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

In the Matter of	)	
	)	
Atlantic Tele-Network, Inc. and	)	
Verizon Wireless	)	
	)	WT Docket No. 09-119
Applications for Consent to	)	
Assignment of Licenses and	)	FILED/ACCEPTED
Transfer of Control	)	

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Federal Communications Commission
Office of the Secretary

APPLICATION FOR REVIEW

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APPLICATION FOR REVIEW

Telephone USA Investments, Inc. ("Telephone USA"), by its attorneys and pursuant to Section § 1.115 of the Commission's rules, 47 C.F.R. § 1.115, hereby requests that the Commission reverse the *ATN Approval Order*[1] and conduct further review proceedings to require Verizon Wireless ("Verizon") to comply with its obligations under the *ALLTEL Merger Order* to increase diversity in the wireless industry to include small and traditionally disadvantaged businesses.[2]

I. SUMMARY AND INTRODUCTION

In this proceeding the Commission has a rare and important opportunity to further Congress's policy of diversifying ownership in the telecommunications industry and, in

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[1] *See* Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless, *Memorandum Opinion and Order*, WT Docket No. 09-119, DA 10-661 (rel. Apr. 20, 2010). *See also* Statement of Commissioner Mignon L. Clyburn on the Wireless Telecommunications Bureau's Consent to the Transfer of Licenses From Verizon Wireless to Atlantic Tele-Network, *Press Release*, Apr. 20, 2010, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297636A1.pdf (last visited May 12, 2010).

[2] Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, *Memorandum Opinion and Order and Declaratory Ruling*, 23 FCC Rcd 17444 (2008) ("*ALLTEL Merger Order*").

particular, in the increasingly consolidated wireless telephone industry. The Commission recognized that opportunity in the *ALLTEL Merger Order*, when it instructed Verizon to ensure that its bidding process for the ALLTEL divestiture properties was transparent and open to "new entrants, small businesses, and businesses owned by minorities or socially disadvantaged groups."[3] Equally important, the Commission specifically held that Verizon's fulfillment of the Commission's expectations for including these bidders would be part of the examination of whether a divestiture transaction is in the public interest.[4]

First Verizon and then the *ATN Approval Order* disregarded the Commission's instructions. The *ATN Approval Order* authorized divestiture of the ALLTEL assets to Atlantic Tele-Networks ("ATN") following a flawed bidding process that reflected no real effort to include entrepreneurial and independent small businesses or other traditionally disadvantaged bidders. After soliciting the participation of a few small and minority-owned businesses, Verizon did nothing to ensure that they actually had a fair opportunity to actually obtain the licenses. Instead, Verizon sold the divestiture licenses to AT&T, the second largest wireless company in the country, and to ATN, a publicly-traded business with no retail domestic telecommunications experience. And the sale to ATN was at a remarkably low price based on prevailing market value that Verizon never indicated it would consider nor offered to highly qualified small business bidders like Telephone USA. Indeed, Telephone USA offered significantly more for the licenses than ATN paid. Thus, Verizon's "bidding" process was a sham; Verizon simply selected the "bidders" it preferred and conducted private negotiations with them, all the while stringing along small business bidders like Telephone USA.

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3 *ALLTEL Merger Order*, 23 FCC Rcd at 17518.

4 *Id.* ("whether the specific transaction is in the public interest will be evaluated when an application is filed seeking the Commission's consent to the transfer or assignment of the Divestiture Assets").

The *ATN Approval Order* appears to have concluded that the *ALLTEL Merger Order* provided no authority to actually require Verizon to satisfy the Commission's expectations that it meaningfully include under-represented companies in the biding process. This was plain error. The *ALLTEL Merger Order* provided sufficient authority to investigate whether Verizon's divestiture process created a fair opportunity for small, minority, and socially disadvantaged businesses. That order also made clear that the Commission expected that investigation to be a meaningful factor in the analysis of whether a proposed transaction satisfied the public interest test. As discussed below, the *ATN Approval Order* missed the Commission's cue, and approved the divestiture to ATN despite the exclusionary bidding process conducted by Verizon.

Before the Commission loses this tremendous opportunity – possibly its last good opportunity – to diversify ownership in the a wireless industry that faces increasing consolidation, it should at least require Verizon to adhere to the modest expectations of an open and transparent process contemplated by the *ALLTEL Merger Order*. The Commission therefore should reverse the *ATN Approval Order* and require Verizon to comply with those expectations.

II. BACKGROUND

Telephone USA is an independent small, minority-owned company that is one of the principal owners of Telephone USA of Wisconsin, a provider of local exchange, long distance and Internet service to more that 60,000 customers in 35 exchanges in rural Wisconsin. Telephone USA entered the telephone business in 2000 with the acquisition of its Wisconsin exchanges from GTE.

Following the Commission's conditional approval of the merger between ALLTEL and Verizon, Verizon invited Telephone USA to participate in the bidding for the wireless licenses made available by the divestitures required by the *ALLTEL Merger Order*. In November 2008, Verizon personally contacted Telephone USA's CEO and encouraged Telephone USA's participation. Shortly thereafter, Verizon directed its agent in the bidding process to provide Telephone USA with a confidential offering memorandum that described the available properties.[5] The memorandum was sent directly to the home of Telephone USA's CEO and included a confidentiality agreement, which was promptly signed and returned. The first sentence of the letter that accompanied the offering memorandum reads "Please find the included Confidential Information Memorandum for the Verizon Wireless Divestitures in response to your call with Mr. Seidenberg." Verizon subsequently encouraged Telephone USA's continued involvement by providing comment on Telephone USA's initial bids and by assuring Telephone USA's CEO that the company should have no trouble financing the acquisition of the divestiture properties.

In reliance on Verizon's encouragement, Telephone USA actively participated in the bidding process between November 2008 and June 2009, expending considerable time, effort, and money in a good-faith effort to acquire the divestiture properties. These efforts included, among other things: (1) hiring a team of financial and legal advisors to research and develop its bids for the properties; (2) submitting four separate bids that fully and consistently complied with the timelines and procedures Verizon prescribed; (3) working with financial institutions and potential investors to secure financing for the prospective purchase; and (4) negotiating agreements that would be associated with an ultimate purchase agreement for the properties.

In contrast with Telephone USA's good-faith efforts, the bidding process itself was opaque at best. Verizon first set for telephone USA a December 24, 2008 bidding deadline, and

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5 *See* Response of Telephone USA to Information Request Re Applications of Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to assign or Transfer Control of Licenses and Authorizations, WT Docket No. 09-119, filed March 22, 2010, Confidential Attachment at TELEPHONE USA 000001 ("Telephone USA Information Production").

its bidding procedures welcomed bids for smaller subsets of the available licenses. Telephone USA worked with its financial and legal advisors and complied with that deadline. As part of this process, Telephone USA retained the services of George Muñoz of Muñoz Investment Banking Group, LLC to perform valuation services, prepare Telephone USA's bids, and help coordinate financing for the eventual purchase. Telephone USA met Verizon's deadline and submitted a bid for licenses in North Dakota, South Dakota, Minnesota, and Montana (the "Upper Midwest Licenses").[6]

Verizon then changed the bidding deadline to March 30, 2009, and advised Telephone USA that bids for all the available properties were preferable to bids for smaller subsets. Telephone USA again complied with this new deadline, submitting a bid for all of the divestiture licenses and a slightly revised bid for the Upper Midwest Licenses.[7] In conjunction with its March 2009 bid, Telephone USA also worked with itslegal counsel to review and provide Verizon with working comments on all of the documents (including an Asset Purchase Agreement, a Transition Services Agreement with associated schedules, and an Intercarrier Roamer Agreement) that would be necessary for ultimate completion of the purchase of the divestiture licenses.[8]

On or about April 9, 2009, Telephone USA wrote to Verizon's CEO to inform him that Telephone USA remained ready to move forward with the acquisition of the divestiture properties, but sought clarification about exactly which licenses Verizon would sell to Telephone USA and at what price.[9] Telephone USA explained that for small independent businesses, affirmation that the company was a serious bidder for the assets was essential to securing the

6 *See* Telephone USA Information Production at TELEPHONE USA 0000239.

7 *See id.* at TELEPHONE USA 0000355.

8 *See id.* at TELEPHONE USA 0000376 - 0000716.

9 *See id.* at TELEPHONE USA 0000742.

financing commitments Verizon was seeking. Telephone USA therefore suggested a brief opportunity to negotiate exclusively to acquire all or some subset of the divestiture licenses, a mechanism that had helped Telephone USA secure financing for its existing telephone business when it acquired its Wisconsin exchanges from GTE.[10] Shortly after that letter was sent, Verizon discussed the divestiture with Telephone USA and its financial advisors and assured Telephone USA that obtaining financing for the acquisition would not be a problem and that Verizon would work with Telephone USA in this regard.

Less than a month later, however, Verizon announced that it was selling the majority of the divestiture licenses to AT&T, the nation's second largest wireless carrier. This transaction contradicted a number of the bidding parameters Verizon communicated to Telephone USA and other bidders. First, by selling only some of the divestiture properties to AT&T, Verizon contradicted its advice to Telephone USA that bids for all licenses would be preferred. Second, the bid procedures provided to Telephone USA stated that proposals involving non-cash consideration or markets other than those being divested would not be considered, but the Verizon-AT&T transactions do involve non-divestiture properties that Verizon intends to swap with AT&T. Third, while Verizon told bidders that no contingencies would be entertained, it elected to sell to AT&T in a two-part transaction that appears to have included properties from AT&T's proposed acquisition of Centennial Communications, which was then pending (*i.e.*,

[10] Telephone USA made clear through each of its bids and in discussions with Verizon that its plan to finance the acquisition involved Mr. Stroud providing most of the equity for the purchase on his own behalf and through Telephone USA and that the divestiture properties themselves would be used as collateral to secure necessary debt financing. *See* Telephone USA Information Production at 5-7 & Confidential Attachment at TELEPHONE USA 0000239 – 0000240 (Dec. 24, 2008 bid); TELEPHONE USA 0000355 – 357 (Mar. 30, 2009 bid).

properties that AT&T did not yet own).[11] Fourth, Verizon informed a member of Congress that it could not engage in separate negotiations with individual bidders because the divestiture was an "auction," but obviously the complex transaction with AT&T was the result of significant individual negotiation, not a bid – a fact made even clearer by the price AT&T agreed to pay, which was significantly below higher bids Verizon received. Thus, instead of complying with the Commission's intent that Verizon seek to involve new entrants and small businesses, Verizon structured its own bidding "rules" to divest most of the properties to the second largest existing wireless carrier in a complex transaction designed to consolidate the dominant position of these two large carriers.

Following announcement of the AT&T transactions, Verizon informed bidders that it would accept bids for the remaining divestiture properties on June 3, 2009.[12] Telephone USA began preparing its new bid and remained active in the process. It worked with legal counsel to prepare and file comments on April 28, 2009 in support of Verizon's request for an extension of its management period for the divestiture assets.[13] That extension was granted to Verizon on May 6, 2009 and it management period was extended through July 8, 2009.[14]

Telephone USA complied with the June 3, 2009 bidding deadline for the remaining divestiture properties, submitting a bid that that was consistent, on a per-subscriber-basis, with

11 *See* AT&T and Centennial Communications Corp., *Memorandum Opinion and Order*, 24 FCC Rcd 13915 (2009) (assignment of licenses granted Nov. 5, 2009).

12 The remaining properties included wireless licenses in Illinois, Ohio, Georgia, North Carolina, South Carolina, and Idaho.

13 *See* Telephone USA Investment, Inc., Comments in Support of Request for Extension of Management Period (filed Apr. 28, 2009).

14 *See* Letter from Katherine M. Harris, Deputy Chief, Mobility Division, 10 Nancy J. Victory, counsel for Verizon, WT Docket No. 08-95, dated May 6, 2009. As noted in the letter, Telephone USA was the only bidder to file comments in support of Verizon's request.

the price paid by AT&T for the larger subset of divestiture licenses.[15] That bid included a request for a 30-day exclusive negotiating window so that financing and the final details of the transaction could be finalized. Verizon objected to the exclusivity provision in Telephone USA's bid and demanded that it remove that condition and resubmit its bid by 10:00 PM on June 8, 2009. Telephone USA complied, resubmitting its bid without the exclusivity provision shortly before the deadline and included the same proposed price for the properties.[16]

On June 9, 2009, at approximately 10:00 AM, Verizon announced that it would sell the remaining divestiture properties to Atlantic Tele-Network ("ATN") for a price that was less than one-fifth of Telephone USA's final bid. Thus, despite its earlier encouragement and Telephone USA's eight months of effort and expense, Verizon essentially ignored Telephone USA's bids for the divestiture assets and sold the bulk of the licenses to AT&T and the rest to Atlantic Tele-Networks, at a prices substantially less than Telephone USA's bids. While ATN did not have the size or scale of AT&T, it also did not fall into any of the categories identified by the Commission as target candidates for the licenses in the *ALLTEL Merger Order*.

Telephone USA and a number of other frustrated bidders and interested parties filed petitions opposing Commission approval of the sale to ATN.[17] Telephone USA chiefly argued that the ATN transaction, coupled with the previous sale to AT&T, was contrary to the public interest because Verizon failed to satisfy the Commission's expectation that at least some of the ALLTEL divestiture properties would be sold to new entrants to the wireless industry or small or

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15 *See* Telephone USA Information Production, filed March 22, 2010, Confidential Attachment at TELEPHONE USA 0000776.

16 *See id.* at TELEPHONE USA 0000806.

17 Petitions were filed by Bulloch Cellular, Inc., Pineland Cellular, Inc., Planters Rural Cellular, Inc., and Plant Cellular RSA 8, Inc. (collectively, "Georgia Partners"), Chatham Avalon Park Community Council ("CAPCC"), and the National Association of Black Owned Broadcasters, Inc. ("NABOB").

minority-owned businesses. In addition, Telephone USA showed that there were no public interest benefits to selling the properties to ATN; rather, serious questions existed about ATN's ability to maintain quality service in the divestiture markets. Indeed, Telephone USA showed that the selection of ATN as the winning bidder was inexplicable, given that it had no domestic telecommunications experience, a history of running its businesses into the ground in foreign markets, and a bid so low that even the trade press was shocked at the result. Telephone USA also argued that the sale process Verizon conducted was fraught with irregularities and that the Commission could not approve the transaction without also approving that tainted process.

After the Bureaus conducted an eight-month review that included several requests for information from the parties and the petitioners to deny, the *ATN Approval Order* brushed all these concerns aside, approving the sale to ATN.[18] In particular, the Bureaus found that the *ALLTEL Merger Order* did not place specific binding conditions on Verizon, and that to the extent Verizon was required to assist new entrants and small and minority owned businesses, Verizon's efforts satisfied its obligations.[19] The Bureaus also concluded that the aspects of the bidding process challenged by Telephone USA and the other petitioners were sufficiently fair to satisfy the public interest.[20] As described below, the Bureau's decision misreads the *ALLTEL Merger Order* and employed an excessively cramped interpretation of the Commission's public interest authority over the ALLTEL divestiture. Moreover, it was based on a number of clear

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[18] This proceeding included a Letter of Inquiry issued to Telephone USA, asking the company to prove that it had been an active bidder for the divestiture properties. *See* Letter from Ruth Milkman, Chief, Wireless Telecommunications Bureau, to Joseph A. Stroud, Chairman, Telephone USA, dated March 12, 2010. Telephone USA responded to this inquiry on March 22 and March 24, 2010 with over 800 pages of correspondence and other material documenting its extensive participation in the divestiture bidding process. *See* Telephone USA Information Production.

[19] *ATN Approval Order* at para. 49.

[20] *Id.* at paras. 51-65.

errors of fact. The facts of this case and the clear directives included in the *ALLTEL Merger Order* require reversal of the *ATN Approval Order* and further Commission action to ensure that the ALLTEL divestiture transactions are consistent with the public interest.

III. THE CONGRESSIONAL AND COMMISSION POLICY OF DIVERSIFYING OWNERSHIP IN THE WIRELESS INDUSTRY REQUIRES REVERSAL OF THE *ATN APPROVAL ORDER*.

Expanding diversity of ownership in the wireless and other telecommunications industries to include small businesses and other under-represented groups has long been a policy priority of Congress and the Commission. As consolidation in the wireless industry increases, taking every rare opportunity to diversify ownership is the only way to work towards that policy. Section 257 Act directs the Federal Communications Commission (FCC) to conduct an ongoing proceeding to identify and eliminate "...market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services" and to report every three years to Congress on its efforts to open telecommunications markets to small business participation.[21] Individual members of Congress have taken an active interest in ensuring that the Commission fulfill this mandate through strong oversight of telecommunications mergers, frequently suggesting that the Commission use its public interest authority to ensure that mergers

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[21] 47 U.S.C. § 257. The Commission provided reports to Congress in 1997, 2000, 2003, and 2006. *See* Section 257 Proceeding to Eliminate Market Entry Barriers for Small Businesses, *Report*, 14 FCC Rcd 16802 (1997); Section 257 Report to Congress – Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, *Report*, 16 FCC Rcd 15376 (2000); Section 257 Triennial Report to Congress -- Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, *Report*, 20 FCC Rcd 3034 (2004); Section 257 Triennial Report to Congress -- Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses, *Report*, 23 FCC Rcd 21132 (2007). The Commission has not yet issued its 2009 report. *See* Letter from the Asian American Justice Center, *et al.*, to Chairman Julius Genachowski, dated Feb. 16, 2010, attached as Exhibit B.

result in increased opportunity for small businesses and other disadvantaged groups.[22] Indeed, congressional interest in the Commission's merger reviews has become more frequent since the 2006 merger of AT&T and BellSouth heralded the tremendous consolidation of the telecommunications industry that has made opportunities for small business entry increasingly rare.[23]

The Commission's authority to ensure that transactions like Verizon's sale to ATN satisfy the public interest is beyond question, and the Commission has a long history of using that authority to increase the diversity of owners and voices in the telecommunications industries.[24] Indeed, the *ALLTEL Merger Order* is a perfect example of the Commission's efforts in this regard, and its direction that Verizon ensure that its bidding process was transparent and open to "new entrants, small businesses, and businesses owned by minorities or socially disadvantaged groups" was entirely consistent with both congressional policy and the Commission's history of seeking to further this policy.

The *ATN Approval Order* abandons these principles of diversity and inclusion and gives the Commission's imprimatur to a deeply flawed process that reached the wrong result. The Bureau appears to have concluded that the *ALLTEL Merger Order* did not provide specific

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22 Numerous letters to the Commission from members of Congress are attached at Exhibit A.

23 *See id.*

24 *See, e.g.*, Adelphia Communications Company, *Memorandum Opinion and Order*, 21 FCC Rcd 8203 ¶ 26 (2006) ("the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that a transaction will yield overall public interest benefits"). *See also* Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, *Memorandum Opinion And Order and Declaratory Ruling*, 23 FCC Rcd 12463 at para. 28 (2008) ("Our public interest evaluation necessarily encompasses the 'broad aims of the Communications Act,' which include, among other things, a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private sector deployment of advanced services, promoting a diversity of license holdings, and generally managing the spectrum in the public interest.")

enough conditions on the divestiture process to find that Verizon failed to satisfy its requirements.[25] But the lack of specific conditions did not diminish Verizon's responsibility under that order to carry out the divestiture process fairly and transparently, in a way that admitted disadvantaged bidders as full participants.

The *ALLTEL Merger Order* made it clear that the Commission believed the public interest would be advanced if Verizon took steps to sell the divestiture assets to companies that face disadvantages in obtaining access to the wireless marketplace. The Commission included in its directions that such groups be included in the process in light of its well-known and understood policy of fostering diversity in the telecommunications market. It then pointedly reinforced its intent by clearly stating that "whether the specific transaction is in the public interest will be evaluated when an application is filed seeking the Commission's consent to the transfer or assignment of the Divestiture Assets."[26] When it consummated its transaction with ALLTEL, Verizon accepted these terms and undertook the obligation to conduct a fair and inclusive divestiture process in accordance with the requirements of the *ALLTEL Merger Order*, and to report truthfully to the Commission on how it conducted that process.

The Commission's directions and their acceptance by Verizon provide all the authority needed to disapprove the sale to ATN and the inequitable process that led to it. The *ALLTEL Merger Order* called for a fair and inclusive process; the *ATN Approval Order* approved a process and transaction that fell far short of that goal. This review provides the Commission with an opportunity to enforce the expectations it laid out in the *ALLTEL Merger Order* and further Congress's policy of diversifying wireless ownership. Based on the record compiled before the Bureaus, nothing less than reversal of the *ATN Approval Order* will satisfy the public

25 *See ALLTEL Merger Order*, 23 FCC Rcd at 17518 para. 50.

26 *See id.*

interest in a diverse wireless telecommunications marketplace as Congress has defined it.[27]

IV. THE RECORD DEMONSTRATES THAT VERIZON'S DIVESTITURE PROCESS AND THE SALE TO ATN ARE NOT IN THE PUBLIC INTEREST.

The extensive record the Bureau compiled in reviewing Verizon's sale of licenses to ATN amply supports reversal of the *ATN Approval Order*. The record shows that Verizon provided a few bidders from traditionally disadvantaged groups with access to materials related to the divestiture process, but that none of those bidders were given anything like a full and fair opportunity to participate. Telephone USA's experience was typical – Verizon personally sought the company's participation and encouraged continued participation, but then refused to make any accommodations similar to those afforded to ATN that might enable Telephone USA to actually complete the transaction. And, rather than sell to a bidder like Telephone USA, Verizon selected ATN, a "bidder" that offered a price that was less than one-fifth the price offered by Telephone USA. Verizon offered the Bureaus a number of excuses for this inexplicable process and result, but none of them withstand scrutiny on the record.

A. The Bidding Process for the Divestiture Properties Effectively Excluded Bidders from Traditionally Disadvantaged Bidders.

Verizon's main argument that its bidding process complied with the *ALLTEL Divestiture Order* is that it solicited bids from a number of minority-owned businesses and permitted some

27 Even if the Commission were to find that the *ALLTEL Merger Order* did not provide the Bureaus with authority to deny approval of the ATN transaction based on Verizon's non-inclusive divestiture process, the Commission still can ensure a divestiture process that includes disadvantaged buyers by granting the pending petition for reconsideration filed in the Verizon-ALLTEL proceeding by Chatham Avalon Park Community Council. *See* Petition for Reconsideration, Chatham Avalon Park Community Council, WT Docket No. 08-95 (Dec. 10, 2008). That petition requested that the Commission strengthen the divestiture requirement to avoid allowing Verizon to conduct a divestiture process that either entirely excluded disadvantaged groups or appeared to include disadvantaged groups but, in fact, did not. *See id.* Thus, if the Commission believes fulfilling Congress's policy required strengthening the conditions in the *ALLTEL Merger Order* – and Telephone USA does not believe that is necessary – it retains the authority to do so.

of those companies to submit bids.[28] No one disputes that Verizon accepted bids from traditionally disadvantaged bidders; the issue is whether it offered them anything approaching meaningful participation in the bidding process. The record shows Verizon's bidding process was designed and executed to ensure deals with preferred bidders and exclude traditionally disadvantaged bidders.

Every step Verizon took diminished the chances that any non-traditional bidder would be successful. Telephone USA informed Verizon on a number of occasions that certainty regarding which licenses would be sold and at what price was an essential prerequisite to securing the financing required to close a deal. Yet, Verizon repeatedly changed the rules of the bidding process and applied different rules to some bidders than to others. It changed the bidding deadlines with little notice; it sent mixed signals about the types of bids (*i.e.*, offers for all licenses or smaller groups) it preferred; it refused to negotiate individually with bidders like Telephone USA and then concluded a deal with AT&T that was so complex that it obviously was individually negotiated and could not possibly have been the result of an equal bidding process. Moreover, Verizon concluded a deal with ATN just a few hours after soliciting a final bid from Telephone USA, indicating that it was negotiating individually with that bidder as well and did not give Telephone USA's bid reasonable consideration prior to its selection of ATN as the winning bidder. Verizon's conduct of the bidding process and the ultimate transactions show that the "rules" governing the process were applied haphazardly, depending on whether Verizon wanted to make a deal with the bidder.

In the end, Verizon conducted a process in which traditionally disadvantaged businesses like Telephone USA were permitted to participate for show, but were given no real opportunity

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28 *ATN Approval Order* at paras. 48-49, 58-59.

to acquire the divestiture properties. But participation was not free for companies like Telephone USA, which expended hundreds of thousands of dollars in the process. The perverse result of Verizon's process is that traditionally disadvantaged companies were made worse off by the divestiture process than they would have been if the Commission had kept silent about including them in the *ALLTEL Merger Order*. That cannot be what the Commission intended when it directed Verizon to encourage the participation of small business and minority bidders.

Despite these facts, the *ATN Approval Order* concluded that Verizon conducted a fair and inclusive bidding process in accord with the requirements of the *ALLTEL Merger Order*.[29] That conclusion is based at least in part on findings of fact that are directly contradicted by the evidence. The *ATN Approval Order* finds that Verizon granted Telephone USA a "waiver" of the requirement of executing an affidavit of confidentiality prior to receiving a copy of the confidential offering memorandum.[30] That never happened. In fact, Verizon reached out to Telephone USA and sought its participation. Verizon's agent sent the confidential offering memorandum and a confidentiality agreement to the home address of Telephone USA's CEO to facilitate Telephone USA's immediate participation. Telephone USA returned the confidentiality agreement shortly after receiving it. No waiver was sought or received.[31] No evidence in the record supports the conclusion that Verizon Wireless gave any special treatment to Telephone USA or other non-traditional bidders. Instead, the record shows that Verizon

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29 *See id.* at paras. 58-59.

30 *See id.* at para. 49.

31 The only evidence of this supposed waiver is an unverified letter from Verizon's counsel. *See ATN Approval Order*, n.201 (citing Letter from Nancy J. Victory, Wiley Rein LLP, counsel for Cellco Partnership d/b/a Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, at 2 (Apr. 8, 2010)). In contradiction of Verizon's counsel's claim, the record includes the letter that accompanied the confidential offering memorandum, which did not mention a waiver (because none existed) and a copy of the confidentiality agreement, which Telephone USA returned to Verizon. Telephone USA Information Production, Confidential Attachment at TELEPHONE USA 00001, 0000004 – 0000009.

invited some minority and other traditionally disadvantaged bidders to participate, but that once these businesses entered the process, they were accorded no favored treatment. To the contrary, it was Verizon's favored bidders, AT&T and ATN, who received special treatment.[32]

B. Verizon Selectively Applied Its Bidding "Rules" to the Disadvantage of Non-Traditional Bidders.

Verizon treated small business bidders much differently that its preferred bidders in two particularly significant areas – its policy on negotiating on an individual or exclusive basis and its supposed requirement of "firm financing." These requirements are intertwined, because as Telephone USA explained to Verizon, small businesses need to provide financial institutions with certainty about the parameters of a deal before they will provide the types of financing commitments Verizon demanded.[33] On the other hand, Verizon knew that once a buyer for the properties was selected, financing would not be difficult to obtain – a fact that Verizon confirmed directly to Telephone USA.[34] Verizon's refusal to negotiate independently and its requirement that small businesses provide "firm financing commitments" essentially made it impossible for non-traditional bidders to satisfy Verizon's bidding criteria.

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32 The Bureaus also received evidence that Verizon's agent in the divestiture process acquired an equity position in ATN while the bidding process continued. *See ATN Divestiture Order* at paras. 61-63. The *ATN Divestiture Order* concluded that this interest was not significant enough to influence the process and that Verizon's agent had firewalls in place to vitiate any potential conflict of interest. *See id.* 63 NABOB, however, provides significant evidence of Verizon's agent's interest, and the Commission must fully investigate that evidence and the very important issue which was presented to the Bureaus during this proceeding. *See* Application for Review of the National Association of Black Owned Broadcasters, Inc. at 9-11 & attached chart.

33 *See* Telephone USA Information Production, Confidential Attachment at TELEPHONE USA 0000742-0000743 (letter from Joseph A. Stroud, CEO, Telephone USA Investments, Inc. to Ivan G. Seidenberg, CEO, Verizon Wireless, dated Apr. 9, 2009).

34 *See id.* at 2.

Telephone USA sought to bridge this gap by proposing a short exclusive negotiating window that would provide lenders with the certainty necessary to secure firm financing.[35] The *ATN Approval Order* found that Verizon reasonably rejected Telephone USA's bid due to its request for an exclusive negotiation period because Verizon had limited time to complete a deal under the orders of the Commission and the Department of Justice.[36] That finding misses the point. First, insisting on firm financing commitments from bidders while refusing to commit to – or even giving bidders any idea about – what a prospective deal would cost effectively excluded non-traditional bidders from the process. Second, Verizon conducted the divestiture process over a period of more than 7 months – a period which included an extension granted by the Commission, which Telephone USA supported. At any point during that process, Verizon could have conducted individual negotiations with any bidder it wished to accommodate, as it apparently did with AT&T and ATN. Indeed, it could easily have granted the 30-day exclusivity period that Telephone USA requested at any point in the protracted seven-month process requested and still had plenty of time to find another bidder had those negotiations failed.[37] Time did not restrict Verizon's ability to accommodate traditionally disadvantaged bidders; its desire to restrict negotiations only to its favored bidders did.[38]

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[35] *See id.*, Confidential Attachment at TELEPHONE USA 0000776-779 (Telephone USA's June 3, 2009 bid), 0000799-0000801 (letter from Joseph A. Stroud, CEO, Telephone USA, to Christopher Bartlet, Morgan Stanley Co., Incorporated, dated June 8, 2009.

[36] *See* paras. 53-54.

[37] The *ATN Approval Order* incorrectly concludes that Telephone USA's final bid to Verizon requested an exclusive negotiating period, but that it not supported by the record. *See* para. 53.

[38] The *ATN Approval Order* also concludes that Verizon was justified in excluding bidders that requested a transition services agreement of longer than one year. *See* paras. 55-56. Even assuming that finding is correct, it could not justify disregarding Telephone USA's bid. Each of Telephone USA's bids made clear that Telephone USA was ready to purchase the divestiture properties under the one-year transition services arrangement proposed by Verizon. *See* Telephone USA Information Production, Confidential Attachment at TELEPHONE USA

Worse yet, Verizon did not uniformly apply its rules against individual negotiations or requiring "firm financing" to all bidders. Instead, Verizon negotiated individually with both AT&T and ATN and ultimately selected a bid for ATN with contingent financing. At several points in this proceeding, Verizon argued that it selected ATN over Telephone USA because ATN had non-contingent financing while Telephone USA did not. In an *ex parte* letter filed April 8, 2010, however, Verizon admitted that ATN's financing actually was contingent on bank approval.[39] In fact, $50 million (or a full quarter of the purchase price) of ATN's financing was contingent on bank approval. It is unsurprising that ATN's lenders agreed to approve that financing once they knew what properties ATN would be acquiring and at what price. That is exactly the information Verizon was told that Telephone USA's lenders needed to commit to financing. In any case, Verizon's acceptance of ATN's bid demonstrates that firm financing was not actually a requirement for submitting a successful bid to acquire the properties; it was simply a paper requirement that Verizon could use as an *ad hoc* justification for choosing its preferred bidders.

The *ATN Approval Order* inexplicably ignores all of these record facts and finds Verizon's demand for financing commitments and its refusal to enter into individual negotiations with some (but not all) bidders were reasonable due to the time constraints placed on Verizon by the Department of Justice.[40] That conclusion is simply not credible given the length of the divestiture process, which Verizon concluded nearly a month before the time period appointed by the Commission and the DOJ expired. And it does not explain why ATN's contingent

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0000777, 0000859. Telephone USA never made a proposal that would have necessitated any renegotiation of the terms of the divestiture imposed by the Commission or the Department of Justice.

39 *See* Verizon Notice of *Ex Parte* Presentation, filed Apr. 8, 2010, at n.3.

40 *ATN Approval Order* at para. 54.

financing was sufficient, but that offered by other bidders was not. Regardless, Verizon's preferential treatment of its preferred bidders is flatly inconsistent with the directive in the *ALLTEL Merger Order* that small businesses and other non-traditional bidders be provided a fair chance to participate.

C. Verizon's Acceptance of ATN's Below-Market Bid Requires Closer Examination by the Commission.

The *ATN Approval Order* refused to examine the remarkably low price Verizon accepted from ATN based on its conclusion that the procedure leading up to selection of the winning bid was fair.[41] As demonstrated above, however, Verizon's exclusionary divestiture process was not fair and did not fulfill its obligations under the *ALLTEL Divestiture Order*. Given the other irregularities in the process, the Commission should examine closely the price Verizon accepted for these divestiture licenses and seek further evidence about why Verizon did not offer such an attractive price to non-traditional bidders like Telephone USA.

Verizon did not contest evidence that the price paid by ATN on a per-subscriber basis was less than one-fifth the price bid by Telephone USA and less than one sixth of the per-subscriber price paid by AT&T for the other ALLTEL divestiture properties.[42] Even the immediate trade press reporting the transaction expressed amazement at the low price ATN would be paying for the divestiture properties.[43] One of the real mysteries of this proceeding is

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41 *See id.* at para. 60.

42 *See id.* at n.246.

43 *See, e.g.*, Eric Savitz, *Atlantic Tele-Network Soars on Verizon Wireless Deal,* Tech Trader Daily Blog, June 10, 10:51 AM entry, *available at* http://blogs.barrons.comltechtraderdaily/2009/06/1 O/atlantic-tele-network-soarson-verizon-wireless-deal (citing research note describing the deal as risky due to ATN's "inexperience with retail operations in the United States, but describing an investment in ATN at worthwhile given the "bargain price" it paid for the licenses); The Motley Fool, *ATNI Incredible Deal for Alltel Subs*, *available at* http://caps.fool.com/Blogs/ViewPost.aspx?bpid=268609&t=01004525939372753684.

how, absent advice from Verizon, ATN ever would have believed it could obtain the licenses at the extremely low price of its winning bid. The Bureaus apparently did not ask Verizon or ATN to explain what justified the extremely low price for these licenses, and no information in the offering memorandum suggested such a debased value for the licenses.

As part of further proceedings to ensure the fair and open bidding process required by the *ALLTEL Merger Order* and the public interest, the Commission should inquire into Verizon's justification for selling the divestiture properties to ATN. This issue directly implicates Verizon's exclusion of traditionally disadvantaged bidders because for the sale price of $200 million, Telephone USA and, in all likelihood, a number of other small business and traditionally disadvantaged bidders could have provided non-contingent financing.[44] Verizon's sale of these licenses at such a low price is particularly troubling because Telephone USA directly asked Verizon what licenses it was willing to sell to Telephone USA and at what price in an effort to get sufficient clarity on the parameters of a deal to obtain funding commitments from lending institutions. Had Verizon made clear that it was not expecting to obtain more than one-fifth of the per-subscriber price that AT&T paid, Telephone USA (and other bidders) could have provided a bid that would satisfy Verizon's stated criteria. In fact, as Telephone USA informed the Bureau, at that price the company could have financed the purchase from cash on hand and collateralization of existing business assets.[45]

Given the rarity of opportunities to expand small business and other non-traditional ownership in the wireless industry, the Commission should find that permitting Verizon to sell

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44 *See* NABOB Application for Review, WT Docket No. 09-119, filed May 12, 2010, at 13-14.

45 *See* Supplemental Response to Information Request Re Application of Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 09-119, filed Mar. 25, 2010, at 3.

its divestiture properties to ATN at a price many disadvantaged buyers could have met while it effectively excluded those potential buyers from the bidding process violated the *ALLTEL Divestiture Order* and is contrary to the public interest.

D. ATN's Qualifications as a Service Provider Do Not Support Affirming the *ATN Approval Order*'s Finding that the Sale Was in the Public Interest.

Verizon's exclusion of small business and other non-traditional bidders in preference of ATN is particularly contrary to public interest because ATN is not a well-qualified buyer. ATN's history of service is unimpressive. As the record below demonstrates, ATN admitted it had no experience in the domestic retail market.[46] ATN had operated in overseas wireless markets, but its businesses in those markets have been remarkably unsuccessful,[47] and the record reflects numerous other shortcomings in ATN's service proposals.[48] Verizon entered into a confidential settlement with one of the parties that actively contested ATN's qualifications.[49] That party's withdrawal from the process however, does not mean the Commission can ignore the substantial factual evidence of ATN's lack of qualifications that party placed into the record before it withdrew. The Commission's rule in reviewing transactions is to ensure that the public interest is served, not that private parties settle disputes. Here the evidence that ATN was unqualified is overwhelming, and the Commission cannot ignore the facts merely because the petition to deny asserting them has been withdrawn.

The *ATN Approval Order* did not consider whether Verizon's acceptance of ATN's bid

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46 *See* Joint Opposition of Atlantic Tele-Network, Inc. and Verizon Wireless to Petitions to Deny, WT Docket No. 09-119, filed Aug. 20, 2009, at 7-8.

47 *See* Petition to Deny of Bulloch Cellular, Inc., *et al.*, WT Docket No. 09-119, filed Aug. 10, 2009, at 5-8, 9-11 (describing ATN's substantial market share declines in overseas markets in Guyana and Bermuda); Reply to Opposition to Petition to deny, WT Docket No. 09-119, filed Aug. 27, 2009, at 3-6.

48 *See* Petition to Deny of Telephone USA Investments, Inc. WT Docket No. 09-119, filed Aug. 10, 2009, at 6-7; Reply of Telephone USA Investments, Inc., filed August 27, 2009, at 2-3.

49 *See ATN Approval Order* at paras. 75-77.

was permissible given the serious questions about ATN's ability to provide high-quality service and the fact that Verizon received substantially higher bids from small business and other non-traditional bidders like Telephone USA that had unquestionable experience providing high-quality retail domestic telecommunications experience. Even if ATN's qualifications might have been considered minimally acceptable normal circumstances, Verizon's choice of a relatively unqualified bidder like ATN over more qualified small business bidders who made higher bids was plainly inconsistent with its duty under the *ALLTEL Merger Order* to include nontraditional bidders in the process.

V. CONCLUSION

For the reasons discussed above, Telephone USA hereby requests that the Commission reverse the *ATN Approval Order*, conduct further review proceedings to ensure Verizon's compliance with its obligations under the *ALLTEL Merger Order* to increase diversity in the wireless industry to include small and traditionally disadvantaged businesses.

Respectfully submitted,

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EXHIBIT
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