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	)	File Nos. 0003463892, *et al.*

REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY

OF THE

RURAL TELECOMMUNICATIONS GROUP, INC.

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Summary

The Rural Telecommunications Group, Inc. ("RTG") continues to oppose the proposed merger between Alltel and Verizon and renews its request for the Commission to designate the above-captioned applications for a hearing pursuant to Section 309(e) of the Act to resolve material issues of fact and to ultimately determine whether a grant of the applications is in the public interest. Pursuant to Section 309(e) of the Act, the Commission is required to designate an application for hearing in either of two circumstances: (i) if a substantial and material question of fact is presented, or (ii) if the Commission for any reason is unable to make the finding that granting such application will serve the public interest, convenience and necessity. To date, the Applicants have not demonstrated that a grant of the above-captioned applications will serve the public interest, convenience and necessity. Nor can they do so because of the numerous substantial and material questions of facts that remain.

Verizon boldly asserts that "the ***primary*** focus of the proposed transaction is to bring benefits to rural America through the delivery of new and expanded wireless services by an experienced, nationwide provider." Verizon also asserts that "[t]he transaction will permit Verizon Wireless to access numerous rural markets it currently does not serve or where it has only limited spectrum." These statements do not ring true and are misleading. In most rural markets, Verizon has had ample opportunity to serve rural America and has simply chosen not to or to do so on a very limited basis. In its own filing, Verizon makes no commitment to ***expand*** services to rural America -- only to upgrade existing services. Because there is no evidentiary proof that Verizon will live up to its commitment to expand Alltel's services in rural America (or its own services for that matter), the Commission should designate the applications for hearing

and have Verizon meet its burden to show how this transaction will primarily benefit rural America.

The record also presents a substantial and material question of fact as to two issues related to how to characterize the spectrum that Verizon would acquire with respect to whether the merger should be allowed. Specifically the Applicants and interested parties have determined that a question of material fact exists regarding: 1) whether AWS-1, BRS/EBS and MSS/ATC spectrum is suitable for the provision of mobile telephony; and 2) whether a distinction exists between the utility of spectrum above and below 1 GHz. These questions of fact must be decided before the Commission can render a decision and are so contentious that a 309(e) hearing is the best vehicle for resolution in the context of the proposed merger.

RTG has also identified several other questions of material fact that warrant the applications being designated for hearing. These include the Commission making a factual determination on whether:

- the CMRS Market is becoming substantially less competitive;
- Verizon's retail competitors, both GSM and CDMA, will become dependent overnight on Verizon for roaming and the impact on the CMRS competitive marketplace that will result; and
- Verizon should receive Alltel's federal high-cost support in light of Verizon's massive economies of scope and scale.

In addition, the Commission should designate the applications for hearing so that Verizon's expert witnesses who put forth new testimony in Verizon's Joint Opposition can be cross examined and the self-serving analysis presented by Verizon in its Local Market Analysis Exhibit can be probed and tested in a public hearing. By sandbagging the parties with this new testimony and information with only a week to respond, the Applicants have sought to game the system and deprive the public of its due process rights under the Administrative Procedure Act.

Failure to probe the testimony and Exhibit and the material questions of fact raised by them in a hearing setting will violate due process and will put this Commission in the unenviable position of having not done its job for the American public. It is therefore imperative that the Commission deny the above-captioned applications or alternatively designate the applications for hearing pursuant to 309(e).

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REPLY TO JOINT OPPOSITION TO PETITIONS TO DENY

The Rural Telecommunications Group, Inc. ("RTG"), by its attorneys and pursuant to 47 C.F.R. § 1.939 of the rules of the Federal Communications Commission ("FCC" or "Commission"), hereby files its reply to the Joint Opposition to Petitions to Deny ("Joint Opposition")[1] filed by Cellco Partnership d/b/a Verizon Wireless ("Verizon"), Atlantis Holdings LLC ("Atlantis Holdings"), and Alltel Corporation ("Alltel") (together, the "Applicants") in the above captioned proceeding and renews its request for the Commission to designate the above-captioned applications for a hearing pursuant to Section 309(e) of the Communications Act of 1934, as amended ("the Act") to resolve material issues of fact and to ultimately determine whether a grant of the applications is in the public interest.

[1] Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, at 3 (filed Aug. 19, 2008).

I. THE FCC MUST DESIGNATE THE APPLICATIONS FOR HEARING PURSUANT TO 309(E) OF THE ACT BECAUSE THERE ARE SUBSTANTIAL AND MATERIAL QUESTIONS OF FACT THAT MUST BE ADDRESSED AND BECAUSE THE APPLICANTS HAVE UTTERLY FAILED TO DEMONSTATE THAT VERIZON'S ACQUISITION OF ALLTEL WILL SERVE THE PUBLIC INTERST, CONVENIENCE AND NECESSITY AS REQUIRED BY SECTION 309(A) OF THE ACT.

Pursuant to Section 309(e) of the Act, the Commission is required to designate an application for hearing in either of two circumstances: (i) if a substantial and material question of fact is presented, or (ii) if the Commission for any reason is unable to make the finding that granting such application will serve the public interest, convenience and necessity.[2] To date, the Applicants have not demonstrated that a grant of the above-captioned applications will serve the public interest, convenience and necessity. Nor can they do so because of the numerous substantial and material questions of fact that remain.

The Applicants' refutation that "RTG… has cited no material questions of fact that would give rise to [a hearing]" is both inadequate and inaccurate.[3] Not only do the Applicants omit one of two bases for a hearing, but they ignore the substantial and material questions of fact raised by RTG in its Petition to Deny.[4] As discussed further below, RTG indeed has raised several substantial and material questions of fact, such as Verizon's vague position on roaming and the current state of the wireless market. Furthermore, the Applicants in their own Joint Opposition raise additional substantial and material questions of fact, such as the nature of Applicants' rural

[2] *See* 47 U.S.C. §§ 309(a) and (e).

[3] Joint Opposition at 2, n 3.

[4] Petition to Deny of the Rural Telecommunications Group, Inc., WT Docket No. 08-95, at 3 (filed Aug. 11, 2008) ("RTG Petition").

spectrum holdings and "testimony" regarding the spectrum screen.[5] In the setting of a hearing, such testimony could and should be subject to cross-examination.

The Commission employs a balancing process, weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[6] Even in the context of a proposed merger, the Commission has demonstrated its willingness to designate an application for hearing where it finds that applicants have not met their burden of demonstrating that approval of such application is in the public interest.[7] As RTG maintains in its Petition to Deny, the Applicants have failed to meet their burden of proving that the proposed transaction, on balance, serves the public interest, and therefore a hearing is appropriate. Given the Applicants' continued failure to prove that the proposed merger serves the public interest, convenience and necessity and the numerous substantial and material questions of fact that remain, the Commission must designate the applications for hearing pursuant to Section 309(e) of the Act.

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[5] Joint Opposition at 31.

[6] *See News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, 23 FCC Rcd 3265, 3276 ¶ 22 (2008); *SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005); *Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18443 ¶ 16 (2005); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, 17 FCC Rcd 23246, 23255 ¶ 26 (2002); *Application of EchoStar Comm. Corp., General Motors Corp., Hughes Elec. Corp.,* (*Transferors*), *and EchoStar Comm. Corp.,* (*Transferee*), Hearing Designation Order, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar-DIRECTV HDO*").

[7] *See EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20562 ¶ 3.

A. There are numerous substantial and material facts that must be addressed before the Commission can determine whether a grant of the applications is warranted.

The record before the Commission is fraught with material questions of fact that must be addressed in the context of a hearing so that the truth can be discovered and an accurate and complete record may emerge. The proposed Alltel/Verizon merger comes on the heels of many other mergers in the CMRS marketplace and cannot be viewed outside of the context of those prior mergers. As RTG previously stated, this merger is the one that will have the impact of destroying wireless competition.[8] Verizon has attempted to dispute this material fact by

[8] *See e.g.*, RTG Petition; Petition to Deny of Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) and the Rural Independent Competitive Alliance (RICA), WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of Roaming Petitioners (Denali Spectrum LLC, Leap Wireless International, Inc., LCW Wireless, LLC, Mobi PCS, NTELOS Inc., OPASTCO, RTG, Revol Wireless, SpectrumCo LLC, SouthernLINC Wireless), WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of the National Telecommunications Cooperative Association, WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of Leap Wireless International, Inc., WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of Cellular South, Inc., WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Dismiss or Deny of the *Ad Hoc* Public Interest Spectrum Coalition (Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, Public Knowledge), WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of Palmetto MobileNet, L.P., WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of Centennial Communications, WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Deny of Chatham Avalon Park Community Council, WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Condition Consent or Deny Application of MetroPCS Communications, Inc. and NTELOS Inc., WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Condition Transaction Approval (Choctaw Telephone Company, Custer Telephone Cooperative, Inc., Dubois Telephone Exchange, Inc., Electra Telephone Company, Emery Telcom, Manti Telephone Company, MoKan Dial, Inc., New Ulm Telecom, Inc., Northeast Florida Telephone Company, Inc., Project Mutual Telephone Cooperative Association, Inc., Public Service Communications, Inc., Range Telephone Cooperative, Inc., South Central Utah Telephone Association, Inc. d/b/a South Central Communications, Uintah Basin Electronic Telecommunications d/b/a UBET Wireless, Yadkin Valley Telephone Membership Corporation), WT Docket No. 08-95 (filed Aug. 11, 2008); Petition to Condition Transaction Approval of South Dakota Telecommunications Association, WT Docket No. 08-95 (filed Aug. 11, 2008); Reply Comments of T-Mobile USA, Inc., WT Docket No. 08-95 (filed Aug. 19, 2008); Comment Letter of Attorney General of North Dakota, WT Docket No. 08-95 (filed Aug. 11, 2008); Comments of Rural Cellular Association, WT Docket No. 08-95 (filed Aug. 11, 2008).

presenting the expert witness testimony of Dennis Carlton, Allan Shampine and Hal Snider. However, key facts in their joint testimony have been redacted from the public record making it impossible for interested parties to examine the premise on which the testimony is based and to counter the accuracy and veracity of the testimony. In addition, the very short one week reply period for parties to respond to the voluminous (over 75 pages of expert testimony from no less than five different experts) makes it impossible for interested parties to participate fully in the process. The United States legal system, including our administrative law processes, demands due process and an opportunity to fully examine controversial issues like the proposed merger. Failure to probe the material questions of fact in a hearing setting will violate due process and will put this Commission in the unenviable position of having not done its job for the American public.

1. **Verizon's commitment to expand services to rural America is disingenuous.**

Verizon boldly asserts that "the ***primary*** focus of the proposed transaction is to bring benefits to rural America through the delivery of new and expanded wireless services by an experienced, nationwide provider." Verizon also asserts that "[t]he transaction will permit Verizon Wireless to access numerous rural markets it currently does not serve or where it has only limited spectrum."[9] RTG disputes these assertions of fact by Verizon. To date, Alltel and Verizon have had close to 20 years to bring wireless services to rural America and they have done a miserable job of it aside from covering highways that their urban and suburban customers utilize. In short, Verizon's true motivations can hardly be characterized as a goal of primarily bringing benefits to rural America. In most of the rural markets, Verizon has had ample opportunity to serve rural America and has simply chosen not to or to do so on a very limited

[9] Joint Opposition at p. 3 (emphasis added).

basis. In its own filing, Verizon makes no commitment to ***expand*** services to rural America -- only to upgrade existing services.[10]

Because there is no evidence Verizon will live up to its commitment to expand Alltel's services in rural America (or its own services for that matter), the Commission should designate the applications for hearing and have Verizon meet its burden of proof on how this transaction will primarily benefit rural America. RTG reminds this Commission that it has already been hoodwinked once by Alltel when it promised that the infusion of equity investors would bring new and improved services to rural America.[11] A promise to do something is not the same as doing it and if the Commission and interested parties were allowed to cross examine Verizon on this point, RTG is certain that Verizon would not be able to support its commitment. If it could support its plan to serve rural America, it would have submitted a proposal setting forth its methodology for expansion of services to rural areas along with a plan to upgrade services in areas it already serves. Verizon would have also provided specific timelines for specific markets and specific costs for these upgrades. Verizon has not done so. Instead, it has made vague

[10] Joint Opposition pp 4-9 (Verizon touts its willingness to upgrade existing services but nowhere does it state that it will expand services *geographically* to rural areas.)

[11] As the Arkansas Limited Partners pointed out in their Petition to Deny, Alltel made similar commitments in order to allow private equity to invest in the company so it could be taken private. Arkansas Limited Partners Petition to Deny at p. 2. The Applicants admittedly didn't follow through on those commitments. Joint Opposition at pp. 86-88. The Commission should learn from prior experience and hold Verizon to its commitment -- whatever that commitment may be. The old adage holds true – "Fool me once, shame on you, fool me twice – shame on me!" The Commission should not fall for this lip service to rural America again.

promises just like Alltel did when it sought approval to bring in its equity partners and take the company private in 2006. [12]

Verizon and Alltel have been long time competitors. All parties need to recognize this merger for what it truly is – an opportunity for Verizon to gain market share and eliminate a robust competitor. History has adequately demonstrated that Verizon has no interest in serving rural America. It is disingenuous for Verizon to try to use rural America as its banner or for Verizon to shake the trees to garner support from entities unfamiliar with the rural wireless landscape to support its position.[13] Verizon and Alltel's past record of service to rural America must be closely examined in the context of a hearing and Verizon's leadership cross-examined to demonstrate how Verizon will ensure that rural America will benefit from the merger.

Only by conducting a Section 309(e) hearing will the FCC and interested parties be able to get to the facts, cross-examine the witnesses and determine whether the merger truly serves the public interest, convenience and necessity pursuant to Section 309(a) of the Act. Reliance on a short paper pleading cycle does not allow the Commission or interested parties to meaningfully review the evidence in support of the merger and denies consumers, especially those consumers

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[12] *In re Applications of Alltel Corporation for Consent to Transfer Control of Licenses, Leases and Authorizations*, WT Docket No. 07-128, Memorandum Opinion and Order, FCC 07-185 9 (October 26, 2007) ("*Alltel Transfer Order*").

[13] *See generally*, Comments of The Free State Foundation (filed August 19, 2008); Comments of Women Impacting Public Policy (filed August 11, 2008); Comments of American GI Forum of the United States (filed August 10, 2008); Comments of Nebraska Chamber of Commerce & Industry (filed August 4, 2008); Comments of Hispanic Alliance for Prosperity (filed July 31, 2008); Comments of Consumers for Competitive Choice (filed July 25, 2008); Comments of Freedom Works Foundation (filed July 25, 2008); Comments of National Indian Council on Aging (filed July 25, 2008); Comments of American Association of People With Disabilities (filed July 25, 2008); Comments of U.S. Cattlemen's Association (filed July 24, 2008); Comments of Michigan Chamber of Commerce (filed July 28, 2008); and Comments of Dominican American National Roundtable (filed July 25, 2008), WT Docket No. 08-95.

living and traveling in rural America, a fair opportunity to discover the truth. Because Verizon has failed to meet its burden to show why the proposed merger will serve the public interest, convenience and necessity in rural America, the applications must be denied or alternatively designated for hearing pursuant to Section 309(e).

2. **There is a Material Issue of Fact Regarding "Suitable" Spectrum.**

In conducting its market analysis of merger transactions and applying its spectrum screen, the FCC includes in its evaluation of potential competitive harm, spectrum in particular bands that is "suitable" for the provision of mobile telephony services.[14] The FCC determines suitability "by whether the spectrum is capable of supporting mobile service given its physical properties and the state of equipment technology, whether the spectrum is licensed with a mobile allocation and corresponding service rules, and whether the spectrum is committed to another use that effectively precludes its uses for mobile telephony."[15] Verizon and Alltel argue that Advanced Wireless Services spectrum at 1710-1755 MHz/2110-2155 MHz ("AWS-1"), Broadband Radio Service ("BRS"), Educational Broadband Service ("EBS"), and Mobile Satellite Service Ancillary Terrestrial Component ("MSS/ATC") spectrum should be considered "suitable" spectrum and included in the Commission's spectrum analysis. AWS-1, BRS/EBS and MSS/ATC spectrum are not "suitable" for the provision of mobile telephony. As RTG stated in its Petition, BRS/EBS spectrum is encumbered spectrum, and licensees in the 2.5 GHz band will not be able to use such spectrum to provide competitive commercial high mobility

[14] *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases,* Files Nos. 0003155487, et al., WT Docket No. 07-208, Memorandum Opinion and Order, FCC 08-181, at par. 42 (rel. August 1, 2008) ("*Verizon/RCC Merger Order*").

[15] *Id.*

wireless services in the foreseeable future; AWS spectrum has not been fully cleared and there remains uncertainty as to whether it will ever be fully deployed; and MSS relies on bulky, expensive handsets and is not a comparable service. Accordingly, at a minimum, the record presents a substantial and material question of fact as to whether AWS-1, BRS/EBS and MSS/ATC spectrum is suitable for the provision of mobile telephony, and Section 309(e) of the Act therefore requires that the FCC designate the Applications for hearing.[16]

3. **There is a Material Issue of Fact Regarding the Distinction Between Spectrum Above and Below 1 GHz**

In its Petition, RTG requested that the Commission condition any grant on, *inter alia*, the divestiture by Verizon of certain spectrum, including all spectrum in excess of 55 megahertz in the bands below 1 GHz. In the sworn Declaration of Dr. Charles L. Jackson submitted with the Opposition, Dr. Jackson appears to question RTG's characterization of spectrum below 1 GHz as superior to spectrum above 1 GHz because of the dynamic propagation characteristics associated with spectrum in the lower bands.[17] This technical dispute over the propagation characteristics of spectrum raises an issue of material fact which should be resolved in the context of a hearing.

4. **The CMRS Market is Becoming Substantially Less Competitive – a Material Fact Verizon Chooses to Ignore.**

Verizon and Alltel attempt to undermine RTG's assertion that the CMRS market is becoming substantially less competitive by noting that RTG bases its HHI analysis on data

[16] The Opposition presents a sworn Declaration of Dr. Charles L. Jackson to provide technical support for their contention that AWS-1, BRS/EBS and MSS/ATC spectrum should be included in the FCC's spectrum analysis. Opposition at Attachment 4 ("*Jackson Declaration*"). A hearing would present RTG and other affected parties the opportunity to cross-examine Verizon/Alltel's technical expert on the basis for his opinions.

[17] *Jackson Declaration* at p. 10.

derived from the FCC's *11th CMRS Competition Report* rather than the more recent *12th CMRS Competition Report*.[18] The Opposition trumpets the FCC's finding in the *12th CMRS Competition Report* that the CMRS market remains competitive, but such finding does not change the fact that over the last seven years, the CMRS market has become substantially less competitive and Verizon and Alltel do not dispute this. Moreover, with the recent mergers of AT&T Inc. and Dobson Communications Corporation, AT&T and BellSouth Corporation, T-Mobile and SunCom Wireless, AT&T and Aloha Partners, and Verizon and Rural Cellular Corporation (as well as the loss of numerous mobile virtual network operators (MVNOs) such as Disney, ESPN, and Amp'd), the upcoming 13th CMRS Competition Report is likely to show a dramatically less competitive CMRS marketplace. To the extent the Commission deems the competitive state of the CMRS marketplace to be a substantial and material question of fact, the FCC should either designate the Applications for hearing on this issue or wait a few more months to review the findings of the 13th CMRS Competition Report and determine the more current state of the CMRS marketplace.

5. **The Opposition Fails to Demonstrate Why RTG's Proposed Divestiture Conditions Should Not be Adopted Raising Another Material Question of Fact As to the Appropriate Spectrum to Consider.**

In its Petition, RTG requested that the FCC require Verizon to divest: (1) all spectrum in excess of 55 megahertz in the bands below 1 GHz; and (2) all spectrum in excess of 110 megahertz in the bands below 2.3 GHz. Verizon and Alltel oppose these proposed divestiture conditions, mistakenly arguing that RTG is attempting to institute "a new rule". Although RTG has requested in another proceeding that the Commission reimpose a spectrum cap, RTG is not

[18] Opposition at p. 17, n. 46.

requesting that the Commission establish any such rule in connection with this merger transaction. Rather, RTG is simply suggesting a method for determining how much Alltel spectrum Verizon should be required to divest. As demonstrated in RTG's Petition, allowing Verizon to hold all the spectrum it seeks to acquire from Alltel would be contrary to the public interest.[19] Accordingly, the only question remaining is how much spectrum should Verizon be required to divest.

RTG has suggested a rational and historically justifiable method for determining how much spectrum Verizon should be allowed to keep in each market. As stated in RTG's Petition, the proposed limit on the amount of spectrum below 2.3 GHz that Verizon should be allowed to retain in individual markets is consistent with precedent.[20] The proposed limit on the amount of spectrum below 1 GHz that Verizon should be allowed to retain in individual markets is also

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[19] RTG finds the statement in the Opposition that "petitioners fail to provide any evidence of potential adverse competitive effects" baffling. Opposition at p. 13. RTG's petition contains extensive evidence of potential adverse competitive effects of the proposed merger. *See* Petition at pp. 2-18, 29-30.

[20] Verizon and Alltel claim that RTG "ignore[es] substantial precedent that hard limits on spectrum aggregation do not serve the public interest." Opposition at p. iii. Contrary to this assertion, there is substantial precedent that hard limits on spectrum aggregation serve the public interest. *Implementation of Sections 3(N) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, *Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, PR Docket No. 89-553, Third Report and Order (rel. September 23, 1994). While the FCC has subsequently determined that a spectrum cap *no longer* serves the interest due to an increasingly competitive CMRS marketplace, it has never stated that a spectrum cap as a method for ensuring competition is contrary to the public interest. To the contrary, even after concluding that the spectrum cap should no longer be applied on a long term basis, the FCC retained the cap on a temporary basis. Of course, in the instant proceeding, RTG is not even seeking a generally applicable spectrum cap, but merely a divestiture in certain problematic markets of spectrum exceeding specified amounts.

consistent with precedent.[21] Nonetheless, even if the FCC determines that RTG's proposed divestiture criteria should not be applied to this transaction, this by no means obviates the need for some divestiture of spectrum in individual markets where the Commission has found Verizon's spectrum holdings and market power to be excessive. In such markets, the FCC should at a minimum require divestiture of all spectrum held by Alltel or Verizon consistent with conditions imposed by the FCC in recent merger transactions.[22]

6. **The Applicants Ignore the Material Fact That in Numerous Roaming Markets, All of Verizon's Retail Competitors, Both GSM and CDMA, Will Become Dependent Overnight on Verizon for Roaming.**

In the Joint Opposition, the Applicants yet again state that "the wireless market is increasingly national in scope."[23] As RTG pointed out in its Petition to Deny, if this statement is true, then it would imply that all operators, especially regional, small and rural operators, need access to *competitive* roaming coverage across the nation in order to compete effectively in their local, retail marketplaces. Apparently, Verizon sees no future need for regional, small or rural mobile operators in America, and views only the current "national operators" as capable of thriving in the mobile marketplace of the present and future. Quite simply, if you are not a

[21] Verizon and Alltel argue that RTG "disingenuously" argues that requiring divestiture of spectrum in excess of 55 megahertz below 1 GHz is consistent with the FCC's 1999 decision to impose a 55 MHz cap on ownership of cellular, PCS and SMR spectrum because RTG did not cite to the FCC's subsequent decision doing away with this cap. Far from "disingenuous", the elimination of the spectrum cap should go without saying. Indeed, if RTG was trying to mislead the Commission into believing that the 55 MHz cap is still in place, why would it be trying to persuade the FCC to adopt such a limit on the post-merger spectrum that Verizon may hold?

[22] *See, e.g., Verizon/RCC Merger Order* at par. 113 (requiring the divestiture of spectrum held by either Verizon or RCC).

[23] Joint Opposition, page 18.

national operator, then you need roaming coverage outside of your home market in order to remain competitive.

Given this context, the Applicants then go to great lengths in their Joint Opposition to convince the FCC, and the general public, that not only is the roaming market not a separate product market, but also that the wireless marketplace cannot be divided into technology types (e.g. CDMA vs. GSM). Indeed, the Applicants go so far as to use a "hypothetical" situation where a CDMA "monopolist" could not, and would not, "increase prices profitably in a home market by raising roaming charges because consumers would react by simply choosing another service provider."[24] What the Applicants knowingly fail to point out is that in numerous places across the country, should the merger go through without conditions, what are currently competitive urban and suburban "home" retail markets today will soon be surrounded by rural roaming markets in which Verizon is the only provider of both GSM and CDMA roaming. This is an indisputable fact, and is especially true in the rural areas of the Mountain West and Great Plains of the country where Verizon stands to inherit the former Western Wireless Corporation GSM roaming network.[25] If all the retail (home market) competitors of this hypothetical CDMA monopolist, regardless of their air-interface technology, suddenly become dependent overnight on Verizon for their nearby rural roaming access, how could this situation of complete dependency *not* be a factor on either retail (home market) pricing, or relative size of network coverage amongst the various retail competitors? Nowhere in their entire Joint Opposition do the Applicants address the glaring fact that all mobile providers in the United States, both GSM

[24] Joint Opposition, page 48.

[25] *Applications of Western Wireless Corporation, and Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002016468, et.al,* WT Docket No. 05-50, Memorandum Opinion and Order, FCC 05-138 (rel. July 19, 2005).

and CDMA, would become dependent upon Verizon for access to any meaningful national roaming coverage, since Alltel today is the only provider of immediately available roaming service, both CDMA and GSM, in many rural markets, especially in former Western Wireless Corporation markets.[26] Instead, the Applicants limit their analysis put forth in the various Attachments of the Joint Opposition (which are themselves not open to cross-examination) only to those markets where the post-merger entity will have 95MHz or more of spectrum, completely ignoring the rural markets mentioned above where Alltel's dual-mode network is so vital for the vast majority of this country's mobile providers.[27] For this reason alone, the Commission should designate the application for a hearing under Section 309(e) of the Act in order to resolve material issues of fact.

In its applications, the Applicants presented testimony from the same authors who provided testimony in one of the Attachments used in the Joint Opposition. In this particular exhibit, the Applicants consistently stipulated that the industry trend is toward national pricing plans offering national service.[28] Again, if this is in fact true, it defies logic to think that in urban and suburban markets proximate to Alltel roaming markets (i.e., cities such as Denver, Kansas City, Boise or Salt Lake City) Verizon will not use the fact that all of its retail competitors will become dependent upon Verizon roaming coverage in certain rural markets to its advantage.

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[26] As RTG stated in its Petition to Deny, Alltel currently holds a unique spot in the domestic wireless marketplace because it is a provider of much needed roaming coverage to both GSM and CDMA operators. This uniqueness is what sets this merger apart from previous mergers.

[27] *See generally*, Joint Opposition, "Attachment 2: CMA-by-CMA Analysis."

[28] *In re Applications of Atlantis Holdings, LLC and Cellco Partnership dba Verizon Wireless for Consent to the Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 08-95, "Exhibit 3, Declaration of Dennis Carlton, Allan Shampine, and Hal Sider," pp 17-20, (filed June 10, 2008).

None of the petitioners would dispute the fact that Verizon's wholesale roaming costs will decrease with the acquisition of Alltel's rural roaming markets. However, this does not change the fact that its closest retail competitors in these markets, namely all the other national operators, will overnight require Verizon roaming out of necessity. It is particularly interesting to note that Verizon makes no conditions or promises regarding roaming to any of the other national operators (e.g., AT&T, Sprint or T-Mobile). By having a true monopoly on out-of-market roaming services in certain rural markets, Verizon will be free to further increase its market share in the home market to the detriment of its closest competitors, by either curtailing roaming access or increasing roaming charges. As for the regional, small and/or rural operators who are now promised a two year commitment to current roaming terms and prices, once that security disappears, Verizon will be able to dictate one-sided terms and limit geographic roaming access. In other words, even under the most optimistic conditions, Verizon's stiffest competitors in the most populous markets will be given no reprieve from potentially anti-competitive roaming practices, and regional, small and rural operators will be given a two year reprieve. By that time, Verizon will have realized enormous economies of scope and scale on a national level, and it will then be in a position to hold hostage national competitors in the major retail markets and regional, small and rural competitors in the remaining retail markets.

Despite all the voluminous filings on the part of the Applicants, relatively little has been actually promised that will help create a more competitive roaming environment. Verizon contends that the mobile marketplace is increasingly national in scope, yet it is silent to the simple fact that each and every mobile operator with nationwide ambition, regardless of air interface technology, will become dependent upon Verizon. By obtaining Alltel's dual-mode network in vast areas of rural America, Verizon will create a situation where it will set the terms

of network access and pricing, which will have a negative, trickle-down effect on otherwise competitive urban and suburban retail markets. Accordingly, a hearing under Section 309(e) is necessary so that the Commission may reconcile these material facts.

7. **Material questions of fact remain with respect to Verizon's need for and use of federal high-cost support in light of Verizon's massive economies of scope and scale.**

Verizon, a company with massive economies of scope and scale, is the second largest recipient of high-cost support in the United States.[29] Verizon provides no legitimate rationale why the Commission should allow Verizon to devour the high-cost support of a former competitor that is currently the largest recipient of competitive high-cost support.[30] Verizon's sudden interest in rural regions and perfunctory promise to fulfill its high-cost obligations,[31] after years of ignoring or bypassing sparsely-populated rural regions, lacks credibility. It is not in the public interest for the Commission to allow the generally urban-based Verizon to become the nation's largest consumer of competitive high-cost support meant for high-cost, rural areas. The Commission has the authority to deal with universal service matters in the course of the instant proceeding. Specifically, in its Alltel license transfer proceeding, the FCC recognized Alltel's "significant role in the expansion of the high cost fund through [its] receipt of competitive ETC funding" and determined "that it is in the public interest to immediately address [the] continued

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[29] *In re Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases*, WT Docket No. 07-208, File Nos. 0003155487, *et al.*, ITC-T/C-20070804-00258, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-181 at ¶ 126 (August 1, 2008).

[30] *Alltel Transfer Order* at ¶ 9.

[31] Joint Opposition at 78 and 79.

receipt of competitive ETC funding in the context of this transaction."[32] As a result, Alltel's support was capped.[33] Based on this precedent, it is in the public interest for the Commission to further restrict high-cost funding to Alltel now that it is being acquired by the *de facto* dominant carrier in the wireless industry.

Verizon's assertion that basing high-cost support on a carrier's size is discriminatory and not competitively neutral is incorrect and is refuted by over seven years of Commission high-cost universal service policy. Since 2001, the Commission has based high-cost support for carriers on their relative size. Specifically, the FCC, along with the Federal-State Joint Board on universal service and the Rural Task Force ("RTF"), developed a tiered high-cost support mechanism that provided more robust support for small and rural rate-of-return incumbent local exchange carriers ("ILECs") than larger price-cap ILECs (such as Verizon).[34] In basing high-cost support on the size and characteristics of carriers, the FCC concluded that denying certain high-cost support to large carriers while providing additional support mechanisms to smaller carriers was consistent with Section 254 of the Act and consistent with the FCC's universal service principle of competitive neutrality.[35] Accordingly, the FCC has the authority and, as discussed below, the impetus to deny Verizon unneeded high-cost support.

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[32] *Alltel Transfer Order* at ¶ 9.

[33] *Id*.

[34] *See in re Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No 00-256, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256, FCC 01-157 (May 23, 2001) ("*RTF Order*").

[35] *Id*. at ¶ 14.

As Verizon confirms, total high-cost support to competitive eligible telecommunications carriers ("CETCs") in 2007 was $1.18 billion.[36] With Alltel receiving the largest portion (29 percent) of such support,[37] Alltel's annual support is approximately $341 million. Even with the *Interim Cap Order*,[38] Alltel's high-cost support is likely to stay the same, or even rise, since support was capped, *not* reduced. In light of Verizon's unprecedented wireless market dominance, no further high-cost support in the form of Alltel-s high-cost support should flow to Verizon when, as the Commission has recognized, the high-cost fund is in "dire jeopardy."[39]

B. The Applicants Put Forth Additional Testimony That Must Be Subject to Cross Examination.

In their Joint Opposition, the Applicants put forth additional testimony and analysis that has not been subject to cross examination by the Commission and/or interested parties. In a move that effectively "sandbagged" the petitioners, the Applicants filed no less than four separate attachments totaling 139 pages. The Applicants presented the additional expert testimony and analysis to which petitioners have had only a week to respond on reply. By sandbagging the parties opposing the merger, the Applicants seek to jam the merger down the

[36] Joint Opposition at 79 (footnote omitted).

[37] *Alltel Transfer Order* at ¶ 9.

[38] *See in re Federal-State Joint Board on Universal Service*, WC Docket No. 05-337, *High-Cost Universal Service Support*, CC Docket No. 96-45, *Communications, Inc., et al. Petitions for Designation as Eligible Telecommunications Carriers, RCC Minnesota, Inc. and RCC Atlantic, Inc. New Hampshire ETC Designation Amendment*, Order, FCC 08-122 (May 1, 2008) ("*Interim Cap Order*").

[39] *Id*. at ¶ 6.

throats of the American public without the proper opportunity to cross examine their experts.[40] The Commission should not tolerate such gamesmanship and should designate the applications for hearing so that the witnesses and their expert testimony can be fully examined especially in light of the questions of material fact contained in the expert testimony.

1. **The Declarations of Dennis Carlton, Allan Shampine and Hal Snider are significantly redacted making it impossible for petitioners to know whether the testimony is supportable.**

While the Commission may have access to the redacted information, neither the petitioners nor the American public have access to this information. The information is relevant for determining the truthfulness and veracity of the witnesses' testimony. Without making this information available or allowing the expert witnesses to be cross examined, the testimony should not be considered. As the Commission indicated in its Public Notice in this proceeding, "[interested parties] may participate fully in the proceeding," including seeking access to any confidential information.[41] Because this testimony has been proffered at this late stage and in such great volume, RTG and other interested parties, even if granted immediate access to the redacted information under the protective order, are not being afforded a sufficient opportunity to

[40] RTG notes that it already sought extra time to understand and analyze the 85 markets that Verizon seeks to divest. RTG could find no rhyme or reason as to why Verizon selected the 85 markets nor has Verizon explained its rationale in the Joint Opposition. Further, by not providing an analysis of the 85 markets it seeks to divest only those it seeks to retain, Verizon gives the petitioners still no way to understand why it chose the markets it chose to divest. Additionally, RTG is having trouble understanding Verizon's rationale based on the Local Market Analysis it supplied in its Joint Opposition and now believes that the selection of the 85 markets is likely to have been a political move on Verizon's part to garner support from key Congressional leadership and FCC Commissioners.

[41] Public Notice, Verizon Wireless and Atlantis Holdings LLC Seek FCC Consent to Transfer Licenses, Spectrum Manager and De Facto Transfer Leasing Arrangements, and Authorizations, and Request a Declaratory Ruling on Foreign Ownership, WT Docket No. 08-95, DA 08-1481 ¶ VI (rel. June 25, 2008).

fully examine and rebut this new evidence presented in support of Applicants' position.[42] By not allowing due process to take place, the Commission will be doing a terrible injustice to our citizens. By choosing to put this information into the record (albeit a redacted version), the Applicants must submit to allowing the Commission and opposing parties to have due process to test the veracity and credibility of their experts and their experts' testimony.

The relevant portion of Section 7(c) of the Administrative Procedure Act states that no "rule or order [shall] be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[43] Verizon, by introducing new testimony at the last minute, is attempting to sway the Commission with testimony that contains material issues of fact that demand serious examination. The Commission risks having any merger order overturned if it relies on speculative and biased testimony without the opportunity for a full evidentiary hearing that allows all interested parties an opportunity to present contrary evidence and for the Commission to weigh all evidence presented.

2. **Michael Katz's testimony raises more questions than it answers and must also be subject to further examination.**

The Declaration of Michael Katz setting forth his economic analysis of whether the spectrum component of the Commission's merger review screen promotes consumer welfare and

[42] Contemporaneous with this filing, RTG is seeking access to the aforementioned redacted information under the protective order in this proceeding.

[43] 5 U.S.C. § 551, § 7(c).

economic efficiency and his ultimate conclusion that it does not must be subjected to cross examination. A one-sided presentation by an alleged expert witness on paper is insufficient support if it is not tested by robust examination. Mr. Katz's testimony raises more questions than it answers.

At this late stage in the merger review process, Mr. Katz is now asking the FCC to completely abandon its spectrum screen mechanism based on mere assertions and unsupported facts. Perhaps sensing that the current spectrum screen process is unfavorable to Verizon, Mr. Katz argues that the FCC's use of a single input (*i.e.*, spectrum held by the merged entity) "makes little sense."[44] In support of this assertion, Mr. Katz claims that "the total of available spectrum is constantly increasing,"[45] but provides no indication of what constitutes his "total" or what sort of spectrum is included in his total. It is also Mr. Katz's opinion that the Commission need not use its spectrum screen because saving spectrum for entrants is unsound since such "spectrum would not be put to its best use in the short run."[46] Again, Mr. Katz supports an assertion with an unproven and unsupported fact that begs the question as to what Mr. Katz, and presumably Verizon, considers the "best" use for spectrum. Verizon is essentially asking the Commission to promulgate a new spectrum screen rule as part of this proceeding based on Mr. Katz's unchallenged testimony. Again, the Commission should not allow this testimony to go untested and should designate the applications for hearing so that a full and complete record may be established.

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[44] Joint Opposition, Attachment 3 at p. 7.

[45] *Id.*

[46] *Id.*

3. **Dr. Jackson's testimony presents one side of a raging debate in the industry and must be further examined at hearing.**

Verizon's suggestion that BRS and EBS spectrum should be included in a spectrum screen is misleading and ignores existing realities of the band. In its attachment, "The Supply of Spectrum of CMRS," Verizon engineer Charles Jackson argues that "there is no technological basis for excluding [Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS")] spectrum from the spectrum screen calculations."[47] Such a conclusion, based solely upon subjective criteria established by Mr. Jackson, constitutes yet another reason why it is important for the Commission to conduct a hearing and allow the record to be fully developed in the context of a hearing.[48]

Specifically, Mr. Jackson suggests four arbitrary requirements which should establish the suitability of spectrum available for the provision of CMRS services.[49] However, in his discussion of BRS and EBS services, Mr. Jackson fails to provide any information to support his fourth criterion, that the "state of equipment technology and equipment markets support the provision of CMRS." [50] It is no wonder that Mr. Jackson excluded such information regarding equipment to provide CMRS services in the BRS and EBS bands because currently, no such equipment exists. In fact, while mobile services are authorized in these bands, the future of a mobile WiMax-type service in these bands is largely unknown and uncertain. [51]

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[47] Verizon Opposition, Attachment 4, Jackson Declaration at 12 ("Jackson Declaration").

[48] Jackson Declaration at 2.

[49] Id. Id.

[50] Id.

[51] In its transfer of control application, Sprint and Clearwire note that the combined company will compete in providing fixed broadband service (Sprint/Clearwire public interest statement at 36).

Mr. Jackson also tries to cast doubts upon real technical and non-technical problems that exist in the 2.5 GHz BRS and EBS bands which could severely hamper the deployment of *any* advanced broadband services in these bands, including the unlikely provision of CMRS services. Specifically, as Sprint and Clearwire have noted in their Public Interest Statement filed with their application seeking transfer of control of their BRS and EBS licenses, operators in the BRS and EBS bands face technological hurdles involving the use of educational spectrum, the creation of a nationwide network out of geographic service areas of various shapes and sizes, and the task of competing against large nationwide licensees of spectrum in lower, more developed spectrum bands.[52] These valid concerns expressed by the two largest BRS and EBS licensees and lessees are even more persuasive when viewed within the current state of the BRS and EBS industry, an industry which has failed to produce consistent successful deployments and which is currently still undergoing a lengthy and costly band transition. Taken in sum, Verizon's notion that BRS and EBS spectrum should be included as part of the FCC's spectrum screen amounts only to the opinion of one expert who must be cross examined at a hearing and whose testimony must be allowed to be rebutted by other expert testimony.

4. **The Local Market Analysis presented in the Joint Opposition is unreliable and must be subjected to further review.**

Most troubling is the Local Market Analysis developed by the Applicants which they seek to present as the "bee's knees". Again, neither the methodology used by the Applicants nor the assumptions made have been subject to cross examination. While none of the conclusions drawn by the Applicants have been validated by anyone other than the Applicants, it is apparent that the Applicants utilize this analysis as a "best possible case" scenario for competition.

[52] Sprint public interest statement at 39.

Specifically, the Applicants' exhibit consists almost exclusively of a chronicling of spectrum holdings in a particular market. In doing so, the Applicants try to persuade the FCC that there will be no competitive harm in markets where spectrum holdings exceed 95 megahertz because, impossibly, there are actually *other* licensees within the same market. Not surprisingly, in all the markets discussed by the Applicants, the combined Verizon/Alltel company would be the dominant CMRS operator by an overwhelming amount.[53] In a week's time, RTG did not have the resources to delve into each market to determine the veracity of the statements, to assess the assumptions for the methodology used or to test the truthfulness of the conclusions drawn by the Applicants. However, it should be noted that a mere chronicling of spectrum in these markets – spectrum that, in many cases has not been constructed or utilized does not mitigate the overwhelming spectrum holdings that the Applicant will acquire should this transaction be approved. Given more time and the opportunity to further examine these markets, RTG would be able to demonstrate that it is not in the public interest for the Commission to allow one CMRS carrier to control so much CMRS spectrum in each market. Prudent and sound judgment dictates that the Commission should designate the applications for hearing so that a thorough unbiased analysis of the markets can be undertaken and the record fully developed.

[53] It should be noted that the Applicants included BRS and EBS in their analysis even though the Applicants themselves admit that these bands, as well as AWS, are not part of the FCC's 95 megahertz screen, See Attachment 2, Footnote 1. It should also be noted that the BRS/EBS and AWS inventories that *are* included are misleading. These listings appear to include spectrum in the mid-band segment of the BRS/EBS band that will be primarily used for high-power educational services. Additionally, with regard to the availability of such spectrum, completion of the BRS/EBS transition in a particular market does not indicate that the spectrum is clear, as adjacent markets must be cleared as well in many cases. With regard to AWS clearing, the amount of data available from the government regarding Department of Defense links is still difficult to ascertain, and therefore, a complete clearing picture is not being presented by the Applicants.

II. CONCLUSION

For the foregoing reasons, RTG respectfully requests that the Commission deny the above-captioned applications or alternatively designate the applications for hearing pursuant to 309(e) so that the Commission may resolve the material questions of fact so that it may, in turn, determine whether a grant of the applications will truly serve the public interest, convenience and necessity as required by Section 309(a) of the Act.

Respectfully submitted,

The Rural Telecommunications Group, Inc.

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