Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
ATLANTIS HOLDINGS LLC, Transferor,	)	
	)	
and	)	WT Docket No. 08-95
	)	
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, Transferee	)	
	)	
For Consent to the Transfer of Control of Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act	)	

FURTHER *EX PARTE* FILING OF LEAP WIRELESS INTERNATIONAL, INC. IN SUPPORT OF ITS PETITION FOR CLARIFICATION OR RECONSIDERATION

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INTRODUCTION

Leap makes this submission to expand on several points as to why it is both necessary and appropriate for the Commission to make clear that there is a durational requirement of at least four years with respect to the contract election condition—and indeed with respect to all of the roaming conditions—imposed in connection with the Verizon-ALLTEL merger.

The Commission plainly has authority to interpret the intended effect of its own order and clarify that a four-year duration applies to the contract election condition. Verizon's insistence that it may terminate existing month-to-month agreements at any time after the merger cannot be squared with the text of the Order, Verizon's own statements, or the Commission's stated rationale for adopting the conditions. The three Commissioners who understood that the chosen roaming contract would be inviolable for four years did not reach that understanding in a vacuum or on a whim, but rather based on representations that Verizon made in the proceeding. It is presumptuous of Verizon to dismiss as irrelevant both the Commissioners' statements and its own statements, on which the Commissioners' understanding was based. At a bare minimum, and most charitably to Verizon, they are highly relevant factually to show there was confusion over the meaning of the condition. Where there is confusion, there needs to be clarity.

Even if the Commission were to determine that a clarification were somehow not enough, the Commission can make a surgical revision to the contract election condition to ensure that it accomplishes its stated purpose—in this case, to protect consumers from the likely competitive harm resulting from the merger. The Commission is on solid ground whether it styles its subsequent order as a "clarification" or a limited "reconsideration." The Commission often revises or extends commitments beyond those originally proposed by the parties where necessary to carry out its obligations to the public interest, including on reconsideration. And whatever

mechanism the Commission chooses here, it is critically important that the Commission provide certainty as to the duration of Verizon's other roaming commitments besides rate. Verizon's aggressive *post hoc* characterization of its commitments would completely nullify many of the hard-fought roaming conditions the Commission imposed, and thereby undermine the Commission's stated public interest justification for approving the merger.

Contrary to Verizon's contention, the limited clarification or reconsideration that Leap and others seek would not amount to a "substantive change" in the conditions and, even if it did, would not require the Commission to revisit its findings or return to square one in evaluating the competitive effects of the merger. All that the Commission needs to do is clarify or revise its Order in a very circumscribed way to make clear that Verizon must honor existing agreements, including ALLTEL agreements selected to apply to the entire Verizon territory, for four years after the merger.

I. THE COMMISSION SHOULD CLARIFY THAT THE CONTRACT ELECTION CONDITION HAS AT LEAST A FOUR-YEAR DURATION

A. Verizon Opposes Clarification of the Wrong Condition

As a threshold matter, Verizon completely mischaracterizes the requested clarification that Leap and other carriers seek. Verizon pretends as though the Commission, in its *Verizon/ALLTEL Order*,[1] imposed only one condition that pertains to roaming—the so-called "Pricing Condition"—and then argues that Leap "asks the Commission to replace" that condition

[1] *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act*, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444 (2008) ("*Verizon/ALLTEL Order*").

with a new and substantially different requirement extending to other agreement terms.[2] But the strawman that Verizon constructs quickly falls apart under scrutiny. The Commission conditioned its approval of Verizon's acquisition of ALLTEL on *four* roaming conditions,[3] all of which must be read in a manner that is consistent with their intended purpose, namely, to prevent the competitive harms that the Commission found would likely occur as a result of this merger.

Leap has never maintained that the "Pricing Condition," standing alone, is ambiguous. Rather, as Leap and others have repeatedly explained, there is considerable uncertainty as to the durational scope of other commitments *besides rate*, and the Commission should exercise its well-recognized authority to clarify that ambiguity.

B. Clarification of the Contract Election Condition Is Supported by the Commission's Precedent

Verizon is simply off base in its portrayal of that narrow request as somehow "unprecedented" or "unlawful."[4] To the contrary, the Commission has repeatedly recognized that petitions for clarification are appropriate "whenever a member of the public requires

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[2] Letter from Helgi C. Walker, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-95 (filed May 8, 2009) ("*Verizon May 8, 2009 Ex Parte*"), attachment ("White Paper") at 1. All other pleadings and *ex parte* filings that are cited here were also filed in WT Docket No. 08-95, unless otherwise noted.

[3] Specifically, Verizon promised to

> (1) "honor ALLTEL's existing agreements with other carriers to provide roaming on ALLTEL's CDMA and GSM networks";
> (2) "keep the rates set forth in" ALLTEL's roaming agreements with other carriers "for the full term of the agreement, notwithstanding any change of control or termination of such agreement";
> (3) allow carriers that had existing roaming agreements with both ALLTEL and Verizon Wireless "the option to select either agreement to govern all roaming traffic between it and post-merger Verizon Wireless";
> (4) to maintain "the rates set forth in ALLTEL's existing agreements . . . for the full term of the agreement or for four years from the closing date, which ever occurs later."

Verizon/ALLTEL Order at ¶ 178.

[4] *Verizon May 8, 2009 Ex Parte* at 1.

assistance regarding the proper construction of a Commission rule or order."[5] And the Commission has provided clarification of merger conditions in circumstances similar to those presented here.

For example, in its further review of the price-floor condition adopted in connection with the AT&T/McCaw Cellular transaction,[6] the Commission determined that it was necessary to "clarify and revise" its order with respect to the scope of the price-floor condition as applied to bundling and rates because there was "some confusion about the price floor" and the order was "susceptible to different interpretations."[7] The Commission looked to the primary purpose in adopting the floor in the first place, observed that there was confusion over the meaning of that condition, and went on to clarify and modify the condition in light of its intent.[7] Notably, the confusion that the Commission observed there was much less palpable than in this case, and the clarification/modification the Commission decided to make there was much more significant than what Leap is requesting here.[8]

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[5] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 14789 ¶ 23 (2002). *See also Application for Transfer of Control; Xerox Corp., Transferee, WUI, Inc., Western Union Int'l, Inc., Airsignal Int'l, Inc. et al., Transferors*, Memorandum Opinion and Order, 76 FCC 2d 297, 298 ¶ 4 (1980) ("*Xerox/Western Union Order*") ("The Commission's authority to clarify its orders," even after the orders have become final, "is implicit in the Communications Act, as well as the Administrative Procedure Act.") (internal citations omitted).

[6] *Applications of Craig O. McCaw, Transferor, and American Tel. & Tel., Transferee, For Consent to the Transfer of Control of McCaw Cellular Commc'ns, Inc. and its Subsidiaries,* Memorandum Opinion and Order on Reconsideration, 10 FCC Rcd 11786 (1995).

[7] *Id.* at 11800 ¶¶ 24, 26.

[7] *Id.* at 11800 ¶ 26.

[8] *Id.*.

Similarly, in its further review of the structural-separation conditions imposed in the Xerox/Western Union transaction,[9] the Commission found that clarification (instead of reconsideration) was appropriate because the petitioner did "not seek to change the result of the order," but merely asked the Commission to "provide additional amplification" on existing conditions.[10] The Commission ultimately determined that additional guidance was necessary to ensure that those conditions served their intended purpose, *i.e.*, to mitigate the competitive harm resulting from the merger.[11]

Likewise, in the Univision/Broadcast Media Partners transaction, the Commission interpreted a divestiture requirement as being satisfied by the parties making their interest non-attributable. In "clarifying" the divestiture requirement, the Commission took into account the fact that volatile market conditions had hampered the parties' ability to comply with divestiture in its strict sense.[12]

Ironically, Verizon itself requested and obtained a clarification of a condition attached to its Bell Atlantic/GTE merger that goes far beyond the relief requested here. The Commission clarified that a condition requiring the pricing of Unbundled Network Elements in accordance with the Total Element Long-Run Incremental Cost ("TELRIC") methodology applied only so long as the Commission's general TELRIC rules were not invalidated by the courts.[13] This was

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[9] *See Xerox/Western Union Order*, 76 FCC 2d 297.

[10] *Id.* at 298 ¶ 4.

[11] *Id.* at 302 ¶¶ 9, 16.

[12] *In re Shareholders of Univision Communications Inc. and Broadcasting Media Partners, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 2548 ¶ 1 (2008) (citation omitted).

[13] Letter from Dorothy T. Attwood, Chief, Common Carrier Bureau, to Michael Glover, Senior Vice President & Deputy General Counsel, Verizon, Docket No. 98-184, DA 00-2168 (rel. Sept. 22, 2000).

not an intuitive reading of the condition at all—illustrating that the Commission routinely goes beyond the rules applicable to the entire industry when it imposes conditions on large mergers. Indeed, that is precisely why Verizon requested the clarification.[14]

In all of the above cases, therefore, the Commission did not hesitate to modify the letter of a condition to resolve confusion that has arisen over its meaning.

C. The Three Commissioners' Understanding Is Relevant and Was Based on Verizon's Own Representations

Verizon's post-merger position appears to be that there is no ambiguity at all in the roaming conditions, and that the only plausible reading of them is that Verizon is not required to maintain existing roaming agreements for *any duration* after the merger. Thus, because many of those agreements are month-to-month, Verizon contends that the roaming conditions do not prevent it from unilaterally terminating those agreements whenever it so chooses.[15]

Verizon repeatedly stated throughout the merger proceedings that it offered up the various roaming commitments specifically to avoid any uncertainty about the continued validity and effect of ALLTEL's existing roaming agreements after the merger.[16] In its initial Public Interest Statement, for example, Verizon stated that, "[u]pon closing of the transaction," it would

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[14] *See* Letter from Michael E. Glover, Senior Vice President & Deputy General Counsel, Verizon, to Dorothy T. Attwood, Chief, Common Carrier Bureau, Docket No. 98-184 (filed Sept. 8, 2000).

[15] *See, e.g.*, Verizon Opposition to Petitions for Reconsideration and Clarification at 7 (filed Dec. 22, 2008).

[16] *See, e.g.*, Petition to Deny of the Roaming Petitioners at 16 & n.32 (filed Aug. 11, 2008) (noting that the competitive harms resulting from the merger "will come to the fore, at the latest, when carriers have to negotiate *new* roaming agreements," and observing that "[s]ome contracts . . . are on a month-to-month basis today"); Leap Petition to Deny at 4, 19 (filed Aug. 11, 2008) (raising concern that after the merger Verizon may terminate ALLTEL's existing roaming agreements after one month under the terms of those contracts, subjecting other carriers to abusive and anticompetitive practices).

"honor *all of the terms* of" ALLTEL's existing roaming agreements with other carriers, "thereby ensuring that other carriers' customers will continue to enjoy roaming service."[17] Crucially, Verizon Wireless said also that it "will honor ALLTEL's existing roaming agreements with other carriers, ensuring continuity for customers of those carriers."[18] In a July 2008 *ex parte*, Verizon explained that it was making additional roaming commitments "[t]o avoid any uncertainty among regional, small and rural carriers as to whether their customers can continue to roam without interruption following the close of the merger."[19] And in its initial Opposition, Verizon acknowledged the concerns of other carriers that "their existing agreements will be terminated post merger," particularly month-to-month agreements and those nearing expiration.[20] Verizon dismissed these concerns as unfounded and insisted that the merger "will either *leave the existing roaming terms . . . unchanged* or, at the voluntary election of certain parties, *improve available terms*."[21] Furthermore, Verizon assured the Commission that its "policy is *not* to terminate roaming arrangements" and, in light of its voluntary commitments, "roaming partners of ALLTEL will *continue* to enjoy rights under their existing roaming agreements."[22]

To what continuity can Verizon have been referring if it was reserving the right to terminate month-to-month agreements instantly? Without equivocation, Verizon repeatedly represented to the Commission that it would offer stability with respect to roaming agreements,

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[17] Verizon Wireless and Atlantis Holdings LLC, Public Interest Statement at 17 (June 10, 2008) (emphasis added).

[18] *See also id.* at ii.

[19] Letter from John T. Scott, III, Verizon, to Marlene H. Dortch, Secretary, FCC at 2 (filed July 22, 2008).

[20] Verizon Wireless, Joint Opposition to Petitions to Deny and Comments at 56 (Aug. 19, 2008).

[21] *Id.* at 54 (emphasis added).

[22] *Id.* at 56 (emphasis added).

and at least three Commissioners took Verizon at its word. But now, according to Verizon, while carriers with both ALLTEL and Verizon roaming agreements may elect one agreement or another to govern all traffic after the merger, the conditions "require only that the *roaming rate* be honored" for four years,[23] whereas the rest of the terms and conditions may be abandoned at any time if the agreement is only month-to-month or near expiration. Verizon will "honor" the existing agreements, Verizon explains, "for the full life of the agreement,"[24] deliberately ignoring that in many instances the "full life" is only a month.

The Commission should not tolerate this sort of "bait-and-switch." By leading the Commission and other parties to believe that the roaming conditions would effectively constrain its ability to terminate existing agreements after the merger, Verizon should not be permitted to renege on the clearly understood import of its representations. Either Verizon had its fingers crossed behind its back when it engaged with the Commission the first time around, or it has now decided it can dilute its commitments by parsing the Order far more narrowly than a majority of the Commission intended or understood. Either way, the result is contrary to the public interest.

The statements of three Commissioners confirm that they each construed the conditions to require that Verizon honor existing roaming agreements (not just the rates) for four years after the merger.[25] Verizon attempts to dismiss those statements as irrelevant, but Verizon misses their true significance. Of course individual statements do not in themselves constitute "agency

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[23] Verizon Opposition to Petitions for Reconsideration and Clarification at 7 (filed Dec. 22, 2008).

[24] White Paper at 4.

[25] *See Verizon/ALLTEL Order*, Statement of Commissioner Tate at 1; Statement of Commissioner Copps at 1; Statement of Commissioner Adelstein at 1.

action," as the D.C. Circuit has observed.[26] But they do clearly reflect that at least three Commissioners—intelligent decision-makers all—thought Verizon was offering far more protection on the roaming issue than Verizon now maintains, and genuinely believed that all of the roaming conditions would last longer than a month. Indeed, it would be difficult to imagine what better evidence there could be to show that reasonable people may well be confused about the meaning of the conditions—particularly when considered alongside Verizon's repeated assurances that it would maintain existing agreements after the merger.

As reflected in two D.C. Circuit decisions, *Chicago Local* and *Oil, Chemical, and Atomic Workers*,[27] separate statements are in fact perfectly legitimate sources to consult when determining whether there is a shared and coherent rationale for the agency's action.[28] In this case, there is some uncertainty as to the duration of several of the roaming conditions, which—if interpreted as Verizon proposes—would seriously call into question the Commission's stated rationale for approving the merger. Three Commissioners clearly expressed their views as to how that ambiguity should be resolved, based on the record and discussions with Verizon. A reviewing court would be derelict in its own duties if it simply ignored those statements, as Verizon urges.

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[26] *See Sprint Nextel v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

[27] *See Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 29 (D.C. Cir. 2000); *Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 46 F.3d 82, 91 (D.C. Cir. 1995).

[28] Verizon comes up short in its attempt to distinguish these cases. According to Verizon, the primary issue in those cases was "whether the agency's action received majority support." White Paper at 15. But the decisions actually make clear that, "[i]n order for the reviewing court to perform its task under *Chevron*, it must be able to discern the *rationale* underlying" the agency's action—not simply the *result*. *Oil, Chem. & Atomic Workers Int'l Union*, 46 F.3d at 90 (emphasis added). Judicial review is effectively frustrated, however, if a majority of agency officials do not all share the same rationale. *See id.*

D. Verizon's Construction Is Inconsistent with Standard Canons of Interpretation and with the Rationale of the Commission's Decision

While Verizon gives short shrift to the views of a majority of Commissioners, it argues that its *own* understanding of the roaming conditions should be given controlling weight because it originally proposed them.[29] That argument fails completely. As a threshold matter, Verizon's contemporaneous characterizations of the conditions are at odds with the newly minted construction it proffers. In any event, however, because the roaming conditions were essential to the Commission's public interest analysis and the merger would otherwise have failed had it not been for those conditions,[30] it is clearly within the Commission's discretion and responsibility to interpret and enforce those conditions based on its own understanding, and not those of the parties.[31] And, of course, it is "'well established that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous.'"[32] Reviewing courts generally "accord particular deference" when "the subject of review is the agency's interpretation or

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[29] *See* Verizon White Paper at 13 ("As the offeror of the commitment, Verizon Wireless is uniquely positioned to speak to its intended meaning.").

[30] *See Verizon/ALLTEL Order* ¶ 29 ("Our public interest authority enables us, where appropriate, to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction."); ¶ 3 (finding that, absent the specific conditions adopted in the Order, "competitive harms would likely result" from the merger); ¶ 179 (finding that roaming and other conditions are "sufficient to prevent the significant competitive harm that this transaction would likely cause in certain geographic markets").

[31] *See SBC Communications, Inc. v. FCC*, 373 F.3d 140, 149 (D.C. Cir. 2004) (observing during review of merger conditions that "it is impossible for the individuals involved in multilateral negotiations to speak to the collective intent of all parties involved in those negotiations," and noting that statements "of one party offering conditions throw little meaning of the actual document to which those parties collectively agreed").

[32] *MCI Worldcom Network Servs. v. FCC*, 274 F.3d 542, 547 (D.C. Cir. 2001) (citation omitted) *see also NetworkIP, LLC v. FCC*, 548 F.3d 116, 121 (D.C. Cir. 2008) ("The FCC's 'interpretation of its own orders and rules is entitled to substantial deference,' just as 'an agency's interpretation of one of its own regulations commands substantial judicial deference.'") (citations omitted).

clarification of its own order."[33] Thus, notwithstanding Verizon's arguments to the contrary, the Commission would be well within its authority under these circumstances to (1) recognize that the existing roaming conditions besides rate are ambiguous with respect to duration, and (2) clarify that ambiguity based on its own interpretation of the intended effect of the conditions. On that score, the agency's interpretation must be upheld "long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of" the Order.[34] Of course, Verizon's presumptuous demand that the Commission appoint Verizon itself the exclusive authority in interpreting its words flouts another fundamental interpretation canon that, when in doubt, language is to be construed against its drafter.[35] Verizon's understanding of the words it wrote would have less weight than the other party's understanding of these words even if, as Verizon seems to imply, this were no more than a contract dispute, and the Commission were no more than a party contracting with Verizon.

Verizon's proposed construction would also completely nullify many of the hard-fought roaming conditions that the Commission imposed. It is a cardinal principle of interpretation that agencies should avoid constructions that would render another part of the same order or regulation "'inoperative or superfluous, void or insignificant,'" and should particularly ensure

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[33] *Nat'l Motor Freight Traffic Ass'n v. ICC*, 590 F.2d 1180, 1184 (D.C. Cir. 1978) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Chesapeake & Ohio Ry. Co. v. United States*, 571 F.2d 1190, 1194 (D.C. Cir. 1977)).

[34] *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991).

[35] *See* 17A Am. Jur. 2d § 343 (2004) ("Doubtful language in a contract should be interpreted most strongly against the drafting party, especially where he or she seeks to use such language to defeat the contract or its operations . . . .").

"'that one section will not destroy another.'"[36] Verizon's proposed construction violates these basic tenets.

Without an obligation to maintain existing agreements for some period of time after the merger, Verizon's commitment to allow carriers to elect either the ALLTEL or Verizon agreement to govern all roaming traffic after the merger would serve no purpose whatsoever, and could actually make other carriers and their subscribers *worse off*. If a carrier elects the ALLTEL agreement, which in some cases may provide for higher rates but contain better terms and conditions, then Verizon could terminate those agreements *at any time* thereafter and insist upon not only more draconian terms, but also the higher ALLTEL rates. Furthermore, Verizon's contention that it may immediately abandon ALLTEL's existing month-to-month agreements cannot be reconciled with its commitment to "honor" ALLTEL's existing agreements.[37]

Verizon also is incorrect that construing the other roaming conditions to apply for four years would render the condition on rate "superfluous."[38] According to Verizon, if it had agreed to honor all of the contract terms for four years, then there would be no need for its separate commitment to keep the rates unchanged for that same duration.[39] Verizon entirely ignores, however, that the roaming agreements themselves may provide for adjustments to the rates over the duration of the contract relationship. Furthermore, it is no surprise that, given the iterative

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[36] *Silverman v. Eastrich Multiple Investor Fund*, 51 F.3d 28, 31 (3d Cir. 1995) (citation omitted); *see also Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 250 (1985) (rejecting statutory interpretation that would "nullify the effect" of another section of the same statute).

[37] *See, e.g.*, Verizon Opposition to Petitions for Reconsideration and Clarification at 7 (filed Dec. 22, 2008).

[38] Letter from Helgi C. Walker, Counsel for Verizon, to Marlene H. Dortch, Secretary (filed June 9, 2009) at 2.

[39] *Id.*

dynamics of the Commission's merger review process, the end product in terms of merger conditions may contain significant substantive overlaps, particularly where (as here) the specific commitments evolved considerably over time. In fact, the second roaming condition (that Verizon must "keep the rates set forth in" ALLTEL's existing roaming agreements with other carriers "for the full term of the agreement, notwithstanding any change of control or termination") is partially subsumed within Verizon's commitment to keep rates unchanged for four years—but that is no justification to read either condition to be a dead letter, as Verizon's construction would do. Overlaps (and the resulting "superfluousness") are more palatable than nullification.

Finally, Verizon's *post hoc* characterization of its commitments would directly undermine the Commission's stated rationale for approving the merger. The Commission expressly acknowledged the concern raised by various small, regional, and rural carriers that "the proposed transaction will eliminate a major wireless provider and will eliminate the possibility that ALLTEL will combine with other wireless providers to create a new major wireless provider."[40] Furthermore, the Commission found that, absent divestitures and *meaningful* conditions with respect to existing roaming agreements, "competitive harms would likely result" from the merger.[41] The Commission believed that the four roaming conditions it adopted would be sufficient to mitigate those harms. Specifically, the Commission found that "the package of

[40] *Verizon/ALLTEL Order* ¶ 87.

[41] *Id.* ¶ 3; *see also* ¶ 179 (finding that roaming and other conditions are "sufficient to prevent the significant competitive harm that this transaction would likely cause in certain geographic markets").

divestitures . . . , along with the roaming conditions," were "sufficient to prevent the significant competitive harm that this transaction would likely cause."[42]

The Commission must have construed the roaming conditions to restrict Verizon's ability to terminate existing agreements for some duration after the merger—or those conditions would be feckless to prevent the competitive harms that the Commission found likely to result from the merger. Even Verizon's own experts relied upon the fact that "carriers with roaming agreements with ALLTEL may *maintain those existing agreements* for at least two years following the close of the merger" in reaching their conclusion that existing contracts limited the potential for competitive harm.[43] Put simply, if Verizon may terminate its existing roaming agreements with impunity, as Verizon now maintains, then the Order cannot be said to be the result of "reasoned decision-making."[44]

The notion that a clarification would amount to a "substantive change" in the roaming conditions, as Verizon contends,[45] assumes that the Order itself unambiguously permits Verizon to abandon its existing roaming agreements upon thirty days' notice and demand that other carriers accept entirely new terms to continue roaming service. As explained above, however, that assumption is clearly wrong. The only way to give meaning to all of the conditions and sufficiently protect consumers from harm is to construe those conditions to restrict Verizon's

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[42] *Id.* ¶ 179.

[43] *See* Verizon Opposition, Attachment 1, Reply Declaration of Dennis Carlton, Allan Shampine, and Hal Sider at 36 ¶ 68 (emphasis added). Of course, the Commission did not deem Verizon's original proposed two-year duration sufficient.

[44] *See, e.g., Tripoli Rocketry Ass'n v. Bureau of Alcohol, Tobacco, and Firearms*, 437 F.3d 75, 81 (D.C. Cir. 2006) ("In order to survive under the arbitrary and capricious standard, an agency must 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the decision made'") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

[45] White Paper at 11–12.

ability to terminate its existing agreements for a substantial duration—at least four years—after the merger.

II. ALTERNATIVELY, THE COMMISSION SHOULD NARROWLY REVISE THE CONDITIONS TO ENSURE THAT THEY ARE CONSISTENT WITH THE AGENCY'S INTENT

Even if there were any truth to Verizon's assertion that clarification of the duration of the roaming conditions besides rate would constitute a "substantive change," Verizon incorrectly portrays that clarification or revision as a dramatic reversal of course. The Commission need not perform a new competitive analysis to justify the surgical clarification or revision sought here, nor would it have to revisit any of its initial findings, as Verizon would have the Commission believe. To the contrary, under *Verizon's* construction, the Commission would have to disavow its earlier finding that, absent meaningful conditions on roaming, the merger is likely to cause significant competitive harms.[46]

It is a basic proposition of administrative law that "the Commission is 'entitled to reconsider and revise its views as to the public interest and the means to protect that interest,' so long as it gives a reasoned explanation for the revision."[47] There is ample justification in the existing record to support either limited clarification or reconsideration as Leap and several other carriers have requested. As Leap has explained above, there are a number of reasons why it is necessary to impose a durational requirement on all of the roaming conditions, and also why four years is a reasonable term to apply to the other conditions besides rate. Furthermore, the fact that

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[46] *Verizon/ALLTEL Order* ¶ 3 (finding that, absent the specific conditions adopted in the Order, "competitive harms would likely result" from the merger); ¶ 179 (finding that roaming and other conditions are "sufficient to prevent the significant competitive harm that this transaction would likely cause in certain geographic markets").

[47] *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001) (quoting *DirecTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997).

three Commissioners believed the four-year restriction already applied to *all* of the roaming conditions plainly highlights a "material . . . omission" sufficient to meet the legal standard for reconsideration.[48]

Verizon is also incorrect that the clarification or reconsideration applying a four-year duration would not remedy a merger-specific harm.[49] Regardless of the fact that Verizon Wireless voluntarily offered to afford other carriers the option of selecting either agreement to govern all roaming traffic between it and post-merger Verizon Wireless carriers, that condition is wholly justified as a merger-specific remedy and indeed, a majority of the Commission considered it as such. Courts and economists have long recognized that a merger may cause competitive harm where, as here, it eliminates either "perceived" or "actual" potential competition.[50] As noted above, the Commission expressly acknowledged that the merger would likely impose competitive harm on small, regional, and rural carriers by the elimination of a "major wireless provider" that is not only an important roaming partner today in many areas of the country, but that could also reasonably be expected to continue to grow as a competitor in Verizon territories, either via organic growth or acquisition.[51]

Furthermore, the record reflects that while the transaction might yield roaming cost efficiencies for the merged entity as "each company's roaming traffic" is "brought onto the

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[48] *See General Motors Corporation and Hughes Electronics Corp., Transferors, and the News Corp. Ltd., Transferee, For Authority to Transfer Control*, Order on Reconsideration, 23 FCC Rcd 3131 ¶ 4 (2008). Moreover, because this omission was not apparent, and could not have been known until the Order was released, it is flatly untrue that the reconsideration requests simply rehashes old arguments, as Verizon contends. *See* White Paper at 16–17.

[49] White Paper at 19–21.

[50] *See, e.g., United States v. Marine Bancorp.*, 418 U.S. 602, 624–25 (1974) (elimination of perceived potential competitor); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977–79 (8th Cir. 1981) (elimination of actual potential competitor).

[51] *Verizon/ALLTEL Order* ¶ 87.

expanded Verizon Wireless network," the result of the merger is to transform Verizon and ALLTEL, each of which were individual net buyers of roaming minutes, into a combined net seller of roaming minutes.[52] The obvious consequence of this transformation is that the combined Verizon-ALLTEL no longer has a strong incentive to either maintain or enter into reciprocal roaming agreements with smaller, regional or rural carriers,[53] creating potentially dramatic instability with respect to roaming arrangements vis-à-vis the combined company. Thus, it made sense for the Commission to condition the merger on the option of allowing other carriers to elect an existing roaming agreement to govern the exchange of roaming traffic in the combined company's territory—but, again, *not* without a durational component. Clarifying or revising the four-year time frame to cover all of the roaming conditions is perfectly consonant with the goals of the Commission in addressing the competitive harms cited in the record, and is clearly designed to remedy merger-specific harms.

The Commission often revises or extends commitments beyond those originally proposed by the parties where necessary to carry out its obligations to the public interest, including on reconsideration. For example, the Commission exercised its authority on reconsideration to modify conditions is its decision implementing the Modification of Final Judgment and requiring AT&T's divestiture of the Bell Operating Companies.[54] The Commission concluded that some

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[52] *Id*. ¶ 148. See Reply Declaration of Dennis Carlton, Allan Shampine and Hal Sider (Aug. 19, 2008).

[53] Verizon's experts opined that "[d]ue to the increased size of the network footprint resulting from the proposed transaction, the merged firm can reduce its reliance on roaming services provided by third parties." *Id.* at 5. *See also id.* at 18 (the "reduced reliance on third-party suppliers of roaming services are the direct consequence of the expansion of footprint resulting from network integration").

[54] *Consolidation Application of AT&T Co. and Specified Bell Companies for Authorization Under Sections 214 and 310(d) of the Communications Act of 1934 for Transfers of Interstate*

modifications were required to the specific divestiture requirements in order to protect consumers and carry out the public interest.[55] Part of the Commission's stated motivation for revising those conditions was its concern that adverse consequences to the public interest might arise from the divestiture.[56] Here, similarly, the Commission is perfectly justified in concluding that a limited revision of the roaming conditions to extend a durational component to all of them is necessary to mitigate the harm to consumers and competition that the Commission already concluded are likely to occur as a result of the merger.[57]

In this regard, there are at least two reasons why the Commission can and should enforce those conditions for at least four years. First, the same rationale that led the Commission to accept four years as sufficient to protect consumers with respect to rate terms applies with equal force to other provisions.[58] Verizon cannot seriously contest that a four-year term is reasonable, since it has voluntarily agreed to that same term with respect to rates. And it has not even attempted to explain why a different duration should be applied to *non-rate* terms—instead, Verizon incredibly maintains that *no duration* should apply. Second, as MetroPCS and

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Lines, Assignments of Radio Licenses, Transfers of Control of Corporations Holding Radio Licenses and Other Transactions as Described in the Application, 98 FCC 2d 141 (1984).

[55] *Id.* at 150 ¶ 20.

[56] *Id.* at 150 ¶ 19.

[57] A significant change in market conditions would also support reconsideration. In this case, the fact that Verizon has requested approval to transfer nearly all of its divested licenses to its largest competitor, AT&T, *see Public Notice*, 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 (June 19, 2009), rather than a non-incumbent carrier that could fill the void to some degree as a new roaming partner in a number of markets is a further separate and sufficient justification for granting the relief that Leap seeks.

[58] Indeed, as the Supreme Court has observed, rates "do not exist in isolation," but have meaning "only when one knows the services to which they are attached." *AT&T v. Central Office Tel.*, 524 U.S. 214, 223 (1998).

NTELOS explain in their petition for reconsideration,[59] the four-year duration was approved based at least in part on the understanding that LTE would be commercially available within that timeframe, which might be expected to foster additional competition.[60] Based on the current record, the application of at least a four-year duration[61] to the roaming conditions can be amply justified as an exercise of the Commission's informed discretion to craft and clarify measures that will protect the public interest.[62]

Finally, Verizon is wrong to suggest that the Commission has a heightened burden to provide a more substantial explanation when it changes a prior decision or policy on reconsideration.[63] Indeed, as the Supreme Court recently observed in *FCC v. Fox Television Stations, Inc.*,[64] the Administrative Procedure Act "makes no distinction . . . between initial agency action and subsequent agency undoing or revising that action."[65] All that is required is

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[59] *See* MetroPCS Communications, Inc. and NTELOS Inc. Petition for Limited Reconsideration at 6–18 (filed Dec. 10, 2008).

[60] *See Verizon-ALLTEL Order*, *Separate Statement of Commissioner Deborah Taylor Tate* (stating that four-year time frame will make it "more likely that" LTE "will be available from other providers").

[61] In fact, more recent data released by Verizon now suggests that the LTE rollout will likely take longer than originally anticipated, which would support an even longer duration than four years. *See* Ex Parte Letter from Jean L. Kiddoo, Counsel for MetroPCS Communications, Inc., to Marlene H. Dortch, Secretary, WT Docket No. 08-95 (filed May 21, 2009), at 2 and attachments (requesting that the Commission provide a seven-year duration).

[62] *See WJG Telephone Co. v. FCC*, 675 F.2d 386, 388–89 (D.C. Cir. 1982) ("If the figure selected by the agency represents its informed discretion and it is neither patently unreasonable nor 'a dictate of unbridled whim,' then the agency's decision adequately satisfies the standard of review." (citations omitted)). *See also Worldcom, Inc. v. FCC*, 238 F.3d 449, 461–62 (D.C. Cir. 2001) ("The relevant question is whether the agency's numbers are in the zone of reasonableness, not whether its numbers are precisely right." (internal quotation marks omitted)).

[63] VZ White Paper at 18.

[64] *FCC v. Fox Television Stations, Inc.*, 556 U.S. ___, Case No. 07-582 (Apr. 29, 2009).

[65] *Id.*, Slip Op. at 11.

for the agency to "display awareness that it *is* changing position," and a reasoned explanation (supported by substantial evidence) for doing so.[66] The Commission can plainly satisfy those requirements in this instance.

CONCLUSION

For the reasons explained above, the Commission should act promptly to make clear that at least a four-year term applies to the contract election condition,[67] and indeed all of the roaming conditions, and not simply to the so-called "Pricing Condition."[68] Whether ultimately styled as a clarification or reconsideration (or both), the Commission plainly has the authority to grant this narrow request, it is necessary to carry out the Commission's intent, and it is necessary to protect the public interest from competitive harm resulting from the merger.

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[66] *Id.*

[67] The four-year period should begin to run from the date that the Commission releases an Order clarifying or reconsidering Verizon's obligations.

[68] The Commission should also make clear that any agreement elected will apply to new service areas and spectrum acquired by Verizon. *See Leap Petition for Clarification or Reconsideration* at 4.

-/s/-

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