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VIA ELECTRONIC FILING (ECFS)

June 20, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers (WT Docket No. 05-265)

Dear Ms. Dortch:

I am writing to elaborate on our response to some questions that several members of the Wireless Bureau staff had identified at our meeting on June 1, 2006 to discuss issues raised in the Petition for Section 403 Inquiry and Reply to the Oppositions. Specifically, in discussing issues related to the unjust and unreasonable pricing practices that nationwide carriers have adopted with respect to wholesale roaming, some staff members inquired as to whether the burden in demonstrating an unjust and unreasonable discriminatory practice should be placed on the smaller carriers to show consumer harm, or whether nationwide carriers should have to demonstrate that the discriminatory pricing practices have a pro-competitive effect.

The case law applying the requirements of 47 U.S.C. § 202(a) squarely places the burden on nationwide carriers to demonstrate that the discriminatory pricing practices they have adopted with respect to wholesale roaming are reasonable. For instance, in *MCI Telecommunications Corp. v. FCC*,[1] the D.C. Circuit set forth the three-step evaluation that should be used to determine whether a carrier has violated the prohibition against unjust and unreasonable discrimination under 47 U.S.C. § 202(a): "(1) whether the services are 'like'; (2) if they are 'like,' whether there is a price difference; and (3) if there is a difference, whether it is

[1] 917 F.2d 30 (D.C. Cir. 1990).

reasonable."[2] The Court went on to hold that, "[i]f the services are 'like,' the carrier offering them has the burden of justifying the price disparity as reasonable."[3] The Commission has also adopted this burden-shifting approach to evaluate discrimination claims under 47 U.S.C. § 202(a).[4]

It is also worth highlighting that this burden-shifting approach is consistent with the way in which courts have evaluated potentially anticompetitive business practices under Section 1 of the Sherman Act.[5] For instance, in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,[6] the Supreme Court held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[7] And recently, in *Polygram Holding, Inc. v. FTC*,[8] the D.C. Circuit endorsed the FTC's burden-shifting approach to evaluating Section 1 claims, in which business practices that appear likely to impair competition are presumed unlawful unless the defendant identifies some plausible procompetitive benefit for its practice.[9]

The record in this proceeding amply demonstrates the first two components of this test. As Leap Wireless International, Inc., and others explained in their comments,[10] the service that nationwide carriers provide is the same, while the rates that large carriers charge vary dramatically. Large carriers often demand that smaller carriers pay rates that are several times higher than what they charge Mobile Virtual Network Service ("MVNO") operators, affiliates,

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[2] *Id.* at 39.

[3] *Id.*; *see also Nat'l Communications Ass'n, Inc. v. AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001) ("[W]e hold that the district court properly placed the burden on AT&T to prove that any discrimination between resellers and its commercial customers in the provision of like SDN services was reasonable.").

[4] *See, e.g.*, *In re Bowles v. United Tel. Co. of Mo.*, 12 FCC Rcd. 9840, 9852 at ¶ 20 (1997) ("In a section 208 complaint proceeding, the complainant has the evidentiary burden of establishing that the services are like and that discrimination exists between them. Once like services and discrimination are established, the burden shifts to the defendant carrier to demonstrate that the discrimination is not unreasonable."); *In re Nova Cellular West, Inc. v. Airtouch Cellular*, 17 FCC Rcd. 15,026, 15036 at ¶ 28 (2002) (same).

[5] *See* 15 U.S.C. § 1.

[6] 468 U.S. 85 (1984).

[7] *Id.* at 104.

[8] 416 F.3d 29 (D.C. Cir. 2005).

[9] *Id.* at 36.

[10] *See, e.g.*, Comments of Leap Wireless International, Inc. at 13–14 (Nov. 28, 2005).

and even retail customers. In fact, several of the nationwide carriers have conceded that they charge different rates for roaming.[11]

In light of the blatantly discriminatory practices that the nationwide carriers have adopted with respect to wholesale roaming, it should be the burden of nationwide carriers to demonstrate some procompetitive explanation in order to escape liability under 47 U.S.C. § 202(a). To date, the nationwide carriers have come forward with no plausible justification.

The best method to address the problems in the wholesale market for roaming would be to require automatic roaming and to clarify that the requirements of Section 201 and 202[12] apply to the provision of automatic roaming services. The Commission should also take this opportunity to ensure these obligations are properly enforced by giving clear guidance as to how unreasonable discrimination can be resolved in the complaint process. Enforcement would be facilitated by (1) permitting complaints of discrimination in the provision of automatic roaming to be resolved through the Enforcement Bureau's Accelerated Docket under Section 1.730 of the Commission's rules,[13] (2) adopting automatic discovery procedures in the complaint process, and (3) establishing a presumption that it is unlawful for a facilities-based provider to charge other carriers more to purchase wholesale roaming services than the facilities-based provider charges its own retail customers in the same area, at least in the absence of any evidence demonstrating that there is a procompetitive justification for such practice.

We thank the Commission for considering these issues. We would welcome an opportunity to continue this dialogue and would be happy to answer any additional questions that may arise.

Sincerely,

/s/ James H. Barker

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Barry J. Blonien[*]

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[11] *See, e.g.*, Cingular Wireless, Opposition to Joint Petition for Commission Inquiry, at 4 (May 5, 2006) ("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."); Sprint Nextel Opposition to Joint Petition for Section 403 Investigation, at 4 (May 5, 2006) ("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?").

[12] 47 U.S.C. §§ 201, 202.

[13] *See* 47 C.F.R. § 1.730.

[*] Admitted only in Illinois; DC bar application pending. Supervised by principals of Latham & Watkins.