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October 27, 2008

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

Via ELECTRONIC FILING

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

**REDACTED – FOR PUBLIC INSPECTION**

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

Dear Ms. Dortch,

Please find attached a redacted version of the Comments of Leap Wireless International, Inc. on the confidential submissions of the applicants in the *Verizon/ALLTEL* proceeding. Pursuant to the Protective Order, DA 08-1718 (rel. Jul. 29, 2008), two copies of this confidential filing is being submitted to the Secretary's Office. A confidential, non-redacted version of this filing is being submitted separately under the Protective Order.

Respectfully submitted,

Pantelis Michalopoulos /Dan

Pantelis Michalopoulos
*Counsel for Leap Wireless International, Inc.*

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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Federal Communications Commission
Office of the Secretary

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| In re Applications of<br><br>ATLANTIS HOLDINGS LLC, Transferor,<br><br>and<br><br>CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, Transferee<br><br>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 |

## REDACTED – FOR PUBLIC INSPECTION*

## COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC. ON APPLICANTS' CONFIDENTIAL SUBMISSIONS

Leap hereby responds to the applicants' confidential submissions regarding the benefits that purportedly flow from this transaction and its associated lack of anti-competitive effects. For all of the applicants' supposed insistence that this proceeding touch only on "merger-specific" matters, their claimed benefits are lacking precisely in this characteristic: they lack a plausible nexus to the transaction. Such a nexus continues to be elusive even now, after the applicants have responded to some pointed questions from the Commission about these claims. Verizon cannot even say by how many months the merger will accelerate the transition of ALLTEL's system to EvDO Rev A. This circumspection is not difficult to understand. The

* *See* Protective Order at ¶ 14, DA 08-1718, *in* WT Docket No. 08-95 (rel. Jul. 29, 2008). A non-redacted, version of this filing containing Confidential Information is being submitted pursuant to this Protective Order.

facts suggest that the merger will not accelerate the transition that ALLTEL had already announced, and may in fact slow it down. With respect to LTE, the applicants' response confirms Leap's suspicions, expressed in its reply: Verizon says it will use its own (not ALLTEL's) frequencies faster, simply because it will be able to use ALLTEL towers in certain markets, as if it is not able to do so today, at minimal cost. On October 22, 2008, Leap made a compromise proposal setting forth a conditioning regime that, it believes, will alleviate these concerns, and Leap respectfully requests its adoption by the Commission.[1]

Even more important, Verizon's submissions to the Commission are inadequate to assuage concerns about the merger's anticompetitive effects. Instead, they strongly suggest that these anticompetitive effects will in fact transpire. As a principal benefit of the transaction, the applicants' economists now tout roaming savings – savings that will result from the fact that Verizon and ALLTEL will no longer need to roam on other carriers' networks. It is this complete self-sufficiency that threatens to make Verizon's conduct towards roaming partners completely unfettered, necessitating remedial action.

Nor is Verizon's case helped by its economists' argument that roaming is of little concern because roaming prices have declined to an average of five cents per minute. <u>Verizon cannot be heard to discount roaming based on the competitive rate that others charge, when it charges many times that rate</u>. Verizon will doubtless be able and willing to charge even more after its combination with ALLTEL affords it the unprecedented luxury of nationwide coverage.

[1] *See* Letter from Pantelis Michalopoulos, Counsel for Leap Wireless International, Inc., to Marlene H. Dortch, Secretary, FCC, *filed in* WT Docket No. 08-92 (filed Oct. 22, 2008).

## I. THE MERGER-SPECIFIC BENEFITS OF THE PROPOSED TRANSACTION REMAIN UNSUBSTANTIATED

The applicants' submissions originally laid great store in two benefits said to flow from the merger: faster transition of ALLTEL's network to EvDO Rev.A, and easier deployment of LTE technology by Verizon. Both remain unsubstantiated.

### A. ALLTEL appears capable of converting all of its EvDO Rev.0 sites to Rev.A on its own.

For their first claim, the applicants relied mostly on ALLTEL's public announcement that it would convert "portions of 18 markets by year end 2008" to EvDO Rev.A.[2] By contrast, the applicants claimed, the proposed merger would "permit [EvDO Rev.A] deployment to occur much more rapidly and broadly."[3] Specifically, Verizon stated 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 closing."[4] As Leap demonstrated in its Reply, however, this is an apples-to-oranges comparison that sheds little light on whether EvDO Rev.A deployment would be accelerated at all, or whether it might actually slow down the pace of conversion.[5] The comparison is especially inconclusive because of what ALLTEL actually said – that it would roll out EVDO Rev. A to "18 market areas *and dozens of cities*."[6]

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[2] Joint Opposition of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC at 11, *filed in* WT Docket No. 08-95 (filed Aug. 19, 2008) ("Joint Opposition").

[3] *Id.* at 9-10.

[4] *Id.* at 11.

[5] Reply of Leap Wireless International, Inc. at 7-8, *filed in* WT Docket No. 08-95 (filed Aug. 26, 2008) ("Leap Reply Comments").

[6] News Release, *ALLTEL Wireless Rolls Out Faster Broadband Network* (Jun. 23, 2008), *available at* http://www.alltel.com/ (last visited Oct. 15, 2008) ("*ALLTEL June 23 News Release*").

The vagueness of the applicants' claim naturally prompted a question from the Commission: "Estimate if possible, by how many months the merger would speed the implementation of EvDO Rev.A in ALLTEL's markets?"[7] The question was pointed, but the applicants' answer was evasive. The applicants, it seems, no longer base their claim on more rapid deployment of EvDO Rev.A. They now claim that "[redacted]"[8] The applicants conclude that ALLTEL "[redacted]"[9] Interestingly, the applicants no longer claim that if Verizon were to convert all of ALLTEL's EvDO Rev.0 sites to Rev.A, it would result in 82 percent of ALLTEL's POPs having Rev.A service. Rather, their response to the Commission's question indicates that only [redacted] percent of ALLTEL's total licensed POPs will receive Rev.A service at the end of the intended conversion.[10]

The [redacted] at odds with its public announcement that "18 market areas and dozens of cities" were only the "initial rollout" of Rev.A.[11] [redacted]? One explanation that suggests itself is that ALLTEL

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[7] Letter from James D. Schlichting, FCC to Kathleen Q. Abernathy, Counsel for Atlantis Holdings LLC, and Nancy J. Victory, Counsel for Verizon Wireless, General Information Request at II.2, *in* WT Docket No. 08-95 (dated Sep. 11, 2008) ("Information Request").

[8] Letter from Kathleen Q. Abernathy, Counsel for Atlantis Holdings LLC, and Nancy J. Victory, Counsel for Verizon Wireless at 6, *filed in* WT Docket No. 08-95 (filed Sep. 17, 2008) ("Response to Information Request").

[9] *Id.* at 6.

[10] *Id.* at 7.

[11] *See ALLTEL June 23 News Release.*

[redacted]. This circular explanation – the merger will accelerate the transition because [redacted] – is not enough to establish a merger-specific benefit.

Equally important, if the applicant's claim is [redacted] because of the current financing environment, the argument is not convincing for a simple reason. According to ALLTEL, it has been "fund[ing] substantially all of its capital expenditures [(including network upgrades)] through internally generated funds"; indeed, all of its 2008 capital outlays "are expected to be funded primarily from internally generated funds."[12] This indicates that ALLTEL does not need Verizon's "technical expertise" or Verizon's "greater financial capabilities" to upgrade its network to EvDO Rev.A. ALLTEL's standalone transition capabilities are best judged from the transition pace it achieved in 2008 without the need to borrow – [redacted] percent of its total EvDO POPs, or [redacted] percent of its total licensed POPs, were converted to Rev.A in all of three months. If the past is an indication, ALLTEL appears fully capable of converting all of its EvDO Rev.0 sites to Rev.A within the next year, which means, again, that Verizon's "promise" to do the same within a year of closing is not a merger-specific benefit.

To make its response even more unsatisfactory, Verizon does not answer the crux of the Commission's question – just how much time the merger will save. Verizon's response to the Commission's question: "the Applicants cannot specify the number of months the merger would accelerate deployment."[13]

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[12] ALLTEL Corporation, Form 10-Q, at 29 (Aug. 13, 2008).

[13] *Id.* at 7.

## B. The Claimed LTE Deployment Savings Are Based on a Faulty Cost Comparison

With respect to LTE deployment, the applicants' original claim suffered from an equally mysterious disconnect. Verizon plans to deploy LTE on its recently licensed 700 MHz frequencies. This leaves it unclear how the combination with ALLTEL, a carrier with no 700 MHz spectrum, would facilitate Verizon's plan. In its petition to deny and its reply, Leap questioned whether this was a merger-specific benefit. Again the tenuous connection between merger and benefit prompted a question from the Commission: "Explain, in detail, how Verizon Wireless's acquisition of ALLTEL's facilitates will speed the deployment of LTE. How much faster will the deployment increase as a result of the merger?"[14] In response, Verizon offers this explanation:

> Extending LTE into some areas Verizon Wireless currently does not serve would involve adding cells and possibly additional switching locations to support those markets, along with all the associated network backhaul/facilities. Given the timeframes required to obtain required zoning approvals, complete the required building and tower construction, and add the network elements and facilities, full deployment in areas not yet covered by Verizon Wireless' network could lag those areas where the company already has facilities. However, ALLTEL has network assets in areas that Verizon Wireless currently does not cover. Verizon Wireless can leverage those assets to more easily and rapidly deploy LTE without the delays associated with building facilities from scratch.[15]

Verizon's explanation, however, is based on a faulty comparison. The proper cost comparison is not between buying ALLTEL and building facilities from scratch. Rather, the proper comparison is between buying ALLTEL and the costs of getting access to existing facilities in the ALLTEL-only areas through some other means, such as by leasing tower space

[14] Information Request at II.3.

[15] Response to Information Request at 8-9.

and other facilities from third parties (possibly from ALLTEL itself) and/or exercising statutory pole attachment rights.[16] These would be low-cost alternatives, particularly when compared to a multi-billion dollar merger. The easy availability of a much less expensive alternative for LTE deployment in the ALLTEL-only areas means that this benefit is not merger-specific either.

## II. THE ROAMING SAVINGS CLAIMED BY THE APPLICANTS AS A BENEFIT OF THE MERGER IS FURTHER PROOF THAT THE MERGED ENTITY WILL HAVE NO INCENTIVE TO ENTER INTO ROAMING AGREEMENTS

A principal benefit of the merger that the Applicants' have highlighted is the roaming costs that they will save because of the merger, which are estimated at $[redacted].[17] Those savings result from the plain fact that the combined Verizon/ALLTEL will not need to roam on other carriers' networks after the merger. This claim dovetails precisely with the point that Leap has made all along – that Verizon/ALLTEL will no longer need roaming as a result of the merger.[18] 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.[19] 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 proponents with near-nationwide coverage – 98.4% of the U.S.

[16] *See* Leap Reply Comments at 8-9.

[17] Reply Declaration of Dennis Carlton, Allan Shampine and Hal Sider at 5-7, *filed in* WT Docket No. 08-95 (filed Aug. 19, 2008) ("Carlton Reply Declaration").

[18] Leap Reply Comments at 18-19.

[19] *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.").

population.[20] Verizon/ALLTEL will have no incentives to enter into reasonable roaming agreements with other carriers once it achieves this level of coverage.[21] The map submitted by the applicants demonstrates this vividly.[22] 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.

Nor is Verizon's case helped by its economists' argument that roaming is of little concern because roaming prices have declined to an average of five cents per minute.[23] This is true of small carriers. In Leap's experience, it is not true of large carriers such as Verizon. In the roaming proceeding, Leap has submitted evidence that the average roaming rate it is charged by large carriers is $0.28 per minute while the average roaming rates charged by smaller carriers are significantly less.[24] Many of Leap's agreements with small carriers do indeed provide for a rate in the neighborhood of five cents per minute. Alas, this is a far cry from the roaming rates Leap must pay large carriers. Verizon's economists also note that typical roaming arrangements "may incorporate volume discounts,"[25] *i.e.*, whereby the price per minute decreases as the

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[20] 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").

[21] *Cf.* 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 is 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 Oct. 15, 2008).

[22] Application at Exhibit 2.

[23] Carlton Reply Declaration at 29-30.

[24] Irving Declaration at ¶ 5, *filed in* WT Docket No. 05-265 (Nov. 26, 2005).

[25] Carlton Reply Declaration at 32.

number of roaming minutes increases. In contrast, Verizon has managed to negotiate a roaming agreement with Leap that contains a "reverse" volume discount, *i.e.* whereby the price per minute increases as the number of roaming minutes increases. The reason Verizon was able to extract such an atypical provision from Leap is telling: "Verizon Wireless had no need for its customers to roam on Leap's network in any of Leap's markets."[26] Allowing Verizon to acquire ALLTEL would only further decrease its need for roaming arrangements with other carriers, and thus enable the combined entity to impose even more unreasonable prices and terms for roaming on its network.

This is another reason why the commitment offered by Verizon to merely preserve the rates in ALLTEL's roaming agreements for two years is wholly inadequate to address the effects of the merger on roaming. The newly emboldened and self-sufficient Verizon/ALLTEL will have reduced incentives to negotiate reasonable terms for roaming on all parts of its combined network, including the non-ALLTEL portions. The proffered commitment does nothing to address this.

Respectfully submitted,

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[26] Reply Comments of Verizon Wireless at 11, *filed in* WT Docket No. 05-265 (Jan. 26, 2006).

## CERTIFICATE OF SERVICE

I, Chung Hsiang Mah, hereby certify that on October 27, 2008, I caused true and correct copies of the foregoing to be served on the following, in accordance with Protective Order, DA 08-1718 (rel. Jul. 29, 2008):

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