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May 12, 2009

VIA ELECTRONIC FILING AND EMAIL

Acting Chairman Michael J. Copps
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Communication – WT Docket 08-95 (Alltel/Verizon Wireless)

Dear Chairman Copps:

MetroPCS Communications, Inc. ("MetroPCS") pursuant to Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, by its attorneys, hereby responds to *ex parte* communications made by Wiley Rein LLP on behalf of Verizon Wireless ("Verizon") on March 19 and 23, 2009 (the "Verizon March Letters"), April 10, 2009 (the "Verizon April 10 Letter") and May 8, 2009 (the "Verizon May 8 Letter", and collectively with the Verizon March Letters and the Verizon April 10 Letter, the "Verizon Letters"), in WT Docket No. 08-95.[1]

In the Verizon Letters, Verizon continues to press the idea that the only two roaming obligations imposed on it in this proceeding with regard to ALLTEL's existing roaming agreements during the four-year post-closing period were that it not raise the rates nominally charged by ALLTEL for such services and that small, rural and regional carriers could elect to have the ALLTEL roaming agreement govern all roaming traffic with the merged entity. According to Verizon, the Commission's *Memorandum Opinion and Order* ("*Order*") in this proceeding leaves Verizon free to vary at will any of the other terms and conditions of those agreements other than rates prior to the end of the four-year standstill period imposed by the *Order*.[2]

[1] The Verizon March Letters also reference various meetings that Verizon has had with Commission personnel to discuss these issues. This letter should be deemed a response to those meetings, as well, and also to any other meetings or *ex parte* communications in which Verizon has addressed those issues. (*See, e.g.,* Verizon's March 30, 2009, and April 30, 2009, *ex parte* filings, which memorialize meetings that appear to have addressed the same issues.) The Verizon May 8 Letter also attaches a "white paper," entitled "Granting Leap's Roaming Petition Would Be Procedurally And Substantively Unlawful And Harm The Public Interest" ("Verizon White Paper").

[2] MetroPCS has argued in the Petition for Limited Reconsideration in this proceeding filed in this docket by it and NTELOS, Inc., on December 10, 2008, that this "standstill period" should be lengthened to seven years in order to adequately protect competition from the harmful effects of the

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MetroPCS urges the Commission to reject Verizon's *post hoc* revisions to its *voluntary* commitments and to hold Verizon to the promises it made in order to receive the Commission's approval of the transaction. Anything less would render any commitment made by the Commission meaningless and would require the Commission to engage in considerable deliberation and dispute resolution post-acquisition to interpret conditions such as these.

Verizon continues to cling to this argument despite several obstacles, which have been succinctly summed up by Leap Wireless International, Inc. ("Leap") as follows:

> "[1] Verizon's own statements to the Commission make clear that it understood the four year commitment would apply to all terms in a roaming agreement; any lingering uncertainty over the meaning of the commitment should be interpreted against Verizon, the original drafter;"
>
> "[2] The statements of three Commissioners reveal that a majority of the agency intended for the four year commitment to apply to each roaming agreement as a whole, and not just to the rate term;" and
>
> "[3] Verizon's commitment to honor rates for four years is rendered meaningless if Verizon can abandon other terms and conditions of its roaming agreements—price is inextricably linked to what one gets for it."[3]

Leap's case on each of these three points is well-documented and dispositive. Not only has Leap demonstrated the fallacy of Verizon's position, but it also has been thoroughly demonstrated in MetroPCS' and NTELOS, Inc.'s Reply to Joint Opposition To Petitions for Reconsideration,[4] in Leap's other filings and submissions in this docket,[5] and in submissions made by the Rural Telecommunications Group, Inc. ("RTG")[6] and The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO").[7] Verizon's proposed rewrite of history based on an overly restrictive reading of its own artful drafting of the condition cannot overcome both the clearly expressed

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Verizon -ALLTEL merger. MetroPCS continues to believe that this longer period is necessary and its comments in this letter should be taken to apply to such longer period.

[3] *See* Leap *Ex Parte* Letter, filed April 6, 2009, in this docket ("Leap April 6 Letter"), at 2 (paragraphs reordered from original).

[4] Filed in this docket on January 6, 2009 ("MetroPCS Reconsideration Reply").

[5] *See, e.g.,* Leap Petition for Clarification or Reconsideration, CC Docket No. 08-95, filed December 10,2008 ("Leap Petition") at 2-4.

[6] Petition for Reconsideration of The Rural Telecommunications Group, Inc., CC Docket No. 08-95, filed December 10, 2008 ("RTG Petition") at 8-12.

[7] *See, e.g.,* OPASTCO Written *Ex Parte* Presentation, filed in this docket on February 24, 2009, at 2-3.

understanding of the Commission and Verizon's own representations as to the intended scope of the condition, especially when to do so would be economically irrational and would completely rob the condition of any ability to fulfill its purpose.

MetroPCS will not belabor the arguments and factual showings that have been made by it, Leap, OPASTCO, and RTG in numerous submissions in support of the three points above. But it is appropriate to point out that Verizon's response to those points is nothing more than a game of "gotcha," as is seen by examining Verizon's responses (or non-responses) to Leap.

Nowhere in its submissions, even in its lengthy White Paper, does Verizon deny (as it could not) that in explaining the terms of its voluntary commitment to the Commission, it made the statements cited in the Leap April 6 Letter at 3-4. These statements – together with the general expectation that conditions on a merger should be rationally related to their objectives – created the context in which all other parties (and, as discussed below, at least a majority of Commissioners) understood that the commitment applied to the agreements *as a whole*, not merely to the rate terms taken in isolation. Verizon's belated insistence that it did not in fact *mean* any of its assurances on this score amounts to nothing more than bait-and-switch. Indeed, if Verizon had meant something other than the plain meaning of its representation it had a duty of candor to the Commission to point it out. Moreover, as the drafter of the conditions, any ambiguity should be construed against Verizon, not against the Commission or the industry. Further, it is not clear how Verizon would have the condition work if its reading were correct. Since the roaming rate cannot change for four years – a rate which may be applicable to in-market as well as out-of-market roaming – Verizon's argument taken to its logical end means that the rate for in-market roaming cannot apply for *any* term. Whether or not the agreement itself or only the rates apply for four years – Verizon never told the Commission that it would disavow any in-market roaming rates offered by ALLTEL *for any term*. But this is clearly the consequence of Verizon's argument. Thus, it is Verizon – not Leap – who is truly offering a new reading of, rather than logical outflow from, the conditions voluntarily offered by Verizon. Accordingly, the Commission should reject Verizon's cramped and self-serving reading of the conditions and construe the conditions as everyone understood them at the time they were offered – the agreements as a whole, including the rates, must be offered for four years – and this patently includes any in-market roaming rates offered by ALLTEL.

Similarly, Verizon does not deny that three of the five then-sitting Commissioners (Commissioners Copps, Adelstein and Tate) clearly expressed their understanding that the commitment extended to the ALLTEL agreements *as a whole* and not merely to the rate terms, as pointed out at length and repeatedly by Leap, RTG and

MetroPCS.[8] Rather, Verizon argues[9] that, because these Commissioners expressed their understanding in separate statements rather than in the *Order* itself, this understanding does not have the force of law and is trumped by the language of the *Order*, which according to Verizon is "clear and unambiguous" and applies only to rate terms. On its face, the language is not "clear and unambiguous," since at least three expert Commissioners have expressly interpreted the language to mean something other than what Verizon says it means.[10] If Verizon's argument is taken seriously, it means that a merger applicant can make solemn commitments to Commissioners and parties throughout the negotiation of merger conditions – upon which a majority of Commissioners *expressly rely* – yet by an artful eleventh-hour drafting maneuver, "put one over" on both the Commissioners and other parties. Because the transaction has now closed, Verizon asserts, its trickery has been successful beyond the Commission's power to do anything about it.[11]

But this is of course untrue. The Commission can – and because Verizon has now taken the contrary position, it *must* – clarify that the commitments made by Verizon taken as a whole require it to maintain in place during the standstill period all the terms and conditions of the agreements, including all rates, chosen by roaming partners. Alternatively, it can clarify that any variance in such terms by Verizon to the detriment of the roaming partner shall be deemed to "adjust upwards the rates" of the agreement – because such variance will in fact do so when the effect is to raise the cost or lower the benefit to the roaming partner of receiving the roaming services under the agreement.[12]

Notably, as to the sheer economic absurdity of the condition as narrowly read by Verizon, Verizon offers no response at all, other than that the condition is "clear and

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[8] Leap April 6 Letter at 5; RTG Petition at 9-11; MetroPCS Reconsideration Reply at 6.

[9] Verizon April 10 Letter at 2-4; Verizon White Paper at 14-15.

[10] Verizon's contention that in the *Order* the Commission "expressly rejected" (Verizon White Paper at 9, 13) the clarification sought by Leap is meritless. Nowhere in the language cited by Verizon appears any "rejection," express or otherwise, of the assertion that the commitment included the entire agreements, not just rates. Indeed, as noted, at least three Commissioners expressly understood that the entire agreements were fully included within the scope of the commitment. Verizon insists (Verizon White Paper at 15) that a provision in an *Order* is only valid if assented to by a majority of the Commissioners – and patently a majority of Commissioners did not assent to any such "rejection" of the Leap position as Verizon now seeks to read into the *Order*.

[11] Verizon April 10 Letter at 3. Of course, Verizon's position flies in the face of the principle that closings before the review process is completed are at the closing parties' own risk.

[12] If, as Verizon claims, this is not a clarification because the language of the condition is "clear and unambiguous," then as RTG pointed out in its reply on reconsideration, "any order that contains text that is flatly inconsistent with the understanding of the majority of Commissioners as to what was actually adopted constitutes material error which must be reconsidered." RTG Reply To Opposition To Petitions For Reconsideration, filed in this docket on December 29, 2008, at 5.

unambiguous," whether sensible or not.[13] This is unsurprising since no substantive response to this argument can credibly be made. If, as Verizon would have it, it is free to offset or eliminate the economic value to roaming partners of its acknowledged rate commitment – by demanding countervailing non-rate concessions which drive up the indirect costs of its roaming services to roaming partners, or to undercut the economic benefits of the contracts by reducing the value of the paid-for services – then Verizon would still be free to abuse its roaming partners in the ways identified in the original petitions to deny its application, and the commitment would offer no real protection to competition at all.[14]

The Commission should similarly reject Verizon's argument[15] that granting Leap's requested clarification would violate the Administrative Procedure Act ("APA"). Verizon unconvincingly argues that the Commission is precluded from adopting Leap's clarification based on an assertion that the clarification would (1) require the Commission to depart from merger precedent by imposing conditions which are contrary to the conditions found necessary to approve the merger, (2) depart from the Commission's prior determination that in-market roaming is not necessary to serve the public interest, and (3) subject Verizon to disparate regulatory treatment. Verizon's arguments clearly miss the mark and must be rejected.

As an initial matter, Verizon wrongly portrays Leap's requested relief as seeking to expand the merger conditions and to impose on Verizon different conditions than those voluntarily agreed to by it to win approval of the merger. As demonstrated earlier, Verizon is just plain wrong. However, even if Verizon were right, adopting Leap's requested clarification would not violate the APA. If Leap's proposed reading of the condition is correct, which is clearly the case, then Leap's reading cannot be contrary to the conditions necessary to approve the merger since they

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[13] Verizon April 10 Letter at 2. Verizon takes the constricted position that only a direct increase to a nominal rate would violate this condition, but this cannot be correct. Under Verizon's model, a candy bar manufacturer which reduces the size of a candy bar from eight to seven ounces while keeping the nominal price at a dollar would be deemed not to have raised the price of candy. No economist or consumer in the world would agree with Verizon's interpretation. Indeed, so clear is this conclusion that, as MetroPCS stated in its Reconsideration Reply, MetroPCS had not even thought clarification to be necessary until Verizon began to take its bizarre and unjustifiable position.

[14] Oddly, Verizon now argues (Verizon White Paper at 19-20) that clarification of the *Order* as sought by Leap would not address a "merger-specific" harm and therefore would not be proper in a merger proceeding. This too is meritless. Leap, MetroPCS and others showed throughout this proceeding that the preservation of the ALLTEL agreements during the standstill period was necessary to prevent competitive harm that would otherwise arise from *this merger,* and in the *Order* the Commission agreed. Verizon concedes that the Commission's adoption of relief as to the extension of the ALLTEL contracts is appropriate merger-based relief, and is now merely quibbling as to the scope of such relief. It can hardly be said that the preservation of rates in these contracts is appropriate merger-specific relief, yet the preservation of other terms in the same contracts is not.

[15] Verizon White Paper at 17-26.

would be the very conditions agreed to by Verizon. Since at least three Commissioners at the time of the adoption of the *Order* believed that the conditions reached to the entire agreement, not just the rates, Verizon's claims that the merger conditions are more limited should be rejected. Even if Leap's proposed reading would expand the conditions beyond a narrow reading of the exact phrasing set forth in the *Order*, however, nothing in the APA would preclude such an expansion through reconsideration. As Verizon observed, Leap sought clarification *or* reconsideration. If Verizon is right and the language in the *Order* means something different than had been understood by all other parties and the Commission, such a fact would support reconsideration of the *Order* since any failure of the *Order* to convey this intended meaning would be a "material error or omission," and even Verizon concedes that material errors and omissions are sufficient to require reconsideration. [16]

As to Verizon's second and third arguments, whether an in-market roaming condition might under other circumstances violate the APA by changing prior Commission policy or creating disparate regulatory treatment is not the issue here. Verizon *voluntarily* agreed to extend the terms of the ALLTEL agreements for 4 years – including any in-market roaming rights. Accordingly, the fact that the Commission decided not to impose a *mandatory* in-market roaming requirement does not mean that Verizon could not *voluntarily* agree to extend such a benefit in order to get approval of the merger –the Commission in the *Roaming Order* did not *preclude* carriers from providing in-market roaming, and so Verizon's agreement would not violate the *Roaming Order*. Moreover, it is not the Commission which is imposing the condition that Verizon complains of – but rather Verizon itself. Verizon made the calculated business decision to offer the condition to extend ALLTEL's agreements and commiserate roaming rates which included no difference between in-market and out-of-market roaming. Having offered such a condition in order to win approval, Verizon should not now be able to withdraw it.

Further, contrary to Verizon's argument that the imposition of any in-market roaming condition must be industry-wide; such a condition is merger-specific and appropriate here because this particular merger has resulted in the removal from the market of a significant roaming partner which served as a competitive check on ,and offered more competitive roaming terms than, Verizon. The voluntary merger conditions also do not impose disparate regulatory treatment on Verizon . Any "disparate" treatment suffered by Verizon comes not from regulation but from the disparate pre-merger agreements of ALLTEL – which had in place the same rates for in-market and out-of-market roaming

[16] Verizon White Paper at 16.

The Commission should also reject the numerous *ad hominem* arguments leveled at Leap by Verizon.[17] These arguments are a complete red herring devised by Verizon to distract attention away from the conditions voluntarily agreed to by it. The question is not whether Leap has the financial wherewithal to build-out all of the licensed area it currently holds – but rather the competitive harm the Verizon-ALLTEL merger would create in the wireless marketplace and the conditions which were necessary in order to ameliorate such harm. Verizon by merging with ALLTEL took out of the market a roaming partner which had offered many of the benefits that Verizon would like now to deny – such as the same rate for in-market and out-of-market roaming. Verizon cannot have it both ways – it cannot reap the benefits of the merger while refusing to honor the minimal conditions it voluntarily offered in order to receive Commission approval.

MetroPCS urges the Commission to act on Leap's and others' request for clarification. The current situation is harming on the very carriers whom the conditions were meant to protect by its chilling effect on their ability to elect the lower rates. Until this Sword of Damocles is removed, few carriers will be willing to take advantage of this benefit expressly required as part of the approval of the merger. Further, any delay by the Commission rewards Verizon's intransigence since the time period attached to Verizon's conditions began as of the consummation of the transaction. The Commission should not reward Verizon's self-help remedy and should issue a strong statement reaffirming the conditions *as promised* by Verizon and understood by the Commission.

Should any additional information be required with respect to this *ex parte* notice, please do not hesitate to contact me.

Very truly yours,

/s/ Jean L. Kiddoo

Jean L. Kiddoo
Counsel for MetroPCS Communications, Inc.

cc: Ms. Marlene H. Dortch (via electronic filing)
Commissioner Jonathan S. Adelstein (via email)
Commissioner Robert M. McDowell (via email)
Mr. Paul E. Murray (via email)
Ms. Renée Roland Crittendon (via email)
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[17] Verizon White Paper at 26-30.