April 6, 2009

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC ("*Verizon/ALLTEL*"), WT Docket No. 08-95, and Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265; ***EX PARTE***

Dear Ms. Dortch:

Leap Wireless International, Inc. ("Leap") hereby replies to the *ex parte* letter of Verizon Wireless ("Verizon"), dated March 19, 2009, submitted in the above-captioned docket.[1] In that letter, Verizon advances an untenable interpretation of the merger conditions that not only contradicts its own filings, but also dismisses as irrelevant the contrary views expressed by at least three Commissioners as to what the conditions require. Verizon seeks to renege on the promises it made in exchange for merger approval and to free itself of the limited restraints that the Commission imposed to protect other carriers against Verizon's abuse of market power.

Verizon cannot simply ignore the conditions with which it does not want to comply and frustrate the Commission's order. Because of the questions Verizon has created as to how a carrier's selection of a roaming agreement will be implemented, Leap and other carriers have been unable to exercise the option of choosing a roaming agreement to govern all roaming traffic with the combined Verizon/ALLTEL. Verizon's position means that carriers like Leap cannot tell what they are being asked to choose. The situation is particularly intolerable because the Commission has imposed a four-year condition on Verizon, and it has been more than *two months* since consummation of the transaction—yet Verizon continues to circumvent the Commission's condition.

Verizon's most recent letter compounds uncertainty and confusion by adding yet another characteristically ambiguous commitment: Verizon now claims that it "will not exercise any contractual provisions that allow it to dissolve Alltel's roaming agreements before their scheduled expiration."[2] What this statement means, given Verizon's conduct, is anyone's guess. Many roaming agreements, including Leap's agreement with ALLTEL, do not have a "scheduled" expiration date, but simply provide either party with the right to terminate upon

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1 Letter from Scott D. Delacourt, Counsel for Verizon Wireless, to Marlene H. Dortch, WT Docket No. 08-95 (filed Mar. 19, 2009) ("Verizon Mar. 19 *Ex Parte* Letter").

2 *Id.* at 3.

notice. Does Verizon mean that it will respect such agreements for at least four years after closing? That is the implication, but Verizon should be compelled to answer this question.

In any event, as set forth below, there are at least three reasons why Verizon's current construction of the conditions set forth in the *Verizon/ALLTEL* Order fails:

(1) Verizon's commitment to honor rates for four years is rendered meaningless if Verizon can abandon other terms and conditions of its roaming agreements—price is inextricably linked to what one gets for it;

(2) Verizon's own statements to the Commission make clear that it understood the four year commitment would apply to *all* terms in a roaming agreement; any lingering uncertainty over the meaning of the commitment should be interpreted against Verizon, the original drafter; and

(3) The statements of three Commissioners reveal that a majority of the agency intended for the four year commitment to apply to each roaming agreement *as a whole*, and not just to the rate term.

First, Verizon's reading of the merger conditions makes no logical or policy sense. Specifically, Verizon attempts to divorce the requirement that Verizon may not "adjust upward the rates set forth in ALLTEL's existing agreements . . . for the full term of the agreement or for four years from the closing date, which ever occurs later"[3] from the condition that existing roaming partners with both Verizon and ALLTEL agreements have "the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless."[4] According to Verizon, the latter condition applies only "for the duration of the selected agreement."[5] As mentioned above, however, many roaming agreements are month-to-month or are terminable after a limited notice period. Therefore, Verizon maintains it is free to terminate a roaming agreement under the contract's terms and then force upon the roaming carrier all sorts of new terms and conditions—or refuse to provide roaming service altogether.

Of course, Verizon's commitment to honor the rates for four years is rendered meaningless if Verizon can demand other ransom in exchange. And Verizon offers no policy justification to support its reading of the conditions—because there is none. As the Supreme Court has observed, rates "do not exist in isolation," but have meaning "only when one knows

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[3] *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*, Memorandum Opinion and Order and Declaratory Ruling, WT Docket No. 08-95, ¶ 178 (rel. Nov. 10, 2008) ("*Verizon/ALLTEL Order*").

[4] *Id.*

[5] Verizon Mar. 19 *Ex Parte* Letter at 3.

the services to which they are attached."[6] To the extent that rate conditions are necessary to ensure that consumers are adequately protected against potential anti-competitive behavior, the same reasoning obviously applies in this context to *non-rate* terms as well. The Communications Act provides that all terms and conditions must be just, reasonable, and nondiscriminatory.[7]

Indeed, based on Verizon's construction, a roaming carrier could be made *worse off* if it exercised its option to select one agreement to govern all roaming traffic with Verizon than it would be if there were no conditions at all. For example, a carrier's roaming agreement with Verizon may provide a lower roaming rate but exclude all "in-market" traffic, whereas its agreement with ALLTEL may provide for higher rates but contain no geographic restrictions. In such a case, if the carrier elects the ALLTEL agreement to achieve better coverage for its subscribers (albeit at a higher price), Verizon could terminate the agreement pursuant to its terms, and the carrier would then be stuck with the higher rate *and* the in-market exclusion. Clearly, such an outcome cannot be not what the Commission intended by imposing these conditions.

Second, a review of Verizon's own filings makes clear that Verizon itself understood the four-year commitment would apply to *all terms* in the agreement. In July 2008, Verizon first committed to extend to carriers the option to select either the Verizon or ALLTEL roaming agreement "to govern all roaming traffic between it and post-merger Verizon Wireless."[8] It explained that this commitment would "avoid any uncertainty among regional, small and rural carriers as to whether their customers can continue to roam without interruption following the closing of the merger."[9] Several carriers (including Leap) raised the concern that this commitment would not protect their customers, because Verizon could immediately terminate their agreements after the merger closed.[10] In its Opposition, Verizon represented that its policy "is not to terminate roaming arrangements," but it made the additional commitment to freeze rates for two years specifically to "allay these concerns."[11] According to Verizon, its voluntary commitments would ensure that all ALLTEL roaming parties would be able to "continue to enjoy rights under their existing roaming agreements."[12] Verizon's own experts observed that

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6 *AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998)

7 *See* 47 U.S.C. §§ 201, 202.

8 Letter from John T. Scott, III, Verizon, to Marlene H. Dortch, WT Docket No. 08-95 (filed July 22, 2008).

9 *Id.*

10 *See, e.g.*, Petition to Deny of Leap Wireless International, Inc., WT Docket No. 08-95, at 18–19 (filed Aug. 11, 2008).

11 Verizon Wireless, Joint Opposition to Petitions to Deny and Comments, WT Docket No. 08-95, at 56 (Aug. 19, 2008) ("Verizon Opposition").

12 *Id.*

existing contracts limited the potential for competitive harm, because the company promised to allow carriers with ALLTEL agreements to "*maintain those existing agreements for at least two years following the close of the merger*."[13]

In October 2008, a coalition of roaming carriers (including Leap) urged the Commission to "[e]xtend the proposed duration of the extension of the Alltel and Verizon agreements beyond the 2 years offered by Verizon to the longer of 7 years (based on an estimate of the widespread introduction of LTE technology into the marketplace) or the term of any existing agreement between the parties."[14] Verizon Wireless stated it "opposed this request but was willing to extend the duration of its previous commitment from two years to four years."[15] At the same time, Verizon stressed that it opposed any proposal that would allow carriers to "pick and choose various terms from other agreements and import them into their own agreements."[16]

Ironically, Verizon now seeks to "pick and choose" here. Verizon's latest position, that its four-year commitment does not provide any protections for roaming agreement terms and conditions besides the rate, is inconsistent with its prior representations. Verizon now claims that the *very same* interpretation it portrayed to roaming carriers and the Commission as sufficient to protect consumer interests amounts to a "reversal" of the Order.[17] Verizon even goes so far as accusing OPASTCO (and, presumably, other roaming carriers) of advancing a "*post-hoc* [sic] construction" that, in Verizon's words, "is nothing more than a self-serving attempt to expand the scope of the condition for the financial benefit of its members."[18]

As demonstrated above, it is Verizon that seeks to reinterpret and retrade upon its commitments to the Commission. And in any event, Verizon is the lone culprit responsible for any lack of clarity regarding the meaning of the conditions—as the entity that drafted them and as the entity that has variously described them in misleading ways. Under standard canons of construction, such ambiguity should be construed against the drafter.[19]

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[13] Verizon Opposition, Attachment 1, Reply Declaration of Dennis Carlton, Allan Shampine, and Hal Sider at 36 ¶ 68 (emphasis added).

[14] Letter from Jean L. Kiddoo, MetroPCS, to Marlene H. Dortch, WT Docket No. 08-95, at 2 (filed Oct. 28, 2008).

[15] Letter from John T. Scott, Verizon Wireless, to Marlene H. Dortch, WT Docket No. 08-95, at 1 (filed Nov. 4, 2008).

[16] *Id.*

[17] Verizon Mar. 19 *Ex Parte* Letter at 2.

[18] *Id.* at 3.

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

Third, Verizon is also wrong that the statements of three Commissioners as to the proper construction of these conditions can be blithely ignored. The separate statements of Commissioners Tate, Copps, and Adelstein make clear that they all interpreted the conditions to require Verizon to honor all of the terms in the selected roaming agreements—not just the rates. Commissioner Tate stated that "Verizon Wireless will honor the existing *agreements*—whether contracted with them or Alltel—for four years."[20] Commissioner Copps stated that "[t]he main conditions we secure today are a commitment by Verizon Wireless to extend existing roaming *contracts* for four years."[21] And Commissioner Adelstein stated, "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."[22]

Verizon's only response is to argue that these statements "do not have the force of law."[23] But Verizon cites no case law to support that proposition, and several cases suggest otherwise. As the D.C. Circuit explained in *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22 (D.C. Cir. 2000), a court cannot perform its judicial review function unless it is "able to discern the rationale underlying" an agency's conclusions. *Id.* at 29. And the D.C. Circuit has periodically examined separate statements of agency officials to determine whether there is in fact a shared basis to support the agency's decision. *See id.; see also Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 91 (D.C. Cir. 1995).

Where, as here, there is potential ambiguity as to the rationale underlying the agency's decision, it would be perfectly reasonable for a court to examine—and defer to—the views of a majority of individual Commissioners as to how that ambiguity should be resolved. Here, three Commissioners relied on their understanding (based on the record and discussions with parties) that Verizon would extend the *entire agreement* to its roaming partners for four years as a principal basis for concluding that this transaction was in the public interest. To the extent they were wrong, as Verizon now contends, that would call into question the Commission's public interest finding and would require the Commission to reevaluate its approval of the merger or would be grounds for reversal on appeal.

Leap respectfully urges the Commission to act promptly on its request for clarification. The clock is already running on the four-year time period and, sadly, Commission action is the only way to ensure that Verizon will live up to its commitments.

Please contact me if you have any questions.

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[20] *Verizon/ALLTEL Order*, Statement of Commissioner Tate at 1 (emphasis added).

[21] *Id.*, Statement of Commissioner Copps at 1 (emphasis added).

[22] *Id.*, Statement of Commissioner Adelstein at 1 (emphasis added).

[23] Verizon Mar. 19 *Ex Parte* Letter at 4.

Very truly yours,

- /s/ -

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