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Latham & Watkins
ATTORNEYS AT LAW

555 ELEVENTH STREET, N.W., SUITE 1000
WASHINGTON, D.C. 20004-1304
TELEPHONE: (202) 637-2200
FAX: (202) 637-2201
WWW.LW.COM

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October 4, 2001

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Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
455 12th Street, S.W., TW-A325
Washington, DC 20554

Re: WT Docket No. 01-14: Notice of Ex Parte Presentation

Dear Ms. Salas:

This letter is to inform you that on October 4, 2001, Dan Pegg of Leap Wireless International and Bill Carnell of Latham & Watkins met with Tom Sugrue, Jim Schlichting, David Furth, Walt Strack, and Jeff Steinberg with regard to the above-referenced proceeding.

The parties discussed Leap's support for the spectrum cap, and reviewed information already within the administrative record. Mr. Pegg stated that using only a limited amount of spectrum – far less than 30 MHz – Leap recently built out and began operations on a CDMA 1xRTT network that is considered "3G" under the standards established by the ITU. The parties also discussed the attached handout. The original and one copy of this letter are enclosed.

Very truly yours,

William S. Carnell
of LATHAM & WATKINS

cc: Tom Sugrue
Jim Schlichting
David Furth
Walt Strack
Jeff Steinberg

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Preserving Competition for Wireless Consumers:
Leap Wireless International Presentation to Wireless Bureau
October 3, 2001

I. Competition Enforcement is Necessary

CMRS is a peculiar market, uniquely prone to anticompetitive conduct.

- Spectrum is an essential input.
- Spectrum is scarce: none can be found (for any price) beyond 180 MHz.
- Spectrum is all held by suppliers of the end product.
- This renders CMRS uniquely prone to anticompetitive foreclosure and monopolization.

Competition is better, but not great.

- Average HHI in top 25 markets is 2,611. Hayes Dec. (Sprint Comments).
- Even CTIA's economists agree: HHI based on built spectrum is 1,916 – within the zone considered "highly concentrated." Schwartz & Gale Dec. (CTIA Comments)
- Cellular duopolists retain 75 percent of subscribership. Fifth CMRS Report.
- Wireless penetration lags at 32 percent: offerings fail to appeal to 68 percent of Americans. *Id.*

Incremental competition continues to produce benefits.

- Dr. Cramton quantifies particular benefits from the "Leap effect" (a "non traditional" market entrant). "True competition comes from the bottom up": Southwest Airlines, Leap.
  - Prices drop 37 percent. Cramton Dec.
  - Consumers enjoy 41 percent more minutes of use. Leap Comments.
  - 40 percent of Leap Customers use it as their primary phone; Seven percent unplug their landline entirely.
- Benefits also stem from entry by "traditional" carriers.
  - Inverse correlation between number of carriers and price. Cramton Dec.
  - No evidence that price decreases cease after entry by a certain number of carriers. Cramton Dec.
  - Example: AT&T one-rate plan remained at constant price through entry by the second, third and fourth competitors, but lowered prices by 14 – 22 percent after entry by a fifth (SBC). Cramton Dec.

Whatever the state of competition might be, the fact that there are multiple carriers does not obviate the need for the spectrum cap.

- Section 11 calls for repeal of regulations "no longer necessary" as a result of competition.
- That means that competitive forces must achieve the same end as was sought by the regulation.
- The fact that there are several carriers in most markets doesn't prevent the excessive concentration of licenses.
- The opposite is true: it's acknowledged that the number of carriers will decrease if spectrum cap is lifted. Sources cited in Leap Comments at 20-21.

Even if it would prefer to cede competition enforcement to DOJ, the Commission cannot escape its duty to "avoid[] excessive concentration of licenses." 47 U.S.C. § 309(j)(3)(B).

II. Spectrum Cap is the Best Available Means of Competition Enforcement

Spectrum cap facilitates auctions and secondary markets.

- It provides *ex ante* certainty as to eligibility, which is critical any time there are multiple bidders.
- It places the burden only on parties who propose mergers resulting in relatively high concentrations.

The bright-line rule is easy to administer, and saves enforcement resources.

DOJ is not particularly well suited to assuming this function.

- HSR filing thresholds – now $50 million – would insulate most pure spectrum acquisitions.
  - 80 percent of Auction #35 auctions under threshold. Auction #35 PN
  - 66 percent went for under $10 million, so they would escape review even if aggregated in blocks of 5 or more. *Id.*
- Institutional limits on DOJ-FTC review
  - Very few second requests; fewer blocked mergers. Antitrust Division Annual Report, Cited in Leap Comments.
  - DOJ reports: "The analysis of proposed mergers has become increasingly difficult." *Id.*
- DOJ polices actual competition, and generally does not consider potential competition.
- DOJ lacks inherent authority to block mergers.

The Cap allows carriers to structure their affairs coherently.

- They can become more efficient.
- They can divest unnecessary spectrum holdings.

Spectrum cap encourages optimal use of a scarce societal resource.

III. Why Lift the Spectrum Cap Now?

No evidence that anyone is capacity constrained.

- If they are capacity constrained, they could alleviate that through better technology.

No evidence that anyone will need additional spectrum for advanced services.

- A regular "wireless web" user requires less bandwidth in a month than a Cricket user requires in a day. Kelley Dec.
- DoCoMo I-Mode uses only 15 MHz. *Id.*
- Unclear what demand will be for advanced services.
- "3G" network equipment will make up for in increased capacity what it requires by generating additional usage. Kelley Dec.

Leap has now installed and activated its first "3G" network.

- Using very little spectrum.

If the Commission is inclined to give relief based on allegations of capacity constraint or need, or based on the notion that additional spectrum will cause no additional harm, it must do so based on concrete evidence.

- The best way to provide relief is by waiver: let the incumbents show particularized need, and then provide particularized relief.