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Via ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
12th Street S.W.
Washington, D.C. 20554

Re: **Ex Parte Written Presentation**
Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC
("*Verizon/ALLTEL*"), WT Docket No. 08-95

Dear Ms. Dortch,

In the spirit of compromise, Leap Wireless International, Inc. ("Leap") proposes conditioning the merger on a market-oriented and Commission-tested mechanism for resolving roaming disputes – baseball rules arbitration. Such a condition would permit the merger to go forward while ameliorating the competitive harm threatened from it in Code Division Multiple Access ("CDMA") roaming markets.

To begin with, there should be no remaining doubt that roaming belongs squarely in this proceeding. In short, the reason why the Commission has been unwilling to impose roaming conditions in the past has been its assumption that all carriers need one another because they all have holes in their coverage.[1] But, to the extent this balance of mutual need constrained roaming conduct in the past, it will be totally unwound now. This is the first transaction submitted to the Commission that will endow its

[1] *See AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 19 FCC Rcd 21522, at ¶ 178 (2004) ("even the 'nationwide' carriers still have holes in their licensed services 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.").

proponents with near-nationwide coverage – 98.4% of the U.S. population.[2] Verizon/ALLTEL will have no incentives to enter into reasonable roaming agreements with other carriers once it achieves this level of coverage. The map submitted by the applicants demonstrates this vividly.[3] Verizon's red and ALLTEL's blue blanket the country. The areas left white revealed themselves to be mostly large bodies of water and a few sparsely inhabited regions.

Leap has proposed a number of conditions to redress these merger-specific harms, but is now prepared to propose a regime pertaining to roaming conduct that is an alternative to these proposed conditions. Central to this regime is baseball-rules arbitration. As explained further in the attached proposal, this type of dispute resolution encourages both parties to develop reasonable offers, for fear that otherwise the arbitrator would pick the other party's offer. In addition, under Leap's proposal, the carrier requesting roaming has an incentive to build out its licensed facilities: after a transition period of five years, its progress (or lack of progress) in building its systems is a relevant factor to be considered by the arbitrator in picking one or the other side in a roaming dispute. Leap offers that compromise provided that approval of the Verizon/ALLTEL transaction would be conditioned on no less than this proposal.

Respectfully submitted,

/s/
Pantelis Michalopoulos
Counsel for Leap Wireless International, Inc.

[2] Carlton Reply Declaration at 32 ("As summarized in Table 9, the merged firm's network will provide service (including roaming service) in counties that account for all but 1.6 percent of the U.S. population").

[3] Application at Exhibit 2 (copy attached).

<u>Verizon/ALLTEL</u>
<u>Roaming Conditions</u>

Verizon/ALLTEL shall comply with the following conditions to implement its automatic roaming obligations under sections 201 and 202 of the Communications Act.

I. AUTOMATIC ROAMING

- For a period of five years from the date the merger is consummated, or from the date on which already licensed but encumbered spectrum is cleared, Verizon/ALLTEL may not deny access to roaming services based upon the requesting carrier's ownership of, or access to, home market spectrum usage rights. In the case of future licenses or access to spectrum, the five years will run from the grant of such licenses or access, or from the later date on which the spectrum becomes unencumbered.

- After this transition period, Verizon will be obligated to provide roaming on reasonable and non-discriminatory terms. In evaluating roaming complaints, the Commission must take into account all factors that may bear upon reasonableness, which could include without limitation the public benefits from the requesting carrier's service and the requesting carrier's progress in building out its licenses. The evaluation will be conducted pursuant to the "baseball-style" arbitration rules described below. To be clear, Verizon may not deny roaming to a requesting carrier in areas where the requesting carrier does not have a wireless license or spectrum usage rights, in accordance with current FCC rules.

II. EFFICIENT, MARKET-BASED PROCEDURES FOR RESOLVING ROAMING DISPUTES

- Any wireless carrier will be permitted to file a complaint challenging the rates or other terms on which automatic roaming is offered to it as unreasonable or discriminatory, or challenging Verizon/ALLTEL's refusal to provide automatic roaming altogether. These complaints will be subject to the following procedures:

  (1) ***Referral to Arbitration.*** Roaming complaints received by the Commission will be referred to a qualified arbitrator appointed in accordance with the expedited commercial arbitration rules of the American Arbitration Association ("AAA"). Complaints will be subject to "baseball rules," whereby each party submits its best and final offer (along with supporting material) and the arbitrator is bound to select the more reasonable one. In assessing reasonableness, the arbitrator is instructed to apply the general provisions of sections 201 and 202. During the transition period set forth above, Verizon/ALLTEL will be barred entirely from denying home market roaming. In evaluating any roaming dispute arising from post-transition conduct, the arbitrator will be required to assess all factors relevant to the reasonableness inquiry, which could include without limitation the public benefits from the requesting carrier's service and the requesting carrier's progress

in building out its licenses. The parties' submissions to the arbitrator, as well as the arbitrator's award, shall be kept confidential.

(2) ***De Novo Commission Review.*** Any party aggrieved by the arbitrator's award will be allowed to petition the Commission for *de novo* review of the award. Such a petition would have to be filed within 30 days of the date of the award. The Commission will review the same evidence presented to the arbitrator and select the more reasonable of the final offers put forward by the parties. By providing for *de novo* review, the mandatory arbitration process meets all of the conditions of the Administrative Procedure Act and other statutory requirements. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 177191, 17858, ¶ 109 n.498 (2007).

(3) ***Standstill During Complaint and Pending Review.*** Pending resolution of the complaint before an arbitrator, Verizon/ALLTEL will be required to provide automatic roaming to the complaining carrier under the terms of any expired roaming agreement. Pending any Commission review of an arbitrator's award, Verizon/ALLTEL will be required to continue providing automatic roaming: (a) under the terms of any new roaming agreement awarded by the arbitrator, or (b) under the terms of the expired roaming agreement between the parties in the case of a petition for review of an arbitrator's decision that the defending carrier need not provide automatic roaming.[1]

(4) ***True-up.*** To the extent practicable, the terms of any new roaming agreement awarded by the arbitrator, or by the Commission on review, will be made retroactive to the expiration date of the previous roaming agreement. The complaining carrier would make an additional payment to Verizon/ALLTEL (or vice versa) in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's or Commission's award and the amount actually paid under the terms of the expired contract during the period of arbitration and any Commission review.

- The Commission has imposed mandatory "baseball rules" or "final offer" arbitration in other contexts on the ground that the process reduces the incentive of anticompetitive conduct, promotes market-based outcomes, and "push[es] parties towards agreement prior to a complete break down in negotiations." *General Motors Corp. and Hughes Elecs. Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 553, ¶ 174 (2003); *see also Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Adelphia Communications Corp. to Time Warner Cable Inc.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8274, ¶ 156 (2006).

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[1] This measure will avert the risk of temporary foreclosure, *i.e.* that most of the harm has been done by the time the arbitrator makes its award or the Commission decides an appeal. *See, e.g.*, *General Motors Corp. and Hughes Elecs. Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, at ¶¶ 175, 221 (2003).

Indeed, the Commission has recognized that "[f]inal offer arbitration has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator.' *General Motors*, *supra*, at ¶ 174. The mandatory arbitration rules adopted in these other contexts have successfully fulfilled the Commission's objectives in similar circumstances and would achieve the same result here.

- Examples of the arbitration procedure:

(1) *conduct during transition period*. Verizon/ALLTEL demands 10 cents per minute for roaming in all areas. The complainant offers 5 cents per minute. The arbitrator may not "split the baby" and come up with a rate of 7.5 cents per minute. Rather, she is bound to pick the more reasonable of the two offers.

(2) *conduct after transition*. Verizon/ALLTEL denies roaming altogether in the complainant's home markets and demands 10 cents a minute outside those markets. The complainant offers 5 cents a minute both within and outside the home markets. Again, the arbitrator must pick the more reasonable of the two offers.

In both cases, the procedure disciplines both parties, constraining them to be reasonable, for fear that otherwise the arbitrator will favor the other party's offer. In that respect, the procedure tends to be replicate the workings of market forces in a competitive market.

Exhibit 2

WA
MT
ND
MN
ME
ID
OR
SD
WI
VT
MI
NH
WY
NY
MA
IA
NE
CT
RI
PA
OH
NJ
NV
UT
IL
IN
CO
KS
MO
WV
DC
DE
KY
VA
CA
TN
OK
NC
AR
AZ
NM
SC
MS
AL
GA
TX
LA
FL

VZW and RCC coverage

Alltel's coverage in VZW/RCC's uncovered areas

Source: American Roamer as of April 2008