

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

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

**OPPOSITION AND COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.
REGARDING SPRINT NEXTEL CORPORATION'S
PETITION FOR RECONSIDERATION**

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Leap Wireless International, Inc. and its subsidiaries (collectively, "Leap") respectfully opposes certain aspects of the Petition for Reconsideration filed by Sprint Nextel Corp. ("Sprint Nextel").¹ Specifically, the Commission should not reconsider its decision to impose an automatic roaming obligation for push-to-talk service.² More generally, however, Leap agrees with Sprint Nextel that an in-market exception to the automatic roaming obligation is inconsistent with the Commission's basis for creating the automatic roaming obligation,³ and that the exception's arbitrary discrimination between in-market and out-of-market roaming will distort competition.⁴ Such objections support Leap's request for the elimination of the in-market

¹ Sprint Nextel Corporation Petition for Reconsideration, WT Docket No. 05-265 (Oct. 1, 2007) ("Sprint Nextel Petition").

² Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-143 (rel. Aug. 16, 2007), summarized at 72 Fed. Reg. 50,064 (Aug. 30, 2007) ("*Roaming Order*"), at ¶ 54-55. Unless otherwise noted, the documents cited herein have been filed in Docket No. 05-265.

³ Sprint Nextel Petition at 8.

⁴ *Id.* at 9.

exception⁵ and do not, as Sprint Nextel suggests,⁶ justify giving carriers a free hand to distort competition through discriminatory roaming practices.

I. SPRINT NEXTEL’S ARGUMENTS DO NOT SUPPORT ABANDONING THE AUTOMATIC ROAMING OBLIGATION FOR PUSH-TO-TALK OFFERINGS

The Commission should deny Sprint Nextel’s request to reconsider the automatic roaming obligation for push-to-talk service set forth in the *Roaming Order*. CMRS providers increasingly package a wide variety of mobile wireless services as a unified offering, and consumers correspondingly expect seamless provision of those services when they roam.⁷ The Commission correctly recognizes that consumers consider push-to-talk as one such “adjunct to basic voice services” provided on their handset,⁸ and Sprint Nextel’s bid to preserve its anticompetitive automatic roaming practices⁹ with respect to this service only highlights the value consumers place in seamless push-to-talk coverage.

The Commission correctly found that the public interest will be served by extending automatic roaming obligations to push-to-talk and SMS services. As the Commission found in its Eleventh Annual Report on CMRS competition, “many cellular and broadband PCS carriers have begun to offer push-to-talk functionality on their networks.”¹⁰ Consumers view that service

⁵ See Petition For Reconsideration of Leap Wireless International, Inc. (Sept. 28, 2007) (“Leap Petition”).

⁶ See Sprint Nextel Petition at 8–9.

⁷ See, e.g., Reply Comments of SouthernLINC Wireless at 39 (Jan. 26, 2006); Comments of SouthernLINC Wireless at 26–27 (Nov. 28, 2005).

⁸ *Roaming Order* at ¶ 55.

⁹ See, e.g., Comments of SouthernLINC Wireless at 12–15.

¹⁰ Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Eleventh Report*, 21 FCC Rcd 10947, ¶ 64 (2006).

(along with SMS and other data functionality) as an integral component of the overall communications package provided by CMRS providers, and they have come to expect “the same seamless connectivity with respect to these features and capabilities as they travel outside their home network service areas.”¹¹ Sprint Nextel has failed to identify any evidence in the record countering these observations and has not even attempted to explain how consumers would be better off if such services were exempt from an automatic roaming obligation.

Sprint Nextel’s objection that push-to-talk service is similar to non-interconnected data services to which the Commission has not yet extended an automatic roaming obligation¹² does not support a conclusion that an automatic roaming obligation for push-to-talk is arbitrary and capricious. The Commission “need not address all problems in one fell swoop,”¹³ for “reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.”¹⁴ Although Leap believes the automatic roaming obligation should extend to all wireless data services, the record amply supports the Commission’s decision that common carrier treatment of push-to-talk service promotes the public interest.

¹¹ *Roaming Order* at ¶ 55; *see also* Comments of SouthernLINC Wireless at 52 (“[C]ommercial mobile radio services encompass not just voice, but also a broad range of other services ... that are becoming an ever-increasingly important component of the CMRS market.”).

¹² Sprint Nextel Petition at 2–3.

¹³ *United States Cellular Corp. v. FCC*, 254 F.3d 78, 87 (D.C. Cir. 2001) (citations and internal quotation marks omitted).

¹⁴ *Nat’l Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (citations and internal quotation marks omitted, alteration in original); *accord* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Further Notice of Proposed Rulemaking*, MB Docket No. 05-311, 22 FCC Rcd 5101, ¶ 1 n.2 (2006) (citing cases).

II. LEAP AGREES THAT THE IN-MARKET EXCEPTION IS IRRATIONAL AND DISCRIMINATORY, AND THEREFORE SHOULD BE ELIMINATED

Sprint Nextel argues that the exception for in-market roaming is inconsistent with the Commission’s public interest analysis elsewhere in the *Roaming Order*.¹⁵ Specifically, Sprint Nextel contends that “to the extent the FCC has found that roaming is a Section 201 obligation, its decision that this statute will apply to only some carriers but not others is arbitrary and capricious” and distorts competition.¹⁶ Leap wholeheartedly agrees. But Sprint Nextel takes this point to argue that automatic roaming should be entirely exempt from common carrier obligations. Sprint Nextel has it completely backwards.

As an initial matter, Sprint Nextel does not address, let alone challenge, the *Roaming Order*’s sound conclusion that, as a matter of statutory interpretation and Commission precedent, automatic roaming must be deemed a common carrier service subject to the requirements of Sections 201 and 202.¹⁷ As the Commission found, automatic roaming “gives end users access to a foreign network in order to communicate messages of their own choosing.”¹⁸ Although Sprint Nextel does not dispute this characterization of automatic roaming service, it continues to advance the fallacious argument that the Commission need not impose common carrier obligations unless it finds that there is some market failure with respect to the provision of automatic roaming.¹⁹ But as Leap explained in its Reply Comments, it is not for the Commission to decide in the first instance whether to impose an automatic roaming obligation, because

¹⁵ Sprint Nextel Petition at 8.

¹⁶ *Id.* at 9.

¹⁷ *Roaming Order* at ¶¶ 23–26.

¹⁸ *Roaming Order* at ¶ 25.

¹⁹ Sprint Nextel Petition at 9.

Congress has already made that determination.²⁰ The *Roaming Order* merely clarifies what the statute compels. Thus, Sprint Nextel’s request that the Commission jettison *any* automatic roaming obligation should be flatly rejected.

The question remains whether CMRS carriers should be permitted to refuse the roaming requests of other carriers where the requesting carrier has access to spectrum in that area. Leap agrees with Sprint Nextel that, for purposes of evaluating the public interest, it is irrational to distinguish between in-market and out-of-market roaming—at least as the Commission has defined those phrases. As Sprint Nextel argues, “all providers of this common carrier service should be subject to the same obligations. To hold otherwise would create inherent inequities and distortions of the market.”²¹ But this does not provide a justification to abandon all common carrier obligations in connection with roaming, as Sprint Nextel supposes. Rather, it demonstrates why the Commission should rescind the “in-market” exception.

As Leap has explained in greater detail in its Petition for Reconsideration, access to in-market roaming is essential for improved facilities-based competition. Because coverage gaps frustrate any carrier’s attempt to enter a new market, reasonable access to roaming is a necessary component of any effective build-out strategy,²² and incumbents looking to stifle competition will refuse to provide roaming at just and reasonable rates to gain an anticompetitive advantage.²³ Depriving access to reasonable automatic roaming discourages entrants from making the steep initial investment required to overcome the nationwide carriers’ first-mover

²⁰ Reply Comments of Leap at 3–4 (Jan. 26, 2006).

²¹ Sprint Nextel Petition at 9.

²² Leap Petition at 8–11.

²³ Leap Petition at 7, 16–18.

advantage.²⁴ It also discourages network growth by imposing a second, unreasonably onerous build-out requirement as a condition for holding the license. A carrier considering whether to acquire additional licenses must decide whether it can soundly afford to construct facilities immediately, throughout the entirety of a license area. If it cannot, then the license may simply become a hindrance, in that the carrier would be barred from demanding just and reasonable rates throughout the entire licensed area.²⁵

Automatic roaming is most critical on the edges of a growing carrier's footprint, and most of that territory will be squarely "in-market" as the Commission has defined that term in the *Roaming Order*.²⁶ Customers who live near the border of a growing carrier's license area are no less frustrated with dropped calls and dead zones "out of market," and because consumers increasingly demand affordable, seamless coverage when they travel, any carrier that aspires to compete with established providers must be able to offer such services outside their license areas. This, of course, does not mean that small, regional, and rural carriers view out-of-market roaming as a substitute for purchasing new licenses—Leap's recent participation in Auction 66, for example, belies any such notion. Instead, just as automatic roaming within a license area helps competitive carriers overcome national carriers' head-start on facilities construction, out-of-market roaming is necessary for growing carriers to remain competitive as they work to match the license coverage of larger, established carriers. If consumers are to enjoy the benefits of increased facilities-based competition between national and growing carriers, the Commission must prevent anticompetitive roaming practices in *all* markets.

²⁴ *Id.* at 9–10.

²⁵ *Id.* at 11–12.

²⁶ *Id.* at 18.

The very reason national carriers deny automatic roaming to small, regional, and rural carriers is to prevent them from providing the high quality, seamless, and reliable coverage customers demand. The deleterious effects of such anticompetitive conduct are most pernicious where small, regional, and rural carriers are attempting to threaten the dominant position of the nationwide carriers and provide greater choices to consumers. The *Roaming Order*'s in-market exception will only exacerbate these problems, as the crazy-quilt of overlapping, differently sized coverage areas will create consumer confusion, as well as logistical difficulties and coverage disputes among carriers.²⁷ The diminution of competition that will inevitably result from any limits on access to automatic roaming will also jeopardize the quality of existing facilities, for entrenched carriers will have less incentive to upgrade or maintain their facilities given the fewer alternatives available to customers receiving inferior service.²⁸

In short, the Communications Act and Commission precedent inescapably demonstrate that automatic roaming is a common carrier service and therefore must be provided at just, reasonable, and nondiscriminatory rates upon "reasonable request."²⁹ Sprint Nextel's arguments do not provide any basis for the Commission to reach a different conclusion and in fact bolster the claims of Leap and others that the Commission should reconsider its conclusion that a carrier may disregard its common carrier obligations with respect to "in-market" requests. Leap agrees with Sprint Nextel that every carrier "should have the same right to demand roaming of other carriers as other carriers have the right to demand roaming of it."³⁰ Leap only seeks to compete on a level playing field, and a clear rule applying the common carrier obligations of CMRS

²⁷ *Id.* at 13–14.

²⁸ *Id.* at 13.

²⁹ 47 U.S.C. §§ 201, 202.

³⁰ Sprint Nextel Petition at 9.

carriers in *all* markets is the simplest and best way to secure consumers the benefits of fair and vigorous competition.

CONCLUSION

The Commission should deny Sprint Nextel's request to reconsider its conclusion that an automatic roaming obligation applies to push-to-talk services. Sprint Nextel's criticism of the *Roaming Order's* disparate treatment of in-market and out-of-market roaming, however, further supports Leap's request that the Commission eliminate the *Roaming Order's* in-market exception.

Respectfully submitted,

- /s/ -

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