



Sprint Nextel
2001 Edmund Halley Drive
Reston, VA 20191
Office: (703) 433-4143
Fax: (703) 433-4142

Laura Holloway Carter
Vice President
Government Affairs-Federal Regulatory
laura.carter@sprint.com

March 16, 2007

Via Electronic Submission

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
4454 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Written Ex Parte Communications
Intercarrier Roaming, WT Docket No. 05-265
Response to Leap and MetroPCS Ex Parte Submissions

Dear Ms. Dortch:

Through this written ex parte presentation, Sprint Nextel Corporation (“Sprint Nextel”) responds to a series of ex parte communications that Leap Wireless International, Inc. (“Leap”) and MetroPCS Communications, Inc. (“MetroPCS”) have made since reply comments were filed in this docket over a year ago.¹

Leap and MetroPCS urge the Federal Communications Commission (“Commission” or “FCC”) to impose rate regulation on facilities-based wireless competitors. Specifically, they urge the Commission to adopt a regulatory price cap regime for the wireless industry, whereby a carrier would be given the legal right to gain access to its competitor’s network at a rate no higher than the latter’s best retail rate per minute. Leap and MetroPCS seek to impose this new regulatory regime despite the fact that the Commission has found that “consumers continue to benefit from robust competition in the CMRS marketplace,”² and has previously held that inter-brand competition in the CMRS market, as well as the efficient use of spectrum, would be undermined if facilities-based CMRS competitors were required to affirmatively assist each other.³

Sprint Nextel asks the Commission to reject this request for rate regulation in the most competitive of all telecommunications markets. Consumers have consistently benefited from the existing pro-competitive wireless rules and a return to rate regulation will only undermine these

¹ Leap filed ex parte communications in WT Docket No. 05-265 on February 5, 2007, September 25, 2006, June 20, 2006, and February 14, 2006. MetroPCS filed ex parte communications in this docket on March 2, 2007, August 3, 2006, and June 2, 2006. Unless otherwise noted, the documents cited in this letter were filed in WT Docket No. 05-265.

² *Eleventh Annual CMRS Competition Report*, 21 FCC Rcd 10947 at ¶ 213 (2006).

³ *See Cellular Resale Policies Order*, 7 FCC Rcd 4006, 4008 (1992).

benefits, including investment into new broadband networks. The price they pay for wireless services, including roaming services, has been reduced dramatically, while innovative new products and features continue to expand. Carriers are investing billions of dollars in extensive network expansions, including wireless broadband data services in both urban and rural areas. These consumer benefits are the direct result of the Commission's decision to allow competition to drive investment and pricing as multiple carriers established competing facilities-based networks. The Commission should reject Leap and MetroPCS' call to abandon this pro-competitive model and return to the days of single provider rate regulation and regulatory arbitrage. Such a radical departure from previous Commission policy would undermine wireless competition and network investment, particularly in rural areas.

I. BACKGROUND: LEAP, METROPCS AND ROAMING GENERALLY

Leap and MetroPCS are CDMA carriers of similar size, with Leap serving 2.2 million subscribers and MetroPCS serving 2.6 million customers.⁴ Leap and MetroPCS also employ a similar business model – namely, the provision of flat-rated, unlimited local calling plans in dense urban areas. While Leap and MetroPCS compete aggressively with other wireless carriers, including Sprint Nextel,⁵ they do not for the most part compete against each other as they each tend to serve different areas.⁶

Leap and MetroPCS have each recently acquired sizable amounts of additional spectrum, and each has announced plans to substantially increase the coverage of its respective network.⁷ As one analyst has noted, the two carriers “together now own at least 10 megahertz of spectrum in nearly all of the top 50 markets and are set to bring their flat-rate, unlimited local calling plans to the masses.”⁸

⁴ See Leap Press Release, *Leap Reports More Than 260,000 Net Customer Additions in the Fourth Quarter and Complete Launch of Approximately 20 Million Covered POPs by Year End* (Feb. 27, 2007); MetroPCS SEC Form S-1 at 57 (Jan. 4, 2007)(data as of Sept. 30, 2006).

⁵ See, e.g., MetroPCS Comments at 9 (“There are highly competitive markets where MetroPCS is competing head-to-head with every major nationwide carrier.”); MetroPCS SEC Form S-1 at 14 (Jan. 4, 2007)(“We compete directly in each of our markets with (i) other facilities-based wireless providers, such as . . . Sprint Nextel.”); Leap SEC Form 10-K at 16 (March 1, 2007)(“We believe that our primary competition in the U.S. wireless market is with national and regional wireless service providers including . . . Sprint Nextel.”).

⁶ Apparently, the two carriers today overlap “only in Modesto, Calif.,” but both companies “came out of the auction with rights to spectrum in Seattle, Philadelphia and Las Vegas, where neither already offers service.” RCR WIRELESS NEWS, *Leap Preparing for Further Expansion, Pondering Affiliates*, at 9 (Dec. 11, 2006).

⁷ For example, in Auction 66, MetroPCS more than doubled the number of POPs it can now serve, and it plans in the near future to double the coverage of its network (POPs served). See MetroPCS SEC Form S-1 at 14 (Jan. 4, 2007). Similarly, Leap in Auction 66 more than doubled the number of POPs it can serve, and it plans in the near future to increase its network coverage (POPs served) by 50 percent. See Leap SEC Form 10-K at 2 (March 1, 2007).

⁸ RCR WIRELESS NEWS, *Auction Reflections*, at 10 (Sept. 25, 2006).

Historically, neither Leap nor MetroPCS offered their customers the ability to roam “off net” when traveling in an area not covered by its respective network.⁹ However, both carriers have recently introduced roaming plans for the occasional roamer, with Leap launching its “Travel Time” service in May 2005,¹⁰ and MetroPCS following suit in April 2006 by launching its “TravelTalk” service.¹¹

The rates Leap and MetroPCS charge their customers to roam off-net are comparable to, or less than, what Sprint Nextel assesses on its own occasional roaming customers:

<u>Occasional Roaming Rate (MOU)</u>		
Leap	39¢ ¹²	
MetroPCS	49¢ or 79¢ ¹³	(Depends on visited area)
Sprint Nextel	50¢ to 75¢	(Depending upon toll charges)

At least MetroPCS has acknowledged that its resale of other carrier’s roaming services is profitable.¹⁴

Leap and Sprint have negotiated a roaming agreement that enables Leap’s customers to roam anywhere on Sprint’s nationwide network. The arrangement is one-way because Leap’s network offers no incremental coverage value to Sprint’s customers. Sprint has offered roaming terms to MetroPCS in the past, but to date, the two carriers have not reached agreement. Press reports indicate, however, that MetroPCS has signed a 10-year roaming agreement with Verizon Wireless.¹⁵

⁹ Indeed, Leap in the past vigorously “opposed” any new roaming mandate because “heightened competition has obviated the need for *any* roaming requirement” and new rules would “jeopardize the ability of carriers such as Leap to offer innovative service plans.” Leap Comments, WT Docket No. 00-193, at 7-8 (Jan. 5, 2001)(emphasis in original).

¹⁰ See Leap Press Release, *Leap Launches Travel Time for Its Cricket Customers: Targeted for the Occasional Roamer, Travel Time Allows Customers to Use Their Cricket Phone Outside Their Cricket Calling Area* (May 5, 2006). See also Leap Press Release, *Leap Marks a Major Milestone as It Completes the Roll Out of Its Travel Time Roaming Service for Cricket Customers in All Markets Across the County* (June 30, 2006); RCR WIRELESS NEWS, *Carrier Briefs* at 11 (July 4, 2005); M2 WIRELESS NEWS, *Leap Roll Out ‘Travel Time’ Roaming Service Nationwide* (July 2, 2005).

¹¹ See MetroPCS Press Release, *MetroPCS Expands Service Options With the Introduction of Travel Talk* (April 18, 2006). See also RCR WIRELESS NEWS, *MetroPCS Launches Service in Detroit, Roaming Option for Customers*, at 13 (April 24, 2006).

¹² See <http://www.myvericricket.com/cricketsupport/faqs/detail?id=103&fromsearch=0>. Leap also offers cheaper per-minute rates if customers prepay a set amount (e.g., 30 roaming minutes for \$5 per month). *Id.*

¹³ See <http://www.metropcs.com/traveltalk/ttfaqpopup.php>.

¹⁴ See MetroPCS Form S-1, Amendment No. 1, at 97 (Feb. 13, 2007)(“We incur costs for providing, and earn revenue from, this nationwide roaming service in excess of our costs.”).

¹⁵ See RCR WIRELESS NEWS, *MetroPCS Launches Service in Detroit, Roaming Option for Customers*, at 13 (April 24, 2006).

In summary, both Leap and MetroPCS are pursuing very similar business plans which focus on cream skimming dense urban markets and using profitable casual roaming charges to offset their lack of rural build-out. While both have spectrum available for additional build-out, and could establish competing networks in the same manner multiple other wireless carriers have done, they instead seek a regulatory solution to their limited footprint.

II. THE COMMISSION HAS ALREADY REJECTED THE LEAP/METROPCS ARGUMENT THAT SECTION 201(A) OF THE ACT REQUIRES FACILITIES-BASED WIRELESS CARRIERS TO AFFIRMATIVELY ASSIST THEIR COMPETITORS

Leap and MetroPCS assert that wireless carriers like Sprint Nextel are “compelled by the common carrier provisions of Title II of the Act” to provide intercarrier roaming to their competitors because the first clause of Section 201(a) of the Act specifies that carriers “furnish . . . communication service[s] upon reasonable request therefore.”¹⁶ Indeed, MetroPCS goes so far as to claim that any competitor that does not provide it with intercarrier roaming arrangements on the rates and terms *it* thinks are reasonable is already “violating Sections 201 and 202 of the Act.”¹⁷ Leap and MetroPCS’ reading of the law is incorrect and ignores governing precedent.

In making their Section 201(a) reasonable request argument, Leap and MetroPCS neglect to address those court decisions that have already rejected it. Specifically, the D.C. Circuit Court of Appeals acknowledged that “the first clause of § 201(a) concerns a carrier’s obligations to its *own customers’* reasonable requests,” and *not* to requests by other carriers.¹⁸ In fact, Section 201(a) of the Act has no relevance to this intercarrier roaming docket,¹⁹ and this statute does not, as the rule proponents suggest, empower the Commission to adopt intercarrier roaming rules.²⁰

¹⁶ See, e.g., Leap Ex Parte at 4 (Sept. 25, 2006); Leap Reply Comments at 3 and 6; MetroPCS Comments at 13-14 and 21-22; MetroPCS Reply Comments at 7 and 35-36.

¹⁷ MetroPCS Reply Comments at 10.

¹⁸ See *AT&T v. FCC*, 292 F.3d 808, 812 (D.C. Cir. 2002)(emphasis added). Of course, Section 201(a) applies to the roaming services a wireless carrier provides to consumers, whether to its own customers (automatic roaming) or to the customers of other carriers (manual roaming).

¹⁹ The second clause of Section 201(a), unlike the first clause, does address dealings between two carriers. But the statute by its very terms makes clear that this second clause is limited in scope to interconnection – specifically, “physical connections with other carriers” in order to “establish through routes” between them. 47 U.S.C. § 201(a). See also *id.* at 332(c)(1).

The second clause of Section 201(a) has no relevance to intercarrier roaming arrangements because roaming does not involve interconnection for call completion. Two carriers do not execute a roaming agreement in order to establish a “through route” between them so they can complete calls originating on one another’s networks. Rather, they execute roaming agreements so the customers of one carrier can use the other carrier’s network in specified circumstances. As a practical matter, intercarrier roaming is a form of resale in the sense that the roaming carrier resells to its own end user customers the services, or network coverage, of the “visited” network.

²⁰ See, e.g., *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994)(Section 201(a) did not, prior to the expression authorizations of the 1996 Act, permit the FCC to compel incumbent LECs to provide physical collocation to competitors’ networks). Even after the 1996 Act, Congress only required incumbent

Moreover, Leap and MetroPCS fail to address the fact that the Commission ruled long ago that a wireless carrier's refusal to deal with another wireless facilities-based competitor is not only consistent with the Act, but also affirmatively promotes the public interest.²¹ In particular, the Commission held that a refusal to deal with a competitor would "promote interbrand competition, expedite expansion of both licensees' coverage areas, and spur the deployment of spectrum-efficient technology."²²

In summary, Section 201(a) of the Act governs the roaming services that a wireless carrier provides to consumers, but this statute does not mandate intercarrier roaming arrangements between two carriers. To the contrary, as the Commission has previously recognized, wireless inter-brand competition and efficient use of spectrum have benefited from rules which do not impose an obligation on carriers to allow unfettered access to their networks.

III. LEAP AND METROPCS HAVE NOT CHALLENGED THE RECORD EVIDENCE DEMONSTRATING THAT SPRINT NEXTEL IS NOT ENGAGED IN UNLAWFUL DISCRIMINATION

Leap and MetroPCS assert that charging "different roaming rates to different carriers constitutes unlawful discrimination under Section 202 of the Act."²³

The requirement that the rates, terms and conditions be non-discriminatory means, at a minimum, that a carrier must provide roaming services to a requesting carrier at terms, and on terms and conditions, that are no less favorable than the carrier provides to itself, to its affiliates and to third parties.²⁴

Leap goes further, claiming that "nationwide carriers" like Sprint Nextel have "not put any evidence into the record to support their disparate pricing practices":

Nationwide carriers have not justified their discrimination as reasonable. . . .
[T]he nationwide carriers have failed to come forward with any evidence to justify their blatantly discriminatory pricing practices.²⁵

LECs to make their networks available to competitors if such access was required under the "necessary and impair" standards. See 47 U.S.C. §§ 251(c), 251(d)(2)(the "necessary and impair" standards).

²¹ See *Cellular Resale Policies Order*, 7 FCC Rcd 4006 (1992).

²² See *id.* at 4008 ¶¶ 7 and 14.

²³ MetroPCS Reply Comments at 32.

²⁴ MetroPCS Comments at 15. See also MetroPCS Ex Parte at 5 (Aug. 3, 2006) ("Carriers should not be able to discriminate against facility-based competitors."); Leap Reply Comments at 4 (FCC "is compelled to apply sections 201, 202, and 332 according to their plain meaning and to confirm that all CMRS carriers must provide roaming services to other carriers upon reasonable request and on a just, reasonable, and non-discriminatory basis.").

²⁵ Leap Ex Parte at 1-2, 7 and 9 (Sept. 25, 2006) (bold in original). See also MetroPCS Reply Comments at 32 ("This [Sprint Nextel] claim is tantamount to a concession that discrimination is indeed occurring."); MetroPCS Ex Parte at 3 (Aug. 3, 2006) ("The major carriers admit that they discriminate among and between carriers."); MetroPCS Ex Parte at 2 (June 2, 2006) ("The three large national carriers make significant admissions in their oppositions that confirm the existence of discrimination.").

Leap and MetroPCS misapply the Section 202(a) antidiscrimination statute, and they further ignore the uncontroverted record evidence in this proceeding.

The Communications Act does “not prevent all discrimination – disparities in prices for similar service – but only *unreasonable* discrimination.”²⁶ Indeed, the Supreme Court has held that the “policy of nondiscriminatory rates is violated when *similarly situated* customers pay different rates for the same service.”²⁷ The Commission has held that two carriers are not similarly situated if they provide different benefits to a third carrier.²⁸

Leap’s and MetroPCS’ core complaint is that Sprint Nextel’s intercarrier roaming rates for direct competitors are higher than the rates contained in Sprint Nextel’s agreements with its affiliates.²⁹ But Leap and MetroPCS never allege that they are similarly situated to Sprint Nextel’s affiliates – and the reason for this omission is understandable.

A direct competitor like Leap or MetroPCS can hardly be considered similarly situated to Sprint Nextel affiliates that sell service under the Sprint brand.³⁰ Indeed, the Commission held long ago that refusing to deal with a wireless facilities-based competitor is not unreasonably discriminatory – and actually promotes the public interest by, among other things, “stimulating interbrand competition” and efficient use of spectrum.³¹

Moreover, the uncontroverted record evidence demonstrates that Sprint Nextel receives benefits from two-way roaming arrangements (like those involving its affiliates) that it does not

²⁶ *NARUC v. FCC*, 737 F.2d 1095, 1136 (D.C. Cir. 1984)(emphasis in original). *See also Associated Press v. FCC*, 452 F.2d 1290, 1300-01 (D.C. Cir. 1971)(“Not every variation in prices charged customers for a particular feature of the carrier’s service supports a claim of unlawful discrimination. Since rate classifications . . . may be justified by differences between the classes, the mere existence of a disparity between particular rates does not establish a statutory violation.”); *Second Priority Access Service Order*, 15 FCC Rcd 16720, 16730-31 ¶ 23 (2000)(“Section 202 of the Communications Act does not prevent carriers from treating users differently; it bars only *unjust* or *unreasonable* discrimination. Carriers may differentiate among users so long as there is a valid reason for doing so.”)(emphasis in original).

²⁷ *AT&T v. Central Office Telephone*, 524 U.S. 214, 222 (1998)(emphasis added). The FCC has further held, and courts have affirmed, that wireless carriers may even treat similarly situated customers differently. *See Orloff v. Vodafone*, 17 FCC Rcd 8987 (2002), *aff’d*, 352 F.3d 415 (D.C. Cir. 2003), *cert. denied*, 542 U.S. 937 (2004).

²⁸ *See, e.g., Digital Cellular Referral Order*, 20 FCC Rcd 8723, 8728 ¶ 13 (2005)(“Topp provided material benefits to AirTouch related to resale of its service that Digital did not and could not provide. We find that these distinctions put Digital and Topp in materially dissimilar positions vis a vis AirTouch, rendering it reasonable for AirTouch to treat Topp and Digital differently.”).

²⁹ *See, e.g., Leap Ex Parte* at 4 (Feb. 14, 2006)(“Large carriers charge Cricket *overtly* discriminatory roaming rates per minute compared to rates charged other carriers for similar services.”)(emphasis in original).

³⁰ *See, e.g., Eleventh CMRS Competition Report*, 21 FCC Rcd 10947 at ¶ 58 (“These affiliations created a ‘family’ of operating companies with much closer relationships than those formed by traditional roaming agreements.”).

³¹ *Cellular Resale Policies Order*, 7 FCC Rcd at 4008 ¶ 16.

receive from one-way arrangements (like that involving Leap). As Sprint Nextel's Director of domestic roaming advised the Commission:

Carriers have a strong incentive to execute roaming contracts with each other because such arrangements enable each carrier to expand the network coverage that it can offer its own customers. Two-way roaming arrangements thus provide an important mutual benefit to each party to the contract: increased coverage. . . . [In contrast], the non-roaming party does not gain a coverage benefit with a one-way arrangement.³²

Notably, neither Leap nor MetroPCS challenge any of the facts in this Declaration, nor do they allege that the factors Sprint Nextel considers in developing its intercarrier roaming practices are unreasonable. Leap and MetroPCS simply ignore the facts in this Declaration as if it did not exist.

Because a roaming agreement with Leap or MetroPCS does not provide Sprint Nextel with any coverage benefit, Leap and MetroPCS cannot be considered similarly situated with carriers that do offer such a coverage benefit. There is, therefore, no unreasonable discrimination as a matter of law.³³

Also baseless is Leap's assertion that the roaming rates it agreed to pay Sprint are "grossly above market."³⁴ These prices cannot be "above market," much less "grossly above market," when Leap *agreed voluntarily* to the rates in a market where Leap enjoyed multiple potential roaming partners.³⁵ Leap's allegation, entirely unsupported, is also contradicted by the record evidence that the rates in the Sprint-Leap contract are sometimes less than the rates Sprint pays other carriers for one-way roaming and are less than what Sprint charges its own customers for certain casual off-net roaming.³⁶

The Commission has previously determined that any new roaming rule would "need to recognize that not all carriers are similarly situated" and would "not require carriers to offer roaming agreements to all other carriers on the same terms and conditions."³⁷ Since Leap and MetroPCS do not even suggest they are similarly situated to Sprint Nextel's affiliates that pay lower roaming rates, there is no "unreasonable" discrimination as a matter of law. To the con-

³² Declaration of Wes T. Coffindaffer at ¶ 8, *appended to* Sprint Nextel Ex Parte Letter (July 7, 2006)("Coffindaffer Declaration").

³³ Leap is again wrong is suggesting that differences can be justified only by "cost differentials or competitive necessity." Leap Letter at 7-8. Cost is irrelevant in a Section 202(a) analysis of the competitive wireless industry. *See Orloff v. Vodafone*, 17 FCC Rcd 8987, 8998 ¶ 24 (2002), *aff'd*, 542 F.3d 937 (D.C. Cir. 2003). Moreover, the cases that Leap relies upon are also not relevant, because "they all involved carriers with significant market power." *Id.* at 8999 n.79.

³⁴ Leap Ex Parte at 2 (Sept. 25, 2006).

³⁵ The fact is that Leap would not have agreed to the terms contained in its roaming agreement with Sprint Nextel (including the prices) if Leap did not believe it would benefit by the agreement.

³⁶ *See* Coffindaffer Declaration at ¶ 18.

³⁷ *2006 Roaming Order*, 11 FCC Rcd 9462, 9475 ¶ 2 (1996).

trary, as the FCC has recognized, “treating differently situated entities the same can contravene the requirement for competitive neutrality.”³⁸

IV. LEAP AND METROPCS ARE INTERESTED IN PROMOTING THEIR OWN CORPORATE WELFARE, NOT PROMOTING CONSUMER WELFARE

Leap and MetroPCS readily acknowledge that the wireless market is “highly competitive.”³⁹ Indeed, consumers who travel outside their local calling area have reaped enormous benefits from this intense competition.

- Customers today are required to roam “off net” less often than they did only a few years ago. As but one example, over the past five years alone, Sprint Nextel and its affiliates have expanded their CDMA networks by approximately 60 million people and iDEN network by approximately 55 million people.⁴⁰
- Over the past decade, annual industry capital investment has increased five-fold (from \$5 billion to over \$25 billion) – investment that reduces the need for roaming (as carriers continue to expand their respective network coverage) and investment that intensifies facilities-based competition in additional areas, further benefiting consumers.⁴¹
- Retail roaming prices (average carrier revenue per minute) have decreased by a factor of ten, from an average of over 80 cents/minute to under 10 cents/minute.⁴²
- Roaming revenues as a percent of total industry revenues have fallen from over 13 percent to 4 percent, while roaming minutes of use have mushroomed.⁴³
- The vast majority of Americans today have a choice of subscribing to “one-rate” plans where they pay nothing extra for roaming “off net.”⁴⁴ In other

³⁸ *Minnesota Preemption Order*, 14 FCC Rcd 21697, 21725 ¶ 52 (1999).

³⁹ MetroPCS SEC Form 10 at ii (Jan. 4, 2007). *See also* Leap SEC Form 10-K at 13 (March 1, 2007) (“[T]he telecommunications industry is very competitive.”); *id.* at 1 (“[A]n extremely competitive marketplace”); *id.* at 14 (“Competition has caused, and we anticipate it will continue to cause, market prices for two-way wireless products and services to decline.”); *id.* at 24 (“**We Face Increasing Competition**”)(bold in original); Leap Press Release, *Leap Reports More Than 260,000 Net Customer Additions in the Fourth Quarter and Complete Launch of Approximately 20 Million Covered POPs by Year End* (Feb. 27, 2007) (“[A]n extremely competitive marketplace”).

⁴⁰ Coffindaffer Declaration at ¶ 14.

⁴¹ *See* Gregory L. Rosston, *An Economic Analysis of How Competition Has Reduced High Roaming Charges*, at 20, Figure 4 (Nov. 2005) (“Rosston Paper”), *appended to* Sprint Nextel’s Comments.

⁴² *See id.* at 8, Figure 2.

⁴³ *Id.* at 9, Figure 3.

words, roaming charges, like wireless long distance charges, have become irrelevant for wireless consumers who deem nationwide coverage important.

Notably, Leap and MetroPCS have never contested any of these facts.

Leap and MetroPCS instead complain that *their* customers are harmed because they have to pay for off-net roaming at rates that are higher than MetroPCS and Leap would prefer while, of course, conveniently ignoring the fact that they can offer much lower “on-net” pricing in light of the lower cost structure they enjoy as a result of their more limited networks.⁴⁵ Most importantly, of course, is the fact that the Commission has already recognized that customers of Leap and MetroPCS have choices if either of their providers does not provide what they want:

[C]ustomers of various firms always have the option to switch to firms employing other air interfaces. In other words, if any mobile telephony consumers -- regardless of whether they are on GSM, TDMA, or analog-only plans -- were to find that the roaming aspects of their wireless service plans became less favorable (whether in terms of price or in terms of coverage) as a result of this merger, they would always have the option not only to upgrade to a GSM plan (in the case of TDMA or analog customers), but to switch to a CDMA-based carrier altogether.⁴⁶

MetroPCS’ only response to this FCC decision is to claim it is “flawed;”⁴⁷ Leap, in contrast, simply pretends this decision does not exist.

Leap and MetroPCS offer “substantially lower” prices than those generally offered by national carriers.⁴⁸ According to Leap and MetroPCS, they can offer lower prices because they have a “significantly lower” cost structure than the national carriers:

- Leap: “[W]e offer a differentiated service and an attractive value proposition to our customers at costs significantly lower than most of our competitors,” noting that its low cost structure is “industry-leading.”⁴⁹
- MetroPCS: “Our service model results in average per minute costs to our customers that are significantly lower than average per minute costs of other traditional wireless broadband PCS carriers. . . . [W]e are one of the lowest cost providers of wireless broadband PCS services in the United States, which allows us to offer our services at affordable prices while maintaining cash prof-

⁴⁴ See, e.g., *Tenth CMRS Competition Report*, 20 FCC Rcd at 15946 ¶ 97; Coffindaffer Declaration at ¶ 14.

⁴⁵ See, e.g., Leap Ex Parte at 11 (Feb. 5, 2007) (“Cricket’s customers [are] harmed by anticompetitive practices.”); MetroPCS Ex Parte (March 2, 2007) (“[T]he high cost of roaming to MetroPCS is disadvantaging its customers.”). See also footnotes 49 and 51, *infra*.

⁴⁶ *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd 21522, 21591 ¶ 180 (2004).

⁴⁷ See MetroPCS Reply Comments at 20.

⁴⁸ See, e.g., Leap SEC Form 10-K at 6 (March 1, 2007) (“Our service is based on . . . prices substantially lower than those offered by most of our wireless competitors for similar usage.”); Leap Ex Parte at 8 (Feb. 5, 2007) (“Cricket sells voice minutes at 40% average industry selling price.”).

⁴⁹ Leap SEC Form 10-K at 3 and 20 (March 1, 2007).

its per customer as a percentage of revenues per customer that are among the highest in the wireless industry.”⁵⁰

The principal reason for this lower cost structure, Leap and MetroPCS explain, is that they limit their network coverage to areas of “high relative population density.”⁵¹ MetroPCS readily acknowledges that its “focus on densely populated areas” and its resulting “leadership position as one of the lowest cost providers” is one of its “many competitive strengths that distinguish us from our primary wireless broadband PCS competitors.”⁵²

On the other hand, national carriers like Sprint Nextel have a competitive advantage Leap and MetroPCS do not enjoy. As MetroPCS has explained:

Many of our competitors have regional or national networks which enable them to offer automatic roaming and long distance telephone services to their subscribers at a lower cost than we can offer.⁵³

Although the national carriers have earned this competitive advantage (by taking the risk of making capital investments in higher costs areas that Leap and MetroPCS choose to avoid), Leap and MetroPCS now want the Commission to disable this larger footprint competitive advantage by requiring Sprint Nextel not only to provide access to its nationwide network, but also to provide access at its “lowest average prevailing retail rate.”⁵⁴ And, in disabling Sprint Nextel’s competitive advantage, Leap and MetroPCS expect the Commission to maintain their competitive advantage – namely, their significantly lower cost structure resulting from their decision to avoid serving rural and other higher-cost areas.

There are numerous policy defects with the Leap and MetroPCS proposal, as the economic analysis in the record documents.⁵⁵ But in the end, this policy argument is irrelevant, because the Commission cannot grant the relief Leap and MetroPCS seek as a matter of law. Specifically, the Commission has recognized repeatedly that it does not have the flexibility to pre-

⁵⁰ MetroPCS SEC Form S-1 at 3 (Jan. 4, 2006).

⁵¹ MetroPCS SEC Form S-1 at 3 (Jan. 4, 2006)(“The aggregate population density across the licensed areas we currently serve and plan to serve . . . is approximately 321 people per square mile, which is nearly four times higher than the nation average of 84 people per square mile.”); Leap SEC Form 10-K at 4 (March 1, 2007)(“All of these markets meet our internally developed criteria concerning customer demographics and population density which we believe will enable us to offer Cricket service on a cost competitive basis in these markets.”).

⁵² MetroPCS SEC Form S-1, Amendment No. 1, at 2 (Feb. 13, 2007).

⁵³ MetroPCS SEC Form S-1 at 29 (Jan. 4, 2006). *See also* Leap SEC Form 10-K at 24 (March 1, 2007)(“[S]ome of our competitors are able to offer their customers roaming services on a nationwide basis and at lower rates.”).

⁵⁴ MetroPCS Ex Parte at 7 (Aug. 3, 2006)(Competitor’s “lowest average prevailing retail rate provides an appropriate ‘cap’ on the roaming rate.”). *See also* Leap Reply Comments at 2 (“average retail revenue per minute”).

⁵⁵ *See, e.g.,* Gregory L. Rosston, *A Solution in Search of a Problem: Leap and SouthernLINC*, at ¶¶ 6, 32-36 (Jan. 2006), *appended to* Sprint Nextel’s Reply Comments. Notably, neither Leap nor MetroPCS has ever responded to Dr. Rosston’s points.

serve the viability of any individual competitor, small or large: its “statutory duty is to protect efficient competition, not competitors.”⁵⁶ Specifically, the FCC is “not at liberty to subordinate the public interest to the interest of equalizing competition among competitors.”⁵⁷

As we have said on many occasions, it is not this Commission’s obligation to equalize competitive differences between licensees in the same market.⁵⁸

Thus, the Commission has held, the important question in evaluating roaming services is the effect on “consumers of mobile telephony services, not on particular mobile telephony carriers *per se*.”⁵⁹

In summary, it is apparent that Leap and MetroPCS are not interested in protecting consumer welfare. Consumers interested in national coverage have vast choices today – including Sprint Nextel rate plans that enable customers to roam off net without paying anything extra for such flexibility. Leap and MetroPCS make their request in the hope that the Commission through regulation will disable their competitors’ advantages – advantages gained as a result of significant capital investment in the midst of a hotly competitive marketplace – while retaining their own competitive advantages (*i.e.*, low-cost local service resulting from serving only selected territories). And, they make this request even though the Commission has already rejected such an argument when it held that “market forces – not regulation – should shape the developing CMRS marketplace”:

⁵⁶ *Bell Atlantic Mobile/NYNEX Mobile Merger Order*, 12 FCC Rcd 22280, 22288 ¶ 16 (1997). See also *Alascom/AT&T Merger Order*, 11 FCC Rcd 732, 768 ¶ 56 (1996) (“[T]he Commission’s statutory responsibility is to protect competition, not competitors.”); *California CMRS Rate Request Denial Order*, 10 FCC Rcd 7486, 7517 ¶ 62 (1995) (Section 332 “protects customers, not competitor inefficiencies.”); *First Access Charge Reform Order*, 12 FCC Rcd 15982, 16059 ¶ 180 (1997) (“[O]ur rules should promote competition, not protect certain competitors.”); *Telesis/SBC Merger Order*, 12 FCC Rcd 2624, 2647 ¶ 48 (1997) (“Our priority is to promote efficient competition, not to protect competitors.”); *Motorola/Nextel Merger Order*, 10 FCC Rcd 7783, 7787 ¶ 20 (1995) (“[O]ur priority is to protect competition, not competitors, for the benefit of consumers.”).

⁵⁷ *800 MHz Rebanding Reconsideration Order*, 20 FCC Rcd 16015, 16048 ¶ 73 (2005), quoting *SBC v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995). See also *Hawaiian Telephone v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to the public interest mandate in approving applications where it considered the factor of “competition, not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors.”); *Western Union v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981) (“[E]qualization of competition is not itself a sufficient basis for Commission action.”).

⁵⁸ *ICS Communications*, File No. 23865-CD-P-(2)-83, at ¶ 6 (Sept. 5, 1985). See also *McCaw/AT&T Transfer Reconsideration Order*, 10 FCC Rcd 11786, 11792-93 ¶ 9 (1996) (“[T]he Communications Act requires us to focus on competition that benefits the public interest, not on equalizing competition among competitors.”); *McCaw/AT&T Transfer Order*, 9 FCC Rcd 5836, 5858 ¶ 32 (1994) “[T]he Communications Act does not require parity between competitors as a general principle.”).

⁵⁹ *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd 21522, 21591 ¶ 180 (2004). See also *MCI/British Telecom Merger Order*, 12 FCC Rcd 15361, 15410 ¶ 154 (1997) (“[A] reduction in the profits of rivals without an adverse effect on consumers constitutes harm to competitors, but not necessarily harm to competition.”).

Success in the [CMRS] marketplace thus should be driven by technological innovation, service quality, and competition-based pricing decisions, and responsiveness to consumer needs – and not by strategies in the regulatory arena.⁶⁰

V. WHILE NOT LEGALLY RELEVANT, LEAP AND METROPCS ARE FARING EXCEEDINGLY WELL UNDER THE COMMISSION’S MARKET-BASED REGIME

Whether Leap, MetroPCS or any other wireless carrier succeeds or fails in the market is not a regulatory concern, so long as competition remains vibrant. Nevertheless, it is noteworthy that Leap and MetroPCS have flourished under the market environment that the Commission has consistently fostered for the wireless industry.

MetroPCS. MetroPCS told the Commission even before it began offering any roaming option to its customers that it was “one of the fastest growing wireless providers in the nation” and that, within three years, it enjoyed the “second-largest customer base” in Miami – serving more customers than Sprint Nextel or Verizon Wireless.⁶¹ MetroPCS’ market success has continued. During the year ending September 30, 2006 (the most recent data the company has made available), MetroPCS’ subscriber base increased by 50 percent.⁶² Although it has been operational for less than five years, MetroPCS enjoyed net income of \$52 million during the year ending September 30, 2006 – an increase of 74 percent over the prior period.⁶³ MetroPCS adds:

We believe our operating strategy, network design, and high relative population density in our markets have enabled us to become, and will enable us to continue to be, one of the lowest cost providers of wireless broadband PCS services in the United States. We also believe our rapidly increasing scale will allow us to continue to drive our per-customer operating costs down in the future. . . . We believe our industry leading cost position provides us and will continue to provide us with a sustainable competitive advantage.⁶⁴

MetroPCS’ future is also promising. Using its recently acquired AWS spectrum, MetroPCS plans to expand its network “by late 2008 or early 2009” to cover an additional 30 to 32 million POPs.⁶⁵ MetroPCS further states that “existing cash” and “anticipated cash flows from operations will be sufficient to fully fund this planned expansion.”⁶⁶ And, MetroPCS states it has “the opportunity to achieve average penetration levels as a percent of covered population in excess of 15%.”⁶⁷

⁶⁰ *Second CMRS Order*, 9 FCC Rcd 1411, 1420 ¶ 19 (1994).

⁶¹ MetroPCS Comments at 2-3. *See also* MetroPCS Ex Parte at 2 (Aug 3, 2006).

⁶² *See* MetroPCS Form S-1 at 1 (Jan. 4, 2007).

⁶³ *See* MetroPCS Form S-1, Amendment No. 1, at 7 and 63-64 (Feb. 13, 2007). The net income comparison excludes an extraordinary gain (sale of spectrum) that occurred in May 2005. *See id.*

⁶⁴ *See* MetroPCS Form S-1, Amendment No. 1, at 96 (Feb. 13, 2007).

⁶⁵ *See* MetroPCS Form S-1, Amendment No. 1, at 50 (Feb. 13, 2007).

⁶⁶ *Id.* at 50-51.

⁶⁷ MetroPCS Form S-1, Amendment No. 1, at 101 (Feb. 13, 2007).

Leap. According to its CEO, Leap “nearly doubled the size of our business in 2006.”⁶⁸ Service revenues increased by 27 percent over 2005, and its total number of customers increased by 34 percent.⁶⁹ Capital investment in 2006 nearly tripled compared to 2005, jumping from \$209 million to \$591 million.⁷⁰ Leap’s stock price in 2006 alone jumped 57 percent (from \$37.88 at the end of 2005 to \$59.47 at the end of 2006).

Leap’s CEO further anticipates “strong customer growth [in 2007] in both new and existing markets and continued improvements in OIBDA.”⁷¹

[W]e believe that our cost structure, combined with the differentiated value proposition that our Cricket service represents in the wireless market provides us with the means to react effectively to price competition. . . . We believe that we are strategically positioned to compete with other communications technologies that now exist.⁷²

The investment community shares this optimism. For example, Citigroup recently increased its target price on “Buy-rated Leap from \$73 to \$85 per share.”⁷³ Citigroup sees “significant upside potential” and is “bullish on subscriber growth in FY07,” stating that Leap is “well on track to grow service revenue by almost 50% in ’07”:

We believe Leap is positioned as one of the few growth stories within a maturing wireless sector, as the company’s niche strategy can be extended to new markets through spectrum the company has acquired. . . . We believe the company can generate customer growth of 19.2% over the next three years based on its market expansion strategy versus our industry forecast of around 5% over the same period.⁷⁴

VI. CONCLUSION

Consumers have benefited from a thriving and competitive wireless market because the Commission has, to date, allowed competition to drive investment and pricing as multiple carriers built out competing networks. This public policy success, and the resulting consumer benefits, will only be undermined if the Commission now begins to regulate prices in the competitive wireless marketplace to enable individual business plans or favor specific market participants. In particular, investment in higher cost rural areas appears most threatened by the business model

⁶⁸ Leap Press Release, *Leap Reports More Than 260,000 Net Customer Additions in the Fourth Quarter and Complete Launch of Approximately 20 Million Covered POPs by Year End* (Feb. 27, 2007).

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ Leap Press Release, *Leap Reports More Than 260,000 Net Customer Additions in the Fourth Quarter and Complete Launch of Approximately 20 Million Covered POPs by Year End* (Feb. 27, 2007).

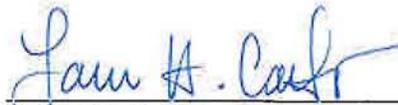
⁷² Leap SEC Form 10-K at 14 and 15 (March 1, 2007).

⁷³ Citigroup, *LEAP: OIBDA Growth Should Leap Beyond Its '07 Guidance Range; Reit. Buy*, at 1 (Feb. 27, 2007).

⁷⁴ *Id.* at 2, 3 and 8.

proposed by Leap and MetroPCS. These carriers are free to compete in the marketplace, but they should not be permitted to avoid the costs of competition – and gain a competitive advantage – through regulatory gamesmanship.

Respectfully submitted,



Laura H. Carter
Vice President, Government Affairs
Sprint Nextel Corporation