bidding. This will ensure that rural and regional mid-tier carriers are able to purchase the assets which best fit with their existing business plan without having to purchase more than they need (or want). Indeed, as the Commission’s recent experience with the 700 MHz auction shows, to the extent that the Commission does not require divestitures in smaller chunks, the number of potential bidders goes down and the possibility that purely financial investors purchase the divested assets goes up. This is not in the public interest.

Finally, when ordering divestiture in markets where there are Verizon and Alltel systems operating on both CDMA and another technology (or where there is non-operational spectrum), the Commission should mandate that properties which operate on CDMA technology be the ones that are divested. Since it is the CDMA roaming market which is being concentrated as a result

of this proposed merger, requiring that CDMA properties be the ones divested is not unreasonable and will go a long way to ensuring that CDMA roaming opportunities continue.<sup>62</sup>

Further, to ensure that such properties in fact remain CDMA, the Commission should order that potential purchasers who already operate systems using CDMA technology receive a priority over other potential purchasers. Because one of the reasons for divesting properties is to ensure that robust competition continues and roaming partners are available, one of the best ways to achieve this is to make it likely that any buyer will already be operating the same technology today. This would ensure that the carrier already has familiarity with the technology and has the inherent incentive to continue to operate the divested property using the same technology. A purchaser who does not already operate with CDMA technology, by contrast, will have the incentive to swap out such technology, which will harm the very market that the divestitures are meant to protect.<sup>63</sup>

## VII. CONCLUSION

Verizon's acquisition of Alltel, if allowed to proceed without conditions, will allow Verizon to cement its market power in the CDMA roaming market. Ultimately, consumers will suffer by both a rise in retail rates, in the short term, and the imperiling of the survival of mid-tier, regional and rural carriers as viable competitors, in the long term. There are five main conditions that should be placed on consummation of this acquisition as minimal prophylactic measures to prevent the competitive harm described above. These are:

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<sup>62</sup> By adopting the requirement proposed herein, the Commission need not fear that it would be departing from its policy of not imposing a technology on the potential purchaser. Rather, for the purpose of preventing the increased concentration in the CDMA roaming market that would otherwise result from the merger, the Commission would simply be mandating which operating system (*i.e.* the CDMA system) is divested.

<sup>63</sup> Again, by requiring that potential purchasers who already operate CDMA systems be offered a priority, the Commission would not be *requiring* that the purchaser operate the system using the CDMA interface. Rather, the Commission would be encouraging a competitive CDMA roaming marketplace in the near-term and assuring that such systems migrate to other technology (when and if they do) in a manner that best fosters the continuing competitiveness of roaming for CDMA and successor technologies.

1. Require Verizon to provide automatic roaming on reasonable terms for all services offered by Verizon, to any requesting wireless carrier, in all areas, whether in-market or out-of-market. As such, automatic roaming would extend not only to voice and SMS services, but also to all data services, whether interconnected or not, including both 1xRTT, EVDO, and all future enhancements, including but not limited to Long Term Evolution (LTE). This obligation should commence at the consummation of the transaction and continue for a period of at least ten years after Verizon has entered into agreements with wireless carriers representing at least 30% of the CDMA customers (other than Verizon, Alltel, Rural Cellular, and their affiliates) in the United States. The Commission must also require Verizon to honor existing Alltel agreements for each roaming carrier, not only in Alltel territory and for their existing terms, but in all of the post-merger territory from the date of consummation of the transaction, until it enters into an agreement with such carrier that complies with the above stated conditions and with Condition 3 below.

2. Require Verizon's automatic roaming rates be the lower of: (a) the rate at which such automatic roaming services are offered by Verizon to any person, including Verizon's affiliates; and (b) \$0.05/minute from answer supervision (or equivalent) to call termination (or equivalent) for voice (with a corresponding reasonable level for data).

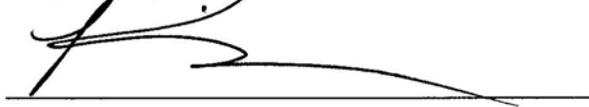
3. Require Verizon to make available any roaming arrangement, service, or function in any agreement or arrangement that Verizon or Alltel has with any person, including Verizon's affiliates, to any wireless carrier on the same terms and conditions, including price, as those provided in the agreement or arrangement.

4. Require Verizon to provide, upon request, to any CMRS provider copies of any roaming agreement Verizon has with any other person.

5. Prohibit Verizon, in the event the Commission decides to require divestiture of any Verizon or Alltel assets (be they spectrum, facilities or customers), from selling such assets to (a) one of the three other national wireless carriers or (b) any person who does not both already offer wireless services and commit to own and operate such assets for at least five years from the closing. For any operating assets being divested, the Commission should further mandate CDMA divestitures (as opposed to divestitures of other technology) and should require that a priority be given to buyers who already operate the same technology.

If the Commission is unwilling to impose these conditions, it must deny the applications.

Respectfully submitted,



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Counsel for MetroPCS Communications, Inc.  
and NTELOS Inc.

Dated: August 11, 2008

## VERIFICATION

I, Mary McDermott, am the Senior Vice President-Legal and Regulatory Affairs for NTELOS Inc. I am a resident of the Commonwealth of Virginia, over the age of 18, and competent to make this verification in support of the attached Petition of MetroPCS Communications, Inc. and NTELOS Inc. to Condition Consent or Deny Application ("Petition").

I hereby verify under penalty of perjury that I have read the foregoing Petition, and that the statements contained therein are true, complete, and correct, except for the statements uniquely pertaining to MetroPCS Communications, Inc., and as to those statements I make no assertions.

Executed on August 7, 2008

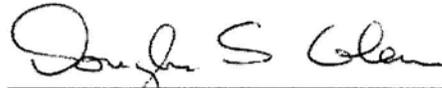
  
Mary McDermott

## VERIFICATION

I, Douglas Glen, am the Senior Vice President, Corporate Development for MetroPCS Communications, Inc. I am a resident of the State of Texas, over the age of 18, and competent to make this verification in support of the attached Petition of MetroPCS Communications, Inc. and NTELOS, Inc. to Condition Consent or Deny Application ("Petition").

I hereby verify under penalty of perjury that I have read the foregoing Petition, and that the statements contained therein are true, complete, and correct, except for the statements uniquely pertaining to NTELOS, Inc., and as to those statements I make no assertions.

Executed on August 11, 2008

A handwritten signature in cursive script that reads "Douglas S. Glen". The signature is written in black ink and is positioned above a horizontal line.

Douglas Glen (signature)

## CERTIFICATE OF SERVICE

I, Carolyn L. Washington, hereby certify that on this 11th day of August, 2008, I caused copies as indicated below of the Petition of MetroPCS Communications, Inc. and NTELOS Inc. to Condition Consent or Deny Application in WT Docket No. 08-95 by first class mail (or, where indicated, by email) delivery on the following individuals:

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