Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
ATLANTIS HOLDINGS LLC, Transferor,	)	
	)	
and	)	WT Docket No. 08-95
	)	
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, Transferee	)	
	)	
For Consent to the Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act	)	

REPLY TO JOINT OPPOSITION
TO PETITIONS FOR RECONSIDERATION

Leap Wireless International, Inc. ("Leap") replies to the Joint Opposition to Petitions for Reconsideration submitted by Cellco Partnership d/b/a Verizon Wireless ("Verizon") and Atlantis Holdings LLC ("Atlantis").[1] The Joint Opposition is deeply troubling. Verizon's responses to the petitions for reconsideration or clarification filed in this proceeding have revealed its willingness to engage in interpretative gamesmanship that would deny competitors and consumers access to fundamental roaming services. That effort should not be countenanced by the Commission.

I. INTRODUCTION AND SUMMARY

***Verizon would write an important condition out of the* Verizon/ALLTEL Order.**[2]

Verizon tries to leverage a small lack of clarity in the *Verizon/ALLTEL Order* to make it lift an

[1] *See* Joint Opposition to Petitions for Reconsideration, *filed in* WT Docket No. 08-95 (filed December 22, 2008) ("Joint Opposition").

[2] *Atlantis Holdings LLC and Cellco Partnership d/b/a Verizon Wireless*, FCC 08-258, Memorandum Opinion and Order, WT Docket No. 08-95 (rel. Nov. 10, 2008) ("*Verizon/ALLTEL Order*").

enormous weight – to relieve Verizon of one of the roaming conditions imposed in the *Order* by simply writing that condition out of the *Order* altogether. Specifically, one of the conditions allows smaller carriers that have roaming agreements with both Verizon and ALLTEL "to select either *agreement* to govern all roaming traffic between it and post-merger Verizon Wireless."[3] Verizon tries to nullify that requirement with respect to the agreements' non-rate terms based on the fact that other roaming conditions are focused on rates. Under Verizon's interpretation, the "select[tion of] either agreement" by a roaming partner would be meaningless since Verizon would be free to disregard most of the chosen agreement's terms. Under standard canons of statutory construction, however, an interpretation that makes sense of all parts of an order is superior to an interpretation that pretends that part of the order was never written. What is especially ironic, Verizon is trying to erase a sentence it wrote itself. The unequivocal language allowing carriers to select "either agreement" is one that Verizon itself offered. Verizon now tries to extricate itself from the bargain it made. At a minimum, under another well-settled interpretive rule, lack of clarity should be construed against the drafter of the unclear language.

At least three Commissioners understood that the roaming conditions required Verizon to honor all terms of the roaming agreement selected by smaller carriers. Verizon's reading of the roaming conditions should also be rejected because it would be contrary to the understanding of those conditions expressed by at least three Commissioners. Commissioners Tate, Copps and Adelstein all understood the condition to require Verizon to honor all of the terms in the roaming agreements selected by smaller carriers, and not just the rate terms. The Commission should put this matter beyond doubt by confirming its intention. Any more restrictive reading of the conditions would put in jeopardy the Commission's finding that the merger, as conditioned, would not cause harm in roaming markets, and require reconsideration of that finding.

[3] *Id*. at ¶ 178 (emphasis added).

Even if Verizon were only required to honor "rates," that obligation would extend to non-price terms that affect the service offered. Even if Verizon had only been required to honor the "rates" in an agreement selected by a party to both Verizon and Alltel roaming agreements, that would not help Verizon. "Rates" have always been interpreted broadly by the Commission and indeed by the Supreme Court to include not just the rate itself, but also non-price terms that define the service being offered in return for the rate. The reason is simple: when you charge a price for a service, increasing the price for the same service is no different than reducing or degrading the service and leaving the price unchanged.

Verizon does not persuasively dispute that the selected roaming agreement will apply to future service areas and spectrum bands. Contrary to Verizon's assertions, Leap's requested clarification in this regard has not been rejected by the Commission. Verizon can point to no specific passage in the *Verizon/ALLTEL Order* in support of its contentions, nor does Verizon otherwise dispute Leap's proposed reading – namely, that "all roaming traffic" means just that and includes roaming in each carrier's future service areas and spectrum bands.

II. VERIZON WOULD WRITE AN IMPORTANT CONDITION OUT OF THE ORDER

The *Verizon/ALLTEL Order* states, without equivocation or distinctions between different kinds of terms: "We also condition our approval on each such regional, small, and/or rural carrier that currently has roaming agreements with both ALLTEL and Verizon Wireless having the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless."[4] To hear Verizon, however, this sentence would have no meaning for the agreement's non-rate terms.

It is true that the Commission also said: "We further condition our approval on Verizon Wireless's commitment that it will not adjust upward the rates set forth in ALLTEL's existing

[4] *Verizon/ALLTEL Order* at ¶ 178.

agreements with each regional, small and/or rural carrier for the full term of the agreement or for four years from the closing date, which ever occurs later."[5] The juxtaposition of the two sentences next to one another does raise a slight question mark, prompting Leap to file its request for clarification.

But once raised, the question is answered with ease. Simply put, Verizon must observe both the rates and the non-rate terms of the agreement selected by its roaming partners for the prescribed period. This makes sense of both sentences. To read the conditions as extending only to rates would nullify one of them. With little apparent concern for consistency, Verizon states:

> While certain roaming partners may select either their Verizon Wireless or ALLTEL roaming *agreement* to govern all traffic with the merged company, this condition plainly requires only that the *roaming rate* be honored for a period of the term of the agreement, or four years after closing, whichever is longer.[6]

This is a sentence that annihilates itself, somewhat like saying: "While something is true, it is not correct." Under standard canons of interpretation, a construction that makes sense of both conditions is decidedly better than one that makes sense of only one. As Sutherland puts it: "No clause, sentence or word shall be construed as superfluous, void or insignificant if a construction can be found which will give force to and preserve all the words of the statute."[7] This is also the better interpretation as a matter of policy. In this regard, Verizon's insistence that it should only be required to honor the rates in selected roaming agreements contrasts sharply with its vehement opposition to the "pick-and-choose" rule in the interconnection

[5] *Id.*

[6] Joint Opposition at 7 (emphases added).

[7] 2A SUTHERLAND STATUTORY CONSTRUCTION § 46:6 (7th ed. 2007).

context; it also flies in the face of the Commission's disfavor of such rules in recent years when considering how to allow carriers to opt into various types of agreements.[8]

In any event, it was Verizon itself that proposed the "bargain" from which it now seeks to extricate itself: if you approve the merger, Verizon said to the Commission, we will commit to allow smaller carriers to choose which roaming agreement would apply to the exchange of roaming traffic. In its last-minute *ex parte* notice, Verizon confirmed that: "once a roaming partner selects one of the two roaming agreements (Alltel or Verizon Wireless), it applies to all roaming traffic of the requesting carrier throughout all of the combined company's service area …,"[9] without any hint that the commitment would be limited only to the *rates* in those agreements. To the extent that there is any lack of clarity in Verizon's commitments, it is a well-established interpretive rule that such lack of clarity should be resolved against the drafter of the unclear language: "Doubtful language in a contract should be interpreted most strongly against the drafting party, especially where he or she seeks to use such language to defeat the contract or its operations…"[10]

[8] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 13494 (2004), *aff'd, New Edge Network, Inc. v. FCC*, 461 F.3d 1105 (D.C. Cir. 2006) (replacing the "pick-and-choose" rule with an "all-or-nothing" rule); *Implementation of the NET 911 Improvement Act* of 2008, 23 FCC Rcd 15884, 15899 n.99 (rel. Oct. 21, 2008) (requiring interconnected VoIP providers to "get the benefits and burdens associated with all of the applicable rates, terms, and conditions of agreements for access to the capabilities they need to provide E911 service, rather than getting to 'pick and choose' the best terms from each such agreement.").

[9] Letter from John T. Scott III, Verizon Wireless to Marlene Dortch, Secretary, FCC, *filed in* WT Docket No. 08-95 (filed Nov. 4, 2008) ("*Verizon Nov. 4 Ex Parte*").

[10] *See* 17A Am. Jur. 2d § 343 (2004).

III. AT LEAST THREE COMMISSIONERS UNDERSTOOD THAT THE ROAMING CONDITIONS REQUIRED VERIZON TO HONOR ALL TERMS OF THE ROAMING AGREEMENT SELECTED BY SMALLER CARRIERS

Rather than accept Verizon's narrow view that its roaming obligations apply only to the rates in ALLTEL's roaming agreements, a clear majority of Commissioners confirmed at the time the *Verizon/ALLTEL Order* was issued that the roaming conditions in the *Order* require Verizon to honor the "roaming contracts" or "roaming agreements" selected by smaller carriers – and not just the rates in those agreements – for the full term of the agreements or for four years from closing, whichever is later. In this respect, Leap's requested clarification is fully consistent with the intent of the Commission majority.

Commissioner Tate, for instance, understood that, as a result of the roaming conditions imposed by the Order: "Verizon Wireless will honor the existing roaming agreements – whether contracted with them or Alltel – for four years."[11] Similarly, Commissioner Copps understood that: "The main conditions we secure today are a commitment by Verizon Wireless to extend existing roaming contracts for four years …."[12] As did Commissioner Adelstein: "And while I appreciate that this item incorporates the commitment to extend the duration of Alltel and Verizon agreements for up to four years, this commitment alone is inadequate."[13] None of these Commissioners seemed to limit their understanding of the roaming conditions to just the rates. In view of Verizon's recent and limited view of its roaming obligations, it is imperative that the Commission confirm that understanding – by clarifying that Verizon must maintain the entirety of the existing roaming agreements selected by smaller carriers for their full term or for 4 years from closing, whichever is later.

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[11] Statement of Commissioner Tate at 1, *in Verizon/ALLTEL Order*.

[12] Statement of Commissioner Copps at 1, *in Verizon/ALLTEL Order*.

[13] Statement of Commissioner Adelstein at 1, *in Verizon/ALLTEL Order*.

Finally, to accept Verizon's view that it is only required to observe the rates in those agreements would shake to its foundations the Commission's finding that the roaming conditions are sufficient to address the anticompetitive harms raised by the proposed merger, and would require reconsideration of that fundamental finding, too. As Leap has pointed out, this merger will create a Verizon whose reach extends virtually everywhere in the country.[14] This means that Verizon will no longer need to roam on any other carrier – demolishing the premise of mutual need for roaming services on which the Commission's roaming policies have rested in the past.[15] The consequences of self-sufficiency can perhaps be reined in for a while if Verizon is subject to a solemn obligation to respect preexisting agreements. These constraints would be undone if Verizon, while paying lip service to observing rates, is left free to toy at its whim with the terms of the service that the rate buys. In the absence of a condition committing Verizon to respect the pre-merger agreements that its roaming partners have chosen, nothing is left to mitigate the lack of need for roaming produced by this merger.

Indeed, the statements of most Commissioners provide additional conclusive proof that the condition allowing smaller carriers to select a roaming agreement was very important to the Commission's public interest evaluation. Commissioner Tate believed that Verizon's commitment to keep in place the "roaming agreement" (not just the roaming rates) chosen by smaller carriers for four years was crucial to preserve competition in roaming markets until LTE

[14] *See* Application at Exhibit 2 (coverage map); Carlton Reply Declaration at 32-33 tbl.9 (showing coverage of 98.4% of the U.S. population), *filed in* WT Docket No. 08-95.

[15] *See AT&T Wireless Services, Inc. and Cingular Wireless Corp.*, 19 FCC Rcd 21522, at ¶ 178 (2004) ("even the 'nationwide' carriers still have holes in their licensed services areas, however, and therefore have a strong incentive to enter into roaming agreements with other carriers …."). Leap's experience is that Verizon will lack incentives to enter into reasonable roaming agreements with a carrier when it does not need roaming on that carrier's network. *See* Reply Comments of Verizon Wireless at 11 (emphasis added), *filed in* WT Docket 05-265 (filed Jan. 26, 2006) (imposing a reverse-volume discount "since Verizon Wireless had no need for its customers to roam on Leap's network in any of Leap's markets.").

is deployed.[16] Moreover, Commissioners Copps and Adelstein believed that the roaming conditions were inadequate to address the roaming issues raised by the merger – even on the more natural reading favored by Leap.[17]

IV. EVEN IF VERIZON WERE ONLY REQUIRED TO HONOR THE "RATES" IN THE SELECTED ROAMING AGREEMENTS, THAT OBLIGATION WOULD EXTEND TO NON-RATE TERMS THAT AFFECT THE SERVICE PROVIDED

Even if Verizon had only been required to honor the rates in its existing roaming agreements, that would not help Verizon. "Rates" have been interpreted broadly by the Commission, and indeed by the Supreme Court, to include not just rates itself, but also non-price terms that define the service being offered in return for the price. As the Supreme Court has explained:

> Rates … do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.[18]

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[16] *See* Statement of Commissioner Tate at 1 ("By maintaining roaming *agreements* for this longer period of time, it is more likely that Long Term Evolution (LTE) will be available from other providers – including AT&T, which does not offer CDMA service – when many of these roaming contracts expire. This will help ensure more competition in the provision of roaming service at that time.") (emphasis added).

[17] *See* Statement of Commissioner Copps at 1 ("These provisions are better than nothing—and better than what was originally proposed when this item was circulated—but I cannot say that they answer more than a portion of my concerns."); Statement of Commissioner Adelstein at 1 ("And while I appreciate that this item incorporates the commitment to extend the duration of Alltel and Verizon *agreements* for up to four years, this commitment alone is inadequate.") (emphasis added).

[18] *See AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998) (internal quotations and citations omitted).

Similarly, in the satellite broadcast carriage context, the Commission has found that offering some television stations on one satellite dish, while offering other stations on another dish free of charge, could still violate a prohibition on price discrimination if "subscribers must incur significant effort to obtain the second dish."[19] In this respect, the Commission found that "the cost associated with this effort should be imputed as a component of the 'price' of obtaining these channels."[20]

Thus, if Verizon were to introduce an in-market exception into existing ALLTEL agreements that did not previously include such an exception, or if Verizon were to limit the frequencies on which it would provide roaming service, Verizon would be failing to maintain the "rate" of that agreement even if the price of the now narrowed service remained the same. A roaming agreement that is crucially qualified by a home market exclusion or restricted by frequency offers much less service at the same price as before. This means that the price has effectively gone up dramatically, and this Verizon is not allowed to do even under its own singularly selective reading of the *Verizon/ALLTEL Order*. The Commission should make this clear. Of course, the Commission can avoid altogether any inquiry into which non-price terms affect the roaming rates or services being offered by clarifying its intent, as requested by Leap – namely, by settling that Verizon must honor *all of the terms* of the roaming agreement selected by smaller carriers for the full term of the agreement or four years, whichever is longer.

V. VERIZON DOES NOT DISPUTE THAT THE SELECTED ROAMING AGREEMENT WILL APPLY TO THE FUTURE SERVICE AREAS AND SPECTRUM BANDS OF EACH CARRIER

Verizon suggests that Leap's requested clarification – that the roaming agreement selected by smaller carriers apply to future service areas and spectrum bands – is encompassed

[19] *National Ass'n of Broadcasters*, 17 FCC Rcd 6065, at ¶ 15 (2002).

[20] *Id*.

within arguments raised previously and rejected by the Commission.[21] However, Verizon points to no specific passage within the *Verizon/ALLTEL Order* that rejects this view, and indeed there is none.

Nor does Verizon otherwise dispute Leap's reading of the roaming condition. This is not surprising as Leap's reading is straightforward – a condition that allows smaller carriers to choose either their Verizon or ALLTEL agreement to govern "all roaming traffic" means just that, and necessarily includes roaming traffic in each carrier's future service areas and spectrum bands. Accordingly, the Commission should confirm this reading of the condition.

VI. CONCLUSION

Leap respectfully requests that the Commission confirm the intended meaning of the merger conditions in the manner requested by Leap.

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January 6, 2009

[21] Joint Opposition at 8.

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