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April 10, 2009

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**VIA ELECTRONIC FILING**

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

Re: Notice of *Ex Parte* Presentation

WT Docket No. 08-95 -- Applications of Atlantis Holdings LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to the Transfer of Control of Commission Licenses and Authorizations

Dear Ms. Dortch:

This letter responds to the April 6, 2009 *ex parte* filed by Leap Wireless International, Inc. (“Leap”)<sup>1</sup> addressing Verizon Wireless’ voluntary commitment, adopted as a condition in the Verizon Wireless-ALLTEL merger, not to:

“*adjust upward the rates set forth in ALLTEL’s existing agreements with each regional, small and/or rural carrier for the full term of the agreement or for four years from the closing date*”<sup>2</sup> (the “Pricing Condition”).

While Leap continues to frame its request for reconsideration of the *Grant Order* as seeking “clarification” of an “ambiguity,” it fails to identify any ambiguity in need of clarification. In the *Grant Order*, the Commission unambiguously rejected the relief Leap and others<sup>3</sup> now seek and voted unanimously to address “in-market”

<sup>1</sup> Letter from James H. Barker, Latham & Watkins, LLP, and Pantelis Michalopoulos, Steptoe & Johnson, LLP, Counsel to Leap Wireless International, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95 (filed Apr. 6, 2009) (“Leap April 6 *Ex Parte* Letter”).

<sup>2</sup> See *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, 23 FCC Rcd 17444, ¶ 178 (Nov. 10, 2008) (“*Grant Order*”) (emphasis added).

<sup>3</sup> See Letter from James H. Barker, Counsel for Leap Wireless International, Inc., to Marlene H. Dortch, Secretary, FCC (filed Mar. 12, 2009); Letter from Stuart Polikoff, Director of Government Relations, OPASTCO, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95

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roaming in the pending roaming docket.<sup>4</sup> By requesting clarification, Leap seeks to gloss over its failure to provide a legal or factual basis for reconsideration of the Commission's holding that the Pricing Condition – in combination with Verizon Wireless's other voluntary roaming commitments – sufficiently protects consumers. The Commission should reject this gamesmanship and Leap's unsupported request for reconsideration.

Leap's sole objective in seeking clarification is to secure "in market" roaming rather than invest in building out its own network. While Leap has been unsuccessful in achieving such relief in the roaming docket, or in the *Grant Order*, it now seeks to obtain mandated in-market roaming by manufacturing a phantom ambiguity in need of "clarification." But the Commission should not lose sight of Leap's underlying objective, which is to secure the right *not* to build out its licensed territory and instead to piggy-back on infrastructure built by others. Leap's objective in this regard is the opposite of the Commission's, which has recently underscored the importance of wireless deployment in achieving nationwide broadband availability.<sup>5</sup> Moreover, in its automatic roaming order, the Commission found, on an extensive factual record, that mandating in-market roaming would *disincent* wireless carriers from investing in new infrastructure that could serve the public.<sup>6</sup> Leap may not agree with the Commission's decision – but it is the law. The clarification Leap seeks would flatly violate the Commission's own finding, and undercut the Commission's objective to promote facilities-based deployment.

The language of the Pricing Condition Leap proposes to supplant is clear and unambiguous. The Pricing Condition was not formulated by the Commission

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(Continued . . .)

(filed Feb. 24, 2009); Letter from Jean L. Kiddoo, Counsel for MetroPCS Communications, Inc., to Marlene H. Dortch, Secretary, FCC (filed March 12, 2009).

<sup>4</sup> *Grant Order*, ¶ 180.

<sup>5</sup> Statement of Commissioner Jonathan S. Adelstein, "Re: A National Broadband Plan for Our Future," released April 8, 2009, *available at* [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-09-31A3.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-31A3.pdf) ("And of course we recognize that any effective effort will rely heavily on wireless broadband as the wave of the future, and a key element to reach hard to serve areas. Considering America's ever-increasing appetite for reliable broadband services and applications from mobile devices, the role that wireless will play is huge and undeniable.")

<sup>6</sup> *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15835 (2007).

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or a petitioner. Instead, the language originated from a voluntary commitment extended by Verizon Wireless, which was adopted *verbatim* by the Commission. In light of this history, a request to change the commitment now, after the *Grant Order* has issued and the transaction has closed, cannot properly be understood as seeking clarification. Instead, it is a request that the Commission reverse course and substitute a new condition proposed by Leap in place of the voluntary commitment provided by Verizon Wireless and included as the Pricing Condition actually adopted.

But the new condition Leap proposes already was considered and rejected in the *Grant Order*. The structure of the *Grant Order* is simple and straightforward. Paragraphs 173-177 provide background on the roaming conditions proposed in comments while paragraphs 178-181 announce the Commission's decision. The new condition Leap now proposes specifically was discussed in paragraph 176: "Commenters further request that Verizon Wireless make clear that their roaming commitment apply to all terms of ALLTEL's existing contracts – not just rates . . . [.]"<sup>7</sup> But the proposal was not adopted and, accordingly, does not appear in paragraphs 178-181. Instead, the Commission adopted, without change, the voluntary commitment offered by Verizon Wireless.<sup>8</sup>

Leap's reliance on Commissioner statements accompanying the *Grant Order* as authority for the *Order's* reversal runs contrary to established norms of administrative law. As OPASTCO concedes, Commissioner statements "do not have the force of law."<sup>9</sup> The D.C. Circuit clearly has stated that individual Commissioner statements "are not institutional Commission actions" and do not constitute an "agency action" under the APA. *Sprint Nextel v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007); *see also Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974). Moreover, any final and judicially reviewable action by the FCC must be approved by a majority vote. *WIBC, Inc. v.*

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<sup>7</sup> *See Grant Order*, ¶ 176 (citing Reply Comments of Leap Wireless International, Inc., WT Docket No. 08-95, at 24 (filed Aug. 26, 2008); Reply to Opposition to Petition to Deny of the *Ad Hoc* Public Interest Spectrum Coalition, WT Docket No. 08-95, at 5 (filed Aug. 26, 2008)).

<sup>8</sup> *Grant Order*, ¶ 178 ("We further condition our approval on Verizon Wireless's commitment that it will not adjust upward the rates set forth in ALLTEL's existing 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.") (citing Verizon Wireless's November 3, 2008 *ex parte*).

<sup>9</sup> OPASTCO Feb. 24<sup>th</sup> *Ex Parte* Letter at 2.

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*FCC*, 259 F.2d 941, 943 (D.C. Cir. 1958) (stating that “[w]hen a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present”). Unlike the *Grant Order* itself, none of the individual Commissioner statements accompanying the order were approved by majority vote, and hence do not constitute final agency action.

The cases cited by Leap are not contrary to this established principle. Indeed, neither case even addresses the question of whether a Commissioner statement appended to an FCC decision has the force of law. Instead, both cases involve National Labor Relations Board (“NLRB”) decisions in which the issue was whether the agency’s action received majority support. In *Chicago Local No. 458-3M*, the D.C. Circuit had no choice but to review the separate opinions of the Board in order to determine whether a Board decision existed at all. *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 29-30 (D.C. Cir. 2000). Likewise, in *Oil, Chem. & Atomic Workers Int’l Union*, the court was forced to review a two-member plurality opinion and a separate concurring opinion in order to conduct a *Chevron* analysis of the Board’s statutory construction activities. *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995). In this case, by contrast, there is no issue as to majority support for the Commission’s action. Every element of the *Grant Order* – including adoption of the Pricing Condition and rejection of the relief Leap now seeks – received at least three votes of a five member Commission.

Finally, Leap’s suggestion that it lacks the information necessary to “exercise the option of choosing a roaming agreement to govern all roaming traffic with the combined Verizon/ALLTEL”<sup>10</sup> is meritless. Leap has access to the full terms and conditions of its roaming agreements with Verizon Wireless and ALLTEL. With this information in hand, Leap is well-situated to make an informed business judgment about which agreement is most advantageous and to exercise its election. Verizon Wireless has not interfered with this election in any way.

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<sup>10</sup> Leap April 6 *Ex Parte* Letter at 1.



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Pursuant to Section 1.1206 of the Commission's rules, an electronic copy of this letter is being filed for inclusion in the above-referenced docket.

Sincerely,

/s/ Scott D. Delacourt  
Scott D. Delacourt

cc (by email):

Paul Murray, Office of Acting Chairman Copps  
Renée Crittendon, Office of Commissioner Adelstein  
Angela Giancarlo, Office of Commissioner McDowell