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May 8, 2009

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VIA ELECTRONIC DELIVERY

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

The attached White Paper elaborates on the issues discussed in the April 23, 2009 meeting between representatives of Verizon Wireless and the Commission's Office of the General Counsel ("OGC") as to why the Petition for Clarification or Reconsideration of Leap Wireless International, Inc.¹ is without merit and cannot lawfully be granted. As was the case with the meeting with the OGC,² the arguments set out herein are consistent with prior arguments that Verizon Wireless and ALLTEL have advanced throughout the proceedings in this docket.³

At the outset, we respectfully emphasize the unprecedented (as well as unlawful) nature of the "clarification" Leap seeks. Although Leap cloaks its request in the guise of a minor technical change to the original order approving Verizon

¹ Petition for Clarification or Reconsideration of Leap Wireless International, Inc., WT Docket No. 08-95 (filed Dec. 10, 2008) ("Leap Petition").

² See Letter from Scott Delacourt, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2 (Apr. 24, 2009).

³ See Joint Opposition to Petitions to Deny and Comments of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket 08-95 (Aug. 19, 2008); Joint Opposition to Petitions for Reconsideration of Cellco Partnership d/b/a Verizon Wireless, and Atlantis Holdings Inc., WT Docket 08-95 (Dec. 22, 2008); *Ex Parte* Letter from Scott D. Delacourt, Wiley Rein LLP, Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95 (filed Mar. 19, 2009); *Ex Parte* Letter from Scott D. Delacourt, Wiley Rein LLP, Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95 (filed Apr. 10, 2009).



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Wireless's merger with ALLTEL,⁴ the actual effect of the request would put Leap in a far *better* position than it already enjoys under existing roaming agreements and the *Grant Order*. In particular, the sought-after "clarification" would in operation require Verizon Wireless to comply with any and all terms and conditions of roaming agreements selected by ALLTEL's roaming partners, including in-market roaming obligations, for as long as four additional years.

Nor is this a question of giving "meaning" to the pricing condition, as Leap has also characterized the matter.⁵ Leap already enjoys the benefit of Verizon Wireless's voluntary agreement to honor its preferred contract and all the terms and conditions thereof for the full life of the agreement. The pricing condition was offered *in addition to* that commitment, in direct response to certain carriers' concern regarding rate increases, in order to guarantee current rates for a period of time, in many cases *beyond the life of the contracts*. And the Commission obviously did not believe the price commitment to be meaningless, as it expressly conditioned its approval of the merger on that basis and, immediately after doing so, reminded carriers that the Section 208 complaint process is available in order to address any unreasonable terms and conditions if and when they occur.⁶ Leap's argument also ignores the fact that, under the *Grant Order*, roaming services may not be unreasonably terminated.⁷ Thus, the Commission quite clearly meant to couple the pricing condition with existing remedies for unreasonable terms, conditions, and terminations. Taken against this backdrop, the condition quite obviously has significant "meaning" already.

In any event, this matter does not concern a mere "clarification" of, or any lack of meaning in, the pricing condition, but a second effort to extend all terms and conditions for an additional period of time. Verizon Wireless's commitment was

⁴ *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 (Nov. 10, 2008) ("*Grant Order*").

⁵ See Reply to Joint Opposition to Petitions for Reconsideration of Leap Wireless International, Inc., WT Docket 08-95, at 3-5 (Jan. 6, 2009); 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, at 2-3 (filed Apr. 6, 2009).

⁶ *Grant Order* at ¶ 178.

⁷ *Id.*



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clear and explicit: it would guarantee the rates of the selected agreement for two years (ultimately extended to four years) or the term of the agreement, whichever is longer. As set forth in the attached White Paper, during the merger proceeding, Leap complained that the two-year commitment went only to rates, not to other terms and conditions. While it wanted more than a rate guarantee, it clearly knew that Verizon Wireless was not offering more. The *Grant Order* expressly drew the same distinction between guaranteed rates for four years – which it imposed – as opposed to guaranteed other terms and conditions – which it did not impose.

In fact, Leap's General Counsel, in testimony before Congress yesterday, described Verizon Wireless's commitment in precisely the same way that Verizon Wireless and the Commission have stated it. He testified that "the FCC conditioned approval of the transaction on Verizon Wireless's commitment to give roaming partners the option of selecting either the Verizon Wireless or ALLTEL agreement to govern all roaming traffic with the merged company, and to keep the *rates* provided in those agreements frozen for at least four years after the consummation of the merger."⁸ Leap's own statements during the proceeding and this recent Congressional testimony undercut its claim that there is any ambiguity to be clarified.

This testimony also confirms that the Leap Petition is ultimately about securing home roaming for a multi-year period. Ultimately, what Leap seeks is the very expansion of in-market roaming rights that it failed to achieve in the original merger proceeding and the Commission's pending rulemakings regarding roaming. By manufacturing a purported ambiguity in the *Grant Order*, Leap hopes the Commission will grant it an entitlement to extended home roaming, despite the fact that the Commission rejected that entitlement both in the roaming rulemaking and in the *Grant Order*. The Commission should reject this gamesmanship.

At the Congressional hearing, Leap's General Counsel reportedly indicated that Verizon Wireless may be violating the *Grant Order*'s condition. We do not understand how a merger order can be so ambiguous as to warrant clarification, while at the same time being so clear as to form the basis for a claim that it is being violated. In any event, if Leap believes Verizon Wireless is not in compliance, it

⁸ Written Testimony of Robert J. Irving, Jr., Senior Vice President and General Counsel, Leap Wireless International, Inc. and Cricket Communications, Inc., Before the U.S. House of Representatives Subcommittee on Communications, Technology and the Internet Committee on Energy and Commerce, at 9-10 (May 7, 2009) (emphasis added).



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has a remedy expressly granted to it by the *Grant Order*, viz., to bring a formal complaint.

If the Commission wishes to revisit its position on home roaming, it theoretically may do so in the rulemaking proceeding so long as it can compile an adequate record showing a sufficient basis in fact, law, and policy to establish a rational explanation for any reversal in that position. But it cannot impose that result on Verizon Wireless alone through the back door of a procedurally and substantively unlawful “clarification” of the *Grant Order*.

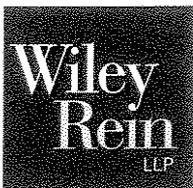
As explained more fully in the White Paper, granting the Leap Petition would run afoul of the law both procedurally and substantively and harm the public interest in several respects.

First, Leap’s request is procedurally improper.

- Leap’s requested relief is in no way a simple “clarification,” as Leap suggests. In the *Grant Order*, the Commission adopted verbatim a voluntary commitment regarding roaming rates extended by Verizon Wireless: “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.”⁹ The record and the *Grant Order* make clear that the Commission considered and rejected the very request that Leap renews here, *i.e.*, to extend Verizon Wireless’s voluntary commitment to “apply to all terms of ALLTEL’s existing contracts – not just the rates.”¹⁰
- The substantive change Leap seeks here thus cannot be accomplished by an order of “clarification” and is available only through reconsideration by the full Commission.

⁹ *Grant Order*, ¶ 178.

¹⁰ *Id.* ¶ 176 (citing Leap Wireless Reply at 24). The Commission expressly “decline[d] to condition [its] approval of the transaction on [Leap’s request or] any [other] additional special requirements relating to roaming rates or arrangements,” *id.* at ¶ 179, noting that “the commenters have failed to demonstrate that the transaction will cause the potential harms they purportedly seek to remedy,” *id.* ¶ 180.



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- However, because the Leap Petition merely rehashes arguments previously rejected by the Commission in the *Grant Order*, it is barred on reconsideration under FCC rules and precedent.

Second, granting Leap's request in the merger proceeding would violate the Administrative Procedure Act.

- It would constitute an unjustifiable departure from the Commission's decisions in the *Grant Order* that the harm alleged was not merger-specific and that the package of conditions in the *Grant Order* were sufficient to protect competition, as well as from the Commission precedent the *Grant Order* relied on to reach those holdings. And, by compelling Verizon Wireless to extend all terms and conditions, including home roaming, for at least four years, it would reverse course from the Commission's 2007 decision not to impose home roaming requirements because they were counter to the public interest.
- Granting Leap's request would also be arbitrary and capricious because it would render Verizon Wireless the *only* CMRS provider subject to additional home roaming and other obligations for at least four years, thereby unlawfully discriminating against Verizon Wireless and violating established FCC policy in favor of regulatory symmetry.

Third, granting Leap's requested relief would undermine the economic stimulus and broadband deployment objectives of the Obama administration and Congress, which the Commission is charged with implementing. By operating to compel home roaming as well as other roaming requirements, it would place the Commission's imprimatur on a practice of carriers piggybacking on Verizon Wireless's network rather than investing in their own facilities, a practice which is directly contrary to the clearly established federal policy of promoting the development of broadband infrastructure. Where carriers such as Leap have available spectrum, they should be expected to build systems rather than ride on the systems of their competitors.

Fourth, Leap does not need the regulatory handout it seeks from the Commission.



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- Although Leap pleads financial need as a reason it should receive additional roaming benefits that contravene existing FCC rules, its financial condition is legally irrelevant; in any event, Leap has wide-ranging roaming coverage (which its CEO touts as “the largest unlimited roaming coverage area of any low cost, unlimited carrier”¹¹) and sufficient financial wherewithal to compete in the market for mobile telephony and broadband services.
- Indeed, Leap has repeatedly painted a rosy picture of its financial and competitive position to its investors, flatly contradicting its statements to the Commission in this proceeding.

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

Sincerely yours,

A handwritten signature in cursive script that reads "Helgi C. Walker".

Helgi C. Walker

cc (by email):

Paul Murray
Renee Crittendon
Angela Giancarlo
Michele Ellison
Jim Bird
Neil Dellar

Attachment

¹¹ Leap Press Release, *Cricket Footprint Grows with Premium Extended Coverage, Forming Largest Roaming Coverage Area for a Low-Cost, Unlimited Carrier* (Nov. 13, 2008), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1226044&highlight>.

**GRANTING LEAP'S ROAMING PETITION WOULD BE
PROCEDURALLY AND SUBSTANTIVELY UNLAWFUL
AND HARM THE PUBLIC INTEREST**

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May 8, 2009

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I. INTRODUCTION AND SUMMARY

In its Petition for Clarification or Reconsideration,¹ Leap Wireless International, Inc. (“Leap”) requests that the Commission “clarify” Verizon Wireless’s voluntary commitment, adopted as a condition of the Commission’s approval of the Verizon Wireless-ALLTEL transaction, 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, whichever occurs later”*² (the “Pricing Condition”).

Specifically, Leap asks the Commission to replace the Pricing Condition with a new requirement that Verizon Wireless honor “the entirety of the [ALLTEL] roaming agreement . . . and not just the rates in [that] agreement[] . . . , for its full term, or for four years from closing, whichever is later.”³ But there is nothing to clarify; Leap itself acknowledges that the four-year commitment applies only to rates. As its General Counsel testified before Congress yesterday, “the FCC conditioned approval of the transaction on Verizon’s commitment to give roaming partners the option of selecting either the Verizon or Alltel agreement to govern all roaming traffic with the merged company, and to keep the *rates* provided in those agreements frozen for at least four years after the consummation of the merger.”⁴

¹ Petition for Clarification or Reconsideration of Leap Wireless International, Inc., WT Docket No. 08-95 (filed Dec. 10, 2008) (“Leap Petition”).

² *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).

³ Leap Petition at 3 (emphasis added).

⁴ Written Testimony of Robert J. Irving, Jr., Senior Vice President and General Counsel, Leap Wireless International, Inc. and Cricket Communications, Inc., Before the U.S. House of Representatives

Although Leap characterizes its request as a minor technical change necessary to protect its existing pricing guarantee, the actual effect of the request is dramatic, novel, and would put Leap in a far *better* position than it currently occupies under existing roaming agreements. It would impose on Verizon Wireless, contrary to the rate commitment it voluntarily proffered and the Commission accepted without change, the obligation to comply with *all other* terms in roaming agreements *for up to four years after closing*. Thus, the requested “clarification” would operate to impose on Verizon Wireless, post merger, an entirely new four-year home roaming obligation,⁵ despite the fact that the Commission recently refused to impose a home roaming condition of any duration whatsoever on the merger applicants themselves or the wireless industry generally.⁶ What Leap seeks here is, at bottom, the very expansion of in-market roaming

Subcommittee on Communications, Technology and the Internet Committee on Energy and Commerce, at 9-10 (May 7, 2009) (“Irving May 2009 Congressional Testimony”) (emphasis added).

⁵ Because Verizon Wireless has committed to allowing any “regional, small, and/or rural carrier that currently has roaming agreements with both ALLTEL and Verizon Wireless [to] hav[e] the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless,” *Grant Order*, ¶ 178, some of these carriers will be able to select an agreement that provides the carrier with in-market roaming rights in territories where the carrier formerly had none for the term of those agreements and, under Leap’s requested “clarification,” force Verizon Wireless to maintain home roaming for up to four years. Thus, were Leap’s request granted, these carriers would enjoy far more than guaranteed rates for four years, as the *Grant Order* provided. They would also enjoy guaranteed terms and conditions, including home roaming, not only in the ALLTEL markets but the Verizon Wireless markets, for at least four years, effectively imposing on Verizon Wireless an obligation it never offered to assume and the Commission never imposed. Indeed, the recent congressional testimony of Leap’s General Counsel confirms that Leap’s ultimate goal is securing the expansion of its current home roaming rights. *See generally* Irving May 2009 Congressional Testimony; *see also An Examination of Competition in the Wireless Industry*, U.S. House of Representatives, Subcommittee on Communications, Technology, and the Internet (May 07, 2009) (testimony of Robert J. Irving, Jr., Senior Vice President & General Counsel, Leap Wireless International, Inc. & Cricket Communications, Inc.), *available at* http://energy.commerce.house.gov/index.php?option=com_content&view=article&id=1611:energy-and-commerce-subcommittee-hearing-on-an-examination-of-competition-in-the-wireless-industry&catid=134:subcommittee-on-communications-technology-and-the-internet&Itemid=74 (emphasizing “the importance of automatic voice and data roaming to ensure effective competition in the wireless industry”).

⁶ *See Grant Order*, at ¶ 179; *2007 Roaming Order*, 22 FCC Rcd at 15834 (¶ 47), 15835 (¶ 49), n.116 (2007) (“*2007 Roaming Order*”) (citing comments filed by Leap).

rights that it failed to achieve in the original merger proceeding and the Commission's roaming rulemaking.

In point of fact, Leap's present request is precisely the same request it previously advanced, and the Commission previously rejected, in the *Grant Order*. There, the Commission explained that "[c]ommenters [including Leap] further request that Verizon Wireless make clear that their roaming commitment apply [sic] to all terms of ALLTEL's existing contracts – not just the rates."⁷ The Commission went on to adopt the Pricing Condition exactly as finally offered by Verizon Wireless and then to "decline to condition our approval of the transaction on *any additional special requirements relating to roaming rates or arrangements*."⁸ Thus, contrary to Leap's assertion, its requested change is not a mere clarification of the *Grant Order* but, rather, a substantive, major change to the *Grant Order*.⁹

Nor is this a question of giving "meaning" to the Pricing Condition, as Leap has also characterized the matter.¹⁰ Leap already enjoys the benefit of Verizon Wireless's voluntary agreement to honor its preferred contract and all the terms and conditions

⁷ *Grant Order*, ¶ 176.

⁸ *Id.* ¶ 179 (emphasis added).

⁹ Further, the Commission specifically ruled that, because "commenters have failed to demonstrate that the transaction will cause the potential harms they seek to remedy . . . , [w]e will address the concerns about roaming raised in the record of this transaction in other, more appropriate, proceedings." *Grant Order*, ¶ 180. For a detailed discussion of the procedural and substantive defects with the "clarification" supported by Leap, see Joint Opposition to Petitions for Reconsideration at 7; *Ex Parte* Letter from Scott D. Delacourt, Wiley Rein LLP, Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95, at 2-4 (filed Mar. 19, 2009) ("Verizon March 19 Letter"); *Ex Parte* Letter from Scott D. Delacourt, Wiley Rein LLP, Counsel to Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95, at 1-4 (filed Apr. 10, 2009) ("Verizon April 10 Letter").

¹⁰ See Reply to Joint Opposition to Petitions for Reconsideration of Leap Wireless International, Inc., WT Docket 08-95, at 3-5 (Jan. 6, 2009); 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, at 2-3 (filed Apr. 6, 2009) ("Leap April 6 *Ex Parte* Letter").

thereof for the full life of the agreement. The Pricing Condition was offered *in addition to* that commitment, in direct response to certain carriers' concern regarding rate increases, in order to guarantee current rates for a period of time, in many cases *beyond the life of the contracts*.¹¹ And the Commission obviously did not believe the Pricing Condition to be meaningless, as it expressly conditioned its approval of the merger on that very basis and, immediately after doing so, reminded carriers that the Section 208 complaint process is available in order to address any unreasonable roaming terms and conditions if and when they occur.¹² Leap's argument also ignores the fact that, under the *Grant Order*, roaming services may not be unreasonably terminated.¹³ Thus, the Commission quite clearly meant to couple the Pricing Condition with existing remedies for unreasonable terms, conditions, and terminations. Taken against this backdrop, the Pricing Condition quite obviously has significant "meaning" already.

Granting Leap's request would violate the law and the public interest in several respects.¹⁴ First, Leap's request is procedurally unlawful. The change Leap seeks here

¹¹ In particular, after initially proposing to not increase roaming rates for the life of each existing agreement, Verizon Wireless responded to commenting carriers by extending the length of this commitment, ultimately agreeing to not adjust upward roaming rates for a period of four years or the life of the agreement, whichever is longer. That commenters expressed so much concern over roaming rates and sought such a commitment with regard to rates in particular further demonstrates that it is not meaningless. *See, e.g.*, Reply Comments of Leap International, Inc., WT Docket No. 08-95, at 22-24 (filed Aug. 26, 2008) (expressing concern that larger carriers tend to charge higher rates for roaming). And the Commission obviously did not believe any of Verizon Wireless's commitments to be meaningless, as it expressly conditioned its approval of the merger on these commitments, *see Grant Order* at ¶ 178, finding that the commitments (along with certain divestitures) are "sufficient to prevent the significant competitive harm that this transaction would likely cause in certain geographic markets" and "will protect competition at the retail level in those geographic markets," *Grant Order*, ¶¶ 178-179.

¹² *Grant Order*, ¶ 178.

¹³ *Id.*

¹⁴ The arguments set out herein are consistent with prior arguments that Verizon Wireless and ALLTEL have advanced throughout the proceedings in this docket. *See* Joint Opposition to Petitions to Deny and Comments of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, WT Docket 08-95 (August 19, 2008) ("Joint Opposition to Petitions to Deny"); Joint Opposition to Petitions for Reconsideration of Cellco Partnership d/b/a Verizon Wireless, and Atlantis Holdings Inc., WT Docket No.

cannot be accomplished by an order of “clarification,” but is available only through reconsideration by the full Commission. Nonetheless, because the Leap Petition merely rehashes arguments previously rejected by the Commission in the *Grant Order*, it is barred from being addressed on reconsideration under FCC rules.

Second, granting Leap’s request in the merger proceeding would violate the Administrative Procedure Act (“APA”) for several reasons. It would constitute an unjustifiable departure from the Commission’s decisions in the *Grant Order* that the harm alleged was not merger-specific and that the package of conditions in the *Grant Order* were sufficient to protect competition, as well as from Commission precedent upon which the *Grant Order* relied to reach those holdings. And, to the extent the sought-after condition would operate to impose an extended home roaming requirement, Commission precedent clearly states that in-market roaming requirements are *contrary* to the public interest because they discourage capital investments in infrastructure. It would be logically impossible to reconcile the imposition of the condition that Leap now seeks with that clear, extant FCC policy. Grant of Leap’s request would also be arbitrary and capricious because it would render Verizon Wireless the *only* CMRS provider subject to special roaming obligations, thereby unfairly discriminating against Verizon Wireless and violating established FCC policy in favor of regulatory symmetry.

Third, granting Leap’s requested relief would run directly counter to the economic stimulus and broadband deployment objectives of the Obama administration and Congress, which the Commission is charged with implementing. By ordering Verizon Wireless to extend all terms and conditions of roaming agreements, including home

08-95 (Dec. 22, 2008) (“Joint Opposition to Petitions for Reconsideration”); Verizon March 19 Letter; Verizon April 10 Letter.

roaming, for at least four years, the Commission would allow carriers to let their own spectrum holdings lie fallow while they piggy-back on the network of a competing carrier, thus disincenting such carriers from building out spectrum licenses they already possess.¹⁵ This is hardly the way to encourage wireless broadband deployment in rural and high-cost areas.

Fourth, while Leap pleads financial need as a reason it should receive additional roaming benefits that contravene existing FCC rules, its financial condition is legally irrelevant; in any event, Leap (which purchased 100 licenses in the AWS auction and is well-positioned to offer fourth-generation broadband wireless services over that spectrum) is in no way in need of a regulatory handout to compete in the market for mobile telephony and broadband services. Indeed, Leap's stock price has *more than doubled* since it entered into a nationwide roaming agreement with MetroPCS last September, and it has repeatedly painted a rosy picture of its financial and competitive position to its investors since that time, flatly contradicting its statements to the Commission in this proceeding. Moreover, Leap has, in the words of its CEO, "the largest unlimited roaming coverage area of any low cost, unlimited carrier."¹⁶ And it has the financial wherewithal to build-out its spectrum. Leap does not need the Commission to give it a regulatory handout in order to compete in the wireless market. If Leap believes Verizon Wireless is not complying with the conditions of the *Grant Order*, it can file a complaint with the Commission. But there is absolutely no basis for the

¹⁵ Verizon April 10 Letter at 2.

¹⁶ Leap Press Release, *Cricket Footprint Grows with Premium Extended Coverage, Forming Largest Roaming Coverage Area for a Low-Cost, Unlimited Carrier* (Nov. 13, 2008), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1226044&highlight>.

Commission to entertain Leap's request *sub silentio* to impose additional merger conditions.

II. BACKGROUND

During the proceedings that produced the *Grant Order*, Verizon Wireless offered, as a voluntary commitment, that “each such regional, small and/or rural carrier that has a roaming agreement with ALLTEL will have the option to keep the *rates* set forth in that roaming agreement in force for the full term of the agreement, notwithstanding any change of control or termination for convenience provisions that would give Verizon Wireless the right to accelerate the termination of such agreement.”¹⁷ Additionally, Verizon Wireless stated that each such regional, small and/or rural carrier “that currently has roaming agreements with both ALLTEL and Verizon Wireless will have the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless.”¹⁸

During the petition to deny stage of the proceedings, however, some commenters criticized the commitment to honor roaming rates as insufficient in duration. In its Opposition to Petitions to Deny and Comments filed on August 19, 2008, Verizon Wireless responded by extending its prior commitment and agreeing to “keep the *rates* set forth in Alltel's existing agreements with [other] carrier[s] for the full term of the agreement or for two years from the closing date, which ever occurs later.”¹⁹ Verizon Wireless also stated that “[t]he merger will either leave the existing roaming terms

¹⁷ See Letter from John T. Scott, III, Vice President & Deputy General Counsel Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-95, at 2 (July 22, 2008) (“Verizon July 22 Letter”) (emphasis added).

¹⁸ *Id.*

¹⁹ See Joint Opposition to Petitions to Deny, at iii.

available from Verizon Wireless and ALLTEL unchanged or, at the voluntary election of certain parties, *improve* available terms.”²⁰ Further, Verizon Wireless explained that typically “month-to-month roaming agreements will remain in place until one of the parties seeks to negotiate different terms and the parties reach a new agreement” but that, to “allay” concerns, Verizon Wireless will “keep the *rates* set forth in ALLTEL’s existing agreements for the full term of the agreement or for two years from the closing date, whichever occurs later.”²¹

After commenters continued to criticize the duration of Verizon Wireless’s commitment,²² Verizon Wireless further extended its voluntary rate commitment, agreeing to keep “*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, whichever occurs later.”²³

In the November 4, 2008 *Grant Order*, the FCC adopted Verizon Wireless’s voluntary commitment, verbatim: “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

²⁰ *Id.* at 54 (emphasis in original).

²¹ *Id.* at 56 (emphasis added).

²² For example, in its reply comments filed on August 26, 2008, Leap stated that “Verizon’s commitment to respect the rates found in ALLTEL’s roaming agreements (disconcertingly, not even the agreements themselves) for two years is meaningless.” Reply Comments of Leap Wireless International, Inc., WT Docket No. 08-95, at 5 (August 26, 2008); *id.* at 24 (“Verizon proposes a two-year ‘grandfathering’ for the rates found in ALLTEL’s roaming agreements, but disconcertingly not for any other terms.”). It is clear from these filings that Leap was well aware that Verizon Wireless was proposing a rate commitment, not an unbridled commitment to extend all terms and conditions of roaming agreements. Although Leap did not get what it wanted, it can hardly assert now that there was any confusion as to what Verizon Wireless offered.

²³ See Letter from John T. Scott, III, Vice President & Deputy General Counsel Regulatory Law, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, WT Docket No. 08-95, at 2 (November 3, 2008) (“Verizon November 3 Letter”).

agreement or for four years from the closing date, which ever occurs later.”²⁴ The Commission rejected the various requests of other commenters, including the same request that Leap renews here, *i.e.*, to extend Verizon Wireless’s voluntary commitment to “apply to all terms of ALLTEL’s existing contracts – not just the rates.”²⁵ The Commission “decline[d] to condition [its] approval of the transaction on any additional special requirements relating to roaming rates or arrangements,”²⁶ noting that “the commenters have failed to demonstrate that the transaction will cause the potential harms they purportedly seek to remedy.”²⁷ In so ruling, the Commission emphasized the availability of the complaint process under Section 208 for carriers requesting roaming services to remedy unjust and unreasonable practices.²⁸ The Commission ultimately concluded in the *Grant Order* that the roaming conditions and the package of divestitures adopted would “protect competition at the retail level” and that the transaction, as so conditioned, would “*not* alter competitive market conditions to harm consumers of mobile telephony/broadband services.”²⁹ Further, the Commission concluded that those that had raised broader concerns regarding in-market roaming had “failed to demonstrate

²⁴ *Grant Order*, ¶ 178. The Commission conditioned its approval on Verizon Wireless’s other voluntary commitments as well. *See id.* (“We condition our approval of this transaction on Verizon Wireless’s commitment to honor ALLTEL’s existing agreements with other carriers to provide roaming on ALLTEL’s CDMA and GSM networks . . . [.] on the option Verizon Wireless voluntarily offers to each regional, small, and/or rural carrier that has a roaming agreement with ALLTEL to keep the rates set forth in that roaming agreement in force for the full term of the agreement, notwithstanding any change of control or termination for convenience provisions that would give Verizon Wireless the right to accelerate the termination of such agreement . . . [, and] 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.”).

²⁵ *Id.* ¶ 176 (citing Leap Wireless Reply at 24).

²⁶ *Id.* ¶ 179.

²⁷ *Id.* ¶ 180.

²⁸ *Id.* ¶ 178.

²⁹ *Id.* ¶ 179 (emphasis added).

that the transaction will cause the potential harms they purportedly seek to remedy” and that, consistent with its policy of addressing only merger-specific issues in a merger docket, those concerns should be addressed via rulemaking in the Commission’s pending roaming proceedings.³⁰

It bears emphasis that, because Verizon Wireless agreed “to honor ALLTEL’s existing agreements with other carriers to provide roaming on ALLTEL’s CDMA and GSM networks” and to allow each “regional, small, and/or rural carrier that currently has roaming agreements with both ALLTEL and Verizon Wireless . . . the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless,”³¹ Leap and other carriers have already obtained more favorable roaming terms through Verizon Wireless’s voluntary commitments than they had by contract. Moreover, as the Commission pointed out, roaming is a common carrier obligation, and carriers may avail themselves of the Section 208 complaint process if they believe that Verizon Wireless’s roaming practices are unjust and unreasonable.³² Leap’s claim that Verizon Wireless may simply terminate an existing agreement and refuse to negotiate is

³⁰ *Id.* ¶ 179-80 (“[W]e decline to condition our approval of the transaction on any additional special requirements relating to roaming rates or arrangements. . . . We note that the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes. We will address the concerns about roaming raised in the record of this transaction in other, more appropriate, proceedings. We also are considering, in the context of the Roaming Further Notice, whether to extend the automatic roaming obligation to non-interconnected services or features, including services that have been classified as information services. Any decisions reached or rules adopted in either of those roaming proceedings will apply with equal force to Verizon Wireless.”).

³¹ *Grant Order*, ¶ 178.

³² *Id.* ¶ 178 (“We remind carriers that roaming is a common carrier service subject to the protections afforded by Sections 201, 202, and 208 of the Communications Act. When a CMRS carrier receives a reasonable request for roaming, pursuant to Sections 201 and 202, that carrier is required to provide roaming on reasonable and non-discriminatory terms and conditions. If a requesting carrier believes that particular acts or practices relating to roaming are unjust and unreasonable, it may file a complaint with the Commission pursuant to Section 208.”).

untenable because, under the Commission’s regulations, all carriers are required to negotiate automatic roaming agreements “on reasonable terms and conditions.”³³

Disappointed with the Commission’s rejection of its request to saddle Verizon Wireless with all of the terms and conditions of the existing ALLTEL roaming agreements for a period of time longer than the full term of that agreement, Leap tries here for a second bite at the apple. Leap recycles its previously rejected request that the Commission make clear that Verizon Wireless’s commitment “appl[ies] to the entirety of the roaming agreement selected by Verizon’s roaming partner, and not just the rates in those agreements.”³⁴ But Verizon Wireless’s commitment needs no clarification; it applies only to rates, as Leap itself recently has acknowledged.³⁵ Moreover, Leap’s request is a disguised attempt to have the Commission impose upon Verizon Wireless the in-market roaming obligation that the Commission refused to impose upon the industry generally less than two years ago.

III. ARGUMENT

A. Leap’s Request For Clarification Is Procedurally Improper.

Leap’s request for clarification fails as a procedural matter. Because the relief Leap seeks is not a mere clarification but a substantive change to the *Grant Order*, it could be accomplished only through reconsideration by the full Commission. Even then, it would be improper to grant Leap’s requested relief on reconsideration because the Leap Petition merely restates arguments previously rejected by the Commission in the *Grant*

³³ 47 C.F.R. § 20.12.

³⁴ Leap Petition at 3. *Compare Grant Order*, ¶ 176 (“Commenters further request that Verizon Wireless make clear that their roaming commitment apply to all terms of ALLTEL’s existing contracts—not just the rates.”) (citing comments filed by Leap).

³⁵ Irving May 2009 Congressional Testimony at 9-10 (“[T]he FCC conditioned approval of the transaction on Verizon’s commitment . . . to keep the *rates* provided in those agreements frozen for at least four years after the consummation of the merger”) (emphasis added).

Order. As the Commission has held, “[r]econsideration is appropriate only where the petitioner either demonstrates a material error or omission in the underlying order or raises additional facts not known or not existing until after the petitioner’s last opportunity to present such matters. A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.”³⁶

1. **Reconsideration By The Full Commission Is The Exclusive Vehicle For Making A Substantive Change To The *Grant Order*.**

Leap’s proposed revision would be a substantive change to the *Grant Order*, which can be accomplished only by the full Commission on reconsideration.³⁷ Indeed, Leap’s request is no different in substance from other requests for reconsideration now pending,³⁸ and there is no basis for addressing them separately or by a different process.

Although Leap tries to frame the relief it seeks as a mere “clarification” of Verizon Wireless’s voluntary roaming commitments, Leap’s requested relief is in no way a ministerial or clarifying change.³⁹ The language of the Pricing Condition that Leap proposes to supplant is clear and unambiguous. It originated from a voluntary commitment extended by Verizon Wireless, which the Commission then adopted

³⁶ *In re One Mart Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 9910, ¶ 5 (2008).

³⁷ *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(a)(1). Assuming that appropriate circumstances existed for reconsideration, the Commission could have accomplished this through reconsideration sua sponte within 30 days of the issuance of the *Grant Order*, *see* 47 C.F.R. § 1.108, but that deadline has long since passed. For the Commission to attempt to modify the *Grant Order* through an erratum or declaratory order would be improper for the additional reason that it would be an end-run of this deadline.

³⁸ The Rural Telecommunications Group, Inc. (“RTG”) filed a Petition for Reconsideration seeking the same relief Leap seeks here. *See* Petition for Reconsideration of The Rural Telecommunications Group, Inc., WT Docket No. 08-95, at 8-12 (filed Dec. 10, 2008). By styling its request as one for clarification *or* reconsideration, Leap itself seems to acknowledge that reconsideration is the appropriate vehicle for the type of relief it seeks. Indeed, on reply, Leap changed the description of its request to one for “reconsideration.” *See* Reply to Joint Opposition to Petitions for Reconsideration of Leap Wireless International, Inc., WT Docket 08-95, at 1 (Jan. 6, 2009).

³⁹ Verizon Wireless previously has explained why Leap’s requested relief is in no way a clarification. *See* Joint Opposition to Petitions for Reconsideration at 7; Verizon April 10 Letter at 1-4.

verbatim in the *Grant Order*. As the offeror of the commitment, Verizon Wireless is uniquely positioned to speak to its intended meaning but, in any event, the record clearly reflects that this commitment was understood by the parties to encompass only rates.⁴⁰ Further, in the *Grant Order* itself, the Commission *explicitly* rejected the very change to Verizon Wireless's voluntary commitment that Leap now advances.⁴¹ Moreover, Leap has recently conceded the clarity of Verizon Wireless's commitment.⁴²

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 achieved via "declaratory order" to "remove uncertainty,"⁴³ as there is absolutely no uncertainty or ambiguity with regard to Leap's present request. It is precisely the same request that the Commission rejected in the *Grant Order*.⁴⁴ To adopt this previously rejected roaming condition now would constitute a substantive and major change to the *Grant Order*, which can be accomplished procedurally only through reconsideration by the full Commission.⁴⁵

⁴⁰ Leap plainly was aware that Verizon Wireless's two-year rate freeze proposal applied only to rates because it criticized that proposal for not extending to "other terms": "Verizon's commitment to respect the rates found in ALLTEL's roaming agreements (disconcertingly, not even the agreements themselves) for two years is meaningless." Reply Comments of Leap Wireless International, Inc., WT Docket 08-95, at 5 (August 26, 2008); *id.* at 24 ("Verizon proposes a two-year 'grandfathering' for the rates found in ALLTEL's roaming agreements, but disconcertingly not for any other terms."). Although Leap did not get the particular condition it sought, there is no ambiguity about what Verizon Wireless offered.

⁴¹ *Grant Order*, ¶ 179-80.

⁴² Irving May 2009 Congressional Testimony at 9-10 ("[T]he FCC conditioned approval of the transaction on Verizon's commitment . . . to keep the *rates* provided in those agreements frozen for at least four years after the consummation of the merger") (emphasis added).

⁴³ 5 U.S.C. § 554(e); *see also* 47 C.F.R. § 1.2.

⁴⁴ *Grant Order*, ¶ 178.

⁴⁵ *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(a)(1). Section 405(a) makes clear that reconsideration of the *Grant Order* could be accomplished only at the Commission level. It could not be handled at the Bureau level. *See* 47 U.S.C. § 405(a). Further, pursuant to the Commission's rules, the Chief of the Wireless Bureau does "not have authority to act on any complaints, petitions or requests . . . [that] present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedent

Leap's stated legal basis for its request for "clarification" rests on selected portions of the separate statements of individual Commissioners that accompanied the *Grant Order*. Leap relies on isolated comments by Commissioners Tate, Copps, and Adelstein indicating that Verizon Wireless agreed to honor the existing ALLTEL contracts for four years.⁴⁶ Even viewing these isolated comments in a vacuum (as Leap does), these comments do not expressly require Verizon Wireless to honor the entirety of these contracts, as opposed to just the rates, for four years.⁴⁷ Considered in conjunction with the Commission's express rejection of such a condition,⁴⁸ Leap stretches these comments beyond comprehension. In any event, the statements paraphrase Verizon Wireless's own proffers, not conditions the Commission itself drafted. Nothing in these statements indicates the Commissioners intended the *Grant Order* to go beyond what Verizon Wireless had proposed.

Moreover, statements of individual Commissioners do not carry the force of law. Indeed, the D.C. Circuit has so held repeatedly.⁴⁹ This is because any final and judicially

and guidelines." 47 C.F.R. § 0.331(a)(2). Moreover, the Commission's rules limit the general grants of delegated authority to the bureaus to "matters which are *minor* or *routine* or settled in nature." 47 C.F.R. § 0.5(c). Here, the Commission is faced with a new and novel situation that is far from routine—a competitor is asking the Commission to: (1) eliminate a previously-approved FCC commitment; and (2) impose new roaming rules exclusively on Verizon Wireless.

⁴⁶ See Leap April 6 *Ex Parte* Letter at 5.

⁴⁷ It appears that these isolated comments conflate "Verizon Wireless's commitment to honor ALLTEL's existing agreements with other carriers to provide roaming on ALLTEL's CDMA and GSM networks," *Grant Order*, ¶ 178, with "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," *id.* This is unsurprising given that these comments were made by individual commissioners in the course of briefly summarizing the *Grant Order* in separate statements accompanying the *Grant Order*.

⁴⁸ See *Grant Order*, ¶¶ 176, 178.

⁴⁹ 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).

reviewable action by the FCC must be approved by a majority vote.⁵⁰ 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.⁵¹

The two cases cited by Leap are inapposite.⁵² Indeed, neither case even addresses the question whether a Commissioner statement appended to an FCC decision has the force of law. Instead, both cases involve National Labor Relations Board (“Board”) decisions in which the issue was whether the agency’s action received majority support. In *Chicago Local No. 458-3M*, the D.C. Circuit reviewed the separate opinions of the Board’s members to determine whether a Board decision existed at all.⁵³ Likewise, in *Oil, Chemical And Atomic Workers International Union*, the court reviewed a two-member plurality opinion and a separate concurring opinion in order to conduct a *Chevron* analysis of the Board’s statutory construction activities.⁵⁴ 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.

⁵⁰ *WIBC, Inc. v. FCC*, 259 F.2d 941, 943 (D.C. Cir. 1958) (“When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present.”).

⁵¹ Reliance on the isolated statements of Commissioner Tate would be especially problematic given that she has since left the position at the Commission.

⁵² Verizon previously explained why the cases cited by Leap are inapplicable here. See Verizon April 10 Letter at 4.

⁵³ *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 29-30 (D.C. Cir. 2000).

⁵⁴ *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 46 F.3d 82, 90 (D.C. Cir. 1995).

2. **Grant Of The Request On Reconsideration Would Be Improper Because Leap Merely Rehashes Arguments Previously Rejected By The Commission In The *Grant Order*.**

Even if the Leap Petition were styled as one for reconsideration rather than clarification, it must still be rejected. It is well-established under FCC rules that to warrant reconsideration a petitioner must do more than simply repeat the same arguments that the Commission has already considered and rejected. Rather, the Commission has emphasized that “[r]econsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner’s last opportunity to present such matters.”⁵⁵ Further, “[a] petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied.”⁵⁶ In past proceedings, the Commission has thus denied petitions for reconsideration where a party “simply recites the issues raised in its Petition to Deny” and “fails to offer any additional argument or evidence in support thereof.”⁵⁷

Here, Leap has raised no new facts or arguments in support of its proposed roaming condition.⁵⁸ Nor has Leap shown a material error or omission in the *Grant Order*. Instead, Leap has reiterated arguments previously rejected by the Commission in

⁵⁵ *General Motors Corporation and Hughes Electronics Corporation, Transferors And The News Corporation Limited, Transferee, For Authority To Transfer Control*, Order on Reconsideration, 23 FCC Rcd 3131, ¶ 4 (2008) (“*General Motors Order*”).

⁵⁶ *One Mart Corporation*, 23 FCC Rcd 9910, ¶ 5. *See also GTE Corporation, Transferor, And Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorization and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Order on Reconsideration, 18 FCC Rcd 24871, ¶ 5 (2003).

⁵⁷ *General Motors Order*, ¶ 11. *See also AVR, L.P.*, Memorandum Opinion and Order, 16 FCC Rcd 1247, ¶ 3 (2001) (“TDS’s petition essentially repeats the same arguments it relied upon in the comments and reply comments it filed . . . [t]he Commission rejected these arguments in the *Hyperion Preemption Order*.”).

⁵⁸ In the Joint Opposition to Petitions for Reconsideration, Verizon Wireless explained that the petitions filed against the *Grant Order*—including Leap’s petition—fail to warrant reconsideration because Leap and other petitioners simply repeat the same arguments that the Commission already considered and rejected. Joint Opposition to Petitions for Reconsideration at 2-4, 7.

that order. Leap does not satisfy the Commission's prerequisites for reconsideration and, thus, its request is procedurally defective.⁵⁹ Any failure on the part of the Commission to abide by its well-established internal rules regarding the reconsideration process would be arbitrary and capricious under the APA.⁶⁰

B. Granting Leap's Requested Relief Would Be Substantively Unlawful.

For the Commission to adopt in these merger proceedings the previously rejected condition advanced again here by Leap would require it to reverse course from the *Grant Order* in at least two important ways. In particular, the Commission would have to reject its prior finding that the alleged roaming harms other than those remedied in the *Grant Order* were not merger-specific and, consequently, Leap's request for an in-market roaming mandate should be considered in the pending industry-wide roaming rulemakings, not in the context of the ALLTEL merger proceeding.⁶¹ The Commission would also have to reverse its ruling that the transaction, as conditioned and given the required divestitures, would not harm competition or consumers. Because there is no legal, factual, or policy reason capable of supporting such Commission reversals, to grant Leap's requested relief would be arbitrary and capricious in violation of the APA.⁶² In addition, granting Leap's requested relief would discriminate against Verizon Wireless by imposing an in-market roaming obligation *solely* on Verizon Wireless, contrary to the

⁵⁹ *General Motors Order*, ¶ 11.

⁶⁰ *See BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) ("The Commission abuses its discretion when it arbitrarily violates its own rules . . .").

⁶¹ Verizon Wireless has repeatedly explained—consistent with the Commission's decision in the *Grant Order*—why in-market roaming should be considered in the industry-wide roaming rulemaking. *See* Joint Opposition to Petitions to Deny at 60; Joint Opposition to Petitions for Reconsideration at 9.

⁶² *See* 5 U.S.C. § 706(2)(A); *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) ("[A]n agency changing its course must supply a reasoned analysis.").

Commission's prior and clear indication that any such obligation should be considered only on an industry-wide, non-discriminatory basis.⁶³ This arbitrary action would also violate the APA.

1. **Granting The Leap Petition Would Require The Commission Unlawfully To Depart From Two Separate Lines Of Commission Precedent.**

An administrative agency must supply a "reasoned analysis" when it reverses regulatory course and departs from precedent.⁶⁴ "[S]harp changes of agency course constitute 'danger signals' to which a reviewing court must be alert."⁶⁵ Thus, as the Supreme Court very recently emphasized, the "reasoned analysis" required to support an agency change in course must go "beyond that which may be required when an agency does not act in the first instance."⁶⁶ In the absence of a sound explanation, an agency's departure from precedent is "not reasoned decisionmaking, but the very sort of arbitrariness and capriciousness we are empowered to correct."⁶⁷

⁶³ In the Joint Opposition to Petitions to Deny, Verizon Wireless explained that there "is no basis for preempting the rulemaking process or imposing discriminatory regulatory burdens on Verizon Wireless that do not apply to the rest of the industry." Joint Opposition to Petitions to Deny at 60.

⁶⁴ See, e.g., Charles H. Koch, *Administrative Law and Practice* § 11.40 (2d ed. 1997); see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983) ("[A]n agency changing its course must supply a reasoned analysis."); *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001) ("[I]t is 'axiomatic that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent.'") (quoting *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1443 (D.C. Cir. 1997)).

⁶⁵ *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 760 (3rd Cir. 1982); see also *Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985) ("This court has long held that an agency's change in direction from a previously announced intention is a danger signal that triggers scrutiny to ensure that the agency's change of course is not based on impermissible or irrelevant factors.").

⁶⁶ *FCC v. Fox Television Stations, Inc.*, 556 U. S. ____, No. 07-582, Slip Op. at 10 (April 29, 2009) (quoting *State Farm*, 463 U. S. at 42).

⁶⁷ *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 49-50 (D.C. Cir. 1994); see also *Telecomm. Research and Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986) ("When an agency undertakes to change or depart from existing policies, it must set forth and articulate a reasoned explanation for its departure from prior norms.").

Departure from Merger Precedent. To adopt in this proceeding the roaming obligation that Leap seeks would require the Commission to reverse the decision it made in the *Grant Order* to decline to condition merger approval on industry-wide concerns about roaming and instead “address the concerns about roaming raised in the record of this transaction in other, more appropriate proceedings.”⁶⁸ This would contradict not only the Commission’s decision in the *Grant Order* itself but also a consistent line of Commission precedent holding that that Commission will impose merger conditions only to remedy transaction-specific harms.⁶⁹

The Commission definitively held that “the commenters have failed to demonstrate that the transaction will cause the potential harms they purportedly seek to remedy” without roaming requirements beyond those adopted in the *Grant Order*.⁷⁰ Nothing in the Leap Petition attempts to explain how or why the alleged need for a broad extension of all contract terms is due to the merger, nor does any such causation exist. In fact, Leap concedes at the outset of its Petition that it should address the remaining roaming “issues in ‘other, more appropriate proceedings.’”⁷¹ There is no factual basis for

⁶⁸ *Grant Order*, ¶ 180.

⁶⁹ See, e.g., *In re Application of AT&T Inc. & Dobson Communications Corp.*, 22 FCC Rcd 20295, 20306 (¶ 67) (Nov. 19, 2007) (“[T]he proper venue to address concerns with the findings in the Roaming Report and Order (e.g., home market roaming exclusion) is in the roaming rulemaking proceeding through pending petitions for reconsideration, and not in the merger.”); *In re Applications of Cellco Partnership d/b/a Verizon Wireless & Rural Cellular Corp.*, 23 FCC Rcd 12463, 12480-81 (¶ 30) (Aug. 1, 2008) (“*Verizon Wireless/RCC Order*”); *In re AT&T Inc. & BellSouth Corp.*, 22 FCC Rcd 5662, 5674-75 (¶ 22) (March 26, 2007); *In re Applications of Midwest Wireless Holdings, LLC and ALLTEL Communications, Inc.*, 21 FCC Rcd 11526, 11539 (¶ 20) (Oct. 2, 2006); *In re Applications of Nextel Communications, Inc. & Sprint Corp.*, 20 FCC Rcd 13967, 13979 (¶ 23) (Aug. 8, 2005); *In re Applications of Western Wireless Corp. & ALLTEL Corp.*, 20 FCC Rcd 13053, 13066 (¶ 21) (July 19, 2005); *In re Applications of AT&T Wireless Services, Inc., & Cingular Wireless Corp.*, 19 FCC Rcd 21522, 21546 (¶ 43) (Oct. 26, 2004).

⁷⁰ *Grant Order*, ¶ 180.

⁷¹ Leap Petition at 1 (quoting *Grant Order*, ¶ 180).

reversing course to find that, although causation did not exist at the time of the *Grant Order*, it exists now.

As support for its decision to address the further roaming issues in the pending rulemakings, the Commission explained that it has long been agency policy to “impose [merger] conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission’s responsibilities under the Communications Act and related statutes.”⁷² This rule is reflected in an unbroken line of precedent under which the Commission routinely rejects attempts to raise non-merger-specific, industry-wide issues in the context of merger⁷³ and transfer-of-control proceedings.⁷⁴ As Verizon Wireless explained in its Opposition to Petitions to Deny,⁷⁵ this rule relating to transaction-specific conditions applies with even greater force where, as here, there are open Commission proceedings relating to the subject matter at issue.⁷⁶

⁷² *Grant Order*, ¶ 29; *see also id.* ¶ 180.

⁷³ *See, e.g., Verizon Wireless/RCC Order*, 23 FCC Rcd at 12518 (¶ 128) (“We reject Joint Petitioners’ request that we mandate Verizon Wireless to offer analog service in RCC’s service territories as a condition of consent to the proposed transaction. We concur with the Applicants that imposing such a requirement is in no way related to the transaction pending before us.”); *In re Verizon Communications Inc. and MCI, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18462 (¶ 57) (2005) (“*Verizon/MCI Order*”) (rejecting “the claims of commenters seeking special access conditions or raising concerns unrelated to the merger”); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from; Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21306 (¶ 29) (1998) (stating that “Commission precedent” is to “decline[] to consider in merger proceedings” matters of “general applicability”).

⁷⁴ *See In re Application of Echo Star Communications Corp.*, 17 FCC Rcd 20559, 20583 (¶ 48) (2002) (in transfer of license proceeding, declining to consider conditions requested by a commenter “that have application on an industry-wide basis”).

⁷⁵ *See* Opposition to Petitions to Deny at 43.

⁷⁶ *See, e.g., Verizon/MCI Order*, 20 FCC Rcd at 18462 (¶ 55) (refusing in merger proceeding to consider ability to discriminate against competitors because “such a concern is more appropriately addressed in our existing rulemaking proceedings”).

In other words, to adopt Leap’s proposed condition would contradict not only the Commission’s finding in the *Grant Order* that the alleged harms were *not* caused by the merger, but also a consistent line of Commission precedent (upon which the *Grant Order* was based) holding that the Commission will impose merger conditions only to remedy transaction-specific harms.⁷⁷ Because there is no factual, legal, or policy reason that could justify this sharp break from the *Grant Order* and underlying Commission precedent, it would be arbitrary and capricious for the Commission to adopt Leap’s proposed condition here.

Departure from Roaming Precedent. To grant Leap’s previously requested-and-rejected relief also would reverse course from the Commission’s decision in the *Grant Order* that an in-market roaming obligation is contrary to not necessary to serve the public interest.⁷⁸ As the Commission concluded, “the [required] divestitures, as well as Verizon Wireless’s roaming related commitments, will protect competition at the retail level” and, as so conditioned, “this transaction will *not* alter competitive market conditions to harm consumers of mobile telephony/broadband services.”⁷⁹ Leap offers no facts as to why the adopted conditions were sufficient to prevent harm to consumers six months ago, when the *Grant Order* was adopted, but are insufficient now.

Moreover, granting Leap’s request would be an about-face from the Commission precedent that undergirded the Commission’s decision in the *Grant Order* to reject any

⁷⁷ See *Grant Order* ¶ 180, n. 625.

⁷⁸ As Verizon Wireless has explained, see *Opposition to Petitions to Deny* at iii, the focus of the Commission’s roaming concerns is on retail customers, not the parochial interests of carriers. See *Grant Order*, ¶ 179 (finding that the Commission’s decisions with respect to roaming are “consistent with the Commission’s prior findings that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices.”).

⁷⁹ *Grant Order*, ¶ 179 (emphasis added); *id.* (“With regard to any additional roaming concerns raised in the record or in the *ex parte* letter filed by MetroPCS and other commenters, . . . we find that the package of divestitures . . . along with the roaming conditions described above [are] sufficient.”).

additional roaming conditions. The Commission’s decision on this point was rooted in precedent holding that an in-market roaming obligation is contrary to the public interest. Less than two years ago, in the *2007 Roaming Order*, the Commission expressly rejected proposals to impose broad automatic roaming rules in home markets. Numerous parties (including Leap) had pressed the Commission to include in-market roaming within the automatic roaming obligations of CMRS carriers.⁸⁰ But after reviewing an extensive factual record, the Commission found that an automatic in-market roaming obligation would “not serve our public interest goals of encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area.”⁸¹ Rather, such an obligation would allow a carrier “to ‘piggy-back’ on the network coverage of a competing carrier in the same market.”⁸² Under such a regime, “both carriers [would] lose the incentive to build-out into high cost areas in order to achieve superior network coverage.”⁸³ Thus, the Commission found that an in-market roaming obligation would *disincent* wireless carriers from investing in new infrastructure and ultimately harm consumers: “If there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a carrier will not likely do so. Consequently, consumers may be disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage. In other words, we believe that requiring home roaming could harm facilities-based competition and negatively affect build-out in these markets, thus, adversely impacting network quality,

⁸⁰ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15834 (¶ 47), 15835 (¶ 49), n. 116 (2007) (“*2007 Roaming Order*”) (citing comments filed by Leap).

⁸¹ *Id.* at 15835 (¶ 49).

⁸² *Id.*

⁸³ *Id.*

reliability and coverage.”⁸⁴ Accordingly, the Commission codified this in-market “exclusion from automatic roaming obligations” in its rules.⁸⁵

There is no conceivable rationale, let alone one sufficient to satisfy the APA, that could square a conclusion that changing the *Grant Order* to impose home roaming and other roaming terms and conditions for an extended period of years is necessary in the public interest, with the Commission’s extant regulation and the *2007 Roaming Order* adopting it that excludes in-market roaming rights as *inconsistent* with the public interest.

2. **Adopting An Extended Home Roaming Requirement Would Subject Verizon Wireless To Disparate Regulatory Treatment.**

To impose upon Verizon Wireless an expanded condition designed to increase some carriers’ roaming rights would violate the APA in another, independent respect. Under the APA, an agency must treat similarly situated persons in a like a manner.⁸⁶ When attempting to draw distinctions between similarly situated persons, the APA requires an agency to “do more than enumerate factual differences, if any . . . it must explain the relevance of those differences”⁸⁷ Accordingly, the agency must supply a

⁸⁴ *Id.* The Commission went so far as to liken an in-market roaming obligation to a mandatory resale rule for CMRS carriers. It emphasized that “the Commission’s mandatory resale rule was sunset in 2002, and automatic roaming obligations cannot be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.” *2007 Roaming Order*, 22 FCC Red at 15836 (¶ 51).

The Commission has expressed a general policy of promoting the deployment of wireless broadband through the build-out of broadband infrastructure. *See In re Sprint Nextel Corporation and Clearwire Corporation*, 2008 WL 4852698, ¶ 123 (Nov. 7, 2008) (citing public-interest benefits in facilitating the arrival of wireless broadband and promoting its availability to all Americans). To impose an in-market roaming obligation on Verizon Wireless would run afoul of this Commission policy as well.

⁸⁵ *Id.* at 15835 (¶ 50). *See* 47 C.F.R. § 20.12(d) (“Automatic Roaming. Upon a reasonable request, it shall be the duty of each host carrier subject to paragraph (a)(2) of this section to provide automatic roaming to any technologically compatible home carrier, *outside of the requesting carrier’s home market*, on reasonable and nondiscriminatory terms and conditions.”) (emphasis added).

⁸⁶ *See, e.g., Etelson v. Office of Personnel Mgmt.*, 684 F.2d 918, 926 (D.C. Cir. 1982) (“Government is at its most arbitrary when it treats similarly situated people differently.”).

⁸⁷ *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *see Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996) (“An agency cannot meet the arbitrary and capricious test by treating type A cases

reasoned analysis *and* enumerate and explain the factual differences that justify the decision to apply disparate regulations.

But there is no reasonable basis that could support burdening Verizon Wireless and no other carrier with additional roaming obligations for as long as four more years.⁸⁸ Indeed, Leap itself has advanced no reason why such an obligation is uniquely necessary for Verizon Wireless. To the extent any particular harms were created by the transaction itself, the Commission expressly found the divestitures and other conditions sufficient to deal with those harms. Further, imposing such a requirement on Verizon Wireless but not other CMRS providers also would be contrary to the Commission's express commitment to employing a "symmetrical regulatory structure" for wireless providers.⁸⁹ For all these reasons, to single out Verizon Wireless for an additional roaming obligation, as Leap asks, would be arbitrary and capricious.⁹⁰

C. Granting Leap's Requested Relief Would Contradict The Broadband Infrastructure Objectives Of The Obama Administration And Congress As Set Out In The ARRA.

It is obvious from Leap's many filings, and most recently its testimony before Congress, that it is attempting to leverage the "clarification" it seeks here to force Verizon Wireless to provide it with home roaming for four extra years. Providing Leap with that entitlement would undermine a key objective of the American Recovery and

differently from similarly situated type B cases The treatment . . . must be consistent. That is the very meaning of the arbitrary and capricious standard."); *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.").

⁸⁸ See Joint Opposition to Petitions to Deny at 60.

⁸⁹ See *Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1418 (¶ 15) (1994); *Petition of the Connecticut Department Public Utility Control to Regulate Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut*, Report and Order, 10 FCC Rcd 7025, 7033-34 (¶ 14) (1995).

⁹⁰ See *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005).

Reinvestment Act of 2009 (“ARRA”),⁹¹ to promote construction of new wireless broadband infrastructure and job creation. In the conference report accompanying the ARRA, the conference committee emphasized that ARRA broadband grants should be distributed in a way to “ensure, to the extent practicable, that grant funds be used to assist *infrastructure investments*.”⁹² The conferees also emphasized that “the construction of broadband facilities capable of delivering next-generation broadband speeds is likely to result in greater job creation and job preservation”⁹³

Leap’s attempt to secure expansive and extensive in-market market roaming rights—and thereby avoid building out its own network—directly contravenes the President’s and Congress’s goals of stimulating infrastructure investments and broadband deployment. Indeed, the Commission has already embraced the concept that in-home roaming obligations undermine the goal of infrastructure development.⁹⁴ Moreover, Leap’s attempt to piggy-back on Verizon Wireless’s network in areas where Leap already holds spectrum would deprive the local economies in those areas of much-needed jobs and capital. Under the current roaming rules, if Leap wants to expand into a market where it holds spectrum, Leap likely would need to deploy its own infrastructure. This would require an influx of capital and generate jobs in that market for workers to engineer and construct the system and to oversee its operations into the future.

If the Commission wishes to revise the current roaming rule so as to change its position on home roaming, despite current federal policy and its own findings two years

⁹¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁹² H.R. REP. No. 111-16, at 774 (emphasis added).

⁹³ *Id.* at 775.

⁹⁴ *See supra* Section II.B.2.b (discussing *2007 Roaming Order*).

ago in the *2007 Roaming Order*, it theoretically may do so if it can develop a sufficient record to show some change in facts, law, or policy that could warrant such a reversal. But, as we have explained, there is no such basis here, and not even Leap has attempted to argue that any changed circumstances warrant departure from the decisions in the *Grant Order*. Thus, whatever the Commission might be able to do in the pending rulemaking, it cannot lawfully impose new roaming requirements on Verizon Wireless in the guise of “clarifying” the *Grant Order*.

D. Leap Does Not Need A Regulatory Handout.

As explained above, the focus of the Commission’s roaming concerns is on retail customers, not the parochial interests of carriers.⁹⁵ Thus, Leap’s asserted “need” for the regulatory handout it seeks⁹⁶ is irrelevant. But, even assuming the relevance of Leap’s financial and market position, Leap does not need in-market roaming rights to compete in the wireless marketplace.

Leap already has significant spectrum holdings and far-reaching roaming agreements that provide it with nearly national coverage. Indeed, Leap—and its partner, Denali Spectrum, LLC—won 100 licenses in the AWS-1 auction. These licenses—capable of providing fourth-generation wireless broadband services—cover vast swaths of territory from coast-to-coast, including: Washington, D.C., Chicago, Seattle, Philadelphia, New Orleans, Baltimore, Minneapolis, St. Louis, Las Vegas, Oklahoma

⁹⁵ *Grant Order*, ¶ 179 (finding that the Commission’s decisions with respect to roaming are “consistent with the Commission’s prior findings that competition in the retail market is sufficient to protect consumers against potential harm arising from intercarrier roaming arrangements and practices”).

⁹⁶ *See* Reply Comments of Leap International, Inc., at 10 (suggesting that “the in-market exclusion and unreasonable roaming terms undermine[]” Leap’s ability to compete). Moreover, Leap fails to understand that the voluntary commitments offered by Verizon Wireless and adopted by the Commission were not intended for Leap only but were a compromise among the competing interests of various carriers.

City, Norfolk, Richmond, and Milwaukee.⁹⁷ To supplement its existing service, Leap recently debuted “Premium Extended Coverage,” which is a “strategic roaming program which gives [Leap] one of the largest unlimited roaming coverage areas of any low-cost, unlimited carrier . . . through strategic roaming partnerships with 14 different carriers.”⁹⁸ Leap’s Premium Extended Coverage provides customers with “unlimited usage in an area stretching from New York to California and from Wisconsin to Texas”⁹⁹ Additionally, Leap entered into a “new nationwide roaming agreement [with MetroPCS in September 2008], which has an initial term of 10 years, [that] covers the companies’ existing and future markets, *which the parties expect could ultimately encompass virtually all of the top 200 markets in the nation.*”¹⁰⁰ In short, Leap and its expanding customer base are well-served by Leap’s ever-expanding roaming coverage, which Leap’s CEO touts as “the largest unlimited roaming coverage area of any low cost, unlimited carrier.”¹⁰¹

⁹⁷ “Leap Services,” *available at* http://www.leapwireless.com/l1_our_cricket_service.htm.

⁹⁸ “New Markets,” CEO LETTER, LEAP 2008 ANNUAL REVIEW, *available at* http://www.leapwireless.com/ar2008/ceo_letter4.php; *see also* Leap Press Release, *Cricket Footprint Grows with Premium Extended Coverage, Forming Largest Roaming Coverage Area for a Low-Cost, Unlimited Carrier* (Nov. 13, 2008), *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1226044&highlight> (“Leap November 13 Press Release”) (explaining that Leap “has significantly expanded the size of its Cricket footprint with the availability of Premium Extended Coverage”).

⁹⁹ Leap November 13 Press Release.

¹⁰⁰ Leap Press Release, *Leap Wireless International, Inc. and MetroPCS Communications, Inc. Enter into National Roaming Agreement and Spectrum Exchange Agreement and Settle Litigation* (Sept. 29, 2008), *available at* <http://phx.corporate-ir.net/phoenix.zhtml?c=95536&p=irol-newsArticle&ID=1203114&highlight=metropcs> (emphasis added) (“Leap-MetroPCS Roaming Press Release”). Leap recently explained that the roaming agreement with MetroPCS will significantly advance its competitive presence. *See Something to Talk About*, San Diego Union Tribune (Apr. 12, 2009), *available at* <http://www3.signonsandiego.com/stories/2009/apr/12/lz1b12leap224820-something-talk-about/?zIndex=80927> (“While it does not match the footprints of the top four wireless companies, [the roaming agreement with Metro] provides a solution for most of the no-contract demographic, Leap says.”); *see also* Cricket Wireless Coverage, <http://www.cellularmap.net/cw.shtml> (map depicting Leap’s wide-ranging roaming coverage).

¹⁰¹ Leap November 13 Press Release.

Leap also maintains a strong marketplace position that it could easily leverage to finance infrastructure developments in its markets. Leap's stock price has increased significantly since the Commission approved the Verizon Wireless/ALLTEL merger.¹⁰² And, as explained in Leap's 2008 Annual Review, Leap generated "adjusted operating income before depreciation and amortization (OIBDA) of \$586 million for [2008], an increase of approximately 49 percent over 2007, *the highest growth rate of any U.S. wireless carrier.*"¹⁰³ Moreover, Leap's "year-over-year customer growth rate of 34 percent was the second highest in the wireless industry" and as part of this growth, Leap's "service revenues rose 23 percent for the year to \$1.7 billion."¹⁰⁴ Further, the investment community has recognized that "Leap issued [an] encouraging 2009 outlook, calling for some of the strongest growth in the industry," and has concluded that "the company is well positioned to achieve these targets from ongoing market expansion plans."¹⁰⁵ Leap thus plainly has the wherewithal to build-out its spectrum.¹⁰⁶ Indeed, Leap itself has so stated: "Our business is well positioned. We're expanding our role as a value-leader in the wireless space. . . . We've assembled significant assets at the right

¹⁰² Leap's stock price at closing on May 8, 2009 was \$38.49, which is more than two-and-a-half times its 52-week low of \$14.18 on November 21, 2008. See "Interactive Stock Charts," available at http://www.nasdaq.com/aspx/dynamic_charting.aspx?selected=LEAP&symbol=LEAP&timeframe=6m&charttype=line.

¹⁰³ "Existing Business," CEO LETTER, LEAP 2008 ANNUAL REVIEW, available at http://www.leapwireless.com/ar2008/ceo_letter3.php (emphasis added).

¹⁰⁴ *Id.* See also Irving May 2009 Congressional Testimony at 9-10 ("[W]e have built a network covering almost 84 million individuals in 32 states, and we are steadily expanding into new markets.").

¹⁰⁵ See "Leap Wireless: Positive Outlook for 2009," Morgan Stanley (Mar. 2, 2009).

¹⁰⁶ Notably, Morgan Stanley recently reported that a "decision [by Leap] on whether to build out to the potential 16 million POPs by YE2010 is expected in mid-2009." See "Leap Wireless: Positive Outlook for 2009," Morgan Stanley (Mar. 2, 2009). A Commission ruling granting Leap in-market roaming rights, however, likely would dissuade Leap from building out its own facilities. This would disserve the Commission's public policy goal of increasing broadband facility deployment.

time. We have adequate financial resources and an attractive spectrum portfolio.”¹⁰⁷ Again, we emphasize that encouraging such build-out is the well-established and consistent policy position of the Commission, as embodied in its rules and orders.¹⁰⁸

But Leap continues to make contradictory statements to the Commission that its future success hinges on the repeal of the in-market roaming exclusion. Indeed, Leap argues in this proceeding that “the in-market exclusion and unreasonable roaming terms undermine[.]” the opportunity for Leap to successfully compete.¹⁰⁹ Leap also argues that the in-market roaming exclusion “means that many consumers who now view Leap as a close substitute for Verizon might no longer do so.”¹¹⁰ Leap therefore concludes that the lack of in-market roaming “threatens to balkanize the market, consign regional carriers to regional status, and cordon off the national market as an exclusive arena for four competitors.”¹¹¹ These assertions, however, directly conflict with Leap’s statements to investors detailing Leap’s recent advancements in the national marketplace and ignore that Leap entered into a “new nationwide roaming agreement” that Leap “expect[s] could ultimately encompass virtually all of the top 200 markets in the nation.”¹¹² This pattern of doublespeak—in which Leap offers a rosy outlook of its financial condition to investors and a divergent picture to the FCC—further deprives the Commission of a reliable factual record for taking the extraordinary step of reversing itself as to the need

¹⁰⁷ “Leap – Q4 2008 Leap Wireless International Earnings Conference Call,” Final Transcript (Feb. 26, 2009), *available at* <http://seekingalpha.com/article/123043-leap-wireless-international-inc-q4-2008-earnings-call-transcript?page=7>.

¹⁰⁸ See Joint Opposition to Petitions to Deny at 61 (explaining that the Commission expressly rejected proposals to impose broad automatic roaming rules in home markets—finding that consumer choice and competition suffer where a competitor with spectrum elects to roam rather than build out).

¹⁰⁹ Reply Comments of Leap International, Inc., at 10.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Leap-MetroPCS Roaming Press Release (emphasis added).

for the requested condition and imposing new, post-merger roaming conditions on Verizon Wireless.

In short, the Commission should not credit Leap's contradictory statements of need. Nor should it grant Leap a regulatory handout.

IV. CONCLUSION

Leap's petition for clarification or reconsideration is a thinly disguised attempt to foist upon Verizon Wireless a far-reaching and novel in-market roaming obligation, which the Commission refused to impose on Verizon Wireless in the *Grant Order* or on the wireless industry less than two years ago. Granting the Leap Petition would be procedurally improper under Commission rules, would violate the APA due to unexplainable reversals of Commission rules and policy, and would undermine current federal policy to promote investment in wireless infrastructure. The Petition should be denied.