

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Applications of AT&T Inc. and Cellco)	WT Docket No. 09-104
Partnership d/b/a Verizon Wireless)	
)	File Nos. 0003840313, <i>et al.</i> ,
For Consent To Assign or Transfer Control of)	ITC-ASG-20090552-00244, <i>et al.</i>
Licenses and Authorizations, and Modify a)	File No. 0003487528
Spectrum Leasing Arrangement)	
)	

PETITION TO DENY

**CHATHAM AVALON PARK
COMMUNITY COUNCIL**
8441 South Cottage Grove
Chicago, Illinois 60619

By

Aaron Shainis, Esq.
Shainis & Peltzman, Chartered
1850 M Street, N.W.
Washington, D.C. 20036
(202) 293-0011

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SUMMARY

Verizon Wireless has chosen to ignore the Commission's admonition that it should "consider and implement mechanisms to assist regional, local, and rural wireless providers, new entrants, small businesses, and businesses owned by minorities or socially disadvantaged groups in acquiring the Divestiture Assets and/or accessing spectrum, to the extent possible." Instead, Verizon Wireless is proposing to sell the bulk of the assets that it agreed to divest as a condition of its acquisition of ALLTEL to its chief competitor, AT&T.

As a consequence, a divestiture that was intended to reduce the concentration in the wireless marketplace will, instead, further consolidate the position of the two companies that already overshadow their competition. Indeed, if all of the transactions involving Verizon Wireless, AT&T, ALLTEL, and Centennial had been proposed at once, the significant increase in market power for AT&T and Verizon Wireless that will result would have been evident, and it would have been nearly impossible for the Commission to conclude that those transactions would be in the public interest. For this reason, a sale to AT&T is precisely the opposite of what the Commission intended when it adopted the divestiture condition.

Equally important, it is apparent that Verizon Wireless did absolutely nothing to encourage or assist socially disadvantaged businesses ("SDBs") during the bidding process. Verizon Wireless did not offer a right of first refusal or a right to match bids, and did not screen SDB bidders and their specific interests during the bidding process. Thus, despite the Commission's evident concern and well-known policies on diversity, Verizon Wireless adopted a bidding structure that effectively eliminated what may have been the last chance to increase diversity in the wireless marketplace. For that reason, the applications should be denied and Verizon Wireless should be required to conduct a divestiture process that provides appropriate,

meaningful consideration for potential SDB buyers. At a minimum, the Commission should hold its processing of these applications in abeyance while it conducts an investigation of Verizon Wireless's purported auction of the Divestiture Assets.

At the same time, the Commission cannot grant consent to the proposed transaction because neither the Commission nor Verizon Wireless has provided any reasonable basis to conclude that Verizon Wireless has complied with the foreign ownership requirements of Section 310(b) of the Communications Act. As CAPCC demonstrated in the Verizon Wireless-ALLTEL proceeding, the Commission cannot simultaneously permit Verizon Wireless to rely on street addresses to establish citizenship and deny that same opportunity to other Commission licensees and prospective licensees.

As a practical matter, street addresses cannot serve as a proxy for citizenship because they have only a tangential relationship to the citizenship of an entity that owns stock in Verizon Wireless and no relationship at all to the citizenship of entities further up the chain of ownership. Even if the Commission could rely on street addresses, it has utterly failed to provide a reasoned basis for doing so in the case of Verizon Wireless while forbidding other applicants from using mere addresses to demonstrate citizenship. So long as a significant question concerning the basic qualifications of Verizon Wireless to hold radio licenses remains unresolved, the Commission cannot grant the applications.

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To: The Secretary
Office of the Secretary
Federal Communications Commission

PETITION TO DENY

Chatham Avalon Park Community Council (“Petitioner” or “CAPCC”), by its attorneys and in accordance with the Commission’s Public Notice, hereby petitions to deny the applications for consent to assign or transfer control of licenses and authorizations and to modify a spectrum leasing arrangement under the above-captioned docket and file numbers. (collectively, the “Divestiture Applications”).¹

CAPCC is a community-based organization located in and around Chicago, Illinois, with hundreds of members who are consumers of telecommunications services, some of which are offered by Verizon Wireless and AT&T. CAPCC has a long and proud history of advocating for our local citizens and a special interest in promoting the growth and economic development of the African-American and small business communities. The increasing consolidation in the

¹ See *AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless Seek FCC Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, Public Notice, DA 09-1350 (rel. June 19, 2009).

telecommunications industry disserves Petitioner and its members by producing fewer competitive services at higher consumer prices. so CAPCC has recently become active in FCC wireless proceedings. While Petitioner is concerned about industry consolidation in general, in light of its interest in economic development and business activity, this transaction is of particular significance to CAPCC because it would result in further excessive consolidation in the wireless industry and foreclose what could be the last meaningful opportunity for socially disadvantaged businesses (“SDBs”) to enter the wireless business. Moreover, this transaction also is being proposed even though Verizon Wireless has not complied with previous Commission requirements for compliance with Section 310(b) of the Communications Act, requirements that the Commission has decided to apply strictly to SDBs seeking to obtain Commission authorization.

It is in this context that CAPCC is taking this opportunity, as the Commission urged in the *Verizon-Alltel Order*, to address “the qualifications of the entity(ies) acquiring the Divestiture Assets and whether the specific transaction is in the public interest[.]”² For the reasons described below, this transaction does not meet the public interest test.

There are two separate grounds to deny the Divestiture Applications. First, the Divestiture Applications ask the Commission to consent to a transaction in which the two dominant players in the wireless market will swap assets that will allow them to further consolidate their positions in that market. Verizon Wireless, in particular, is seeking this consent despite the Commission’s explicit statement in the *Verizon-Alltel Order* that it should seek to sell these assets to “regional, local, and rural wireless providers, new entrants, small businesses, and

² See *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC*, WT Docket No. 08-95, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, 17518 (rel. Nov. 10, 2008) [hereinafter “*Verizon-Alltel Order*”], *reconsideration pending*.

businesses owned by minorities or socially disadvantaged groups[.]”³ As shown below, Verizon Wireless made no effort at all to seek out such buyers, instead choosing to sell the vast majority of the divested systems to its chief competitor. Both Verizon Wireless’s failure to comply with the Commission’s wishes and the nature of the swap it proposes with AT&T justify denial of the Divestiture Applications.

Second, significant questions remain concerning the qualifications of Verizon Wireless to hold any radio licenses, including those it proposes to divest to AT&T under the foreign ownership provisions of Section 310(b) of the Communications Act.⁴ As CAPCC demonstrated in its petition for reconsideration in the Verizon Wireless-ALLTEL merger proceeding,⁵ Verizon Wireless still has not provided the information necessary to establish its qualifications under established Commission precedent. If Verizon Wireless cannot establish that it complies with Section 310(b), it has no licenses to transfer or assign to AT&T and the Divestiture Applications must be denied.

I. Verizon Wireless Did Not Make a Good Faith Effort to Act Consistently with the Commission’s Intent that Socially Disadvantaged Businesses Be Considered as Buyers for the Divested Markets.

CAPCC demonstrated in its petition to deny Verizon Wireless’s acquisition of the ALLTEL assets that there are significant barriers to the entry of SDBs in the wireless services marketplace.⁶ While the Commission did not fully address those concerns in the *Verizon-Alltel Order*, it did acknowledge their significance.⁷ Indeed, the *Verizon-Alltel Order* specifically

³ *See id.*

⁴ 47 U.S.C. § 310(b).

⁵ CAPCC Petition for Reconsideration, WT Docket No. 08-95 et al., filed December 10, 2008, at 17-24.

⁶ CAPCC Petition to Deny, WT Docket No. 08-95 et al., filed August 11, 2008, at 19-22 [hereinafter “*CAPCC Petition to Deny Verizon-Alltel*”].

⁷ *Verizon-Alltel Order*, 23 FCC Rcd at 17518.

“encourage[d] Verizon Wireless to consider and implement mechanisms to assist regional, local, and rural wireless providers, new entrants, small businesses, and businesses owned by minorities or socially disadvantaged groups in acquiring the Divestiture Assets and/or accessing spectrum, to the extent possible.”⁸ The record demonstrates, however, that Verizon Wireless chose to ignore this advice.

First, and most obviously, Verizon Wireless is proposing the sale of the overwhelming majority of the divested licenses to the second largest wireless provider in the United States. In fact, it proposes to sell these systems to a company that is supposed to be its most significant business rival, and the sale is part of a series of transactions in which the two companies are selling each other properties to fill in the holes in their coverage.⁹ This swap is part of an effort by the two companies to solidify their market positions and to disadvantage smaller competitors. By locking up spectrum across the country, AT&T and Verizon Wireless make it more difficult for other companies to compete, or to create more complete networks of their own. Indeed, if the combined Verizon-ALLTEL, AT&T-Centennial, Verizon-AT&T and AT&T-Verizon transactions had been proposed to the Commission at once, it would have been self-evident that these transactions would have a substantial negative impact on the wireless marketplace, and it would have been nearly impossible for Verizon Wireless and AT&T to convince the Commission that the transactions would be in the public interest. The creation of a *de facto* duopoly in this fashion is anticompetitive and plainly does not serve the public interest.

This concern is particularly significant because Verizon Wireless and AT&T now are being investigated by the Justice Department for anticompetitive activities and abuse of market

⁸ *Id.*

⁹ See Reuters, *AT&T to buy some ALLTEL assets for \$2.35 billion*, May 8, 2009, available at <http://www.reuters.com/article/innovationNews/idUSTRE5475E620090509> (describing paired

power.¹⁰ Permitting Verizon Wireless and AT&T to further consolidate the wireless marketplace by trading spectrum would further increase both their ability and incentive to engage their market power, to the detriment of consumers across the country.

Equally important, Verizon Wireless, by proposing to sell the bulk of the licenses it agreed to divest in the *Verizon-Alltel Order* to AT&T, is ignoring the Commission's admonition to seek out new entrants and SDBs when selling the Divestiture Assets. This admonition is, as CAPCC described in the Verizon-ALLTEL merger proceeding, a vital public policy goal given that for many years both the Commission and Congress have sought to increase diversity in the ownership of telecommunications businesses as expressed in Sections 257, 309(i) and 309(j) of the Communications Act.¹¹ The Commission also has recognized that minorities, in particular, are subject to significant discrimination in the capital markets, which makes it difficult for them to obtain the financial resources necessary to compete effectively for telecommunications authorizations.¹² The specific barriers to entry faced by socially disadvantaged businesses are well known and established; they are facts, not conjecture. Moreover, the Commission has recognized that there is a compelling interest in ensuring diversity in ownership of communications businesses.

The *Verizon-Alltel Order* admonished Verizon Wireless to take heed of these considerations, and Verizon Wireless chose not to do so. The most obvious evidence of this fact is the choice of buyer – AT&T is the antithesis of a socially disadvantaged business. Even Verizon Wireless's choice of buyer for the relatively small number of licenses not purchased by

transactions involving sale of ALLTEL and RCC assets to AT&T and sale of AT&T assets to Verizon Wireless).

¹⁰ See Wall Street Journal, *Telecoms Face Antitrust Threat*, July 7, 2009, available at <http://online.wsj.com/article/SB124689740762401297.html>.

¹¹ *CAPCC Petition to Deny Verizon-Alltel*, at 22.

AT&T is a publicly-traded company with no obvious connections to any minority or other socially-disadvantaged ownership. Indeed, it is particularly telling that Verizon Wireless was willing to sell systems with more 800,000 customers to Atlantic Tele-Networks for only \$200 million, or about \$250 a subscriber.¹³ At that price, and even at significantly higher prices, SDBs would have found it extremely feasible to obtain financing for the divested assets, and yet Verizon Wireless did not find a way to sell any assets to SDBs. In fact, there is no evidence that Verizon Wireless took any steps to encourage or assist SDBs that were potential purchasers. The Divestiture Applications do not claim that Verizon Wireless sought out SDBs and failed to attract any responsive bids, and none of Verizon Wireless's previous statements (including its request to the Commission for additional time to negotiate the divestiture) contain any suggestion that SDBs were among those bidders being considered seriously or, for that matter, at all.

Verizon Wireless may well argue that it did nothing to discourage bids from SDBs, but that, ultimately, it determined that a sale to its main competitor was a better fit for its corporate needs. This, of course, ignores the barriers to entry described by CAPCC and acknowledged by the Commission, particularly those that affect an SDB's ability to obtain financing. More important, it would be inconsistent with the Commission's admonition that Verizon Wireless should "consider and implement mechanisms to assist" disadvantaged bidders.¹⁴

If, for instance, Verizon Wireless demanded that bidders have their financing in place before they bid, that would have been a significant disadvantage for many SDBs, which often have to negotiate deal terms before they obtain financing. If Verizon Wireless had intended to

¹² *Id.* at 13.

¹³ By comparison, the price per subscriber for the assets to be acquired by AT&T was more than \$1,500.

¹⁴ *Verizon-Alltel Order*, 23 FCC Rcd at 17518.

assist SDBs, it would have negotiated terms and conditions first, and then given a successful SDB an opportunity to obtain financing. Similarly, a bidding free for all that, by Verizon Wireless' own account, attracted more than 70 bidders is likely to shut out SDBs. If Verizon Wireless had screened bidders to identify SDBs and their specific interests, then taken the time to negotiate with those entities first, the likelihood of success in divesting properties to SDBs would have been much higher.¹⁵ It is apparent that, instead, Verizon Wireless simply took the path of least resistance and did nothing at all to encourage, let alone assist SDBs that were interested in the divested systems. Given the Commission's strong, stated interest in encouraging investment in wireless by SDBs and the specific statements in the *Verizon-Alltel Order* urging Verizon Wireless to provide assistance to SDBs in bidding for the divested markets, this failure is unacceptable.

Finally, the applicants may argue that it is too late to apply these requirements to this transaction, and that any condition on the divestiture had to have been imposed in the *Verizon-Alltel Order*. This is incorrect. First, the *Verizon-Alltel Order* does, in fact, contain language admonishing Verizon Wireless to act in ways that would increase the likelihood of divestiture to SDBs. Second, the *Verizon-Alltel Order* specifically states that interested parties should wait until this proceeding to address questions concerning "the qualifications of the entity(ies) acquiring the Divestiture Assets and whether the specific transaction is in the public interest[.]"¹⁶ The question of whether the transaction should be allowed to go forward when Verizon Wireless

¹⁵ CAPCC is not seeking a guarantee of a sale to an SDB, merely a fair opportunity. Experience shows that affording such opportunities can have a significant effect. For instance, when the National Football League adopted its "Rooney Rule," requiring teams to interview minority candidates for all head coaching positions, but not requiring minority hiring, the number of minority head coaches hired increased dramatically. G. Garber, *Thanks to Rooney Rule, doors opened*, Feb. 9, 2007, available at <http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645> (describing increase in number of minority head coaches after adoption of rule).

ignored the significant issues created by its failure to seek out potential SDB buyers for the divested assets plainly is within the scope of an appropriate petition to deny, particularly given that such issues were called out by the Commission in the *Verizon-Alltel Order*.

Consequently, the Commission should deny the Divestiture Applications and require Verizon Wireless to conduct a divestiture process that provides appropriate, meaningful consideration for potential SDB buyers of these assets. Given the important public policy of increasing diversity in the telecommunications and media industry coupled with the acknowledged barriers to entry, specific action is required to address those barriers. In other proceedings, the Commission has adopted specific measures to do so. For instance, in the Sirius-XM merger, the Commission based its public interest finding, in part, on the combined entity's commitment to make four percent of channel capacity available to entities under minority control.¹⁷ At a minimum, the process here should include, as proposed by CAPCC in its initial submissions on the Verizon-ALLTEL merger, a right of first refusal for SDBs. Only if SDBs are given an appropriate opportunity for meaningful participation in a divestiture sale can the Commission live up to its stated policies of encouraging competition and diversity in the telecommunications industry.

II. At a Minimum, the Commission Should Conduct an Investigation into the Circumstances of Verizon Wireless's Proposed Sales of the Divestiture Assets Before Acting on These Applications.

The facts described above demonstrate that there are significant questions about how Verizon Wireless conducted itself in determining the buyers for the Divestiture Assets. These and other circumstances warrant exercise of the Commission's broad power to investigate

¹⁶ *Verizon-Alltel Order*, 23 FCC Rcd at 17518.

¹⁷ *Applications for Consent to Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc. to Sirius Satellite Radio Inc.*, MB Docket No. 07-57, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348 (rel. Aug. 5, 2008).

actions by its licensees to determine the extent to which Verizon Wireless intended to use the divestiture to extend, not limit, its market power and the extent to which Verizon Wireless has made accurate representations to the Commission and to Congress about the sale process.

The Commission has ample power to conduct an investigation into the facts and circumstances surrounding this transaction, as well as the seemingly intertwined but not yet filed proposed sale of Centennial assets to Verizon Wireless by AT&T.¹⁸ Section 403 grants the Commission the “full authority and power at any time to institute an inquiry . . . in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission[.]”¹⁹ The Commission’s Rules provide for the use of investigative tools, such as subpoenas for document production and witness testimony, that increase the Commission’s ability to obtain all relevant facts and that are unavailable to parties like CAPCC in proceedings such as this one.²⁰ This ability to obtain all of the information necessary to see the full picture is essential when the known facts strongly suggest that relevant information is not being provided.

¹⁸ AT&T’s applications to obtain spectrum from Centennial are currently pending. *See, e.g., Applications of AT&T Inc. and Centennial Communications Corp.*, WTC Docket No. 08-246; CC Docket No. 99-200, Public Notice, DA 09-1300 (rel. June 10, 2009). Concurrent with the instant transaction, however, AT&T is selling some of the spectrum it expects to obtain from Centennial to Verizon Wireless. *See* News Release, “AT&T Agrees to Sell Certain Centennial Communications Corp. Assets to Verizon Wireless,” May 8, 2009, included in AT&T Notice of Ex Parte Presentations, WT Docket No. 08-246, filed May 11, 2009.

¹⁹ 47 U.S.C. § 403; *see also Impact of Arbitron Audience Ratings Measurements on Radio Broadcasters*, MB Docket No. 08-187, Notice of Inquiry, FCC 09-43, 74 Fed. Reg. 26235, n.1 (rel. May 18, 2009) (explaining that Sections 4(i) and 403 give “the Commission broad authority to initiate inquiries . . .”). The Commission often invokes its Section 403 authority where it concludes that it needs additional information before taking action. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket 05-255, 21 FCC Rcd 2503, 2613 (rel. March 3, 2006); *Broadcast Localism*, Notice of Inquiry, MB Docket No. 04-233, 19 FCC Rcd 12425 (rel. July 1, 2004).

²⁰ 47 C.F.R. § 1.27; *see also* 47 U.S.C. § 409 (describing investigative tools available to Commission).

In this case, the facts plainly warrant an investigation. As described above, the circumstances of the two transactions between Verizon Wireless and AT&T strongly suggest an intent to use divestitures to strengthen, not reduce, the two companies' positions in the wireless marketplace, to the detriment of competition, other competitors and consumers. Among the questions the Commission should pursue in an investigation are (i) whether the two Verizon Wireless-AT&T transactions are linked to each other; (ii) whether Verizon Wireless already had identified AT&T as the buyer for the Divestiture Assets before it formally started the sale process; and (iii) whether other bids that Verizon Wireless did not accept would have, alone or in combination, yielded a higher purchase price.

Second, there are additional facts that support the need for an investigation. It is CAPCC's understanding that Capitol Hill personnel were told that Verizon Wireless could not give any special consideration to SDBs in the divestiture process because it was conducting a pure auction, yet Verizon Wireless has agreed to sell a portion of the Divestiture Assets Atlantic Tele-Networks at a price per pop that is far below what AT&T is paying.²¹ CAPCC also understands that SDBs were informed that, to participate in the sale, they would be required to have made full arrangements for financing, but Verizon Wireless nevertheless agreed to sell some assets to Atlantic Tele-Networks even though it does not have its financing in place.²² The

²¹ CAPCC also understands that Verizon Wireless suggested in communications with Capitol Hill that it was compelled to conduct an auction, although there was no regulatory requirement to do so, whereas there was Commission direction to seek ways to sell some or all of the Divestiture Assets to SDBs.

²² See News Release, "Atlantic Tele-Network to Acquire Divestiture Properties from Verizon Wireless," June 9, 2009, available at http://www.atni.com/pr_web.php?nd=090609&pr=01 (noting that availability of funds is "subject to lender consent," with the caveat that "there can be no assurances that such financing will be available to ATN at all"); Atlantic Tele-Network, Inc. Form 8-K, at 2, June 15, 2009, available at http://www.sec.gov/Archives/edgar/data/879585/000110465909038199/a09-15334_18k.htm (same); see also News Release, "AT&T Agrees to Sell Certain Centennial Communications

Verizon Wireless swap with AT&T, under which AT&T would convey Centennial properties that it did not even own (and still does not own), was announced a full month before the announcement of the proposed sale of the remaining Divestiture Properties to Atlantic Tele-Networks,²³ and, thus, at a time when the window for negotiations for the purchase of Divestiture Assets was still open. These facts strongly suggest that, rather than giving SDBs a fair opportunity, Verizon Wireless intentionally shut them out of the process.

Again, these facts warrant an investigation. And, the only way the Commission can know whether Verizon Wireless was merely indifferent to SDBs or intentionally prevented them from having a fair chance to purchase the Divestiture Assets is to conduct such an investigation. Moreover, if the Commission fails to investigate this matter thoroughly, or grants the applications without completing an investigation, it will have lost the opportunity to address Verizon Wireless's actions in a meaningful way.²⁴ In addition, if the investigation being conducted by the Department of Justice should lead to findings of improper conduct by Verizon Wireless and AT&T that in any way relate to the divestiture arrangement being passed on by the Commission, it could prove more difficult and costly to rectify the problem. It will do no good to grant the applications and then later admonish or fine Verizon Wireless for its actions – the divestiture will have occurred and it would be effectively impossible to unwind the transaction. This is, in fact, the last best chance for the Commission to act to afford SDBs a real opportunity to participate in the wireless marketplace and to address the questions left unanswered in the *Verizon-Alltel Order*.

Corp. Assets to Verizon Wireless,” May 8, 2009, included in AT&T Notice of Ex Parte Presentations, WT Docket No. 08-246, filed May 11, 2009.

²³ *Id.*

²⁴ This is particularly the case because once the AT&T transaction is completed, the Commission will have lost any chance to address the Section 310(b) issues still pending in the Verizon-ALLTEL merger proceeding, as described in Section III below.

III. It Would be Arbitrary and Capricious for the Commission to Grant Consent for the Transfer of Verizon Wireless's Licenses to AT&T When the Commission Has Yet to Provide Any Reasonable Basis to Conclude That Verizon Wireless Meets the Basic Qualifications for a Wireless Licensee Under Section 310(b) of the Communications Act.

It is well established that the Commission will not approve a proposed transfer of control of a Commission licensee or assignment of Commission licenses when issues regarding the licensee's basic qualifications remain unresolved.²⁵ In acquiring these licenses in the first place, Verizon Wireless purported to establish its qualifications under the foreign ownership provisions of Section 310(b) through reliance upon shareholder addresses – an approach that, as CAPCC demonstrated in its prior Petition to Deny in the ALLTEL proceeding, the Commission consistently and repeatedly has rejected for anyone other than Verizon Wireless. Compliance with Section 310(b) is a basic qualification for a licensee in the Commercial Mobile Radio Service. Neither Verizon Wireless nor the Commission has yet offered any plausible rationale why Verizon Wireless is qualified to hold Commercial Mobile Radio Licenses in the first place, much less transfer them to AT&T.

“The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside.”²⁶ In the *Verizon-Alltel Order*, however, the Commission “blithely cast aside” two policies it has consistently maintained

²⁵ See *Applications of SBC Communications, Inc. and BellSouth Corporation for Transfer of Control or Assignment*, WT Docket No. 00-81, Memorandum Opinion and Order, 15 FCC Rcd 18128 (WTB/IB rel. Sept. 29, 2000); *Applications of Vodafone AirTouch and Bell Atlantic Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 11608, 11611 (WTB/IB rel. Mar. 30, 2000); *VoiceStream/Aerial Order*, WT Docket 00-3, Memorandum Opinion and Order, 15 FCC Rcd 10089, 10093-94 (citing “*MobileMedia Corporation et al.*, 14 FCC Rcd 8017 (1999) (citing *Jefferson Radio Co. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964))”); see also Stephen F. Sewell, “Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934,” 43 Fed. Comm. L.J. 277, 339-40 (1991).

²⁶ *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (citing *Rainbow B'casting Co. v. FCC*, 949 F.2d 405, 408 (D.C. Cir. 1991); *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986)).

in prior decisions: its methods for evaluating foreign ownership and its policy of policing foreign ownership strictly even to the detriment of other high priority goals. Because the *Verizon-Alltel Order* strikingly conflicts with existing precedent, the Commission had an obligation to provide a reasoned explanation for applying a different standard to Verizon Wireless. As discussed below, the Commission did not provide any such explanation.

The question of Verizon Wireless's basic qualifications under Section 310(b) already is pending in two other proceedings.²⁷ The Commission should not grant yet a third major transfer application without directly addressing CAPCC's arguments. CAPCC submits that, if the Commission addresses the arguments CAPCC actually made, it must either (i) make its special Verizon Wireless interpretation of Section 310(b) available to SDBs and new market entrants or (ii) require that Verizon Wireless conduct a statistically valid sample survey of the outstanding voting and equity interests of its partners in which it analyzes the citizenship of the sampled shares using the same methodology through the vertical ownership chain that the Commission requires of new entrants and SDBs.

A. As Demonstrated in Pending Petitions for Reconsideration, the Commission's Approval of Verizon Wireless's Foreign Ownership Showing in the *Verizon-RCC Order* and in the *Verizon-Alltel Order* Contradicts Established Policy and Precedent Without Justifying a Departure from Settled Law.

In the *Verizon-Alltel Order*, the Commission failed to provide any reasoned analysis of its decision to allow Verizon Wireless to presume citizenship based on registered and beneficial owners' addresses of record. Instead, Verizon Wireless offered conclusory statements that the order dutifully repeated. The Commission did so despite CAPCC's demonstration that, in accepting shareholder address information, the Commission applied an entirely different and far more liberal definition of what constitutes foreign ownership under Section 310(b) than it applies

²⁷ See WT Dockets 08-95 and 07-208.

to small and socially disadvantaged businesses and other entities that compete with Verizon Wireless's media and telecommunications businesses. In issuing the *Verizon-Alltel Order* and granting special procedures and a special statutory interpretation applicable only to Verizon Wireless, the Commission acted arbitrarily and capriciously and contrary to settled law.

By departing from precedent, the Commission incurred an obligation to explain its change in policy. Approval of Verizon Wireless's reliance on shareholder addresses to meet its Section 310(b)(4) showing cannot be reconciled with the Commission's precedent for calculating foreign ownership.²⁸ Moreover, approval of Verizon Wireless's limited showing cannot be reconciled with the Commission's Report and Order and Third Further Notice of Proposed Rulemaking in MB Docket No. 07-294 ("*Diversity Order*"), now on reconsideration,²⁹ which denied far more modest relaxations of Section 310(b)(4) even for the priority goal of encouraging market entry by socially disadvantaged businesses and other small businesses.³⁰ "The law that governs an agency's significant departure from its own prior precedent is clear. The agency cannot do so without explicitly recognizing that it is doing so and explaining why."³¹ Accordingly, the Commission's inconsistent treatment of Verizon Wireless vis-à-vis its prior treatment of Verizon Wireless's competitors, particularly SDBs, gave rise to an obligation for the Commission to recognize and provide a reasoned explanation for its apparent inconsistency.

Under established Commission policy, when evaluating an applicant's foreign ownership for purposes of Section 310(b)(4), the Commission considers "all the relevant ownership

²⁸ See generally *Verizon Commc 'ns Inc. and América Móvil, S.A. DE C.V.*, Memorandum Opinion and Order and Declaratory Ruling, 22 FCC Rcd 6195 (2007) [hereinafter "*América Móvil*"].

²⁹ *Promoting Diversification of Ownership in the Broad. Servs.*, Report and Order and Third Further Notice of Proposed Rulemaking, 23 FCC Rcd 5922, 5949 ¶ 77 (2008), *recon. pending* [hereinafter "*Diversity Order*"].

³⁰ *CAPCC Petition to Deny Verizon-Alltel*, at 24-27.

interests up the vertical ownership chain including ‘even small investments in publicly traded securities.’”³² The Commission determines the principal place of business, nationality, or “home market” of underlying investors through a multi-level analysis.³³ As the Commission’s *Foreign Ownership Guidelines* and the instructions to the Commission’s application forms make clear, the determination of an investor’s Section 310(b)(4) status under existing Commission policy requires, among other things, analysis of whether a U.S. entity is a subsidiary of a foreign entity, whether a corporation under one set of national laws is owned and voted by persons or entities of a different nationality, and whether limited partners or LLC members are “insulated” or not.³⁴ Thus, the interest of an investor or shareholder with an address of record in the United States or a WTO-member nation may be classified as foreign or non-WTO. In *América Móvil* – the most recent in a line of Commission decisions rejecting presumptions from investor addresses – the Commission stated unequivocally: “we decline, based on the record in this proceeding, to change

³¹ *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989).

³² *Foreign Ownership Guidelines for FCC Common Carrier and Aeronautical Radio Licenses*, 19 FCC Rcd 22612, 22625 (IB rel. Nov. 17, 2004) [hereinafter “*Foreign Ownership Guidelines*”] (citing *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*, Docket Nos. IB 97-142, 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23941 (rel. Nov. 26, 1997) [hereinafter “*Foreign Participation Order*”]).

³³ *América Móvil*, 22 FCC Rcd at 6217 (citing *Foreign Participation Order*, 12 FCC Rcd at 23941).

³⁴ See *Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-31; see, e.g., Instructions to FCC Form 315, Section IV.H (“The Commission may also deny a construction permit or station license to a licensee directly or indirectly controlled by another entity of which more than 25% of the capital stock is owned or voted by aliens. their representatives, a foreign government or its representative, or another entity organized under the laws of a foreign country. . . . The voting interests held by aliens in a licensee through intervening domestically organized entities are determined in accordance with the multiplier guidelines [for determining attributable interests held through corporations.]”).

the Commission's precedent by accepting street addresses of stockholders and banks as an indicator of citizenship of the beneficial owners."³⁵

Nevertheless, in the *Verizon-Alltel Order*, the Commission approved Verizon Wireless's showing of citizenship based on shareholder addresses, stating that "[CAPCC] has not provided, and we do not discern, any basis for concluding that the information Verizon Wireless has provided is inaccurate, cannot be relied on, or is insufficient for purposes of demonstrating compliance with its foreign ownership ruling under section 310(b)(4) of the Act."³⁶ In the first place, this analysis reversed – for Verizon Wireless alone – decades of precedent that the applicant, *not* the petitioner, has the burden of establishing its qualifications under Section 310(b).³⁷

Furthermore, contrary to the Commission's statement, CAPCC's Petition to Deny and Reply each explained why, in light of the methodology Verizon Wireless says it followed, Verizon Wireless did not conduct the analysis that the Commission requires from all other applicants.³⁸ Verizon Wireless itself did not deny that the review it commissioned only examined the address of the owner just one level below a pure nominee, and did not assess the underlying ownership of that entity, as it might have done in a sample survey. Thus, as CAPCC explained in detail, replete with examples, Verizon Wireless did not concern itself with whether that top-level "beneficial owner" was a U.S. corporation directly or indirectly owned or

³⁵ *América Móvil*, 22 FCC Rcd at 6223.

³⁶ *Verizon-Alltel Order*, 23 FCC Rcd at 17544-45.

³⁷ See, e.g., *Application of Continental Cellular for Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 316, Alaska 2 (Bethel) and Nineteen Rural Service Area Applications Filed by Partnerships with Alien Partners*, 6 FCC Rcd 6834, 6837 (rel. Nov. 20, 1991); *Midwest Radio-Television, Inc.*, Docket No. 18499, 24 FCC 2d 625, 626 (rel. July 31, 1970).

³⁸ See *CAPCC Petition to Deny Verizon-Alltel*, at 28-31; CAPCC Reply, WT Docket No. 08-95 et al., filed August 26, 2008, at 15-16.

controlled by foreign parties, a limited partnership with non-insulated alien limited partners, or even a foreign sovereign wealth fund, so long as the stockholder supplied a U.S. address, either as a “registered address” to the company or as the “registered address” supplied to a bank or other nominee holder. This is not the assessment of ultimate beneficial ownership that the Commission’s longstanding precedent requires. For Verizon Wireless, the subsidiary of a foreign corporation, a limited partnership or LLC with non-insulated foreign investors, or the sovereign wealth funds of non-WTO-member nations, so long as they have supplied an address of record in the United States, each would count not only as WTO-qualified ownership and control but as wholly U.S. investment and voting rights under Section 310(b).³⁹ For all other applicants and licensees, in contrast, those investments would count in their entirety, regardless of registered address, as foreign investment and, unless the underlying share ownership could be traced and proven, would count as non-WTO-qualified investment.⁴⁰ Such a glaring deficiency demonstrates that the information obtained through Verizon Wireless’s methodology “cannot be relied upon” and is “insufficient for purposes of demonstrating compliance with its foreign ownership ruling under section 310(b)(4) of the Act.”⁴¹

³⁹ As CAPCC previously explained, sovereign wealth funds maintain offices outside their borders. For example, Kuwait Investment Authority has an office in the United Kingdom. *See* Sovereign Wealth Fund Institute – Kuwait Investment Authority, <http://www.swfinstitute.org/fund/kuwait.php> (last visited July 13, 2009); Jamil Anderlini, *Financial Times*, *China Investment Arm Emerges from Shadows*, Jan. 5, 2008, available at www.ft.com/cms/s/0/fd0b7e6e-bb2f-11dc-9fbc-0000779fd2ac.html.

⁴⁰ *See Foreign Ownership Guidelines*, 19 FCC Rcd at 22624-34.

⁴¹ *See Verizon-Alltel Order*, 23 FCC Rcd at 17544-45. The Commission’s approval of Verizon Wireless’ foreign ownership showing is particularly surprising given the additional caveat in the *Verizon-Alltel Order* that “where a public company has reason to know the citizenship or principal places of business of particular beneficial owners, *e.g.*, based on notifications made pursuant to federal securities regulations, the information should be included in the company’s citizenship calculations.” *See id.*, n.794. The methodology approved by the Commission for Verizon Wireless, which involved the gathering of addresses from a third party, ensured that Verizon Wireless would never even have the opportunity to glance down the list of investors, thus insulating Verizon Wireless from ever seeing a shareholder name that itself would

Moreover, the Commission cannot reconcile its dramatic loosening of the foreign ownership rules just for Verizon Wireless with its *Diversity Order*, in which the Commission rejected a proposal by 29 organizations and a broadcaster coalition to open new financing resources for SDBs by relaxing existing restrictions on foreign ownership, using its authority under Section 310(b)(4). As discussed above, diversity in ownership in the telecommunications industry has long been a public policy goal of both the Commission and of Congress, and it is well-recognized that discrimination in the capital markets has handicapped minority entrepreneurs attempting to enter the rapidly consolidating telecommunications industry.⁴² Nevertheless, the Commission rejected the relaxation proposed in the *Diversity Order* first, because it saw relaxation of foreign ownership restrictions as “an extraordinary step” and, second, because taking that step would require “a significant rulemaking proceeding to examine this issue in greater depth.”⁴³ Having thus rejected any liberalization of its foreign ownership standards and policies for SDBs, the Commission cannot reasonably accede to a new liberalized standard that applies only to Verizon Wireless.

conclusively show non-U.S. or non-WTO status, such as a non-WTO sovereign investor fund with a registered address at its Paris office.

⁴² See, e.g., William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (2000); Ivy Planning Group, LLC, *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing [1950 to Present]* (2000); see also *Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042, 26052 (Dep’t of Justice, May 23, 1996) (DOJ proposal citing studies and Congressional hearings documenting that “widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy”).

⁴³ *Diversity Order*, 23 FCC Rcd at 5949.

“The Commission may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside.”⁴⁴ In the *Verizon-Alltel Order*, however, the Commission “blithely cast aside” two policies it has consistently maintained in prior decisions: its methods for evaluating foreign ownership and its policy of policing foreign ownership strictly even to the detriment of other high priority goals. Because the *Verizon-Alltel Order* strikingly conflicts with existing precedent, the Commission had an obligation to provide a reasoned explanation for applying a different standard to Verizon Wireless. As discussed below, the Commission did not provide any such explanation.

B. The Commission Did Not Properly Distinguish *América Móvil*.

“A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.”⁴⁵ Therefore, when the Commission treats an applicant differently than it has treated an apparently similar applicant in a prior decision, the Commission must explain its departure from precedent. If the agency distinguishes the previous case based on its facts, then the agency must cite a distinction logically related to the underlying policy goals the agency intends to achieve. Indeed, the Supreme Court has explained that factual distinctions between cases “serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule.”⁴⁶ Therefore, “[if] the agency distinguishes earlier cases[, it must]

⁴⁴ *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (citing *Rainbow B'casting Co. v. FCC*, 949 F.2d 405, 408 (D.C. Cir. 1991); *Telecomms. Research & Action Ctr. v. FCC*, 800 F.2d 1181, 1184 (D.C. Cir. 1986)).

⁴⁵ *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

⁴⁶ *Atchison, Topeka Santa Fe Railway Corp. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

assert[] distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing.”⁴⁷

In the *Verizon-Alltel Order*, the Commission entirely failed to provide an adequate explanation for refusing to follow its decision in *América Móvil*, which explicitly rejected the use of shareholder addresses as a basis for assessing ownership under Section 310(b). América Móvil, like the partners of Verizon Wireless, was a publicly held corporation with widely dispersed stockholdings. América Móvil sought to have the Commission “infer that the citizenship of the company’s beneficial owners typically will correspond to: (1) the registered addresses of stockholders that have taken possession of their stock certificates; and (2) the addresses of custodian banks and brokers that hold shares for the more numerous owners that have chosen not to possess the stock certificates.”⁴⁸ The Commission, however, flatly refused: “we decline, based on the record in this proceeding, to change the Commission’s precedent by accepting street addresses of stockholders and banks as an indicator of citizenship of the beneficial owners.”⁴⁹

In contrast, responding to objections based on *América Móvil* in CAPCC’s Petition to Deny, the Commission stated:

As a factual matter, we believe that [CAPCC] misconstrues the methodology that Verizon Wireless has used to demonstrate compliance with its section 310(b)(4) ruling. Verizon Wireless has provided the Commission with aggregate information regarding the *addresses of record* of nearly 100 percent of the

⁴⁷ *Shaw’s Supermarkets, Inc.*, 884 F.2d at 36 (quoting *Atchison, Topeka Santa Fe Railway Corp.*, 412 U.S. at 809) (alterations in original); *see also Tel. & Data Sys. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994).

⁴⁸ *América Móvil*, 22 FCC Rcd at 6222-23.

⁴⁹ *Id.* The Commission eventually was able to grant the América Móvil application with extensive conditions, based on a finding that the shares analyzed using shareholder “registered addresses” were almost all non-voting shares and that more than 93 percent of the voting rights were held by a trust controlled by a single family. Those conditions are not present, of course, for the Verizon Wireless partners.

beneficial owners of Verizon and Vodafone stock. Thus, in contrast to the foreign ownership information we rejected in the *América Móvil Order*, the Verizon Wireless data does not rely on “the addresses of custodian banks and brokers that hold shares for the more numerous owners that have chosen not to possess the stock certificates.”⁵⁰

This explanation entirely fails to show that Verizon Wireless’s Section 310(b)(4) showing did something other than presume stockholder citizenship from stockholder addresses, the very presumption that the Commission found insufficient in *América Móvil*. The Commission has an obligation in adjudications to explain its departure from settled precedent and to articulate the reason for that decision in light of the underlying policy.⁵¹ Thus, CAPCC did not “misconstrue” Verizon Wireless’s methodology, and, as discussed below, the Commission did not distinguish *América Móvil* on grounds sufficient to withstand judicial review under an arbitrary and capricious standard.

In fact, just as in *América Móvil*, the street (or post office box) address supplied by a shareholder, as Verizon Wireless acknowledged,⁵² only discloses the location of the place or the agent to which the stockholder wants information sent; it has no necessary relationship with the Section 310(b) status of the stockholder under the interpretation of Section 310(b) that the Commission applies to everyone but Verizon Wireless. Thus, Verizon Wireless’s showing was deficient for *exactly the same reasons* that a showing based on addresses was deficient in *América Móvil*, and the Commission’s approval of that showing just for Verizon Wireless was arbitrary and capricious.

⁵⁰ *Verizon-Alltel Order*, 23 FCC Rcd at 17544-45 (quoting *América Móvil*, 22 FCC Rcd at 6222-23) (emphasis added).

⁵¹ See *Kidd Commc'ns v. FCC*, 427 F.3d 1, 4-6 (D.C. Cir. 2005).

⁵² Verizon Wireless, Opposition to Chatham Avalon Park Community Council’s Petition for Reconsideration, WT Docket No. 07-208, filed August 28, 2008, at 8.

Accordingly, the Commission cannot change its current policy rejecting shareholder street addresses to establish a new definition of “foreign ownership” under Section 310(b) just for Verizon Wireless without overruling *América Móvil* and acknowledging that all applicants in all services may use the same definitions of “foreign ownership” that Verizon Wireless used here. By departing from precedent, the Commission incurred an obligation to explain its change in policy. Approval of Verizon Wireless’s reliance on shareholder addresses to meet its Section 310(b)(4) showing cannot be reconciled with the Commission’s precedent for calculating foreign ownership as illustrated by the *América Móvil* decision.⁵³ “The law that governs an agency’s significant departure from its own prior precedent is clear. The agency cannot do so without explicitly recognizing that it is doing so and explaining why.”⁵⁴ Accordingly, the Commission’s inconsistent treatment of Verizon Wireless vis-à-vis its prior treatment of Verizon Wireless’s competitors gave rise to an obligation for the Commission to recognize and provide a reasoned explanation for its apparent inconsistency.

C. The Commission Improperly Relied on *WWOR-TV* and the *Mobile Satellite Ventures* Decisions to Support the Use of Shareholder Addresses “On a Fact-Specific, Case-by-Case Basis.”

In the *Verizon-Alltel Order*, the Commission attempted to show that it was following precedent with respect to reliance on shareholder addresses for a 310(b)(4) showing, stating that “[t]he Commission has permitted public companies to use methods other than random surveys, including the collection of shareholder addresses, on a fact-specific, case-by-case basis.”⁵⁵ In support of this statement, the Commission cited its 1991 *WWOR-TV* decision and its 2006 and 2008 decisions concerning the ownership of Mobile Satellite Ventures Subsidiary LLC

⁵³ See generally *América Móvil*, 22 FCC Rcd 6195.

⁵⁴ *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989).

⁵⁵ See *Verizon-Alltel Order*, 23 FCC Rcd at 17544-45.

(“MSV”).⁵⁶ These cases do not support its decision in the *Verizon-Alltel Order*. First, none of these cases actually demonstrates a Commission policy, or a conscious change in Commission policy, with respect to the use of shareholder addresses to demonstrate permissible levels of foreign ownership. (Indeed, uncited portions of *WWOR-TV* flatly contradict the Commission’s conclusion.) Second, the Commission failed to identify any facts and circumstances that it relied upon to allow Verizon Wireless’s showing on a “fact-specific, case-by-case basis.”

1. The Cases Cited by the Commission Provide No Precedent for Allowing Verizon Wireless to Rely on Shareholder Addresses in its 310(b) Showing.

Neither *WWOR-TV* nor the two MSV decisions provide a precedent for the Commission’s decision to allow Verizon Wireless to rely on shareholder addresses. In *WWOR-TV*, the Commission permitted a *pro forma* transfer of control of station WWOR-TV, Secaucus, New Jersey, from its parent corporation, MCA, to an entity owned by substantially the same set of shareholders.⁵⁷ Prior to the transfer, MCA had performed an alien ownership sample survey that, under worst-case assumptions regarding the outcome of intervening transactions, showed that MCA’s foreign ownership fell below the 25-percent guideline, and it then confirmed the results of that survey when it filed a *pro forma* application to see if shareholder addresses had changed.

⁵⁶ See *id.* (citing *WWOR-TV, Inc. For Transfer of Control of Station WWOR-TV, Licensee of Station WWOR-TV, Channel 9 Secaucus, New Jersey*, Memorandum Opinion and Order, 6 FCC Rcd 6569, 6572 (rel. Nov. 13, 1991) [hereinafter “*WWOR-TV*”], *appeal dismissed sub nom. Garden State Broadcasting Ltd. Partnership v. F.C.C.*, 996 F.2d 386 (D.C. Cir. 1993); *Motient Corporation and Subsidiaries, Transferors, and SkyTerra Communications, Inc., Transferee, Application for Authority to Transfer Control of Mobile Satellite Ventures Subsidiary LLC*, WC Docket No. 06-106, Memorandum Opinion and Order and Declaratory Ruling, 21 FCC Rcd 10198, 10216 (IB rel. Sept. 15, 2006) [hereinafter “*MSV 2006*”]; *Mobile Satellite Ventures Subsidiary LLC and SkyTerra Communications, Inc. Petition for Declaratory Ruling Under Section 310(b) of the Communications Act of 1934, as Amended; Harbinger Capital Partners Master Fund I, Ltd. and Harbinger Capital Partners Special Situations Fund, L.P. Petition for Expedited Action for Declaratory Ruling Under Section 310(b) of the Communications Act of 1934, as Amended*, Order and Declaratory Ruling, 23 FCC Rcd 4436, 4461-62 (rel. March 7, 2008) [hereinafter “*MSV 2008*”]).

In contrast to Verizon Wireless, which filed for a “substantial” transfer of ownership, MCA was not required to certify its Section 310(b) qualifications in a *pro forma* application.⁵⁸ In response to Whitely Communications’ petition for reconsideration, the Commission cited MCA’s previous alien ownership survey and described its initial decision as follows:

[W]e would not require a new survey in connection with a *short-form transfer application* in the absence of a well-founded question as to compliance with the Act. . . .⁵⁹

The Commission also stated that “*relying on mailing addresses is not a substitute for a random survey,*” and expressed the expectation that “in connection with the preparation of any subsequent renewal application, [the transferee] will use *reasonable methods* to insure compliance with section 310(b).”⁶⁰ *WWOR-TV* therefore provides no basis for the Commission to approve Verizon Wireless’s total reliance on shareholder addresses to demonstrate compliance with Section 310(b) in the context of a long-form transfer of control and contradicts the Commission’s holding in the *Verizon-Alltel Order*.

The *MSV 2006* decision also does not address citizenship presumptions from stockholder addresses; the decision does not mention the issue and gives no indication that the issue was raised or considered in the proceeding.⁶¹ At most, one of many filings in that proceeding mentions that a minority shareholder several levels removed from the licensee consulted shareholder addresses. Accordingly, to cite the *MSV 2006* decision as a precedent for reliance on stockholder addresses, the Commission in essence would have to conclude that it somehow invalidated *sub silentio* a consistent, express line of precedent by overlooking an application

⁵⁷ See *WWOR-TV*, 6 FCC Rcd at 6569.

⁵⁸ See *id.* at 6572.

⁵⁹ See *WWOR-TV*, 6 FCC Rcd at 6572 (emphasis added).

⁶⁰ See *id.* at 6572 (emphasis added).

⁶¹ See *MSV 2006*, 21 FCC Rcd at 10215.

defect.⁶² That position is untenable, particularly in view of the Commission's express recognition that it in fact was departing from established precedent in the *Verizon-RCC Order* because of Verizon Wireless's supposed but unexplained "special circumstances."⁶³

The *MSV 2008* decision similarly does not address or endorse citizenship presumptions from stockholder addresses. In fact, the only evidence that the Commission might possibly have considered the reliance on mailing addresses is the vague statement that "we are concerned about the quality of information made available to the Commission with respect to the foreign ownership of TerreStar, with the exception of the Harbinger Funds for which we have more complete information."⁶⁴ In support of this statement, the Commission cites a January 25, 2008 letter filed by MSV that does not discuss the methodology used to calculate TerreStar's foreign ownership. Thus, the Commission's comment about "the quality of information" may reflect the age of the data (one year old at the time of the decision), the lack of detail concerning the countries where shareholders were located (in contrast to the data submitted by the Harbinger Funds), or any other concern not stated in the order. Furthermore, based on these nebulous concerns about data quality, the Commission declared that it would consider all future investment by TerreStar as non-WTO until the applicants could provide "information to demonstrate that TerreStar's shareholdings in SkyTerra are properly ascribed to the United States

⁶² See *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir. 1989) (explaining that an agency "may not depart sub silentio, from its usual rules of decision to reach a different, unexplained result in a single case." (citing *NLRB v. Int'l Union of Operating Engineers, Local 925*, 460 F.2d 589, 604 (5th Cir. 1972)); *Comm. for Cmty. Access v. FCC*, 737 F.2d 74, 80 (D.C. Cir. 1984) ("[A]n agency cannot silently change its policies.")).

⁶³ See *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation*, WT Docket No. 07-208, Memorandum Order and Declaratory Ruling, 23 FCC Rcd 12463, 12525 (rel. Aug. 1, 2008), *reconsideration pending* [hereinafter "*Verizon-RCC Order*"].

⁶⁴ See *MSV 2008*, 23 FCC Rcd at 4461-4462.

or other WTO Member countries.”⁶⁵ Thus, the *MSV 2008* decision is hardly an endorsement of the methodology used to calculate TerreStar’s foreign ownership, however the Commission may have understood it.

Furthermore, the very fact that the Commission expressed concern about the quality of TerreStar’s foreign ownership data reveals that Verizon Wireless’s reliance on addresses of record for first-level beneficial owners does not meet the Commission’s requirements. While Verizon Wireless relies on mailing addresses for 100% of its ownership calculation, mailing addresses were used in the *MSV 2008* decision to determine the ownership of only 24.5% of MSV’s equity and none of its voting rights.⁶⁶ TerreStar itself was three levels up the ownership chain, and yet the Commission still scrutinized the accuracy of its citizenship data instead of relying on TerreStar’s “address of record” (or the address of one of the corporations lower in the ownership chain). Under the Commission’s special rule for Verizon Wireless, MSV’s U.S. address could have established MSV as wholly U.S.-owned and U.S.-controlled, and TerreStar’s foreign ownership would have been ignored entirely.

Finally, the *MSV 2008* decision does not indicate in any way that the Commission intended to alter in any respect its express decision in *América Móvil* to reject the use of

⁶⁵ *See id.*

⁶⁶ Petitioner derives this 24.5% by multiplying the 59% of TerreStar not owned by the Harbinger Funds, by wholly-owned Motient Venture Holdings’ 41.48% equity interest in Skyterra, by Skyterra’s 99.29% equity interest in MSV LP. Indeed, because MSV reported that 4.5% of this 24.5% was non-WTO, MSV used shareholder addresses only to show the U.S. or WTO status of 20% of its equity ownership. *See* Letter from Tom W. Davidson, Esq., Counsel for SkyTerra Communications, Inc. and Bruce Jacobs, Esq., Counsel for Mobile Satellite Ventures Subsidiary LLC to Ms. Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, dated Oct. 5, 2007, at Attachment 7(b) (reporting 10.8% non-WTO ownership in TerreStar); Letter from Tom W. Davidson & Karen Milne, Counsel for SkyTerra Communications, Inc. and Bruce Jacobs & Clifford M. Harrington, Counsel for Mobile Satellite Venture Subsidiary LLC to Ms. Marlene H. Dortch, Esq., Secretary, Federal Communications Commission, filed January 25, 2008, at 2 n.2 (stating that the data in the October 5, 2007 letter did not include the Harbinger Funds’ interest in TerreStar).

shareholder address information as an acceptable means to show stockholder citizenship. To the contrary, the *MSV 2008* decision cites *América Móvil* with approval, which refutes any inference that the Commission intended to depart from that decision.⁶⁷ In short, presumption of citizenship from stockholder addresses of any sort is an approach that the Commission precedent expressly, definitively, and consistently has rejected for everyone but Verizon Wireless.

2. The Commission's Failure to Identify the Facts and Circumstances Justifying Reliance on Shareholder Addresses Is Fatal to the *Verizon-Alltel Order's* Ability to Withstand Judicial Review.

Even if any of the above decisions actually constituted precedent for permitting reliance on mailing addresses “on a fact-specific, case-by-case basis,” the Commission completely failed to describe any facts and circumstances that justified allowing Verizon Wireless to rely on shareholder addresses in this particular case. By failing to do so, the Commission severely endangered the ability of the *Verizon-Alltel Order* to withstand a challenge under the arbitrary and capricious standard.

An agency may “proceed case by case or, more accurately, subregulation by subregulation, but it must be possible for the regulated class to perceive the principles which are guiding agency action.”⁶⁸ Therefore, the Commission may use adjudication to evolve a definition of “reasonable methods to insure compliance with section 310(b),”⁶⁹ but its decisions must converge into a coherent body of law rather than diverge into a miscellaneous assortment of completely unrelated decisions.⁷⁰ Thus, it is not enough for the Commission to say, as it did in the *Verizon-Alltel Order*, that it has allowed applicants to rely on shareholder mailing addresses

⁶⁷ See *MSV 2008*, 23 FCC Rcd at 4443, 4462.

⁶⁸ See *Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Cir. 1999).

⁶⁹ See *Verizon-Alltel Order*, 23 FCC Rcd 17544-55 (quoting *WWOR-TV*, 6 FCC Rcd at 6572).

“on a fact-specific, case-by-case basis.”⁷¹ Regulated parties must be able to “measure the scope of the *ratio decidendi*, so as to predict how future cases will be decided, and therefore how behavior should be shaped. For [the agency] to utter the words ‘unique facts and circumstances’ and ‘equity’ . . . as a wand waived over an undifferentiated porridge of facts, leaves regulated parties and a reviewing court completely in the dark”⁷²

Indeed, judicial review is impossible without some explanation of an agency’s decision to treat apparently similar cases differently. “A reviewing court must be able to discern in the Commission’s actions the policy it is now pursuing, so that it may complete the task of judicial review – in this regard, to determine whether the Commission’s policies are consistent with its mandate from Congress.”⁷³ When no explanation is provided, “[t]he court really has no way of knowing if the rationale it discerns is in fact that of the agency, or one of the court’s own devise. . . . Yet only the former can provide a legitimate basis for sustaining agency action.”⁷⁴ Consequently, courts will remand agency decisions when they cannot determine the basis for the agency’s action.

The Commission’s order and the record in this proceeding are devoid of any support for the existence of circumstances warranting a different and more liberal interpretation of Section 310(b) for Verizon Wireless than for other licensees and applicants that the Commission

⁷⁰ *Commc ’ns Investment Corp. v. FCC*, 641 F.2d 954, 976 (D.C. Cir. 1981) (“Distinguishing cases on the basis of principled differentiations is one thing; consciously setting out to ‘confine each case to its own facts,’ another—one which would virtually eliminate all precedent.”).

⁷¹ See *Verizon-Alltel Order*, 23 FCC Rcd at 17544-45.

⁷² See *Philadelphia Gas Works*, 989 F.2d 1246, 1251 (D.C. Cir. 1993).

⁷³ See *Atchison, Topeka Santa Fe Railway Corp. v. Wichita Bd. of Trade*, 412 U.S. at 806.

⁷⁴ *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004); See also *Bush-Quayle ’92 Primary Comm. v. FEC*, 104 F.3d 448, 454 (D.C. Cir. 1997) (“Without adequate elucidation, this court has no way of ascertaining whether cases are indeed distinguishable, whether the Commission has a principled reason for distinguishing them, or whether the Commission is refusing to treat like cases alike.”).

regulates.⁷⁵ The *Verizon-Alltel Order* does not discuss what facts and circumstances might justify the use of shareholder addresses, as opposed to previous cases such as *América Móvil* (rejecting the use of shareholder addresses) and *WWOR-TV* (stating that shareholder addresses are not a reasonable means of assessing foreign ownership). Because the Commission has no justification for applying such an extraordinarily inequitable policy, which amounts to patent discrimination in favor of Verizon Wireless and against its competitors, the Commission's approval of Verizon Wireless's 310(b) showing in the *Verizon-Alltel Order* cannot withstand judicial review. And, in the absence of an adequate showing that Verizon Wireless has met the requirements of Section 310(b), the Commission cannot conclude that Verizon Wireless has any valid licenses to transfer.

IV. Conclusion

For all these reasons, the Commission should deny the above-captioned applications until Verizon Wireless first conducts a divestiture process that provides appropriate, meaningful

⁷⁵ As CAPCC pointed out in its Petition to Deny at pages 29-30 in the Verizon-RCC proceeding, although the Commission states in the *Verizon-RCC Order* that it permitted Verizon Wireless to make a conclusive presumption of stockholder citizenship based on stockholder addresses alone because of supposed "special circumstances," there is no evidence in the decision or the record for the existence of such "special circumstances," other than Verizon Wireless' bare assertion that a survey would be "burdensome." The sample size required for a statistically valid sample does not vary linearly with the size of the population to be sampled, however, so the raw number of shares outstanding cannot justify special treatment for Verizon Wireless. Verizon Wireless's need for a rapid decision also is irrelevant. Verizon Wireless had the time and resources to conduct a proper survey, so the timing was entirely in Verizon Wireless's control.

consideration for potential SDB buyers of these assets and second, demonstrates actual compliance with Section 310(b)(4) of the Communications Act.

Respectfully submitted,

**CHATHAM AVALON PARK
COMMUNITY COUNCIL**

By: 

Aaron Shainis, Esq.
Shainis & Peltzman, Chartered
1850 M Street, N.W.
Washington, D.C. 20036
(202) 293-0011

July 20, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Applications of AT&T Inc. and Cellco)	WT Docket No. 09-104
Partnership d/b/a Verizon Wireless)	
)	File Nos. 0003840313, <i>et al.</i> ,
For Consent To Assign or Transfer Control of)	ITC-ASG-20090552-00244, <i>et al.</i>
Licenses and Authorizations, and Modify a)	File No. 0003487528
Spectrum Leasing Arrangement)	
)	

To: The Secretary
Office of the Secretary
Federal Communications Commission

**AFFIDAVIT OF KEITH O. TATE,
PRESIDENT
CHATHAM AVALON PARK COMMUNITY COUNCIL**

Keith O. Tate hereby submits this declaration, pursuant to Section 1.16 of the Commission's rules, 47 C.F.R. § 1.16 with the understanding that this declaration will be submitted to the Federal Communications Commission (the "Commission") in connection with a petition to deny the applications of Verizon Wireless and AT&T, Inc., for Commission consent to the merger of Verizon Wireless with ALLTEL Wireless and its affiliates.

1. I am the President of Chatham Avalon Park Community Council ("CAPCC"). CAPCC is a broad-based grass-roots community membership organization founded in 1955 in Chicago, Illinois, to promote and protect the well-being of Chicago's Chatham Park Avalon Community and the civic growth of Chicago as a whole.

2. Since its founding, CAPCC has been in the forefront of major civic actions and other vital issues in Chicago. CAPCC and its representatives regularly appear before various departments and agencies of Chicago's government to address issues critical to maintaining civic life, promoting effective education, and providing essential services and security to Chicago residents, and promoting social justice and civic betterment. CAPCC joins regularly with other organizations representing Chicago's African-American Community to encourage citizen participation in local political action, and seeks to maintain the reputation of the Chatham Avalon Park Community for beauty, safety, civic action, and excellence. CAPCC sponsors and works

through a network of geographically-defined block clubs covering the whole of the Chatham Avalon Park Community.

3. CAPCC favors economic development and business activity. It believes, however, that increased consolidation of the providers of telecommunications providers, by reducing competition and eliminating smaller and mid-size service providers, has had and will have a deleterious effect upon its members. Members of CAPCC reside in areas in which the combined Verizon Wireless-ALLTEL entity and AT&T have commanding presences.

4. The absence of an adequate competitive spur from years of consolidation, CAPCC believes, causes telecommunications service providers to have less interest in the unique needs and the welfare of the communities they serve and less involvement with the people who live in them. For example, in the Chatham Park Avalon Community, which is served by the Verizon Wireless-ALLTEL combined entity and AT&T, neither Verizon Wireless-ALLTEL nor AT&T have had significant presence in terms of customer service centers or storefront operations. They do not have employees in the community, nor do they deal with community businesses in obtaining services for their own business. Because of this lack of involvement and understanding, service to the community suffers. Accordingly, CAPCC opposed the Verizon Wireless-ALLTEL merger unless the Commission imposes conditions its merger consent to require appropriate divestitures and to enhance competition and diversity of ownership in telecommunications services for the benefit of underserved communities such as the Chatham Avalon Park Community and other similarly situated communities in the greater Chicago area and in the proposed Verizon-ALLTEL service area as a whole. The Commission granted consent for the Verizon-ALLTEL merger notwithstanding the CAPCC Petition, and a petition for reconsideration CAPCC is now pending. Ignoring the Commission's exhortation to make properties required to be divested available for purchase by new entrants and socially disadvantaged businesses, Verizon Wireless now seeks authority to transfer those licenses to the second-largest wireless carrier in the United States, a move that CAPCC believes exacerbates the anticompetitive effects of the Verizon-ALLTEL merger and allows Verizon Wireless to negate the Commission's ability to give meaningful relief in response to CAPCC's pending petition or reconsideration.

5. It is CAPCC's understanding (a) that Capital Hill personnel were told that Verizon Wireless could not give special consideration to socially disadvantaged businesses in the divestiture process because it was conducting a pure auction; (b) that Verizon Wireless suggested in communications with Capitol Hill that it was compelled to conduct an auction, when the Commission imposed no such requirement; and (c) that socially disadvantaged businesses seeking to purchase divestiture assets were informed that, to participate in the sale, they would be required to have made full arrangements for financing.

6. In light of its interest in economic development and business activity, CAPCC also is concerned that larger entities have access to sources of capital that are unavailable to smaller businesses and socially disadvantaged businesses. The ability of a

company like Verizon Wireless to obtain authorization for its foreign investment without meeting the same requirements that would be applicable to a smaller business or a socially disadvantaged business exacerbates the disadvantages in obtaining capital that already exist in the marketplace. Allowing Verizon Wireless to resell licenses that, for the reasons set forth in CAPCC's petition for reconsideration, it may not validly hold likewise permits Verizon Wireless to deny the Commission the ability to grant meaningful relief in response to CAPCC's petition for reconsideration. Consequently, it is important to CAPCC that the Commission ensure that there are no short cuts available to larger companies that are not also available to socially disadvantaged businesses.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on this 17 day of July, 2009.

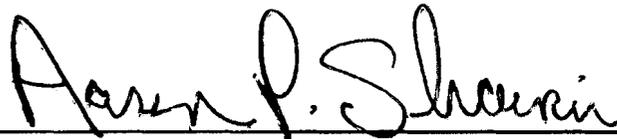


Keith O. Tate

CERTIFICATE OF SERVICE

I, Aaron Shainis, do hereby certify that on this 20th day of July, 2009, copies of the foregoing Petition for Reconsideration were served as follows:

To Federal Communications Commission as follows (via hand delivery):	
Erin McGrath Mobility Division Wireless Telecommunications Bureau 445 12th Street, S.W. Washington, D.C. 20554	Stacy Ferraro Spectrum and Competition Policy Division Wireless Telecommunications Bureau 445 12th Street, S.W. Washington, D.C. 20554
Linda Ray Broadband Division Wireless Telecommunications Bureau 445 12th Street, S.W. Washington, D.C. 20554	David Krech Policy Division International Bureau 445 12th Street, S.W. Washington, D.C. 20554
Jim Bird Office of General Counsel 445 12th Street, S.W. Washington, D.C. 20554	Neil Dellar Office of General Counsel 445 12th Street, S.W. Washington, D.C. 20554
Best Copy and Printing, Inc. 445 12th Street, S.W. Washington, D.C. 20554	
To Office of the Chairman as follows: The Honorable Julius Genachowski 445 12th Street, S.W. Washington, D.C. 20554	To the Office of the Chairman as follows: Bruce Gottlieb 445 12th Street, S.W. Washington, D.C. 20554
To the Office of Commissioner Michael Copps as follows: The Honorable Michael Copps 445 12th Street, S.W. Washington, D.C. 20554	To the Office of Commissioner Michael Copps as follows: Scott Deutchman 445 12th Street, S.W. Washington, D.C. 20554
To the Office of Commissioner Robert McDowell as follows: The Honorable Robert McDowell 445 12th Street, S.W. Washington, D.C. 20554	To the Office of Commissioner Robert McDowell as follows: Angela Giancarlo 445 12th Street, S.W. Washington, D.C. 20554

To the following via U.S. mail, first-class, postage prepaid	
To Celco Partnership as follows: Nancy Victory Wiley Rein LLP 1776 K Street, N.W. Washington, D.C. 20006	To AT&T Inc. as follows: Joan Marsh Vice President – Federal Regulatory AT&T Services, Inc. 1120 20 th Street, NW Suite 1000 Washington, DC 20036
	 <hr/> <p>Signed: Aaron Shainis</p> <hr/> <p>July 20, 2009</p> <hr/> <p>Date</p>