Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, CLARIFICATION

United States Cellular Corporation, Carolina West Wireless, Inc., and NE Colorado Cellular, Inc., d/b/a Viaero Wireless (collectively, "Petitioners"), by counsel and pursuant to Section 1.106 of the Commission's rules, hereby submit this reply to the Joint Opposition to Petitions for Reconsideration filed by Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC ("Verizon") on December 22, 2008 ("Opposition"). In support of this reply, the following is respectfully stated:

Verizon does not challenge the statement of interest set forth by Petitioners.

Verizon states that the *Grant Order*[1] does not limit "Verizon Wireless' flexibility in implementing the staged ETC funding reductions."[2] This seems counterintuitive to a commitment designed to lower support rather than increase it and contrary to the clear language of the *Grant Order* that the phase down begin with a 20% reduction "beginning 30 days following the closing of the transaction, or no later than December 31, 2008, whichever is earlier"[3] and followed by reductions "in **equal** 20% increments annually thereafter…."[4]

On its face, this does not appear to allow for much in the way of "flexibility." Assuming for the sake of argument the accuracy of Verizon's statement that such flexibility was intended by Verizon and the Commission, this would suggest that such flexibility was discussed in *ex parte* meetings between Verizon and the Commission, to which no other affected party was privy or was given an opportunity to respond. Verizon's claim to such flexibility confirms Petitioners' belief that Verizon may choose to merge its subsidiary companies in such a manner as to *increase* its support contrary to the spirit of the voluntary commitment and the actual text of the *Grant Order* accepting the commitment. When Verizon increases its support, other competitive eligible telecommunications carriers ("CETCs") are denied funding they need to meet commitments they have made to state public utility commissions and the FCC.

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[1] *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and* De Facto *Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258, WT Docket No. 08-95 (Nov. 10, 2008) ("*Grant Order*").

[2] Opposition, at 24.

[3] *Grant Order*, at 90 (¶ 196).

[4] *Id.* (emphasis added).

From a procedural standpoint, Verizon's Opposition highlights the lack of transparency in this process. Verizon sees no need for a clarification because it believes its understanding of the deal, including the flexibility it alleges has been afforded, is clearly set forth in the *Grant Order*. However, the rest of the world had no opportunity to reach a similar understanding in advance of the *Grant Order* because nothing in the public record sets forth the flexibility that Verizon now claims to have. Petitioners only learned of the potential for such an understanding through informal discussions with Verizon's counsel, conducted after the grant was made, prompting our Petition.

What the public does not know is whether the Commission shares Verizon's understanding. While Verizon is correct that the *Grant Order* does not expressly mention a state-by-state phase down, it seems to be implied by the very goal of the commitment which is to step down the amount of support that Verizon receives in equal 20% increments. How can that be accomplished without decreasing the support in each state in equal 20% reductions? Verizon reads into the *Grant Order* an understanding by the FCC that Verizon is free to add additional lines eligible for support in such a way as to significantly ***increase*** its support during the phase down period. Put simply, if an annual phase down of 20% does not mean that support is fixed on day one and reduced 20% thereafter each year, then exactly what does it mean? If the FCC's understanding is consistent with Verizon's, then the public record and the *Grant Order* should set forth such an understanding so that the public is provided appropriate notice required to perfect an appeal.

Verizon made its "voluntary commitment" to reduce its CETC high-cost support during the Sunshine period that began on October 28, 2008.[5] Although it claims that it "introduced" its voluntary commitment "on the date the *Grant Order* was adopted," Opposition, at 23, Verizon actually introduced its commitment in *ex parte* presentations that culminated with the filing of a letter the day before the *Grant Order* was adopted.[6] And Verizon's November 3, 2008 *Ex Parte* Letter refutes the Commission's claim that "all *ex parte* presentations have been made part of the public record in this proceeding and commenters have had ample time to review and respond to all such filings if they chose to do so." *Grant Order*, at 99 (¶ 220) (footnote omitted).

The November 3, 2008 *Ex Parte* Letter was the first of three Sunshine period written *ex parte* presentations.[7] It was filed, and served on the Commissioners, the day before they were to vote to approve the merger. The Verizon November 3, 2008 *Ex Parte* Letter ostensibly responded "to a question posed by the Commission" by attempting to provide "still further comfort" that its merger with ALLTEL would serve the public interest. *See* November 3, 2008 *Ex Parte* Letter 2, at 1. In the letter, Verizon offered "commitments" to phase down its high-cost universal service fund ("USF") support, to improve wireless E-911 location accuracy on a county-by-county basis, and to "double" the period it would honor ALLTEL's roaming rates from two to four years. *Id.*, at 1-2. The next day, the Commission conditioned its consent to

[5] *See FCC to Hold Open Commission Meeting Tuesday, November 4, 2008*, at 2 (Oct. 28, 2008).

[6] *See* Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95 (Nov. 3, 2008) ("November 3, 2008 *Ex Parte* Letter").

[7] *See* Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95 (Nov. 4, 2008); Letter from John T. Scott, III to Marlene H. Dortch, WT Docket No. 08-95 (Nov. 4, 2008).

the merger on Verizon' compliance with its three "voluntary commitments." *See Grant Order*, at 4 (¶ 4), 82-83 (¶¶ 178, 179), 90 (¶ 197), 92 (¶ 201).

Verizon's *ex parte* contacts during the Sunshine period could have been requested or approved in advance by the Commission ostensibly "for the resolution of issues."[8] In that case, some of the Sunshine period presentations were arguably permitted under the Commission's *ex parte* rules, but they were clearly improper when "measured against the demands of due process as well as the statutory requirements of the … Act." *RKO General v. FCC*, 670 F.2d 215, 232 (D.C. Cir. (1981).[9] The presentations were made during the "period of repose," during which the Commission was supposed to reach decisions "free from any hint of external pressure,"[10] and they continued up to the very day the Commission adopted the *Grant Order*. Not only were

[8] *Ex parte* presentations during the Sunshine period are permitted if they are exempt under § 1.1204(a) of the Rules. *See* 47 C.F.R. § 1.1203(a)(1). Under § 1.1204(a), *ex parte* presentations requested or approved in advance by the Commission are exempt provided that they are "for the clarification or adduction of evidence, or for resolution of issues, including possible settlement." *Id.* § 1.1204(a)(10). Considering the substance of Verizon's *ex parte* presentation, the Commission did not request those presentations for the purpose of adducing evidence or reaching a settlement. To be proper under the *ex parte* rules, the presentations had to have been requested or approved for the purpose of resolving issues raised in this proceeding. However, Verizon's commitment with respect to E-911 location accuracy was not at issue in this case.

[9] Congress conferred standing upon interested parties to file petitions to deny in order to "enable them to convey information bearing on the qualifications of licensees and potential licensees to the Commission." *Faulkner Radio, Inc. v. FCC,* 557 F.2d 866, 875 (D.C. Cir. 1977). The D.C. Circuit has recognized that any Commission practice which would seriously inhibit this flow of intelligence could be "inconsistent with the congressional mandate" and "injurious of the public interest." *Id.* The Commission's practice of treating contested wireless merger cases as permit-but-disclose proceedings is inconsistent with the procedural framework of § 309(d) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 309(d), and inhibits the ability of petitioners to submit adversarial comments on the matters at issue. In short, allowing *ex parte* presentations in § 309(d) adjudications effectively nullifies the statutory right of parties in interest to notice and the opportunity to "participate meaningfully in the decision-making process." *Cf., United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 540 (D.C. Cir. 1978).

[10] *Amendment of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3020 (1987).

Petitioners given no notice or opportunity to respond to Verizon's *ex parte* presentations,[11] they were prohibited by the Sunshine cut-off rule from responding. *See* 47 C.F.R. § 1.1203(a).

Verizon attempts to restore some semblance of fairness to the process by claiming that "USF issues were raised early in the proceeding, including the concept of reducing or eliminating the merged firm's ETC payments." Opposition, at 23. On the record, however, Verizon flatly refused to agree to a reduction in its high-cost CETC support and argued that it "should not be singled out for discriminatory treatment."[12] After Verizon altered its position during the Sunshine period and volunteered the phase down, Petitioners were not only unaware of the terms of Verizon's "voluntary commitment," they were prohibited by rule from responding and rebutting the proposition that the commitment was "sufficient to relieve commenters' concerns." *Id*. (quoting *Grant Order,* at 90 (¶ 197)). Under these circumstance, the Commission's adoption of the commitment was unlawful and must be remedied.

The D.C. Circuit has held that the Commission must employ procedures for the resolution of issues in adjudicatory proceedings under § 309(d) that permit "meaningful participation by petitioners." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,* 595 F.3d 621, 634 (D.C. Cir. 1978) (*en banc*). Thus, any information the Commission obtains for the resolution of issues "must be placed in the public record, and a stated reasonable time allowed for response and rebuttal by petitioners." *Id.* Here, the Commission solicited information from Verizon for the purpose of resolving contested issues, but it did so at a time

[11] Verizon's *ex parte* presentations were first posted online on November 4, 2008, the day of the Commission's decision.

[12] Joint Opposition to Petition to Deny and Comments, WT Docket 08-95, at 76 (Aug. 19, 2008).

when a response and rebuttal by the Petitioners was impossible. By its actions, the Commission deprived Petitioners of their right under § 309(d) of the Act and *Bilingual* to participate meaningfully in the decision-making process.

In *United States Lines*, the D.C. Circuit warned that for an agency adjudication of private rights "to pass muster in this court, it must be impeccably dressed with fairness." 584 F.2d at 536 (quoting *Sea-Land Service, Inc. v. Connor*, 418 F.2d 1142, 1146 (D.C. Cir. 1969)). In that case, the court was "squarely presented with a situation in which one interested party had private access to the Commission and in which a decision was made at least in part on contacts that were kept completely secret." *Id.*, at 542 n.63. The court held the agency violated "the basic fairness concept of due process" by allowing the *ex parte* contacts in a quasi-adjudicatory proceeding. *See id.*, at 539-41.

In this case, only Verizon had private access to the Commission during the Sunshine period and the *Grant Order* is explicitly based on their Sunshine period *ex parte* contacts. *See Grant Order*, at 82-83 (¶¶ 178, 179), 88 (¶ 191), 90 (¶ 197), 92 (¶ 201). The contacts were effectively kept secret since they were not disclosed until after the Commission adopted its *Grant Order*. By depriving parties in interest of their right to participate in a fair decision-making process, the Commission's actions were inconsistent with "fundamental notions of fairness implicit in due process." *HBO v. FCC*, 567 F.2d 9, 56 (D.C. Cir. 1977). The Commission can attempt to remedy its due process violation by issuing a reasoned decision on the issue on reconsideration.

On its face, Verizon's professed concern about the need to reduce overall support levels to competing carriers is self-serving. Its papers plainly state an intention to use the flexibility allegedly afforded by the FCC to somehow vindicate the public interest. Verizon is a market participant, not a regulator, and we think it unlikely that Verizon would seek to reduce the support that its competitors would otherwise be investing in new towers so as to further the FCC's public policy goals. Rather, we expect Verizon to act like a market participant and take actions that improve its competitive position to the fullest extent possible, without regard to whether consumers of its competitors receive new or improved service. By seeking to increase its support under the cap, while reducing that of other carriers, Verizon is not performing some public interest function on behalf of the agency; it is in fact prejudicing rural consumers who are expecting to receive service from new facilities that other CETCs intend to construct.

For example, in Maine, where U.S. Cellular has been notified by Verizon's counsel of its intent to merge entities and submit line counts from the former Verizon entity, assume that support under the cap to U.S. Cellular drops by $500,000.[13] Were that to happen, U.S. Cellular would cancel at least one, and possibly two, cell sites as a result of the reduction in funding. Communities promised new or upgraded service would not receive it, and U.S. Cellular would have to report to the Maine Public Utility Commission that it could not keep its commitment to deliver service to these communities in 2009. In effect, U.S. Cellular and its customers become unwilling participants in a "voluntary commitment" not of their making and to which they had no effective opportunity to respond.

[13] In response to an informal inquiry from U.S. Cellular's counsel, Verizon's counsel could not provide an estimate as to the expected impact of Verizon's submitting all of its Maine lines to the Universal Service Administrative Company on its competitors and U.S. Cellular has no way to make such an estimate.

Verizon makes an unsupported claim that Petitioners have set forth no basis to show that reductions in this manner are contrary to the FCC's goal of "minimizing CETC access to funding."[14] No support is provided because there is no validly stated FCC goal of minimizing CETC access to funding. Our Petition, along with the example set forth above, clearly set forth a valid basis to demonstrate that reductions in support to other CETCs contravene Section 254 of the Act, which commands the FCC to provide support that is explicit and sufficient to preserve ***and advance*** universal service for rural consumers.[15] Whenever a cell site is cancelled as a result of Verizon's actions, the ***consumers'*** interest that is protected by Section 254 is adversely affected.[16]

The consumers' interest in the preservation and advancement of universal service is superior to Verizon's stated interest in reducing overall support. In fact, Verizon's interest has never been expressed by the Congress or enshrined in any Commission regulation. Accordingly, to the extent that the Commission ever considered this issue (and the record sets forth no evidence that it has), then any interpretation that is consistent with Verizon's interest and inconsistent with that of consumers must be rejected.

In view of the above, Petitioners again ask the Commission to clarify that, as of the effective date of the Grant Order, Verizon's federal high-cost support shall be fixed, on a state-by-state basis, and reduced by 20%. On each anniversary thereafter, Verizon's support in each state shall be reduced by 20% from the initial fixed amount. Verizon's support shall not

[14] Opposition, at 21.

[15] 47 U.S.C. §§ 254(b)(5), 254(e).

[16] Were Verizon to submit line count information to the FCC explaining how its intended actions affect support to other carriers, we would be able to more accurately quantify its effects on consumers.

be increased by virtue of any mergers or acquisitions it effectuates until its support is reduced to zero, or a successor universal service mechanism adopted. Verizon's support may be reduced if divests assets generating high-cost support.

In order to encourage transparency, the Commission should publicly release the amount of support that Verizon is entitled to receive in each state, as of December 31, 2008, so that the maximum amount of support it will receive in each state, in each subsequent year, can be definitively established.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David LaFuria, hereby certify that on this 29th day of December, 2008, copies of the foregoing document were sent by e-mail to:

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