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	)	

REPLY COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

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Leap Wireless International, Inc. ("Leap") hereby replies to the "Joint Opposition to Petitions to Deny and Comments" filed by Cellco Partnership d/b/a Verizon Wireless ("Verizon"), Atlantis Holdings LLC ("Atlantis") and ALLTEL Corporation ("ALLTEL").[1]

I. INTRODUCTION AND SUMMARY

In its Petition to Deny, Leap raised a number of questions that Verizon and ALLTEL had not answered in their application – questions necessary to the evaluation of their proposed, "mammoth-producing" transaction. Most of these questions remain unanswered in the Applicants' Opposition. Indeed, many of the doubts expressed by Leap about the public benefits (and, most important, the lack of competitive harms) from the transaction are heightened or confirmed by the Opposition. The Commission should:

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

- promptly send interrogatories and document requests to the Applicants to elicit the missing information;

- conduct a rulemaking regarding the spectrum screen, and the possible reinstatement of the spectrum cap, before action on the application;

- condition any grant of approval on:

    - the Applicants' commitment to forego the in-market exclusion from roaming agreements and to offer data roaming;

    - the Applicants' agreement that data roaming is also subject to reasonable and non-discriminatory requirements;

    - an expedited procedure for resolving roaming complaints coupled with a continuation of any pre-existing roaming agreement during adjudication of such complaints;

    - a presumption that wholesale roaming rates exceeding a carrier's average retail rates are unreasonable; and

    - divestiture in three-to-two and two-to-one CDMA roaming markets.

With respect to the transaction's supposed benefits, the Opposition does little to bolster the link between benefits and merger. A reasonable reader cannot help but get the impression that the Applicants are reaching here. Take the speed of conversion to EvDO Rev.A from Rev.0 – one of the claimed benefits. The Applicants purport to lay this issue to rest by the following comparison between the standalone plans of ALLTEL and those of the merged entity. Without the merger, they say, "ALLTEL intends to cover portions of only 18 market areas by year end 2008." (In fact, the press release cited by the Applicants states that ALLTEL's "initial rollout of Rev.A" will be to "18 market areas and dozens of cities.") "In contrast," the Applicants continue, Verizon has indicated its intent to convert all of ALLTEL's EvDO Rev.0 cell sites – approximately 82 percent of its POPS – to EvDO Rev.A within a year of the deal closing." But, depending on the population covered by the 18 markets and the dozens of other cities that ALLTEL plans to convert, this could even mean that the transaction will slow down the pace of

conversion instead of accelerating it. In any event, any contribution of the merger to speeding up the conversion appears distinctly lackluster. Or, take Verizon's plans for LTE deployment on its recently won 700 MHz frequencies. ALLTEL has not won any 700 MHz frequencies. To connect the dots between benefit and merger, the Applicants offer the vague idea that LTE deployment will be somehow helped by unspecified ALLTEL infrastructure.

Because of the transaction's dubious benefits, its competitive effects loom especially important. The Applicants' reliance on the oft-rejected "national market" for CMRS as a constraint on its behavior rings hollow for at least two reasons. First, the Applicants continue their policy of offering hardly any comment on their local promotions. Local pricing, however, means that the discipline of national competition, such as it is, evaporates.

Second, and more important, the health of the national market depends on the ability of smaller carriers such as Leap to participate in it. But this ability crucially turns on roaming, and is undermined when roaming rights are diminished by the in-market exclusion and Verizon's well-documented refusal to provide roaming in all areas where it has facilities, a refusal now potentially to be applied to a larger canvas. Verizon cannot have it both ways – relying on the benefits of national competition to support the proposed acquisition and at the same time pursuing policies that will turn the national market into an exclusive club, with four members and no further admissions possible.

As for the spectrum screen, Verizon unwittingly confirms the need for a prior rulemaking by virtue of its silence on a crucial question raised by Leap. Verizon continues to advocate the inclusion of the AWS frequencies in the pool of suitable spectrum for purposes of computing the screen. It has not escaped Leap's attention that Verizon does so principally based on the progress made by Leap and some other providers in building out their AWS frequencies, though

ironically not based on any progress towards construction made by Verizon itself – a company holding 20 MHz of AWS-1 spectrum covering a population of nearly 200 million. In any event, as Leap pointed out in its Petition, if AWS frequencies are to be included, they cannot possibly be assumed to be equivalent, MHz for MHz, to 700 and 800 MHz frequencies. Rather, they should be accorded a different weight to reflect the significantly different properties of 2 GHz spectrum. The Applicants' opposition offers no response whatsoever to this obvious point.

This is no wonder. There are no ideas "in the can" for how to do this. The Applicants know it is not possible for the Commission to come up with an appropriate weighting of the disparate spectrum segments that the Applicants urge the Commission to include in the context of this merger proceeding. Instead, a rulemaking is necessary first. This is also the crucial distinction between this case and *AT&T/Dobson*, where the Commission went ahead and revised the spectrum screen in the adjudication proceeding itself. Deciding to add the 700 MHz frequencies was straightforward because of the 700 and 800 MHz spectrum's homogeneous properties. Adding 2 GHz frequencies is another matter altogether.

The Applicants' economist offers the view that spectrum screens are wasteful because they identify too many markets for further analysis and therefore consume scarce administrative resources. On that logic, foregoing any Commission review of a merger such as this would achieve maximum efficiency as it would consume no administrative resources at all. But while salutary to the applicants, such forbearance of oversight would not serve the public interest. The risks of missing markets that require further analysis using a higher screen vastly outweighs the risks of identifying too many markets for analysis using a lower one.

Under-inclusiveness and improper methodology mar the Applicants' market-by-market analysis. Oddly, while the Applicants fault the transaction's opponents for ignoring the

concentration screens, they are guilty of this charge themselves. Their analysis does not take any account of market shares and concentration. This means that markets that may exceed the HHI screen may be left undiscussed if they do not exceed the spectrum screen; and that the competitive effects of the transaction in a market that does exceed the spectrum screen may be vastly understated, depending on the market share increase resulting from the transaction.

With respect to the all-important question of roaming, Verizon's commitment to respect the rates found in ALLTEL's roaming agreements (disconcertingly, not even the agreements themselves) for two years is meaningless. At best, the offer defers the problem for two years.

The roaming practices of carriers to date show conclusively the link between size and unreasonableness in the roaming arena. The greater the carrier's size, the larger the disconnect between roaming prices and cost, or indeed between roaming rates and retail rates. The roaming market – and there is one, despite the Applicants' protestations – is a wholesale market where economic logic is turned on its head. The wholesale roaming rates are many times higher than the retail rates. Some agreements (certainly Verizon's agreement with Leap) are subject to reverse volume discounts, where the price rises with the number of roaming minutes, instead of falling to reflect lower marginal costs as one might expect in a better-functioning market. These already-experienced consequences of market power do not bode well for what is to be expected with the further exponential increase in leverage that this transaction will produce. Conditions with teeth, as outlined above, are needed to rein in the Applicants' roaming behavior.

II. THE BENEFITS OF THE MERGER ARE EVEN MORE ILLUSORY THAN WAS APPARENT FROM THE APPLICATION

The Applicants assert that the merger will achieve a cornucopia of benefits – broadband deployment in rural areas, faster EvDO deployment, and faster conversion from EvDO Rev.0 to

EvDO Rev.A. But the links between these benefits and the proposed transaction prove to be even more tenuous than appeared at first, and in some cases they are entirely mysterious.

A. Faster EvDO deployment is a dubious benefit

With respect to EvDO deployment, the Applicants' claim previously seemed to be that Verizon will expand the EvDO deployment of ALLTEL's operations. Their claim now is more dubious: each of them will help the other. It turns out that, much as Verizon has deployed EvDO in some areas where ALLTEL has not, ALLTEL, too, "currently offers EvDO in some areas where Verizon Wireless does not."[2] Unanswered is the question: absent the merger, why would not each simply continue the EvDO deployment that each independently has started? Why does each need the other's help? Given the existing development plans and actions, it would appear that the benefit is not better coverage but cost savings. The question then is whether this is a net gain or net loss in consumer welfare. Is this supposed benefit actually a *loss* to consumer welfare in areas where both carriers have deployed EvDO technology (or would deploy such technology absent the merger) and one of the two EvDO-equipped options is then lost?

The Applicants cast further doubt on the link between EvDO expansion and the merger by stating that "ALLTEL's EvDO coverage currently extends to approximately 76 percent of its covered POPS, with plans to reach approximately 82 percent of its POPS by year end."[3] ALLTEL seems to have done very well on its own on that score, and the help to be meted out to it by the merger is unclear.

[2] Opposition at 7 n.21.

[3] Opposition at 11.

B. The Merger Might Actually Slow Down ALLTEL's Upgrade to EvDO Rev.A

With respect to the link between the merger and the pace of conversion from EvDO Rev.0 to Rev. A, the Applicants attempt to rebut the doubts expressed by Leap in a way that only confirms these doubts. "[W]hat Leap chooses to ignore," they say, "is that the transaction will permit this deployment to occur much more rapidly and broadly given Verizon Wireless' technical expertise and experience as well as its greater financial capabilities."[4] But let us look at the facts that the Applicants then proceed to disclose. Without the merger, "ALLTEL intends to cover portions of only 18 markets by year end 2008."[5] In fact, the press release cited by the Applicants states that ALLTEL's "initial rollout of Rev.A" will be "to 18 market areas and dozens of cities."[6] "In contrast," the Applicants continue, "Verizon has indicated its intent to convert all of ALLTEL's EvDO Rev.0 cell sites – approximately 82 percent of its POPS – to EvDO Rev.A within a year of the deal closing."[7]

The problem is that the two parts of this comparison are apples and oranges. The Applicants do not say how many POPS are covered by the "18 market areas and dozens of cities" that ALLTEL plans to convert on its own by year end – markets that are presumably among ALLTEL's most populous. If these 18 markets and dozens of cities account for, say, 60 percent of ALLTEL's POPS, it may well be that the merger will *slow down* the pace of EvDO Rev.A conversion instead of accelerating it. In addition, according to its own press release, this

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[4] Opposition at 9-10.

[5] Opposition at 11.

[6] *See* News Release, *ALLTEL Wireless Rolls Out Faster Broadband Network; Rev. A launch means faster access to Internet, video, music and more* (Jun. 23, 2008), *available at* http://www.computershopper.com/cellphones/review/s4829/Alltel+Wireless+rolls+out+faster+broadband+network/1 (last visited Aug. 26, 2008)..

[7] *Id*.

is only ALLTEL's "initial rollout" of EvDO Rev.A. Therefore, the Commission can only speculate whether Verizon's proposed merger with ALLTEL would actually result in faster rollout of EvDO Rev.A in ALLTEL's territory than would result from ALLTEL's own rollout plans. Indeed, ALLTEL seems to be perfectly capable of executing a rapid rollout of EvDO Rev.A on its own. In the two months since its June 23 press release, ALLTEL has issued 13 separate press releases announcing the successful deployment of EvDO Rev.A in various parts of 11 different states.[8]

C. Earlier Introduction of LTE Service is Equally Doubtful

Equally doubtful remains the nexus between Verizon's deployment of LTE in its 700 MHz frequencies and the acquisition of ALLTEL, an entity that has not won any 700 MHz frequencies. Here is the Applicant's response to Leap:

> Although Leap argues that accelerated LTE deployment is not a merger-specific benefit because ALLTEL does not possess 700 MHz spectrum, Leap misunderstands how this benefit is achieved. It is not solely due to the acquisition of ALLTEL's spectrum – which provides additional capacity for the introduction of new technologies – but also due to the acquisition of ALLTEL's network that will permit the more rapid deployment of LTE in rural areas. ALLTEL's customers will benefit because Verizon Wireless will be able to use its 700 MHz spectrum and ALLTEL's existing infrastructure to deploy LTE in ALLTEL markets.[9]

What kind of ALLTEL infrastructure will help Verizon with its 700 MHz LTE deployment? Does it consist of spectrum-agile equipment? Or is it just access to ALLTEL cell towers, and if so, why can Verizon not obtain such access without the merger by using, for example, the standard industry practice of tower-sharing, leasing tower space from a company

[8] *See* ALLTEL Wireless, 2008 News Releases, *at* http://www.alltel.com (last visited Aug. 26, 2008).

[9] Opposition at 12.

like American Tower, or exercising statutory pole attachment rights?[10] A $28 billion transaction is a very expensive way to obtain access to this kind of infrastructure. In how many markets where Verizon has 700 MHz licenses does ALLTEL have helpful infrastructure that Verizon does not? The Applicants do not answer these questions. The Applicants estimate 700 MHz-related network cost savings of only a modest amount,[11] and do not explain how this cost saving estimate was derived, or against what baseline. For example, to the extent that Applicants are relying on cost savings from the elimination of duplicate network construction and operation costs, such savings need to be discounted. This is because the elimination of a duplicate network also implies the elimination of a substantial facilities-based competitor, with all of the consumer welfare losses associated with such a reduction in competition.

III. NATIONAL COMPETITION IS NO PANACEA AND WILL BE UNDERMINED WITHOUT ROAMING CONDITIONS WITH "TEETH"

The Applicants continue to tout the importance of the national market.[12] According to them, the pressure from national competition will restrain the merged entity's conduct in any given local market. This reliance is misplaced for at least two reasons.

First of all, for any such pressure to exist at all, the merging entity needs to lack the incentive and the ability to differentiate its prices between different local markets, by means of discounts, promotional offers and the like. The Applicants continue to fail to make such a showing. As Leap pointed out in its Petition, the Applicants' economist Dr. Carlton has admitted that such price differentials exist, and confined himself to saying that he understands them to be

[10] *See* 47 U.S.C. § 224; *NCTA v. Gulf Power Co.*, 534 U.S. 327 (2002).

[11] *See* Reply Declaration of Dennis Carlton, Allan Shampine and Hal Sider at 9, *filed in* WT Docket No. 08-95 (filed Aug. 19, 2008) ("Reply Declaration").

[12] Opposition at 17-18.

limited.[13] Presumably, Dr. Carlton's understanding was based on what he was told by the Applicants, but in any event it lacked an empirical basis disclosed in his statement or in the application. On reply, the Applicants' economists respond only by reference to the statistic provided by Verizon that 90% of its subscribers are on "service plans based on national pricing and that close to 100% of new subscribers are enrolled in national pricing plans."[14] But this still means that, in areas where Verizon has more market power than in others, it can simply refrain from offering promotions and discounts.

Second, to whatever extent national competition restrains local behavior, it will be less of a restraint if the merger is approved without tough conditions on the Applicants' roaming behavior. For national competition to be vibrant, it ought not to be confined to the four national players. Carriers, from regional providers to small providers, must have an opportunity to participate in it. But the diminution of roaming that is threatened by the in-market exclusion and unreasonable roaming terms undermines in turn that opportunity. Reduced roaming rights means that many consumers who now view Leap as a close substitute for Verizon might no longer do so. Such a regime threatens to balkanize the market, consign regional carriers to regional status, and cordon off the national market as an exclusive arena for four competitors. The Applicants should not be allowed to have it both ways – rely on the national market as a basis for approval of the merger and at the same time threaten to undermine competition in that market by means of their position on roaming.

In any event, the Commission has already rejected the notion of a national market based simply on the presence of national pricing and only occasional discounts. It did so less than a

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

[14] Reply Declaration at ¶ 88.

year ago in *AT&T/Dobson*[15] and did so again earlier this month in *Verizon/RCC*, finding explicitly that "the Applicants' argument that prices are set on a national level, and that consumers shop for national plans and national rates, does not undercut the finding of a local geographic market."[16] The Applicants have provided no new arguments or information that would warrant a reversal of the Commission's findings in this regard.

IV. THE APPLICANTS UNWITTINGLY CONFIRM THE NEED FOR A PRIOR RULEMAKING ON THE SPECTRUM SCREEN

On the question of the appropriate spectrum screen, the Applicants fail to advance the debate, and in doing so unwittingly confirm that a rulemaking is necessary to consider the spectrum screen (and the possible reinstatement of a spectrum cap) before action on their applications is appropriate.

Again, the Applicants make their plea for the Commission to change its spectrum screen on the occasion of their application in order to evaluate their proposed transaction.[17] They do not address any of the arguments made by Leap in support of a prior rulemaking.[18] Virtually their only argument remains that the Commission has changed the screen before.[19] But changing the yardstick by which to measure a transaction in the transaction proceeding itself for the second

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[15] *Applications of AT&T Inc. and Dobson Communications Corporation For Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd 20295, at ¶ 76 (2007) ("*AT&T/Dobson*").

[16] *Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation*, FCC 08-181, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 07-208, at ¶ 41 (rel. Aug. 1, 2008) ("*Verizon/RCC*").

[17] Opposition at 18 *et seq.*

[18] Leap Petition at 5-14.

[19] Opposition at 20.

time is not the same as having done so before. Doing so every time would create an almost intolerable risk of standardless, arbitrary and capricious review.

There is an additional reason why this proceeding is less suitable for *ad hoc* relaxation of the screen than the previous ones. In *AT&T/Dobson* the Commission increased the screen because it decided to include the 700 MHz spectrum in the pool of available CMRS spectrum, but the added spectrum was comparable to the 800 MHz spectrum already in the pool. In this case, the Applicants request the addition of AWS-1, BRS/EBS, and MSS/ATC spectrum, all of which is significantly higher on the Table of Allocations and has different characteristics than 700 or 800 MHz frequencies. Leap raised this discrepancy in its application and made the common sense point that if 2 GHz spectrum is to be pooled together with 800 MHz spectrum for purposes of calculating a screen, spectrum with different properties should be give different weights.[20] But in their opposition, the Applicants completely disregard that obvious issue.

The Applicants are right, of course, that much of this spectrum is suitable for mobile telephony services. Indeed, one of the few additional contributions to the spectrum screen discussion that the Applicants do make on reply is to cite to "empirical evidence suggesting substantial AWS-1 deployment," including Leap's aggressive build-out and launch of commercial AWS service.[21] Leap, of course, is proud of its record in developing its AWS-1 licenses. It is ironic and telling, however, that Verizon cannot point to its own record of progress towards building out *its* AWS licenses.

That the Applicants should have no ideas about the appropriate weights to be assigned disparate spectrum segments should not come as a surprise. This is not the kind of calculation

[20] Leap Petition at 12, 13 n.24.

[21] Opposition at 23-24.

for which scribbling numbers on the back of an envelope is enough. It requires highly technical testimony and evidence on the different throughput capacity, propagation, rain attenuation and other properties of the different spectrum segments. This searching analysis ought to be undertaken in a rulemaking, and Verizon's proposed acquisition ought to be held in abeyance until the Commission completes that rulemaking.

Yet another issue that bears on the spectrum screen and that the Applicants fail to address is this: at the same time that successive spectrum aggregations by the largest CMRS providers in the nation continue to reduce the amount of spectrum available to smaller competitors, the initial mass of spectrum needed to be competitive is relentlessly on the rise due to continuing increases in consumer demand for bandwidth-hungry services such as mobile video. The amount of spectrum that any one entity should be allowed to hold in one market without triggering further competition review must therefore be determined with an eye towards the amount of spectrum that will be left and whether that amount is enough to enable robust competition. This in turn requires a review of the different spectrum characteristics, the impact such characteristics will have on costs, as well as the number of competitors that the Commission believes the market can support. This is the very kind of multi-faceted technical and policy issue for which a rulemaking is the most suitable forum for resolution.

One of the Applicants' economists, Michael Katz, argues for the elimination of the spectrum screen altogether or, if it is to be retained, its modification to include additional spectrum available for CMRS.[22] Dr. Katz worries that the present screen is over-inclusive,

[22] *See* Michael L. Katz, *An Economic Analysis of the Spectrum Component of the Federal Communications Commission's Merger Review Screen, filed in* WT Docket No. 08-95 (filed Aug. 19, 2008) ("Katz Declaration").

causes uncertainty, and will divert "scarce investigative resources" to the wrong issues.[23] Certainly, foregoing all review of a merger such as this would eliminate the expenditure of all investigative resources. This may be what the Applicants are hoping for, given their laconic explanations and their apparent expectation that their say-so is enough – astonishingly, the Applicants still fail to explain what criterion led them to single out 85 markets for divestiture, and why divestitures in those markets and no others would be enough. But such abdication of oversight would not serve the public interest.

In fact, the more serious risks lie in the opposite direction than that troubling Dr. Katz. An under-inclusive screen is far worse than an over-inclusive one: the latter may cause some extra hours of analysis to be spent; the former would save that time, but would enable many markets in which there are anticompetitive effects to escape scrutiny altogether. Under-inclusion is precisely the problem that mars the Applicants' own screen-based market-by-market analysis (discussed further below). That analysis failed to identify 84 of the 85 markets that the Applicants have offered to divest (presumably because of antitrust concerns).[24] Of course, to the extent that Dr. Katz's arguments attack the policy rationale for the Commission's spectrum screen and provides support for its elimination or modification,[25] these are matters worthy of full consideration in a rulemaking proceeding.

V. THE APPLICANTS' LOCAL MARKET ANALYSIS IS DEFECTIVE AS IT DOES NOT TAKE INTO ACCOUNT MARKET SHARES AND

[23] *See id.* at 3-5.

[24] *See* Letter from John T. Scott, III, Vice President & Deputy General Counsel, Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, at 2, *filed in* WT Docket No. 08-95, at 1 ("*Verizon Ex Parte*") (Jul. 22, 2008) ("offer[ing] to accept divestiture requirements" in 85 markets "[f]ollowing initial discussions with the Department of Justice.").

[25] *See* Katz Declaration at 5-8, 9-15.

CONCENTRATION AND DOES NOT INCLUDE DETAILED DIVERSION STUDIES

The Applicants fault some petitioners for "ignor[ing] the fact that the FCC's screen also triggers markets for analysis based upon changes in the HHI – analysis also is required if the post-transaction HHI would be greater than 2800 and the change in HHI would be 100 or greater or the change in HHI would be 250 or greater regardless of the level of HHI."[26] But it is the Applicants themselves that have ignored the HHI screen and more generally these indispensable tools of competitive analysis – market shares and concentration.

The Applicants' own market-by-market analysis singles out markets based only on the 95 MHz spectrum screen.[27] No markets are identified based on the HHI triggers that the Applicants accuse petitioners of ignoring. And even in the markets identified by the Applicants for further analysis, their analysis focuses exclusively on the number of licensees and operational competitors in each of those markets and does not dwell on market share at all. For this failure, lack of information is not an acceptable excuse. For some markets at least, the Applicants have been able to provide market share figures as part of their limited diversion analysis.[28] At the very least, the Applicants know their own subscriber numbers, and should be able to estimate the subscriber population of each market based on the population and mobile penetration figures reported in the Commission's CMRS competition reports.[29] This task has also been facilitated by the Commission's protective order granting confidential access to carrier-specific information

[26] Opposition at 19 n.52.

[27] *See* Opposition at Attachment 2, p.1.

[28] *See* Carlton Declaration at ¶ 43.

[29] *See, e.g., Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 23 FCC Rcd 2241, at tbl.A-3 (2008).

in its NRUF/LNP database.[30] Based on these numbers, the Applicants should be able to develop a very good estimate of their market shares, the market's concentration, and the concentration increase resulting from the transaction.

The Applicants' failure to consider market shares and concentration has two implications: *first*, there may be many markets that exceed the HHI screen but which do not exceed the 95 MHz spectrum screen that the Applicants have not identified or analyzed at all. This is suggested by a simple comparison between the CMAs that the Applicants analyze in their Opposition and the 85 markets they have identified elsewhere for divestiture.[31] There is an overlap of only two counties in one New Mexico market (CMA 553) between the two lists.[32] This means that 84 of the 85 "divestiture" markets were not identified by the Applicants' methodology for further review, even though the market concentration and the concentration increase resulting from the merger would be presumably large enough to warrant antitrust concern and divestiture.[33]

The Applicants' single-minded focus on the spectrum screen also has a second implication. It may be that among markets that they have identified for further analysis, there are some (and maybe many) that raise competitive concerns because the merger would result in a very large increase in market concentration or in a highly concentrated market. But the Applicants have provided no market share data or HHI calculations for any of these markets in

[30] *See* Protective Order, DA 08-1785, WT Docket No. 08-95 (rel. Jul. 29, 2008).

[31] *Compare* Opposition at Attachment 2 *with Verizon Ex Parte*.

[32] *See* Opposition at Attachment 2, p.1 n.2. Incidentally, it appears that the Applicants have omitted "Supplement A" to their market-by-market analysis, which purports to address the competitive issues in three new overlap counties not previously identified by the Applicants.

[33] As noted above, Verizon still has not explained the cut-off criterion for singling out only these 85 markets as candidates for divestiture, and not others.

their market-by-market analysis. Instead, they content themselves with pointing to the number of participants remaining in the market after the merger without reference to their relative market shares, and thereby concluding that the merger raises no competitive concerns. While the number of remaining market participants is obviously relevant, it is no substitute for market share and concentration analysis. For this reason, Leap has called for the Commission to require the Applicants to submit CMA-level market share data for all markets in which both of them are present so that the appropriate economic analysis can be performed.[34]

Nor does the Applicants' analysis include diversion studies – if properly conducted, the true measure of the extent of rivalry among competitors in a given market. In that respect, the Applicants simply fail to respond to Leap's request for information on the data, methodology and assumptions underlying the partial studies whose sketchy results were disclosed by Dr. Carlton in his original declaration. The Applicants do not follow up on these studies at all, as if they never had been conducted.

VI. THE REDUCTION IN THE NUMBER OF THE ALREADY LIMITED CDMA ROAMING OPTIONS CANNOT BE CURED EXCEPT WITH MEANINGFUL CONDUCT RESTRICTIONS AND DIVESTITURES

In previous mergers, the Commission has said that: "competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices."[35] Unavailingly, the Applicants try to parlay the Commission's focus on retail competition into two altogether different propositions: that "roaming is not a separate product market"; and that, even if it were, the Commission does not, or at least should

[34] Leap Petition at 22.

[35] *See Verizon/RCC* at ¶ 88.

not, care about the customers in that market – the carriers who need roaming in order to service their subscribers.[36] Neither of these propositions is true, however.

The Commission has in fact already acknowledged the existence of a roaming services market. In *Cingular/AT&T*, the Commission specifically "consider[ed] the possible effect of the merger on the roaming market for those wireless telephony consumers who rely on analog service."[37] Crucially, while the Commission found in *Cingular/AT&T* that that merger would not have a serious effect on roaming markets,[38] it did so on a factual premise that the instant merger threatens to undo – the mutual need of each carrier for roaming services provided by the others. In the Commission's words:

> [E]ven the "nationwide" carriers still have holes in their licensed service areas, however, and therefore have a strong incentive to enter into roaming agreements with other carriers in order to fill in coverage gaps, compete on the basis of coverage, and thereby meet growing consumer demand for nationwide single-rate calling plans. Since the average price per minute under this type of plan is the same regardless of whether the call is initiated or received on the provider's own network or another carrier's network, carriers offering a single-rate price plan have a strong incentive to negotiate to lower roaming rates they pay to other carriers. Conversely, competition and the need to generate revenues prevent nationwide carriers from refusing to enter into roaming agreements with smaller local and regional carriers or raising the roaming rates they charge other carriers above competitive levels.[39]

The problem posed by this transaction, especially as it comes on top of other significant CMRS consolidations since *Cingular/AT&T*, is precisely this: it threatens to unravel the links of

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[36] Opposition at 46.

[37] *AT&T Wireless Services, Inc. and Cingular Wireless Corporation*, 19 FCC Rcd 21522, at ¶ 178 (2004) ("*Cingular/AT&T*").

[38] *Id*. at ¶ 178 ("No party has argued, and we do not find, that this two-to-one reduction in analog carriers will result in a significant adverse effect on the roaming market.").

[39] *Id*. at ¶ 176.

mutual need that previously were enough to allay roaming concerns. One need only look at the coverage map submitted by the Applicants to see that the acquisition of ALLTEL would fill in many of the "holes" and coverage gaps in Verizon's footprint.[40] The merged Verizon/ALLTEL entity will be so large that it can afford to ignore smaller carriers' roaming needs without fear of any meaningful retaliation in the marketplace.[41]

Nor is it fair for the Applicants to say that the Commission's exclusive focus is on retail customers. Otherwise, the Commission would not have confirmed that CMRS carriers have a Title II common carrier obligation to provide other carriers with roaming services on reasonable and nondiscriminatory terms.[42] The problem, of course, is that the Commission created significant exceptions to the automatic roaming obligation that neuter it in the very circumstances in which a dominant carrier's incentives to deny roaming would be the greatest, such as where a smaller, competing carrier has access to spectrum in the same market and in relation to growth services such as broadband data. As Leap has requested elsewhere, the

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[40] *See* Application at Exhibit 2, *filed in* WT Docket No. 08-95 (filed Jun. 13, 2008).

[41] *Cf.* European Commission, Decision 1999/287/EC – WorldCom/MCI, 1999 O.J. (L 116) 1, 22 ¶ 117 ("[t]he combination of the Internet backbone networks of WorldCom and MCI would create a network of such absolute and relative size that the combined entity would behave to an appreciable extent independently of its competitors and customers."), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:116:0001:0035:EN:PDF (last visited Aug. 26, 2008); Complaint at 19 ¶ 42 ("Whereas in a competitive environment Tier 1 [Internet backbone providers] have roughly equal incentives to peer with each other, the merged entity will be so large relative to any other IBP that its interest in providing others efficient and mutually beneficial access to its network will diminish."), *in* United States v. WorldCom, Inc., Jun. 26, 2000, *at* http://www.usdoj.gov/atr/cases/f5000/5051.pdf (last visited Aug. 26, 2008); *WorldCom, Inc. and MCI Communications Corp.*, 13 FCC Rcd 18025, at ¶ 149 (1998).

[42] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007).

Commission should review these exceptions before approving this merger.[43] But, in any event, the continuing existence of those exceptions means that the automatic roaming obligation cannot be relied upon in this proceeding to address the specific market power issues raised by this merger.

The existence of a market for wholesale roaming services is really a matter of basic competitive analysis 101. Leap has already presented detailed economic testimony demonstrating the existence of technology-specific wholesale roaming markets under the standard merger analysis.[44] In a market where Verizon and ALLTEL are the only two (or two of only three) CDMA carriers, Leap can only obtain roaming rights from a very limited number of carriers in order to provide its customers with service in that market. Not only are roaming rights from Verizon and ALLTEL substitutable products, but they are also two of the very few (and in some cases the only) suppliers of such products in that market. A merger that would reduce the number of CDMA roaming partners from three-to-two or two-to-one would create the kind of duopoly or monopoly market structure that has prompted the Commission and the antitrust authorities to step in.

And, even if retail competition were the Commission's exclusive preoccupation, anti-competitive behavior in the roaming market redounds certainly to the detriment of retail customers. The Applicants argue that they will not behave anti-competitively towards CDMA roaming partners because they do not stand to profit from such behavior. In their words:

> [E]ven if a CDMA provider were the only source of roaming in a particular market for another CDMA carrier, and that other carrier

[43] *See* Petition to Deny of Denali Spectrum LLC, et al., *filed in* WT Docket No. 08-95 (filed Aug. 11, 2008).

[44] *See* Reply Comments of Leap Wireless International, Inc. at att.A, *filed in* WT Docket No. 05-265 (filed Jan. 26, 2006). Leap hereby incorporates by reference these reply comments.

> were forced as a result to pay high per-minute roaming charges and pass those charges onto its customers in the form of high roaming prices, customers in that market would be able to choose service from another carrier in the market rather than pay the high charges. As a result, the carrier with market power would reap no benefit from its exercise of that market power.[45]

This argument is defective for three reasons. First, the Applicants have an incentive to deny or charge prohibitive prices on roaming because this would reduce competition generally from regional carriers, and thus would reduce downward pressure on prices. Second, the Applicants elsewhere admit that roaming can be a significant source of revenue.[46] Why then would the Applicants *not* use their market power to charge above-competitive roaming rates? Third, even if a subscriber were to change carriers because of high roaming costs, it would not be Verizon's loss. It would be primarily the loss of Verizon's roaming partner, and very possibly Verizon's gain. As one of the nation's largest carriers, Verizon is, after all, one of the most likely candidates to get the dissatisfied customer's business. And as for the consumers who find switching too costly or inconvenient, the large carrier will simply make a windfall profit at their expense when they roam. For Verizon, therefore, high roaming rates seem to be a "heads-you-lose, tails-I-win" proposition.

In fact, the passage from *Cingular/AT&T* that the applicants cite optimistically as evidence of the Commission's lack of concern over two-to-one reductions in roaming markets is nothing of the kind:[47]

> Although the number of nationwide carriers using TMDA will decrease from two to one as a consequence of the proposed merger (because T-Mobile has no TDMA network), we are not overly

[45] Opposition at 48.

[46] Opposition at 52 ("ALLTEL generates significant revenue from GSM roaming . . . .").

[47] Opposition at 50.

> concerned about the effect on Cingular's potential roaming partners because, like Cingular, those partners are transitioning their business from TDMA to GSM (or, in some cases, to CDMA).[48]

The Commission was "not overly concerned" in that case only because of a fact – the conversion to GSM – that is not present to allay its concerns in the instant proceeding, certainly not with respect to CDMA roaming.

The Applicants argue that roaming conditions are inappropriate because roaming is "an industry-wide subject" and "there is an open proceeding" on it "that encompasses the proposed condition."[49] But, as the Applicants also admit, this is true only where the requested condition is "non-merger-specific."[50] This is not the case here. The creation of the largest-ever mobile telephony carrier that the United States has ever seen will significantly increase that provider's willingness and ability to engage in anti-competitive behavior in the area of roaming.

A look at what is happening in the roaming marketplace today demonstrates the close link between a carrier's size and its ability to charge above-cost roaming rates, and it augurs badly for the kind of conduct that is to be expected with the further increase in size, concentration and market power that is proposed here. The examples are stark. As Leap has previously shown, the roaming rates per minute of large carriers are several times higher than their average retail rates,[51] and therefore even more times higher than their costs.

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[48] *Cingular/AT&T* at ¶ 177.

[49] Opposition at 43.

[50] *Id*.

[51] *See* Comments of Leap Wireless International, Inc. at 13, att.A p.10-13, *filed in* WT Docket No. 05-265 (filed Nov. 28, 2005). Leap hereby incorporates by reference these comments.

In another disconnect between price and costs, Verizon's roaming price is *higher* per minute as the volume of roaming increases. Economies of scale, of course, would suggest a lower price per minute with higher volumes. Verizon's own explanation of the circumstances underlying this reverse volume discount illuminates the market leverage that this deal will increase:

> [T]he roaming agreement [that Leap] has with Verizon Wireless was negotiated last year as part of a much larger property acquisition whereby Verizon Wireless purchased 24 PCS licenses and 4 operating markets from Leap. Early in the property acquisition negotiations with Verizon Wireless, Leap made it clear to Verizon Wireless it wanted to negotiate a nationwide roaming agreement as a component of the deal. Leap also requested a low nationwide roaming rate. *Verizon Wireless was reluctant to agree to such a low rate with Leap since Verizon Wireless had no need for its customers to roam on Leap's network in any of Leap's markets*. However, given Leap's representation that it was seeking only to develop an "occasional" roaming service for its customers, Verizon Wireless proposed an approach that Leap agreed to: Leap received its low requested rate, but the rate increases if Leap's average per customer usage rate increases beyond the "occasional" roaming service level.[52] (emphasis added)

This explanation demonstrates the asymmetry of need: unlike Leap, "Verizon Wireless has no need for its customers to roam on" Leap. The negotiating posture of "you need us, but we do not need you" will only become more assertive after Verizon absorbs yet another large carrier. Verizon's attitude proves conclusively that the Commission can no longer afford to rely on the carriers' mutuality of need for roaming to be unconcerned about behavior in roaming markets.

The link between size and above-cost prices is also shown by another comparison. Leap has roaming agreements with smaller carriers priced at five cents or less per minute. But

[52] *See* Reply Comments of Verizon Wireless at 11 (emphasis added), *filed in* WT Docket 05-265 (filed Jan. 26, 2006).

because of industry consolidation and elimination of the hard spectrum cap, Leap has had to rely on the national CDMA carriers to provide their customers with seamless coverage outside of Leap's service areas. In this regard, the roaming rates charged by the national CDMA carriers are much higher than the rates charged by other carriers. The difference cannot be attributable to the costs of providing one roaming minute, as it is highly unlikely that the national carriers' cost-to-produce would be greater than that of the smaller carriers with which Leap has roaming agreements. Rather, the difference is attributable to the national carriers' market power in the market for CDMA roaming services. Verizon's proposed acquisition of ALLTEL threatens to leverage that power to an alarming degree. And as consumer demand for data services increases, Verizon can be expected to exercise its increased market power in relation to data roaming as well.

The post-merger "commitments" made by Verizon are totally inadequate to cure the competitive harm that this transaction portends for roaming. Verizon proposes a two-year "grandfathering" for the rates found in ALLTEL's roaming agreements, but disconcertingly not for any other terms.[53] In any event, the ALLTEL roaming rate standstill will at best delay the problems for two years, and only with respect to ALLTEL's roaming rates. Verizon would remain free to use its new muscle post-merger in order to demand even more unreasonable terms in its own roaming agreements.

In Leap's view, nothing short of the following conditions is necessary to cure these anti-competitive effects:

- the Applicants' commitment to forego the in-market exclusion from roaming agreements;

[53] Opposition at 56 ("upon closing of the transaction, Verizon Wireless will keep the rates set forth in ALLTEL's existing agreements with each regional, small and/or rural carrier for the full term of the agreement or for two years from the closing date, which ever occurs later.").

- an extension of the automatic roaming obligations beyond voice, SMS and push-to-talk to other data services such as MMS and broadband services, and the Applicants' agreement that data roaming is also subject to reasonable and non-discriminatory requirements;[54]

- a presumption establishing that wholesale roaming rates that exceed a carrier's average retail rates costs are unreasonable;

- an expedited procedure for resolution of roaming complaints against Verizon, with a continuation of any pre-existing roaming agreement pending resolution by the Commission of a roaming complaint.[55]

The Applicants complain that the imposition of roaming conditions would discriminate against them and in favor of competitors that will not be subject to the same requirements. This misunderstands the nature of merger conditions, which is precisely to single out the merger participants. It is *their* merger that raises anticompetitive effects and it is those effects that need

[54] The Applicants challenge the Commission's jurisdiction to regulate broadband data roaming on the grounds that it is an "information service." Opposition at 62. But the Commission's jurisdiction to impose merger-approval conditions relating to "information services," including Internet-based services, is well established. *See Time Warner Inc., and America Online, Inc.*, 16 FCC Rcd 6547, at ¶¶ 319-326 (2001) (imposing open access and instant messaging conditions); *Verizon Communications Inc. and MCI, Inc.*, 20 FCC Rcd 18433, at app.G (2005) (requiring merger parties to offer naked DSL and compliance with Commission's broadband policy statement); *SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 18290, at app.F (2005) (same); *AT&T Inc. and BellSouth Corp.*, 22 FCC Rcd 5662, at app.F (2006) ("*AT&T/BellSouth*") (accepting expanded network neutrality condition). Indeed, the Commission's general jurisdiction over "information services" outside of the merger context has been confirmed by the Supreme Court, *see NCTA v. Brand X Internet Services*, 545 U.S. 967, 996 (2005), and was recently exercised by the Commission. *See Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications*, FCC 08-183, Memorandum Opinion and Order, WC Docket No. 07-52 (rel. Aug. 20, 2008).

[55] *See, e.g., General Motors Corporation, Hughes Electronics Corporation and The News Corporation Ltd*, 19 FCC Rcd 473, at app.F (2003) ("*News Corp/DIRECTV*") (imposing similar process for resolving retransmission consent and certain program access disputes); *Adelphia Communications Corp., Time Warner Cable, Inc. and Comcast Corp.*, 21 FCC Rcd 8203, at app.B (2006) (same); *News Corporation, DIRECTV Group Inc. and Liberty Media Corp.*, 23 FCC Rcd 3265, at app.B (2008) (same).

to be ameliorated if they want to consummate the transaction. The Commission has routinely imposed on merger partners conditions on matters of general industry importance, even though their competitors are not subject to them. For example, when the Commission conditioned the *News Corporation/DIRECTV* merger, it required the FOX television network and regional sports networks to observe conditions with respect to retransmission consent and program access that rival television networks and regional sports networks did not.[56] Similarly, Verizon Communications benefited when the Commission accepted an expanded network neutrality condition on the *AT&T/BellSouth* merger that did not apply to Verizon Communications.[57]

VII. APPLICANTS HAVE NOT ADDRESSED THE CONCERN THAT THE MERGER WOULD RESULT IN A DOMINANT PURCHASER IN THE U.S. MARKET FOR CDMA TECHNOLOGY AND EQUIPMENT

In its Petition to Deny, Leap raised the concern that a merger of the nation's first and third largest CDMA carriers would create a dominant purchaser in the U.S. market for CDMA technology and equipment.[58] After all, the merger would result in a carrier with at least 57% of the CDMA subscribers in North America and an even larger share of CDMA subscribers in the United States. The Applicants do not respond to this argument at all. They do, however, admit that a Verizon/ALLTEL combination would "enable [the combined firm] to negotiate lower prices for network equipment,"[59] which suggests an increase in purchasing power. Indeed, one need only look at the size of the Applicants' estimated cost savings from lower vendor pricing relative to the savings from redeploying existing equipment or elimination of duplicate

[56] *See News Corporation/DIRECTV* at app.F.

[57] *See AT&T/BellSouth* at app.F.

[58] Leap Petition at 20.

[59] Reply Declaration at 9.

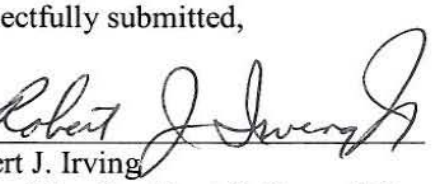
expansion plans.[60] As a result, there is enough here to warrant further inquiry into the likelihood of the competitive harm that might flow from Verizon/ALLTEL's abuse of their dominant purchaser position.

VIII. CONCLUSION

For all of these reasons, the Commission should deny the Application.

[60] *Id*. at 11 tbl.3.

Respectfully submitted,



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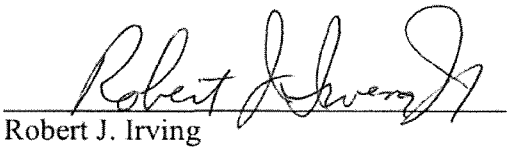
August 26, 2008

DECLARATION OF ROBERT J. IRVING

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

Executed on August 26, 2008



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