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

In the Matter of	)	
	)	
Atlantis Holdings LLC,	)	**WT Docket No. 08-95**
Assignor/Transferor	)	**FCC ULS File Nos. 0003463892, et al.**[1]
	)	
And	)	
	)	
Cellco Partnership d/b/a Verizon Wireless,	)	
Assignee/Transferee	)	
	)	
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	)	**File No. ISP-PDR-20080613-00012**

To: The Commission

REPLY TO JOINT OPPOSITION TO PETITION FOR RECONSIDERATION

Public Service Communications, Inc. (PSC), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby submits this reply to the December 22, 2008 Joint Opposition filed by Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless") and Atlantis Holdings LLC ("Atlantis Holdings"), in response to PSC's December 10, 2008 petition for reconsideration ("PFR") in the above-captioned matter.

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[1] This file number has been designated the lead application. *See* *Public Notice*, Mimeo DA 08-1481, released June 25, 2008 at page 2 footnote 3.

As discussed below, the Commission's approval action, embodied in its November 10, 2008 *Memorandum Opinion and Order and Declaratory Ruling* ("Approval Order") in the above-captioned proceeding[2], failed to impose conditions designed to ensure that the proposed merger of these two telecom giants does not result in an anticompetitive impact on small telecommunications carriers that serve primarily rural areas. The Joint Opposition fails to refute this showing in PSC's PFR. In support hereof, the following is shown:

I. The Joint Opposition Seeks to Impose an Inapplicable Standard on the PFR

Citing Rule Section 1.106(b)(3), the Joint Opposition argues (at pp. 2-3) that "a petition for reconsideration that fails to rely on new facts or changed circumstances may be dismissed by the Commission as repetitious." However, Rule Section 1.106(b)(3) only applies to a petition for reconsideration of a Commission order denying an application for review. That is not the case in the instant proceeding, so PSC was not required to demonstrate new facts or changed circumstances. Instead, PSC properly pointed to arguments in the record that were not adequately addressed, and more reasonable alternatives that were not given due consideration; and PSC cited precedent stating that these shortcomings are arbitrary and capricious, and require that the Commission reconsider its actions. See PFR at pp. 4-5.

In that regard, the Joint Opposition repeatedly relies on the argument that the contentions in PSC's PFR were considered by the Commission and rejected in its *Approval Order* in this proceeding. However, it is always the case when a petition for

[2] Mimeo No. FCC 08-258, released November 10, 2008.

reconsideration is filed that arguments were considered and rejected in an earlier phase of the proceeding. The point of the petition for reconsideration process embodied in Rule Section 1.106 is to hold the Commission accountable to address shortcomings in its consideration of the record below. Therefore, the mere fact that PSC's arguments were somehow discussed in the *Approval Order* is not an adequate ground to dismiss PSC's petition.

For example, the Joint Opposition fails to refute PSC's showing that the following matters were not given proper consideration and analysis in the *Approval Order*:

1. Roaming relief for small, rural carriers: PSC identified the fact that the Approval Order did not go far enough in ensuring that fair and reasonable roaming terms will be available for rural carriers despite the significant loss of competition for roaming terms created by the merger of ALLTEL into Verizon Wireless. Several other parties have developed this issue in even greater detail, and PSC concurs with their arguments.[3] PSC must reinforce the fact that the proposed merger will take away the primary source of competitive roaming rates, and destroy any incentive for Verizon Wireless to keep its rates competitive. Moreover, there is a critical need for rural carriers to have access to 3G data roaming, or their rural customers will suffer. See PFR at 11-14. The Joint Opposition argues that "these roaming requests have not only been specifically considered and rejected, but the Commission has either already provided relief or has open dockets considering the issues raised." Joint Opposition at 8. However, as argued

[3] See, e.g., December 10, 2008 Petition for Reconsideration of MetroPCS Communications, Inc. at pp. 7-24; December 10, 2008 Petition for Reconsideration of Rural Telecommunications Group. at pp. 5-14;

in the PFR, any relief afforded is not *adequate*. The mere recitation of the right of a carrier to file a complaint over a roaming dispute does not adequately address the extraordinary harm to roaming options caused by this mega-merger. And while the Commission has open dockets relating to some of these roaming issues, if the merger is allowed to go forward without the imposition of conditions designed to prevent the resulting harms, any relief eventually coming out of other end of the rule making pipeline is likely to be too little and too late. Many rural carriers may be out of business by then. The Joint Opposition does not address these facts.

2. Handset Exclusivity Issues: Similarly, the PFR demonstrated that the Approval Order erred by not imposing restrictions on the handset exclusivity arrangements that Verizon Wireless makes with manufacturers, to the detriment of rural carrier subscribers. See PFR at 14-15. Such arrangements have even made it difficult for rural carriers to comply with hearing aid compatibility mandates. The Joint Opposition erroneously argues once again (at 13) that petitioners had to demonstrate "new facts", and that any handset relief must come from a rule making. However, in this instance, a Notice of Proposed Rule Making has not even been issued; and the PFR properly demonstrated that the Approval Order failed to give proper consideration to a less onerous alternative, namely, restricting exclusive handset arrangements until a rule making can be concluded. Again, serious harms to rural carriers and their customers will have occurred by the time a rule making is initiated and completed (taking months or more likely over a year). A condition on the merger approval is a reasonable way to prevent such harms on an interim basis, and the Commission failed to consider this alternative, even though the

record in this proceeding demonstrated that the Commission has used such interim merger conditions in the past. *See* In the Matter of Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees; For Consent To Transfer Control of Licenses and Authorizations, 21 FCC Rcd 7358, 7361 (FCC 2006)The Joint Opposition fails to refute PSC's showing in this regard.

II. The Joint Opposition Fails to Refute PSC's Showing that Additional Markets Should Be Divested

PSC has requested that the Commission reconsider its refusal to require the divestiture of the following additional markets as a condition of merger approval.

CMA 153 Columbus, GA MSA
CMA 311 AL 5 - Cleburne RSA
CMA 314 AL 8 – Lee RSA
CMA 375 GA 5 – Haralson RSA
CMA 392 ID 5 – Butte RSA
CMA 393 ID 6 – Clark RSA

The Joint Opposition (at 17-20) argues that the Commission should reject this request, because the Commission already has reviewed these markets, and found them to be competitive, "as part of its granular competitive analysis of the transaction." However, this argument is flawed because the Commission failed to consider PSC's showing (through the Rural Carriers' Petition to Condition Merger Approval) that it is vital to ensure that the divested cellular systems offer the purchaser enough of a population base and other characteristics to remain viable. Otherwise, the divestiture will do nothing to preserve competition. While the *Approval Order* notes (at para. 160) that the Rural Carriers' petition made this argument, the Commission fails to consider the merits of the Rural Carriers' showing, and explain why the public interest is served by allowing the divestiture of systems that will likely fail competitively in the near term. It is

not enough for a Commission order to simply note and summarily dismiss an argument. Instead, the Commission must provide a reasoned analysis of its action. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415, (1971) (Reviewing court must consider "whether the decision was based on a consideration of the relevant factors"). Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 462 US 29, 43 (1983)(Holding "the requirement that an agency action not be arbitrary and capricious includes a requirement that an agency adequately explain its result").

In this regard, PSC notes that five of the six markets listed above were in fact identified by the Commission's "Initial Screen" as markets in which there were anti-competitive impact concerns. See Approval Order at Appendix C. If the Commission had not improperly modified the screening criteria (as discussed in the PFR at pp. 9-10), it is likely that these markets would have been included in the divestiture requirement.

While Verizon Wireless has argued consistently that the proposed merger will further competition, if it is allowed to divest low population density areas without the adjoining markets that would are necessary to make the divested system viable, then Verizon will only be harming competition. The Approval Order fails to adequately address this issue, and the Joint Opposition likewise fails to do so. In contrast, the PFR has amplified the market characteristics that justified a closer look at the above markets, as requested in the Rural Carriers' petition.

As noted in the PFR, the need to provide a fair opportunity to succeed is particularly necessary given the current economic climate. Credit is tight, and consumers are resistant to spending of all kinds. Prospective purchasers (other than the major carriers, who as purchasers would only further increase concentration) will have a difficult time making an acquisition in Georgia and Alabama and making it work. Excluding the Columbus area from any divestiture will make it that much harder to restore competition.

III. The Commission Should Hold the Merger in Abeyance Pending Final Consideration of Public Comment on the DOJ Settlement with Verizon, As Required By the Tunney Act.

The Joint Opposition fails to refute PSC's showing that the merger approval should be held in abeyance until the public comment period on the Department of Justice settlement with Verizon Wireless has ended. As noted in the PFR, the Tunney Act requires that the public be given 60 days to comment on the proposed settlement with Verizon/ALLTEL. Since the proposed settlement was not published in the Federal Register until November 12, 2008, this 60 day period does not expire until January 12, 2009; and thereafter, DOJ and the Court will need to consider the public's views on the settlement proposal, and determine if the settlement would be in the public interest. The Joint Opposition's retort is that "it is ordinary course processing for transactions to close during the period allowed for public comment on a proposed settlement under the Tunney Act." However, on a merger of this magnitude, allowing a closing would clearly make it impossible for DOJ and the court to give careful consideration to public comment. Could the court reasonably be expected to undo a merger of this size and impact after the fact?

Therefore, the Commission should hold its action in abeyance until the court and DOJ have processed public comments. Otherwise, the public comment procedure would be a meaningless "box checking" exercise, a result that Congress did not intend in enacting the Tunney Act.

Respectfully submitted,

THE RURAL CARRIERS

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CERTIFICATE OF SERVICE

I hereby certify that I am an attorney with the law offices of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, LLP and that on December 29, 2008, I caused to be sent by electronic mail (e-mail), a copy of the foregoing **"Reply to Joint Opposition to Petitions for Reconsideration"** to the following:

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