

DOCKET FILE COPY ORIGINAL FILED/ACCEPTED

DEC 10 2008

Federal Communications Commission  
Office of the Secretary

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 08-95
	)	
Applications of Cellco Partnership d/b/a	)	File Nos. 0003463892, <i>et al.</i> , ITC-T/C-
Verizon Wireless and Atlantis Holdings LLC	)	20080613-00270, <i>et al.</i>
	)	
For Consent To Transfer Control of Licenses,	)	
Authorizations, and Spectrum Manager and	)	
<i>De Facto</i> Transfer Leasing Arrangements	)	
	)	
and	)	
	)	File Nos. ISP-PDR-20080613-00012
Petitions for Declaratory Ruling that the	)	
Transaction is Consistent with Section	)	
310(b)(4) of the Communications Act	)	

**PETITION FOR RECONSIDERATION**

**CHATHAM AVALON PARK  
COMMUNITY COUNCIL**  
8441 South Cottage Grove  
Chicago, Illinois 60619

*By*

No. of Copies rec'd 011  
List ABCDE

Vernon Ford, Jr., Esq.  
3234 W. Washington St.  
Chicago, Illinois 60624

*Of Counsel*

Aaron Shainis, Esq.  
Shainis & Peltzman, Chartered  
1850 M Street, N.W.  
Washington, D.C. 20036  
(202) 293-0011

December 10, 2008

**ORIGINAL**

## SUMMARY

In the *Verizon-Alltel Order*, the Commission, contrary to its precedent and without supporting analysis, permitted Verizon Wireless to demonstrate its foreign ownership qualifications under Section 310(b)(4) of the Communications Act using registered and beneficial owners' street addresses of record, an approach that the Commission has expressly, definitively, and consistently rejected for everyone but Verizon Wireless. In so doing, the Commission applied to Verizon Wireless a different and far more permissive standard for what constitutes foreign ownership under Section 310(b) of the Communications Act than it imposes on socially disadvantaged businesses and other small business applicants. Instead of making this new standard available to all applicants generally, including socially disadvantaged businesses, the Commission has applied this special policy only to Verizon Wireless. Yet the Commission has cited no evidence in the record to justify exempting Verizon Wireless from those standards by which its competitors must abide.

Petitioner CAPCC, a community based organization with a long and proud history promoting the growth and economic development of the African-American and small business communities, does not object to liberalizing the Commission's interpretation of Section 310(b). It does object, however, a special rule for Verizon Wireless, particularly when the Commission recently denied any such relief to socially disadvantaged businesses. It also objects to the Commission's unexplained refusal to impose a condition including a right of first negotiation for socially disadvantaged businesses for divested Verizon-Alltel assets. These small businesses could provide a spur for enhanced service to Petitioner's members and their communities. Consequently, it is important to Petitioner to ensure that the Commission considers compelling diversity goals in reaching its decisions and that the Commission does not privilege behemoths

like Verizon Wireless by granting them shortcuts that are not also available to socially disadvantaged businesses.

Here, the Commission not only has rejected without explanation a unique opportunity to advance compelling statutory and policy goals of ownership diversity, but has granted Verizon Wireless special privileges to enhance Verizon Wireless's access to capital markets that the Commission denies to socially disadvantaged businesses and other Verizon Wireless competitors. Petitioner submits that the Commission failed to justify (and cannot justify) its application of a special interpretation of Section 310(b) to Verizon Wireless. Consequently, on reconsideration the Commission therefore must either (1) obtain from Verizon Wireless a statistically valid sample survey establishing the citizenship based on direct and indirect ownership of the shareholders of Verizon Wireless's constituent partners and demonstrating eligibility for a Section 310(b)(4) public interest determination based upon the multilevel analysis that the Commission requires from other applicants or (2) expressly acknowledge that socially disadvantaged businesses likewise may use Verizon Wireless's "registered address" standard as the sole test for determining the citizenship of their potential investors under Section 310(b) for all services. Moreover, the Commission must either explain in light of its stated policies and statutory obligations, its rejection of CAPCC's proposal for a divestiture condition, including a right of first negotiation for socially disadvantaged businesses or, in the alternative, adopt measures or conditions that mitigate the preclusive effect of its *Verizon-Alltel Order* and the resulting massive consolidation on socially disadvantaged businesses.

# TABLE OF CONTENTS

	Page
SUMMARY .....	i
I. The Commission Provided No Justification for Its Rejection of CAPCC's Proposal to Require a Divestiture Condition That Includes a Right of First Negotiation for Socially Disadvantaged Businesses.....	3
II. The Commission Erred by Allowing Verizon Wireless, Without Supporting Analysis and Contrary to Precedent, to Rely on Shareholder Addresses in its 310(b) Showing.....	7
A. The Commission's Approval of Verizon Wireless' Foreign Ownership Showing Contradicts Established Policy and Precedent, Giving Rise to an Obligation for the Commission to Explain the Reasons for Its Departure from Precedent.....	7
B. The Commission Did Not Properly Distinguish América Móvil.....	13
C. The Commission Improperly Relied on the WWOR-TV Decision and the Mobile Satellite Ventures Decisions as "Precedents" for the Use of Shareholder Addresses "On a Fact-Specific, Case-by-Case Basis.".....	16
III. Conclusion.....	24

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 08-95
	)	
Applications of Cellco Partnership d/b/a	)	File Nos. 0003463892, <i>et al.</i> , ITC-T/C-
Verizon Wireless and Atlantis Holdings LLC	)	20080613-00270, <i>et al.</i>
	)	
For Consent To Transfer Control of Licenses,	)	
Authorizations, and Spectrum Manager and	)	
<i>De Facto</i> Transfer Leasing Arrangements	)	
	)	
and	)	
	)	File Nos. ISP-PDR-20080613-00012
Petitions for Declaratory Ruling that the	)	
Transaction is Consistent with Section	)	
310(b)(4) of the Communications Act	)	

To: The Secretary  
Office of the Secretary  
Federal Communications Commission

**PETITION FOR RECONSIDERATION**

Chatham Avalon Park Community Council (“Petitioner” or “CAPCC”), by its attorneys and pursuant to Section 1.106 of the Commission’s rules, hereby petitions for reconsideration of the Commission’s order granting the above-captioned applications (collectively, the “Merger Applications”) for Commission authority for the transfer of control of the licenses, authorizations, and spectrum manager leasing arrangements held or controlled by Alltel Corporation and Atlantis Holdings, LLC to Cellco Partnership d/b/a Verizon Wireless (“Verizon Wireless”).<sup>1</sup> There are two reasons for reconsideration. First, Petitioner objects to the

---

<sup>1</sup> See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258 (rel. Nov. 10, 2008) [hereinafter “*Verizon-Alltel Order*”].

Commission's inexplicable and entirely unexplained squandering of a unique opportunity to expand participation of socially disadvantaged businesses in telecommunications at a time when economic conditions and capital market practices are squeezing out diversity and tilting the playing field toward behemoths like Verizon Wireless as never before. Second, Petitioner objects to the special treatment accorded to Verizon Wireless. The Commission not only has permitted Verizon Wireless to ignore years of precedent specifying how a telecommunications carrier must assess the citizenship of its owners under Section 310(b) of the Communications Act,<sup>2</sup> but has let Verizon Wireless flout established policy at the same time the Commission has denied similar relief to small and disadvantaged businesses. Because the Commission failed to provide a reasoned explanation for this striking departure from established policy and precedent, as well as its unequal treatment of Verizon Wireless and small and socially disadvantaged businesses, the Commission's approval of Verizon Wireless' foreign ownership showing was arbitrary and capricious and cannot withstand judicial review.

CAPCC is a community-based organization located in and around Chicago, Illinois, with hundreds of members who are consumers of telecommunications services, some of which are offered by Verizon Wireless. CAPCC has a long and proud history of advocating for our local citizens and a special interest in promoting the growth and economic development of the African-American and small business communities. The increasing consolidation in the telecommunications industry disserves Petitioner and its members by producing fewer competitive services at higher consumer prices. While Petitioner is concerned about industry consolidation in general, in light of its interest in economic development and business activity, Petitioner is particularly concerned when large entities have access to sources of capital that the

---

<sup>2</sup> 47 U.S.C. § 310(b).

Commission closes off to smaller businesses and socially disadvantaged businesses that seek to compete with them, especially when the Commission, as in the *Verizon-Alltel Order*, not only refuses to take obvious steps to rectify barriers to entry but also makes special exceptions for a large company like Verizon Wireless that it denies to socially disadvantaged businesses.

Petitioner submits that the Commission failed to justify (and cannot justify) adopting a special interpretation of Section 310(b) that applies only to Verizon Wireless. Consequently, on reconsideration the Commission therefore must either (1) obtain from Verizon Wireless a statistically valid sample survey establishing the citizenship of the shareholders of Verizon Wireless' constituent partners and demonstrating eligibility for a Section 310(b)(4) public interest determination based upon the multilevel analysis that the Commission requires from other applicants; or (2) expressly acknowledge that socially disadvantaged businesses likewise may use Verizon Wireless' "registered address" standard as the sole test for determining the citizenship of their potential investors under Section 310(b) for all services. Moreover, the Commission must either explain, in light of its stated policies and statutory obligations, its rejection of CAPCC's proposal for a divestiture condition including a right of first negotiation for socially disadvantaged businesses or, in the alternative, adopt other measures or conditions that mitigate the preclusive effect of its *Verizon-Alltel Order* and the resulting massive consolidation on socially disadvantaged businesses.

**I. The Commission Provided No Justification for Its Rejection of CAPCC's Proposal to Require a Divestiture Condition That Includes a Right of First Negotiation for Socially Disadvantaged Businesses.**

In its *Verizon-Alltel Order*, the Commission failed to articulate any basis for rejecting CAPCC's amply supported proposal to impose a condition granting a right of first negotiation for divested Verizon-Alltel properties to SDBs. Instead, after alluding to CAPCC's proposal in a single sentence, the Commission stated only, without explanation, that "we decline to impose

specific conditions regarding the potential acquirers of and methods of selling the Divestiture Assets.”<sup>3</sup>

Under the “arbitrary and capricious” standard of judicial review, an agency at the least must “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.”<sup>4</sup> Here, the Commission has failed to offer any explanation whatsoever for its rejection of CAPCC’s proposal, much less provide a reasoned analysis to explain how rejection of the condition comports with the Commission’s statutory mandate to increase diversity of ownership in telecommunications, the Commission’s recent reliance upon similar preferences in its public interest analysis in the *XM-Sirius Order*, and the Commission’s own recognition of a marked lack of minority ownership in the industry at all levels. Particularly now that capital markets – largely inaccessible to SDBs at any time – have become even more hostile to new entrants and underrepresented groups, CAPCC submits that the Commission’s unexplained rejection of an alternative that its stated policies and statutory directives strongly support constitutes arbitrary agency action.

In its Petition to Deny and in its Reply, CAPCC demonstrated the benefits of granting a first-refusal right for SDBs in terms of the Commission’s stated policies and the statutory objective of increasing diversity of ownership of telecommunications businesses, as expressed in Sections 257, 309(i), and 309(j) of the Communications Act. In recognition of Congressional directives and its compelling interest in avoiding a system of racial exclusion, the Commission

---

<sup>3</sup> *Verizon-Alltel Order*, ¶ 162.

<sup>4</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

has taken some steps to attempt to increase minority ownership in the telecommunications industry and rectify discrimination in the capital markets.<sup>5</sup>

Despite these and other efforts, however, the level of minority and socially disadvantaged ownership in the telecommunications industries remains extraordinarily low, and the Commission has fallen far short of its statutory objectives and its own policy goals in this area. The telecommunications industry is extremely capital intensive. Only well-financed companies win FCC auctions or acquire FCC-regulated businesses. Minority-owned businesses, therefore, face a distinct disadvantage because discrimination hinders their ability to raise capital and thus establishes a significant barrier to entry. The Commission's regulatory policies passively support this discrimination and continue to hinder socially disadvantaged entrepreneurs' ability to enter the telecommunications industry. Ongoing, massive consolidation, approved by the Commission, only reinforces the barriers that prevent SDBs from participation in those industries in which the Commission regulates ownership and, through its auction process, entrance by new competitors.

In this proceeding, the Commission had both the authority and the unique opportunity to combat discrimination and encourage diversity of ownership in the telecommunications industry by adopting the condition CAPCC proposed. The Commission has recognized the public interest benefits of similar preferences as recently as this summer, in the *XM-Sirius Order*. In that order,

---

<sup>5</sup> For example, the Commission has awarded bidding credits for auctions of spectrum to smaller businesses qualifying as designated entities. See 47 C.F.R. § 1.2110. Also, in 2003, the Commission established the "Advisory Committee for Diversity in the Digital Age," charged with making recommendations to the Commission designed to enhance the ability of minorities and women to participate in telecommunications industries. See *Chairman Powell Announces Intention to Form a Federal Advisory Committee to Assist the Federal Communications Commission in Addressing Diversity Issues*, Public Notice (rel. May 19, 2003); see also *Advisory Committee for Diversity in the Digital Age*, [www.fcc.gov/DiversityFAC/welcome.html](http://www.fcc.gov/DiversityFAC/welcome.html) (last visited Dec. 8, 2008).

the Commission granted the application for XM and Sirius to merge, and based that grant, in part, on the combined entity's commitment to make four percent of channel capacity available to entities under minority control.<sup>6</sup> The Commission's specific finding that this commitment addressed diversity concerns presented by the merger in a manner "consistent with the Commission's stated goals to promote diversity"<sup>7</sup> allowed the Commission to conclude that grant of the XM-Sirius merger application would serve the public interest. Grant of a right of first negotiation to SDBs for assets to be divested in this transaction thus would have comported fully with the Commission's policies, its prior practices, and its statutory obligations. Instead, the *Verizon-Alltel Order* gave no explanation for rejecting CAPCC's proposal and, indeed, gave Verizon Wireless indirect assurance that it need not even consider ways to encourage prospective SDB purchasers of the divested assets if Verizon Wireless should find doing so to be inconvenient.<sup>8</sup> Given that the Commission has a compelling interest in ending patterns and practices that prevent SDB participation in the telecommunications marketplace and expanding ownership opportunities before the era of consolidation completely ends, the Commission's failure even to provide any reasoned explanation for rejecting the CAPCC proposal is unfathomable and, CAPCC submits, constitutes arbitrary and capricious agency action.

---

<sup>6</sup> *Applications for Consent to Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc. to Sirius Satellite Radio Inc.*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, FCC 08-178 (rel. Aug. 5, 2008), ¶¶ 134-35.

<sup>7</sup> *Id.*, ¶ 135.

<sup>8</sup> "We encourage Verizon Wireless to consider and implement mechanisms to assist . . . small businesses and businesses owned by minorities or socially disadvantaged groups in acquiring the Divestiture Assets and/or accessing spectrum, *to the extent possible.*" *Verizon-Alltel Order*, ¶ 162 (emphasis added).

**II. The Commission Erred by Allowing Verizon Wireless, Without Supporting Analysis and Contrary to Precedent, to Rely on Shareholder Addresses in its 310(b) Showing.**

“Agencies are free to change course as their expertise and experience may suggest or require, but when they do so they must provide a ‘reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’”<sup>9</sup> In the *Verizon-Alltel Order*, however, the Commission failed to provide a reasoned analysis of its decision to allow Verizon Wireless to presume citizenship based on registered and beneficial owners’ addresses of record. The Commission did so despite CAPCC’s demonstration that, in so doing, the Commission applied an entirely different and far more liberal definition of what constitutes foreign ownership under Section 310(b) than it applies to small and socially disadvantaged businesses and other entities that compete with Verizon Wireless’ media and telecommunications businesses. Therefore, in issuing the *Verizon-Alltel Order* and granting special procedures and a special statutory interpretation applicable only to Verizon Wireless, the Commission not only acted arbitrarily and capriciously but also contrary to settled law.

**A. The Commission’s Approval of Verizon Wireless’ Foreign Ownership Showing Contradicts Established Policy and Precedent, Giving Rise to an Obligation for the Commission to Explain the Reasons for Its Departure from Precedent.**

By departing from precedent, the Commission incurred an obligation to explain its change in policy. Approval of Verizon Wireless’ reliance on shareholder addresses to meet its Section 310(b)(4) showing cannot be reconciled with the Commission’s precedent for calculating foreign ownership, including the *América Móvil* decision discussed in Section II.B.<sup>10</sup> Moreover,

---

<sup>9</sup> *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (quoting *Greater Boston Television Corp. v. FCC*, 44 F.2d 841, 852 (D.C. Cir. 1970)).

<sup>10</sup> See generally *In re Verizon Commc’ns Inc. and América Móvil, S.A. DE C.V.*, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195 (2007) [hereinafter “*América Móvil*”].

approval of Verizon Wireless' limited showing cannot be reconciled with the Commission's Report and Order and Third Further Notice of Proposed Rulemaking in MB Docket No. 07-294 ("*Diversity Order*"), now on reconsideration,<sup>11</sup> which denied far more modest relaxations of Section 310(b)(4) even for the priority goal of encouraging market entry by socially disadvantaged businesses and other small businesses.<sup>12</sup> "The law that governs an agency's significant departure from its own prior precedent is clear. The agency cannot do so without explicitly recognizing that it is doing so and explaining why."<sup>13</sup> Accordingly, the Commission's inconsistent treatment of Verizon Wireless vis-à-vis its prior treatment of Verizon Wireless' competitors gave rise to an obligation for the Commission to recognize and provide a reasoned explanation for its apparent inconsistency.

Under established Commission policy, when evaluating an applicant's foreign ownership for purposes of Section 310(b)(4), the Commission considers "all the relevant ownership interests up the vertical ownership chain including 'even small investments in publicly traded securities.'"<sup>14</sup> The Commission determines the principal place of business, nationality, or "home market" of underlying investors through a multi-level analysis.<sup>15</sup> As the Commission's *Foreign*

---

<sup>11</sup> *In re Promoting Diversification of Ownership in the Broad. Servs.*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5949 ¶ 77 (2008), *recon. pending* [hereinafter "*Diversity Order*"].

<sup>12</sup> CAPCC Petition to Deny at 24-27 (filed Aug. 11, 2008).

<sup>13</sup> *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989).

<sup>14</sup> *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, 22625 (IB 2004) [hereinafter "*Foreign Ownership Guidelines*"] (citing *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23941 ¶ 115 (1997) [hereinafter "*Foreign Participation Order*"]).

<sup>15</sup> *América Móvil*, 22 FCC Rcd at 6217 ¶ 49 & n.146 (citing *Foreign Participation Order*, 12 FCC Rcd at 23941 ¶ 116).

*Ownership Guidelines* and the instructions to the Commission's application forms make clear, the determination of an investor's Section 310(b)(4) status under existing Commission policy requires, among other things, analysis of whether a U.S. entity is a subsidiary of a foreign entity, whether a corporation under one set of national laws is owned and voted by persons or entities of a different nationality, and whether limited partners or LLC members are "insulated" or not.<sup>16</sup> Thus, through application of these current policies, the interest of an investor or shareholder with an address of record in the United States or a WTO-member nation may be classified as foreign or non-WTO. In *América Móvil* – the most recent in a line of Commission decisions rejecting presumptions from investor addresses – the Commission stated unequivocally: "we decline, based on the record in this proceeding, to change the Commission's precedent by accepting street addresses of stockholders and banks as an indicator of citizenship of the beneficial owners."<sup>17</sup>

In the *Verizon-Alltel Order*, however, the Commission approved Verizon Wireless' showing of citizenship based on shareholder addresses, stating that "[CAPCC] has not provided, and we do not discern, any basis for concluding that the information Verizon Wireless has provided is inaccurate, cannot be relied on, or is insufficient for purposes of demonstrating compliance with its foreign ownership ruling under section 310(b)(4) of the Act."<sup>18</sup> In the first place, this analysis reversed – for Verizon Wireless alone – decades of precedent that the

---

<sup>16</sup> See *Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-31; see, e.g., Instructions to FCC Form 315, Section IV.H ("The Commission may also deny a construction permit or station license to a licensee directly or indirectly controlled by another entity of which more than 25% of the capital stock is owned or voted by aliens, their representatives, a foreign government or its representative, or another entity organized under the laws of a foreign country. . . . The voting interests held by aliens in a licensee through intervening domestically organized entities are determined in accordance with the multiplier guidelines [for determining attributable interests held through corporations.]").

<sup>17</sup> *América Móvil*, 22 FCC Rcd at 6223 ¶ 59.

<sup>18</sup> *Verizon-Alltel Order*, ¶ 229.

*applicant, not the petitioner has the burden of establishing its qualifications under Section 310(b).*<sup>19</sup>

Furthermore, contrary to the Commission's statement, CAPCC's Petition to Deny and its associated Reply each explained why, in light of the methodology Verizon Wireless says it followed, Verizon Wireless did not conduct the analysis that the Commission requires from all other applicants.<sup>20</sup> Verizon Wireless itself did not deny that the review it commissioned only examined the address of the owner at the first level below a pure nominee, and did not assess the ownership of that entity, as it might have done in a sample survey. Thus, as CAPCC explained in detail, replete with examples, under the "special rule" allowing reliance on addresses of record, Verizon Wireless, unlike its less "special" competitors, did not concern itself with whether that top-level "beneficial owner" was a U.S. corporation directly or indirectly owned or controlled by foreign parties, a limited partnership with non-insulated alien limited partners, or even a foreign sovereign wealth fund, so long as the stockholder supplied a U.S. address, either as a "registered address" to the company or as the "registered address" supplied to a bank or other nominee holder. This is not the assessment of ultimate beneficial ownership that the Commission's longstanding precedent requires for all other applicants. For Verizon Wireless, the subsidiary of a foreign corporation, a limited partnership or LLC with non-insulated foreign investors, or the sovereign wealth funds of non-WTO-member nations, so long as they have supplied an address of record in the United States, each would count not only as WTO-qualified

---

<sup>19</sup> See, e.g., *Application of Continental Cellular for Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel) and Nineteen Rural Service Area Applications Filed by Partnerships with Alien Partners*, 6 FCC Rcd 6834, 6837 ¶ 17 (1991); *Midwest Radio-Television, Inc.*, 24 FCC 2d 625, 626 ¶ 4 (1970).

<sup>20</sup> See CAPCC Petition to Deny at 28-31 & nn.61 & 63 (filed Aug. 11, 2008); CAPCC Reply at 15-16 (filed Aug. 26, 2008).

ownership and control but as wholly U.S. investment and voting rights under Section 310(b).<sup>21</sup>

For all other applicants and licensees, in contrast, those investments would count in their entirety, regardless of registered address, as foreign investment and, unless the underlying share ownership could be traced and proven, would count as non-WTO-qualified investment.<sup>22</sup> Such a glaring deficiency certainly suggests that the information obtained through Verizon Wireless' methodology "cannot be relied upon" and is "insufficient for purposes of demonstrating compliance with its foreign ownership ruling under section 310(b)(4) of the Act."<sup>23</sup>

Moreover, the Commission cannot reconcile its dramatic loosening of the foreign ownership rules just for Verizon Wireless with the recently-released *Diversity Order*, in which the Commission rejected a proposal by 29 organizations and a broadcaster coalition to open new financing resources for SDBs by relaxing existing restrictions on foreign ownership, using its authority under Section 310(b)(4). As discussed in Section I, diversity in ownership in the telecommunications industry has long been a public policy goal of both the Commission and of

---

<sup>21</sup> As previously explained in CAPCC's Petition to Deny, sovereign wealth funds maintain offices outside their borders. For example, Kuwait Investment Authority has an office in the United Kingdom. See Sovereign Wealth Fund Institute – Kuwait Investment Authority, <http://www.swfinstitute.org/fund/kuwait.php> (last visited Dec. 8, 2008); Jamil Anderlini, "China Investment Arm Emerges from Shadows," *Financial Times*, Jan. 5, 2008, [www.ft.com/cms/s/0/fd0b7e6e-bb2f-11dc-9fbc-0000779fd2ac.html](http://www.ft.com/cms/s/0/fd0b7e6e-bb2f-11dc-9fbc-0000779fd2ac.html).

<sup>22</sup> See *Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-34.

<sup>23</sup> See *Verizon-Alltel Order*, ¶ 229. The Commission's approval of Verizon Wireless' foreign ownership showing is particularly surprising given the additional caveat in the Verizon-Alltel Order that "where a public company has reason to know the citizenship or principal places of business of particular beneficial owners, e.g., based on notifications made pursuant to federal securities regulations, the information should be included in the company's citizenship calculations." See *id.*, ¶ 229 n.795. The methodology approved by the Commission for Verizon Wireless, which involved the gathering of addresses from a third party, ensured that Verizon Wireless would never even have the opportunity to glance down the list of investors, thus insulating Verizon Wireless from ever seeing a shareholder name that itself would conclusively show non-U.S. or non-WTO status, such as a non-WTO sovereign investor fund with a registered address at its Paris office.

Congress, and it is well-recognized that discrimination in the capital markets has handicapped minority entrepreneurs attempting to enter the rapidly consolidating telecommunications industry.<sup>24</sup> Nevertheless, the Commission rejected the relaxation proposed in the *Diversity Order* first, because it saw relaxation of foreign ownership restrictions as “an extraordinary step” and, second, because taking that step would require “a significant rulemaking proceeding to examine this issue in greater depth.”<sup>25</sup> Having thus rejected any liberalization of its foreign ownership standards and policies for SDBs, the Commission cannot reasonably accede to a new liberalized standard that applies only to Verizon Wireless.

“The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside.”<sup>26</sup> In the *Verizon-Alltel Order*, however, the Commission “blithely cast aside” two policies it has consistently maintained in prior decisions: its methods for evaluating foreign ownership and its policy of policing foreign ownership strictly even to the detriment of other high priority goals. Because the *Verizon-Alltel Order* strikingly conflicts with existing precedent, the Commission had an obligation to provide a reasoned explanation for applying a different standard to Verizon Wireless. As discussed below, the Commission did not provide any such explanation.

---

<sup>24</sup> See, e.g., William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (2000); Ivy Planning Group, LLC, *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing [1950 to Present]* (2000); see also *Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042, 26052 (Dep’t of Justice, May 23, 1996) (DOJ proposal citing studies and Congressional hearings documenting that “widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy”).

<sup>25</sup> *Diversity Order*, 23 FCC Rcd at 5949 ¶ 24.

<sup>26</sup> *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (citing *Rainbow B’casting Co. v. FCC*, 949 F.2d 405, 408 (D.C. Cir. 1991); *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986)).

**B. The Commission Did Not Properly Distinguish *América Móvil*.**

“A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.”<sup>27</sup> Therefore, when the Commission treats an applicant differently than it has treated an apparently similar applicant in a prior decision, the Commission must explain its departure from precedent. If the agency distinguishes the previous case based on its facts, then the agency must cite a distinction logically related to the underlying policy goals the agency intends to achieve. Indeed, the United States Supreme Court has explained that factual distinctions between cases “serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule.”<sup>28</sup> Therefore, “[if] the agency distinguishes earlier cases[, it must] assert[] distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing.”<sup>29</sup>

For example, in *Telephone & Data Systems v. FCC*, the D.C. Circuit evaluated the Commission’s application of the six-factor test for *de facto* control known as the *Intermountain* test.<sup>30</sup> The court found that the Commission failed to reconcile its evaluation of several factors with how it had applied them in previous cases and, indeed, drew conclusions at odds with the factors themselves. The court explained:

The Commission’s application of the *Intermountain* test in this case amounts to a determination that it is a meaningless recitation with which the Commission may find compliance or noncompliance by arbitrarily saying in one case that

---

<sup>27</sup> *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

<sup>28</sup> *Atchison, Topeka Santa Fe Railway Corp. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

<sup>29</sup> *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989) (quoting *Atchison, Topeka Santa Fe Railway Corp.*, 412 U.S. at 809) (alterations in original).

<sup>30</sup> *See Tel. & Data Sys. v. FCC*, 19 F.3d 42 (D.C. Cir. 1994).

theoretical access to the facility is sufficient while in another that the purported licensee must have actual control of the facility; that in one case a theoretical, hazy, and intermittent right to participate in daily operations is sufficient, in another actual control is required; that in one case awareness of policy decisions is sufficient and in another determining and carrying out policy decisions including preparing and filing applications is required; and that in one case being in actual charge of employment supervision and dismissal of personnel is a determinative factor and in another a factor hardly relevant to the *Intermountain* analysis at all. *This is not reasoned decisionmaking, but the very sort of arbitrariness and capriciousness we are empowered to correct.*<sup>31</sup>

Accordingly, the court remanded the decision to the Commission, holding that the Commission's decision was arbitrary and capricious due to its failure to apply the law in a manner consistent with precedent.

In the *Verizon-Alltel Order*, the Commission entirely failed to provide an adequate explanation for refusing to follow its recent decision in *América Móvil*, where it explicitly rejected the use of shareholder addresses as a basis for assessing ownership under Section 310(b). *América Móvil*, like the partners of Verizon Wireless, was a publicly held corporation with widely dispersed stockholdings. *América Móvil* sought to have the Commission "infer that the citizenship of the company's beneficial owners typically will correspond to: (1) the registered addresses of stockholders that have taken possession of their stock certificates; and (2) the addresses of custodian banks and brokers that hold shares for the more numerous owners that have chosen not to possess the stock certificates."<sup>32</sup> The Commission, however, flatly refused: "we decline, based on the record in this proceeding, to change the Commission's precedent by accepting street addresses of stockholders and banks as an indicator of citizenship of the beneficial owners."<sup>33</sup>

---

<sup>31</sup> See *id.* at 50 (emphasis added).

<sup>32</sup> *América Móvil*, 22 FCC Rcd at 6222-23 ¶ 59.

<sup>33</sup> *Id.* The Commission eventually was able to grant the *América Móvil* application with extensive conditions, based on a finding that the shares analyzed using shareholder "registered

Instead, responding to objections based on *América Móvil* in CAPCC's Petition to Deny, the Commission stated:

As a factual matter, we believe that [CAPCC] misconstrues the methodology that Verizon Wireless has used to demonstrate compliance with its section 310(b)(4) ruling. Verizon Wireless has provided the Commission with aggregate information regarding the *addresses of record* of nearly 100 percent of the beneficial owners of Verizon and Vodafone stock. Thus, in contrast to the foreign ownership information we rejected in the *América Móvil Order*, the Verizon Wireless data does not rely on "the addresses of custodian banks and brokers that hold shares for the more numerous owners that have chosen not to possess the stock certificates."<sup>34</sup>

This explanation entirely fails to show that Verizon Wireless' Section 310(b)(4) showing did something other than presume stockholder citizenship from stockholder addresses, the very presumption that the Commission found insufficient in *América Móvil*. The Commission has an obligation in adjudications to explain its departure from settled precedent and to articulate the reason for that decision in light of the underlying policy.<sup>35</sup> Thus, CAPCC did not "misconstrue" Verizon Wireless' methodology, and, as discussed below, the Commission did not distinguish *América Móvil* on grounds sufficient to withstand judicial review under an arbitrary and capricious standard.

At best, the passage quoted above points out that, for some shares, Verizon Wireless got a third party to go a single step above pure nominee holders and then make a conclusive presumption of citizenship based on the address of the holder at that next level. But this distinction has no relevance with respect to the Commission's rejection of shareholder addresses

---

addresses" were almost all non-voting shares and that more than 93 percent of the voting rights were held by a trust controlled by a single family. Those conditions are not present, of course, for Verizon and Vodafone.

<sup>34</sup> *Verizon-Alltel Order*, ¶ 228 (quoting *América Móvil*, 22 FCC Rcd at 6222-23 ¶ 59) (emphasis added).

<sup>35</sup> *See Kidd Commc'ns v. FCC*, 426 F.3d 1, 4-6 (D.C. Cir. 2005).

in *América Móvil*. The street (or post office box) address supplied by a shareholder, as Verizon Wireless acknowledged,<sup>36</sup> only discloses the location of the place or the agent to which the stockholder wants information sent; it has no necessary relationship with the Section 310(b) status of the stockholder under the interpretation of Section 310(b) that the Commission applies to everyone but Verizon Wireless. Thus, Verizon Wireless' showing was deficient for *exactly the same reasons* that a showing based on addresses was deficient in *América Móvil*, and the Commission's approval of that showing just for Verizon Wireless was arbitrary and capricious.

Accordingly, the Commission cannot change its current policy rejecting shareholder street addresses to establish a new definition of "foreign ownership" under Section 310(b) just for Verizon Wireless without overruling *América Móvil* and acknowledging that all applicants in all services may use the same definitions of "foreign ownership" that Verizon Wireless used here.

**C. The Commission Improperly Relied on the *WWOR-TV* Decision and the *Mobile Satellite Ventures* Decisions as "Precedents" for the Use of Shareholder Addresses "On a Fact-Specific, Case-by-Case Basis."**

In the *Verizon-Alltel Order*, the Commission attempted to show that it was following precedent with respect to reliance on shareholder addresses for a 310(b)(4) showing, stating that "[t]he Commission has permitted public companies to use methods other than random surveys, including the collection of shareholder addresses, on a fact-specific, case-by-case basis."<sup>37</sup> In support of this statement, the Commission cited its 1991 *WWOR-TV* decision and its 2006 and 2008 decisions concerning the ownership of Mobile Satellite Ventures Subsidiary LLC

---

<sup>36</sup> Verizon Wireless, Opposition to Chatham Avalon Park Community Council's Petition for Reconsideration, WT Docket No. 07-208, at 8 (filed Aug. 28, 2008).

<sup>37</sup> See *Verizon-Alltel Order*, ¶ 229.

(“MSV”).<sup>38</sup> For two principal reasons, however, the Commission’s citation to these cases fails to support its decision in the *Verizon-Alltel Order*. First, none of these cases actually demonstrates a Commission policy, or a conscious change in Commission policy, with respect to the use of shareholder addresses to demonstrate permissible levels of foreign ownership. (Indeed, uncited portions of *WWOR-TV* contradict the Commission’s conclusion.) Second, the Commission failed to identify any facts and circumstances that it relied upon to allow Verizon Wireless’ showing on a “fact-specific, case-by-case basis.”

**1. None of the Cases Cited by the Commission Provide a Precedent for Allowing Verizon Wireless to Rely on Shareholder Addresses in its 310(b) Showing.**

Neither *WWOR-TV* nor the two MSV decisions provide a precedent for the Commission’s decision to allow Verizon Wireless to rely on shareholder addresses. In *WWOR-TV*, the Commission permitted a pro forma transfer of control of station WWOR-TV, Secaucus, New Jersey, from its parent corporation, MCA, to an entity owned by substantially the same set of shareholders.<sup>39</sup> Prior to the transfer, MCA had performed an alien ownership sample survey that, under worst-case assumptions regarding the outcome of intervening transactions, showed that

---

<sup>38</sup> See *id.*, ¶ 229 n.794 (citing *WWOR-TV, Inc. For Transfer of Control of Station WWOR-TV, Licensee of Station WWOR-TV, Channel 9 Secaucus, New Jersey*, Memorandum Opinion and Order, 6 FCC Rcd 6569, 6572 ¶ 13 (1991) [hereinafter “*WWOR-TV*”], *appeal dismissed sub nom. Garden State Broadcasting Ltd. Partnership v. F.C.C.*, 996 F.2d 386 (D.C. Cir. 1993); *Motient Corporation and Subsidiaries, Transferors, and SkyTerra Communications, Inc., Transferee, Application for Authority to Transfer Control of Mobile Satellite Ventures Subsidiary LLC*, WC Docket No. 06-106, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 10198, 10216 ¶ 41 & n.114 (IB 2006) [hereinafter “*MSV 2006*”]; *Mobile Satellite Ventures Subsidiary LLC and SkyTerra Communications, Inc. Petition for Declaratory Ruling Under Section 310(b) of the Communications Act of 1934, as Amended; Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. Petition for Expedited Action for Declaratory Ruling Under Section 310(b) of the Communications Act of 1934, as Amended*, Order and Declaratory Ruling, 23 FCC Rcd 4436, 4461-62, App. B, ¶¶ 24-25 (2008) [hereinafter “*MSV 2008*”]).

<sup>39</sup> See *WWOR-TV*, 6 FCC Rcd at 6569 ¶ 1.

MCA's foreign ownership fell below the 25-percent guideline."<sup>40</sup> In response to Whitely Communications' petition for reconsideration, the Commission cited MCA's previous alien ownership survey and described its initial decision as follows:

[W]e observed that a licensee would not ordinarily be required to certify its compliance with [Section 310(b)] until it filed its next renewal application and that we would not require a new survey in connection with a *short-form transfer application* in the absence of a well-founded question as to compliance with the Act. . . . We therefore concluded that no substantial and material question of fact existed as to compliance with the Act.<sup>41</sup>

The Commission's decision relied upon the sufficiency, in the context of a *pro forma* transfer, of MCA's prior sample survey. The Commission did not even discuss shareholder addresses in its initial decision. In response to Whitely's petition for reconsideration, the Commission acknowledged that the transferee had used shareholder mailing addresses merely to confirm the continued accuracy of the prior survey, which alone was sufficient.<sup>42</sup> The Commission referred to the information from mailing addresses but stated that "*relying on mailing addresses is not a substitute for a random survey,*" and expressed the expectation that "in connection with the preparation of any subsequent renewal application, [the transferee] will use reasonable methods to ensure compliance with section 310(b),"<sup>43</sup> the plainly stated policy being that reliance upon shareholder addresses does not constitute a "reasonable method." *WWOR-TV* therefore provides no basis for the Commission to approve Verizon Wireless' total reliance on shareholder addresses to demonstrate compliance with Section 310(b) in the context of a long-form transfer of control and contradicts the Commission's holding in the *Verizon-Alltel Order*.

---

<sup>40</sup> See *id.* at 199 ¶ 12.

<sup>41</sup> See *WWOR-TV*, 6 FCC Rcd at 6572 ¶ 12 (emphasis added).

<sup>42</sup> See *id.* at 6572 ¶ 13.

<sup>43</sup> See *id.* at 6572 ¶ 13 (emphasis added).

The *MSV 2006* decision does not address citizenship presumptions from stockholder addresses; the decision does not mention the issue and gives no indication that the issue was raised or considered in the proceeding.<sup>44</sup> One of many filings in that proceeding mentions that a minority shareholder several levels removed from the licensee consulted shareholder addresses. To cite the *MSV 2006* decision as a precedent for reliance on stockholder addresses, the Commission in essence must argue that it somehow invalidated *sub silentio* a consistent, express line of precedent by overlooking an application defect that the applicant failed to point out.<sup>45</sup> That position is untenable, particularly in view of the Commission's express recognition that it in fact was departing from established precedent in the *Verizon-RCC Order* because of Verizon Wireless' supposed but unexplained "special circumstances."<sup>46</sup> Furthermore, even if the Commission was aware of the reliance on stockholder addresses in the *MSV 2006* decision, because that decision fails to acknowledge or explain its departure from precedent, a citation to the decision with no supporting analysis would merely perpetuate the Commission's failure to explain its change in policy—not provide the required explanation for that change.

The *MSV 2008* decision similarly does not address or endorse citizenship presumptions from stockholder addresses. In fact, the only evidence that the Commission might possibly have considered the reliance on mailing addresses is the vague statement that "we are concerned about the quality of information made available to the Commission with respect to the foreign

---

<sup>44</sup> See *MSV 2006*, 21 FCC Rcd at 10215 ¶ 41 & n.114.

<sup>45</sup> Compare *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir. 1989) (explaining that an agency "may not depart sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case." (quoting *NLRB v. Int'l Union of Operating Engineers, Local 925*, 460 F.2d 589, 604 (5th Cir. 1972))); *Comm. for Cmty. Access v. FCC*, 737 F.2d 74, 80 (D.C. Cir. 1984) ("[A]n agency cannot silently change its policies.").

<sup>46</sup> See *Applications of Celco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation*, WT Docket No. 07-208, Memorandum Order and Declaratory Ruling, FCC 08-181, ¶ 149, *reconsideration pending* [hereinafter "*Verizon-RCC Order*"].

ownership of TerreStar, with the exception of the Harbinger Funds for which we have more complete information.”<sup>47</sup> In support of this statement, the Commission cites a January 25, 2008 letter filed by MSV that does not discuss the methodology used to calculate TerreStar’s foreign ownership. MSV discloses the use of mailing addresses only in a footnote of its petition, which cites the filings that MSV submitted in conjunction with the *MSV 2006* order. Thus, the Commission’s comment about “the quality of information” may reflect the age of the data (one year old at the time of the decision), the lack of detail concerning the countries where shareholders were located (in contrast to the data submitted by the Harbinger Funds), or any other concern not stated in the order. Furthermore, based on these nebulous concerns about data quality, the Commission declared that it would consider all future investment by TerreStar as non-WTO until the applicants could provide “information to demonstrate that TerreStar’s shareholdings in SkyTerra are properly ascribed to the United States or other WTO Member countries.”<sup>48</sup> Thus, the *MSV 2008* decision is hardly an endorsement of the methodology used to calculate TerreStar’s foreign ownership, however the Commission may have understood it.

Furthermore, the very fact that the Commission expressed concern about the quality of TerreStar’s foreign ownership data reveals the importance that the Commission normally places on a thorough evaluation of all ownership interests. While Verizon Wireless relies on mailing addresses for 100% of its ownership calculation, mailing addresses were used in the *MSV 2008* decision to determine the ownership of only 24.5% of MSV’s equity and none of its voting rights.<sup>49</sup> TerreStar itself was three levels up the ownership chain and yet the Commission still

---

<sup>47</sup> See *MSV 2008*, App. B, ¶ 25 & n.123.

<sup>48</sup> See *id.*, App. B, ¶ 25.

<sup>49</sup> Petitioner derives this 24.5% by multiplying the 59% of TerreStar not owned by the Harbinger Funds, by wholly-owned Motient Venture Holdings’ 41.48% equity interest in Skyterra, by Skyterra’s 99.29% equity interest in MSV LP. Indeed, because MSV reported that

scrutinized the accuracy of its citizenship data instead of relying on TerreStar's "address of record" (or the address of one of the corporations lower in the ownership chain). Under the Commission's special rule for Verizon Wireless, MSV's U.S. address could have established MSV as wholly U.S.-owned and U.S.-controlled, and TerreStar's foreign ownership would have been ignored entirely.

Finally, the *MSV 2008* decision does not indicate in any way that the Commission intended to alter in any respect its express decision in *América Móvil* to reject the use of shareholder address information as an acceptable means to show stockholder citizenship. To the contrary, the *MSV 2008* decision cites *América Móvil* with approval, which refutes any inference that the Commission intended to depart from that decision.<sup>50</sup> In short, presumption of citizenship from stockholder addresses of any sort is an approach that the Commission precedent expressly, definitively, and consistently has rejected for everyone but Verizon Wireless.

**2. The Commission's Failure to Identify the Facts and Circumstances Justifying Reliance on Shareholder Addresses Is Fatal to the Verizon-Alltel Order's Ability to Withstand Judicial Review.**

Even if any of the above decisions actually constituted precedent for permitting reliance on mailing addresses "on a fact-specific, case-by-case basis," the Commission completely failed to describe the facts and circumstances that justified allowing Verizon Wireless to rely on

---

4.5% of this 24.5% was non-WTO, MSV used shareholder addresses only to show the U.S. or WTO status of 20% of its equity ownership. See Letter from Tom W. Davidson, Esq., Counsel for SkyTerra Communications, Inc. and Bruce Jacobs, Esq., Counsel for Mobile Satellite Ventures Subsidiary LLC to Ms. Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, dated Oct. 5, 2007, at Attachment 7(b) (reporting 10.8% non-WTO ownership in TerreStar); Letter from Tom W. Davidson & Karen Milne, Counsel for SkyTerra Communications, Inc. and Bruce Jacobs & Clifford M. Harrington, Counsel for Mobile Satellite Venture Subsidiary LLC to Ms. Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, filed January 25, 2008, at 2 n.2 (stating that the data in the October 5, 2007 letter did not include the Harbinger Funds' interest in TerreStar).

shareholder addresses in this particular case. By failing to identify the kinds of facts and circumstances that would justify reliance on shareholder addresses in some cases but not in others, the Commission severely endangered the ability of the *Verizon-Alltel Order* to withstand a challenge under the arbitrary and capricious standard.

An agency may “proceed case by case or, more accurately, subregulation by subregulation, but it must be possible for the regulated class to perceive the principles which are guiding agency action.”<sup>51</sup> Therefore, the Commission may use adjudication to evolve a definition of “reasonable methods to insure compliance with section 310(b),”<sup>52</sup> but its decisions must converge into a coherent body of law rather than diverge into a miscellaneous assortment of completely unrelated decisions. As the Court of Appeals for the District of Columbia Circuit has stated:

Distinguishing cases on the basis of principled differentiations is one thing; consciously setting out to ‘confine each case to its own facts,’ another—one which would virtually eliminate all precedent. After all, finding factual variations from case to case is a trivial task, and to say a case has been confined to its facts is just a polite way to say it has been ignored. But the Commission cannot be so cavalier with its own precedent and those of this court without suggesting that the rationale by which it is reaching its conclusions is either illogical or sub rosa, and thereby inviting reversal.<sup>53</sup>

Thus, it is not enough for the Commission to point out, as it did in the *Verizon-Alltel Order*, that it has allowed applicants to rely on shareholder mailing addresses “on a fact-specific, case-by-case basis.”<sup>54</sup> Indeed, regulated parties must be able to “measure the scope of the *ratio decidendi*, so as to predict how future cases will be decided, and therefore how behavior should

---

<sup>50</sup> See *MSV 2008* at 8 n.39, 14 n.129.

<sup>51</sup> See *Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Cir. 1999).

<sup>52</sup> See *Verizon-Alltel Order*, ¶ 229 (quoting *WWOR-TV*, 6 FCC Rcd at 6572 ¶ 13).

<sup>53</sup> *Commc'ns Investment Corp. v. FCC*, 641 F.2d 954, 976 (D.C. Cir. 1981).

<sup>54</sup> See *Verizon-Alltel Order*, ¶ 229.

be shaped. For [the agency] to utter the words 'unique facts and circumstances' and 'equity' . . . as a wand waived over an undifferentiated porridge of facts, leaves regulated parties and a reviewing court completely in the dark . . . ."<sup>55</sup>

Indeed, judicial review is impossible without some explanation of an agency's decision to treat apparently similar cases differently. "A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review – in this regard, to determine whether the Commission's policies are consistent with its mandate from Congress."<sup>56</sup> When no explanation is provided, "[t]he court really has no way of knowing if the rationale it discerns is in fact that of the agency, or one of the court's own devise. . . Yet only the former can provide a legitimate basis for sustaining agency action."<sup>57</sup> Consequently, courts will remand agency decisions when they cannot determine the basis for the agency's action.

The *Verizon-Alltel Order* states that prior use of shareholder addresses was allowed "on a fact-specific, case-by-case basis," yet the Commission's order and the record in this proceeding are devoid of any support for the existence of circumstances warranting a different and more liberal interpretation of Section 310(b) for Verizon Wireless than for other licensees and applicants that the Commission regulates.<sup>58</sup> The *Verizon-Alltel Order* does not discuss what

---

<sup>55</sup> See *Philadelphia Gas Works*, 989 F.2d 1246, 1251 (D.C. Cir. 1993).

<sup>56</sup> See *Atchison, Topeka Santa Fe Railway Corp. v. Wichita Bd. of Trade*, 412 U.S. 800, 806 (1973).

<sup>57</sup> *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004); see *Bush-Quayle '92 Primary Comm. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997) ("Without adequate elucidation, this court has no way of ascertaining whether cases are indeed distinguishable, whether the Commission has a principled reason for distinguishing them, or whether the Commission is refusing to treat like cases alike.").

<sup>58</sup> As CAPCC pointed out in its Petition to Deny, although the Commission states in the *Verizon-RCC Order* that it permitted Verizon Wireless to make a conclusive presumption of

facts and circumstances might justify the use of shareholder addresses, as opposed to previous cases such as *América Móvil* (rejecting the use of shareholder addresses), *WWOR-TV* (possibly accepting shareholder addresses as a supplement to an ownership survey in a pro forma transaction), *MSV 2006* or *MSV 2008* (accepting data based on shareholder addresses without acknowledging the issue at all). Because the Commission has no justification for applying such an extraordinarily inequitable policy, which amounts to patent discrimination in favor of Verizon Wireless and against its competitors, the Commission's approval of Verizon Wireless' 310(b) showing in the *Verizon-Alltel Order* cannot withstand judicial review.

### III. Conclusion

Accordingly, for the reasons set forth above in its Petition for Reconsideration, and in its Petition to Deny, Petitioner submits that the *Verizon-Alltel Order* should be reconsidered. The Commission erred in (1) rejecting, without explanation and contrary to recently-applied policies, CAPCC's proposal of a divestiture condition including a right of first negotiation for SDBs and (2) applying to Verizon Wireless a substantially more favorable definition of what constitutes foreign ownership under Section 310(b) than it applies to all other licensees and applicants. Consequently, the Commission (1) must reconsider the divestiture condition proposed by CAPCC and (2) must either (a) obtain from Verizon Wireless a statistically valid sample survey establishing the citizenship of the shareholders of Verizon Wireless' constituent partners and

---

stockholder citizenship based on stockholder addresses alone because of supposed "special circumstances," there is no support in the decision or the record for the existence of such "special circumstances," other than Verizon Wireless' bare assertion that a survey would be "burdensome." The sample size required for a statistically valid sample does not vary linearly with the size of the population to be sampled, however, so the raw number of shares outstanding cannot justify special treatment for Verizon Wireless. See CAPCC Petition to Deny at 29-30. Verizon Wireless's need for a rapid decision also is irrelevant. Verizon Wireless had the time and resources to conduct a proper survey, so the timing was entirely in Verizon Wireless's control.

demonstrating eligibility for a Section 310(b)(4) public interest determination based upon the multilevel analysis that the Commission requires from other applicants or (b) expressly acknowledge that socially disadvantaged businesses and other applicants and licensees likewise may use Verizon Wireless' registered address standard as the sole test for determining the citizenship of their potential investors under Section 310(b) for all services.

Respectfully submitted,

**CHATHAM AVALON PARK  
COMMUNITY COUNCIL**

By: 

Aaron Shainis, Esq.  
Shainis & Peltzman, Chartered  
1850 M Street, N.W.  
Washington, D.C. 20036  
(202) 293-0011

Vernon Ford, Jr., Esq.  
3234 W. Washington St.  
Chicago, Illinois 60624

*Of Counsel*

December 10, 2008

## CERTIFICATE OF SERVICE

I, Aaron Shainis, do hereby certify that on this 10<sup>th</sup> day of December 2008, copies of the foregoing Petition for Reconsideration were served as follows:

<b>To Federal Communications Commission as follows (via hand delivery):</b>	
Erin McGrath Mobility Division Wireless Telecommunications Bureau 445 12th Street, S.W. Washington, D.C. 20554	Susan Singer Spectrum and Competition Policy Division Wireless Telecommunications Bureau 445 12th Street, S.W. Washington, D.C. 20554
Linda Ray Broadband Division Wireless Telecommunications Bureau 445 12th Street, S.W. Washington, D.C. 20554	David Krech Policy Division International Bureau 445 12th Street, S.W. Washington, D.C. 20554
Jodie May Competition Policy Division Wireline Competition Bureau 445 12th Street, S.W. Washington, D.C. 20554	Jim Bird Office of General Counsel 445 12th Street, S.W. Washington, D.C. 20554
Best Copy and Printing, Inc. 445 12th Street, S.W. Washington, D.C. 20554	
<b>To Office of the Chairman as follows:</b> The Honorable Kevin Martin 445 12th Street, S.W. Washington, D.C. 20554	<b>To the Office of the Chairman as follows:</b> Aaron Goldberger 445 12th Street, S.W. Washington, D.C. 20554
<b>To the Office of Commissioner Michael Copps as follows:</b> The Honorable Michael Copps 445 12th Street, S.W. Washington, D.C. 20554	<b>To the Office of Commissioner Michael Copps as follows:</b> Bruce Gottlieb 445 12th Street, S.W. Washington, D.C. 20554
<b>To the Office of Commissioner Jonathan Adelstein as follows:</b> The Honorable Jonathan Adelstein 445 12th Street, S.W. Washington, D.C. 20554	<b>To the Office of Commissioner Jonathan Adelstein as follows:</b> Renee Roland Crittendon 445 12th Street, S.W. Washington, D.C. 20554

*Continued . . .*

<p><b>To the Office of Commissioner Deborah Tate as follows:</b>                  The Honorable Deborah Taylor Tate                  445 12th Street, S.W.                  Washington, D.C. 20554</p>	<p><b>To the Office of Commissioner Deborah Tate as follows:</b>                  Wayne Leighton                  445 12th Street, S.W.                  Washington, D.C. 20554</p>
<p><b>To the Office of Commissioner Robert McDowell as follows:</b>                  The Honorable Robert McDowell                  445 12th Street, S.W.                  Washington, D.C. 20554</p>	<p><b>To the Office of Commissioner Robert McDowell as follows:</b>                  Angela Giancarlo                  445 12th Street, S.W.                  Washington, D.C. 20554</p>
<p><b>To the following via U.S. mail, first-class, postage prepaid</b></p>	
<p><b>To Alltel Communications, LLC as follows:</b>                  Wireless Regulatory Supervisor                  One Allied Drive, B1F02-D                  Little Rock, AR 72202</p>	<p><b>To Atlantis Holdings, LLC as follows:</b>                  Thomas Davidson, Esq.                  Akin Gump Strauss Hauer &amp; Feld LLP                  1333 New Hampshire Avenue, N.W.                  Washington, D.C. 20036</p>
<p><b>To Celco Partnership as follows:</b>                  Nancy Victory                  Wiley Rein LLP                  1776 K Street, N.W.                  Washington, D.C. 20006</p>	<p>Jon Wooster, President                  U.S. Cattlemen's Association                  P.O. Box 339 San Lucas, CA 93954</p>
<p>Traci L. McClellan, JD, MA, Executive Director                  National Indian Council on Aging                  10501 Montgomery Blvd. NE, Suite 210                  Albuquerque, NM 87111</p>	<p>Jenifer Simpson, Senior Director,                  Telecommunications and Technology Policy                  American Association of People With Disabilities                  1629 K Street, NW, Suite 503                  Washington, DC 20006</p>
<p>Wayne T. Brough, Chief Economist and VP for Research                  Freedom Works Foundation                  601 Pennsylvania Ave., NW, Suite 700                  Washington, DC 20004</p>	<p>Brent A. Wilkes, LULAC National Executive Director                  League of United Latin American Citizens                  2000 L Street, NW, Suite 610                  Washington, DC 20036</p>
<p>Harry Alford, President and CEO                  National Black Chamber of Commerce                  1350 Connecticut Avenue, NW, Suite 405                  Washington, DC 20036</p>	<p>Victor F. Capellan, President                  Dominican American National Roundtable                  1050 17th Street, NW, Suite 600                  Washington, DC 20036</p>

*Continued . . .*

<p>Robert K. Johnson, President          Consumers for Competitive Choice          PO Box 329          Greenwood, IN 46143</p>	<p>Hector V. Barreto, Chairman          The Latino Coalition          3255 Wilshire Blvd., #1850          Los Angeles, CA 90010</p>
<p>John A. Prendergast          Robert M. Jackson          Blooston, Mordkosfky, Dickets, Duffy &amp;          Prendergast, LLP          2120 L Street, NW, Suite 300          Washington, DC 20037  <i>Counsel to North Dakota Network Co.</i></p>	<p>William Sepic, CCE, President and CEO          Kristin Beltzer, Vice President, Government          Relations          Lansing Regional Chamber of Commerce          500 E. Michigan Avenue, Suite 200          Lansing, MI 48912</p>
<p>Leslie Sanchez, Co-Chair          Jose F. Nino, Co-Chair          Hispanic Alliance for Prosperity Institute          807 Brazos, Suite 316          Austin, TX 78701</p>	<p>Richard K. Studley, President &amp; CEO          Michigan Chamber of Commerce          600 S. Walnut Street          Lansing, MI 48933</p>
<p>Barry L. Kennedy, CAE, IOM, President          Nebraska Chamber of Commerce &amp; Industry          1320 Lincoln Mall          Lincoln, NE 68509</p>	<p>Barbara Kasoff, President          Women Impacting Public Policy          1615 L Street, NW, Suite 650          Washington, DC 20036</p>
<p>Albert Zapanta, President &amp; CEO          United States-Mexico Chamber of Commerce          1300 Pennsylvania Ave., NW, Suite G-0003          Washington, DC 20004</p>	<p>Whitney North Seymour, Jr.          425 Lexington Avenue, Room 1721          New York, NY 10017  <i>Attorney for the EMR Policy Institute</i></p>
<p>Yanira Cruz, MPH, DrPH, President &amp; CEO          National Hispanic Council on Aging          734 15th Street, NW          Washington, DC 20005</p>	<p>Kenneth E. Hardman          2154 Wisconsin Avenue, NW, Suite 250          Washington, DC 20007  <i>Attorney for Ritter Communications, Inc. and          Central Arkansas Rural Cellular Limited          Partnership</i></p>
<p>Pantelis Michalopoulos          Chung Hsiang Mah          Steptoe &amp; Johnson LLP          1330 Connecticut Avenue, NW          Washington, DC 20036  <i>Counsel for Leap Wireless International, Inc.</i></p>	<p>Karen Kerrigan, President &amp; CEO          Small Business &amp; Entrepreneurship Council          2944 Hunter Mill Road, Suite 204          Oakton, VA 22124</p>

*Continued . . .*

<p>Daniel Mitchell Jill Canfield 4121 Wilson Boulevard, 10th Floor Arlington, VA 22203 <i>Attorneys for the National Telecommunications Cooperative Association</i></p>	<p>Stuart Polikoff, Director of Government Relations Brian Ford, Regulatory Counsel The Organization for the Promotion and Advancement of Small Telecommunications Companies 21 Dupont Circle, NW, Suite 700 Washington, DC 20036</p>
<p>Daniel Alvarez Willkie Farr &amp; Gallagher LLP 1875 K Street, NW Washington, DC 20006 <i>Counsel for Denali Spectrum LLC et al (the Roaming Petitioners)</i></p>	<p>Edwin Hill, International President International Brotherhood of Electrical Workers 900 Seventh Street, NW Washington, DC 20001</p>
<p>Stephen G. Kraskin 2154 Wisconsin Avenue, NW Washington, DC 20007 <i>Attorney for the Rural Independent Competitive Alliance</i></p>	<p>David L. Nace Lukas, Nace, Gutierrez &amp; Sachs, Chartered 1650 Tysons Boulevard, Suite 1500 McLean, VA 22102 <i>Counsel for the Rural Cellular Association</i></p>
<p>Daniel R. Ballon, Policy Fellow, Technology Studies Pacific Research Institute for Public Policy One Embarcadero Center Suite 350 San Francisco, CA 94111</p>	<p>William L. Roughton, Jr., Vice President of Legal and Regulatory Affairs Centennial Communications Corp. 3349 Route 138, Building A Wall, NJ 07719</p>
<p>Patrick J. Whittle Jean L. Kiddoo Bingham McCutchen LLP 2020 K Street, NW Washington, DC 20006 <i>Counsel for MetroPCS Communications, Inc. and NTELOS Inc.</i></p>	<p>Caressa D. Bennet Kenneth C. Johnson Daryl Zakov Bennet &amp; Bennet, PLLC 4350 East West Highway, Suite 201 Bethesda, MD 20814 <i>Counsel for the Rural Telecommunications Group</i></p>

*Continued . . .*

<p>Wayne Stenebjem, Attorney General State of North Dakota, Office of Attorney General Consumer Protection &amp; Antitrust Division PO Box 1054 Bismarck, ND 58502-1054</p>	<p>Benjamin H. Dickens John A. Prendergast Blooston, Mordkofsky, Dickens, Duff &amp; Prendergast, LLP 2120 L Street, NW, Suite 300 Washington, DC 20037 <i>Counsel to South Dakota Telecommunications Association</i></p>
<p>Benjamin H. Dickens John A. Prendergast Blooston, Mordkofsky, Dickens, Duff &amp; Prendergast, LLP 2120 L Street, NW, Suite 300 Washington, DC 20037 <i>Counsel to the Rural Carriers</i></p>	<p>Donald L. Herman, Jr. Michael R. Bennet Bennet &amp; Bennet, PLLC 4350 East West Highway, Suite 201 Bethesda, MD 20814 <i>Counsel to Palmetto MobileNet, L.P.</i></p>
<p>David L. Nace Lukas, Nace, Gutierrez &amp; Sachs, Chartered 1650 Tysons Boulevard, Suite 1500 McLean, VA 22102 <i>Counsel to Cellular South, Inc.</i></p>	<p>Larry A. Blosser Law Office of Larry Blosser, P.A. 3565 Ellicott Mills Drive, Suite C-2 Ellicott City, MD 21043 <i>Attorney for the Ad Hock Public Interest Spectrum Coalision</i></p>
<p>Martin J. Wright, President FBI National Academy Associates, Inc., West Virginia Chapter 17 Aster Drive Terra Alta, WV 26764</p>	<p>Leslie T. Hyman, Senior Investigator, Troop "C" Major Crimes Unit State of New York New York State Police Rt. 7 Box 300 Sidney, NY 13838-0300</p>
<p>Brian Fontes, CEO National Emergency Number Association 4350 North Fairfax Drive, Suite 750 Arlington, VA 22203</p>	<p>Tom Stone, Executive Director FBI Law Enforcement Executive Development P.O. Box 2349 West Chester, PA 19380</p>

*Continued . . .*

<p>David C. Lizarraga, Chair United States Hispanic Chamber of Commerce 2175 K Street, NW, Suite 100 Washington, DC 20037</p>	<p>Randolph J. May, President The Free State Foundation 10701 Stapleford Hall Dr. Potomac, MD 20854</p>
	<p></p> <hr/> <p><b>Signed: Aaron Shainis</b></p> <hr/> <p><b>December 10, 2008</b></p> <hr/> <p><b>Date</b></p>