

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
) WC Docket No. 05-265
Reexamination of Roaming Obligations)
of Commercial Mobile Radio Service Providers)
)

To: The Commission

REPLY TO OPPOSITIONS

AIRPEAK Communications, LLC, Airtel Wireless LLC, Cleveland Unlimited, Inc., Leap Wireless International, Inc., MetroPCS Communications, Inc., Punxsutawney Communications, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc. d/b/a SouthernLinc Wireless (collectively, the “Petitioners”) hereby reply to the three separate pleadings filed by Verizon Wireless, Sprint Nextel, and Cingular Wireless¹ in opposition to the Joint Petition filed by the Petitioners on April 25, 2006.² In reply, the following is respectfully shown:

I. Preliminary Statement

Properly viewed, the opposition pleadings provide compelling evidence of the need for the Section 403 inquiry sought by the Petitioners. The Joint Petition was filed by a diverse group of carriers who all see a critical need for a robust factual record in order for the important issues

¹ See Opposition of Verizon Wireless (May 5, 2006) (“Verizon Wireless Opposition”); Sprint Nextel Opposition to Joint Petition for Section 403 Investigation (May 5, 2006) (“Sprint Nextel Opposition”); and Cingular Wireless, Opposition to Joint Petition for Commission Inquiry (May 5, 2006) (“Cingular Wireless Opposition”).

² See AIRPEAK Communications, LLC, Airtel Wireless LLC, Cleveland Unlimited, Inc., Leap Wireless International, Inc., MetroPCS Communications, Inc., Punxsutawney Communications, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc. d/b/a SouthernLinc Wireless, Joint Petition for Commission Inquiry Pursuant to Section 403 of the Communications Act (April 25, 2006) (“Joint Petition”).

in this proceeding to be resolved properly. Not a single small or mid-sized carrier has opposed the relief that Petitioners are seeking. No large non-national carrier voices any objection. Yet, the three largest wireless carriers in the country – who happen to be the principal architects of the wireless industry consolidation that has intensified concerns over discrimination in the roaming market – all have lined up and are moving in lockstep to oppose the Joint Petition. In doing so, they resoundingly affirm the “stark disagreement between the large national carriers, on the one hand, and smaller local and regional carriers, on the other hand, as to whether roaming services are being made available on reasonable non-discriminatory terms.”³

Most important, the three oppositions by their own words provide direct and compelling evidence that discrimination is prevalent in the roaming marketplace. All three major carriers admit to engaging in rate discrimination.⁴ This being the case, it now is incumbent upon the Commission to ascertain the nature and scope of that discrimination in order to determine whether “competition in the CMRS marketplace has eliminated the means or economic incentives for certain CMRS providers to discriminate unreasonably in the provision of roaming, or otherwise to engage in unjust or unreasonable practices...”⁵

The oppositions also have failed to cite any persuasive legal, factual or policy arguments for denying the Petitioners the relief that they seek.

II. Widespread Discrimination is Admitted in the Oppositions

The opposition pleadings all contain significant admissions regarding the breadth of discrimination in the roaming market. For example, Cingular states:

³ See Joint Petition at 5.

⁴ Cingular Wireless Opposition at 4; Sprint Nextel Opposition at 4; Verizon Wireless Opposition at footnote 9.

⁵ *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, 15 FCC Rcd 21628 at para. 16 (2000).

There is no dispute that carriers may have a variety of different roaming rates. The collection and review of a representative sample of roaming agreements will merely confirm this fact.⁶

Similarly, Sprint Nextel cavalierly notes:

To be sure, the document production Petitioners request might very well show variations among roaming agreements Different roaming agreements may impose varying roaming rates, terms and conditions, but so what?⁷

The most troubling admission of discrimination is found in the Verizon opposition. At footnote 9, Verizon indicates that it is a party to certain “legacy agreements” in which the rates “may be out of line with agreements negotiated more recently.” Verizon goes so far as to admit, *correctly*, that its practice of providing rates to long-time incumbents that are not being made available to newer competitors would be an “obvious target” for a claim of unreasonable discrimination. In the Petitioners’ view, the Commission should be extremely concerned about this situation. Detailed information about discriminatory practices of this nature would be directly relevant to the Commission’s stated desire in this proceeding to obtain “up-to-date information regarding the state of today’s CMRS marketplace.”⁸

The major carriers tacitly reveal that there is widespread discrimination by arguing how burdensome it would be to assemble the brief summaries of their roaming agreements that are called for by the approach to the Section 403 inquiry recommended by Petitioners. Each of these nationwide carriers appears to have between 90 and 100 roaming agreements in place. If these agreements followed a relatively small number of rate templates, providing the minimal amount of summary information suggested by the Petitioners would present no problem at all. The task

⁶ Cingular Wireless Opposition at 4.

⁷ Sprint Nextel Opposition at 4.

⁸ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, WT Docket No. 05-265, *Automatic Roaming Obligations Pertaining to Commercial Mobile Radio Services*, WT Docket No. 00-193, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 15047, 15048 (2005).

of assembling the required summary information – while still reasonable and manageable given the size and resources of these carriers – only becomes significant if the rates in the agreements vary greatly and show no consistency. If assembling the requested information will be burdensome, then the Commission must be concerned that discriminatory pricing practices are rampant in the industry. This prospect must be explored.

The prevalence of widely discriminatory rates also is evidenced by the nationwide carriers’ oft-expressed concerns over the highly sensitive and confidential nature of roaming rate information. Obviously, if the large carriers were offering roaming on standard terms and conditions to all comers, they would have little concern about filing the agreements with the Commission, particularly when Petitioners have proposed confidentiality procedures. It would appear to be because the carriers are offering grossly variant rates that they consider the information to be so sensitive.⁹

The Cingular opposition contends that “[i]n the absence of *any evidence* of discrimination, the Commission should not commence a formal Section 403 inquiry into roaming.”¹⁰ Petitioners prefer stating this principle in a more positive fashion: in the presence of overwhelming evidence of discrimination, the Commission must initiate the requested Section 403 inquiry.

III. The Information Petitioners Seek for the Record Clearly is Relevant

The opponents of the Joint Petition claim that the information Petitioners are asking is “irrelevant” to the stated inquiry.¹¹ Nothing could be further from the truth. The *NPRM* expressly invited commenters to submit “data regarding evidence of discriminatory or non-

⁹ It is also hard to reconcile the notion of common carrier services with secret rates.

¹⁰ Cingular Wireless Opposition at 3.

¹¹ Verizon Wireless Opposition at 6, Sprint Nextel Opposition, Section I.

discriminatory roaming practices” and evidence indicating whether “large, nationwide carriers are preferring one another over other carriers in roaming arrangements.” The agreements themselves remain the best evidence on these critical points notwithstanding the national carrier’s disagreement.

Petitioners agree that there may be instances in which discrimination in the rates offered to different carriers can be justified if the carriers are not similarly-situated. But the information being sought may also show that similarly-situated carriers are being treated in a dissimilar fashion. The Section 403 inquiry that the Petitioners request would not preclude carriers from offering explanations as to why the rates offered to one carrier differ dramatically from the rates offered to another. Unlike the major carriers, Petitioners give the Commission staff enough credit to be able to identify differences in rates that are justified by differences in circumstances.¹²

Finally, the three nationwide carriers who oppose the Joint Petition claim to have entered into many roaming agreements with other carriers and therefore assert that there is no issue to be examined. But the *existence* and number of such agreements avoids addressing the relevant factual issue under Commission consideration – whether the terms of these roaming agreements demonstrate unjust discrimination such as would require as a matter of public policy that automatic roaming agreements among carriers be mandated on just and reasonable terms.

IV. The Record is Not Complete

Contrary to the claims of the large carriers, the record in this proceeding is not complete. While Verizon boasts of having filed comments and reply comments that were over 20 pages long, those filings are devoid of any of the agreement-specific information that the Petitioners’

¹² Indeed, if the carriers wanted to volunteer such information it would be helpful to the Commission in getting this matter resolved. The Petition did not request it in an attempt to minimize the burden on the large national carriers.

Section 403 inquiry is designed to elicit. The simple truth is that the comments and reply comments, while sufficiently voluminous to have justified a brief extension of the reply comment deadline, do not provide a comprehensive overview of the available rates in the roaming marketplace and the extent to which those rates are offered on a non-discriminatory basis. The mere fact that the record in this proceeding is *voluminous* does not mean that the Commission has received *useful* information, *i.e.*, concrete details regarding the terms and conditions under which automatic roaming services are being provided.¹³

The Verizon opposition contains a remarkably candid explanation of why the large carriers have failed to volunteer, and now are actively opposing the provision of, the obviously pertinent roaming agreement data that Petitioners seek:

[P]articipants in a rulemaking proceeding have an incentive to provide information to the Commission in order to avoid a particular result.¹⁴

Here, the large carriers are seeking to avoid a Commission finding that competition in the roaming marketplace is not sufficiently robust to produce reasonable non-discriminatory rates, with the result that a regulatory regime is imposed to mandate automatic roaming at fair prices. Their approach to avoid this result is to selectively provide information which creates the mistaken impression that the roaming market is fully competitive while withholding the agreement data that evidences unreasonably discriminatory prices.

Petitioners make a simple request: that the Commission obtain and review a representative cross-section of existing roaming agreements and make their own determination of whether unjust or unreasonable discrimination is evidenced by the terms of these agreements. If unjust discrimination does not exist, or would not be demonstrated by inspection of such

¹³ *Cf.* Verizon Wireless Opposition at 4 (claiming that the Commission has all the information it needs because the record is voluminous).

¹⁴ *Id.* at 5.

agreements, there would be no reason why any carrier should object to making its agreements available to the Commission under appropriate confidentiality requirements.

The opposing carriers ask the Commission to trust them and rely on their characterizations of the terms and written agreements, rather than offer such agreements for the Commission's own review and determination. Only Commission review of sample roaming agreements would provide the factual information on whether automatic roaming should be required in the public interest.

V. Granting the Petition Would Not Violate the Paperwork Reduction Act

Sprint Nextel claims that the inquiry requested by Petitioners would violate the Paperwork Reduction Act of 1995 ("PRA") and the rules of the Office of Management and Budget ("OMB") promulgated thereunder.¹⁵ This argument is a red herring and assumes that the Commission either would fail to follow the requisite procedures or could not justify the gathering of roaming agreements under OMB's rules.

As an initial matter, Petitioners recognize that the Commission's staff is well-versed in the requirements of the PRA and the rules promulgated thereunder by OMB. Petitioners have no doubt that the Commission can and will comply with all applicable laws and regulations, including the PRA and OMB's rules. The Commission clearly could demonstrate the utility and necessity of the inquiry requested by Petitioners for the reasons given in the Joint Petition and elsewhere in this Reply. Specifically, the information requested by Petitioners would have practical utility in demonstrating the prevalence of unreasonable discrimination against smaller

¹⁵ See Sprint Nextel Opposition at 7.

CMRS carriers, and is “the least burdensome necessary” because only a sampling of agreements would be required and this information has not been provided using other means.¹⁶

VI. Existing Confidentiality Arrangements Provide an Adequate Safeguard

Verizon Wireless and Sprint Nextel both suggest that the Commission’s confidentiality rules may not be sufficient to protect the confidentiality of roaming agreements submitted to the Commission,¹⁷ implying that such agreements may have to be disclosed under the Freedom of Information Act. The Freedom of Information Act protects from disclosure, *inter alia*, trade secrets and commercial or financial information that is privileged or confidential. The Commission has deep and long expertise in addressing requests for such information, and Petitioners trust the Commission to fully protect roaming agreements pursuant to the Freedom of Information Act provisions exempting commercial and financial information.¹⁸

VII. The Authority of the Commission to Initiate the Section 403 Inquiry is Clear

Verizon Wireless recognizes as it must that the Commission has used Section 403 inquiries in certain rulemaking proceedings in the past, but argues that the needed information already has been submitted and that, in any event, the request “raises significant questions of first impression.”¹⁹ However, the Joint Petition cited clear authority indicating that the Commission has broad discretion to institute a Section 403 inquiry in situations such as those presented in this proceeding, where the information required is readily available and needed to conduct a market-

¹⁶ See 5 C.F.R. § 1320.5(d)(1) and (e). We note that in the unlikely event that OMB were to refuse to approve the inquiry requested by Petitioners, the Commission has the authority to override such a disapproval. 5 C.F.R. § 1320.15.

¹⁷ See 47 C.F.R. § 0.459.

¹⁸ See 5 U.S.C. § 552b(c); 47 C.F.R. § 0.441 *et seq.* See also <http://www.fcc.gov/foia> (visited on May 11, 2006).

¹⁹ Verizon Wireless Opposition at 5.

wide inquiry of the practices of the carriers.²⁰ There is no “significant question of first impression.” Verizon Wireless is incorrect to suggest that the Commission cannot institute such an inquiry after the comment cycle closed. To the contrary, Petitioners think it is totally appropriate for the Commission to initiate a Section 403 inquiry in a rulemaking proceeding only after it has concluded that commenters have failed to volunteer all of the information that is needed.

Petitioners would not suggest that the Commission institute a Section 403 inquiry if this type of information, which will be very valuable in determining whether roaming rules should be adopted, had been submitted in comments to the proceeding or otherwise made publicly available. The comment period would *have* to be closed before it would be known whether or not the information was made available. If Verizon Wireless’ suggestion is that an inquiry should not be instituted after the comment period has closed because a party might be denied an opportunity to comment on the Commission’s findings, there is no basis in law or fact for this suggestion. The Commission routinely accepts both *ex parte* oral presentations and written *ex parte* submissions until a decision is adopted or a docket is placed on the Sunshine calendar.²¹

In addition, it is not uncommon for the Commission, in its discretion, to reopen a comment period when issues are raised or information submitted that it believes should be addressed.²² These actions certainly are within the Commission’s discretion, and if sample provisions from roaming agreements demonstrate unjust and unreasonable conditions, addressing these in the rulemaking record would be entirely appropriate before deciding upon final rules.

²⁰ See Petition at fn. 17.

²¹ See 47 C.F.R. § 1.1200 *et seq.*

²² See, e.g., FCC Public Notice DA 06-927, ET Docket No. 03-122 (released April 26, 2006).

Conclusion

The Joint Petitioners requested that the Commission obtain and review sample roaming agreements in order to determine whether unjust and unreasonable discrimination exists within such agreements. The Joint Petitioners also asked that the Commission use its powers under Section 403 to do so because carriers with control over the agreements have refused to voluntarily provide them to the Commission, even subject to full confidential protection.

In their oppositions, the three large carriers continue to deny the Commission the “best evidence” that would either confirm, or controvert, those same carriers’ assertions that they do not engage in prohibited discrimination. There is no reason why the Commission should have to rely on secondary and tertiary evidence when considering this issue, and therefore we urge the Commission to proceed to compel submission of sample agreements if the carriers continue to refuse to cooperate in a reasonable and timely manner.

Respectfully submitted,

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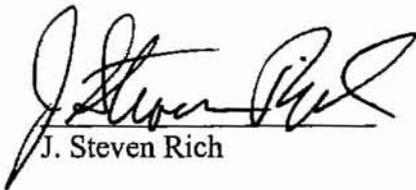
Certificate of Service

I, J. Steven Rich, hereby certify that on this 12th day of May, 2006, I caused true and correct copies of the foregoing Reply to Oppositions to be mailed by first-class mail to:

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