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July 23, 2008

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-B204
Washington, DC 20554

Re: Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265; EX PARTE

Dear Ms. Dortch:

Leap is encouraged by recent news reports¹ that suggest the Commission may soon act upon requests for reconsideration filed in the above-captioned docket that seek to close the “in-market” loophole, under which carriers may ignore requests for wholesale roaming agreements in any area where the requesting carrier holds a license or leases spectrum. As Leap and others have explained in their petitions and other filings, the in-market exception as set forth in the *Roaming Order*² effectively swallows any common carrier obligation to provide automatic roaming on just and reasonable terms, and forces many consumers to suffer as a result.

Leap submits this letter to reiterate that the problems with the in-market exception are not confined merely to the recently auctioned AWS and 700 MHz spectrum bands, and any action to address the exception that ignores PCS, cellular, and other CMRS licenses will disenfranchise millions of wireless consumers. In order for the Commission to accomplish its stated goals of promoting competition and ensuring seamless coverage for all wireless subscribers, minor tweaks to the exemption only for AWS and 700 MHz licenses will not suffice. Here are just a few of the reasons why Leap believes it is critically important for the Commission to take a fresh

¹ See, e.g., Howard Buskirk, *Just AWS? Sprint Could Be Stranded under Proposed Revision to in-Market Exception*, Communications Daily, July 18, 2008.

² Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *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*”).

look at its reasoning in the *Roaming Order* and either altogether eliminate or dramatically revise the in-market exception in a fashion that will benefit all wireless consumers.

THE IN-MARKET EXCEPTION CANNOT BE JUSTIFIED BASED UPON CONCERNS OF SPECTRUM WAREHOUSING

- There is zero evidence that automatic roaming, an industry practice for decades, leads to decreased build-out.
- In fact, Leap's own history of aggressive build-out plainly demonstrates otherwise. Over the past two years Leap and its subsidiaries have spent an average of 47% of its service revenues on capital expenditures, which includes, among other things, investing and expanding its network to ensure that subscribers receive the best possible facilities-based service.
- It is hypocritical for Verizon and AT&T to oppose robust automatic roaming rules, when only a short time ago they relied heavily on roaming agreements to expand their networks—and they still rely on roaming agreements today to provide comprehensive coverage.
- Ironically, Verizon—who has been heavily relying on the in-market exception in its dealings with some other providers—is sitting on enormous amounts of fallow spectrum and yet is flatly denying competitors access to wholesale roaming services in large geographic regions, resulting in a dramatic loss of service for consumers.

THE IN-MARKET EXCEPTION AS CURRENTLY DRAFTED UNDERMINES—NOT PROMOTES—FACILITIES-BASED SERVICE.

- As economist and former FCC Commissioner Dr. Harold Furchtgott-Roth has explained in filings in this proceeding,³ the current exclusion makes it more difficult for new entrants and small, regional, and rural carriers to expand their services.
- Instead of encouraging more build-out, the “in-market” exception is likely to discourage carriers from acquiring and holding licenses, which in turn will depress auction participation and revenues.
- The *Roaming Order* also jeopardizes the quality of existing facilities and services because, with fewer alternatives available to consumers, the entrenched nationwide carriers have little or no incentive to build out new licenses or upgrade services.

THE IN-MARKET EXCEPTION IS ANTI-COMPETITIVE AND HARMFUL TO CONSUMERS

- Consumers today expect and demand affordable, nationwide wireless service. Nationwide carriers wielding considerable market power in the wholesale market for roaming seek to reduce or eliminate competition from small, regional, and rural rivals by charging supra-competitive rates for automatic roaming or by outright refusing requests from competing carriers for service in large geographic areas.
- Leap and other carriers have offered several examples of such anti-competitive conduct that occurred even before the Commission adopted the in-market exception. The *Roaming Order* ratifies this conduct and will only make this pattern of behavior more common.

³ See generally T-Mobile, *Ex Parte Letter*, WT Docket NO. 05-265, Attachment, Supplemental Declaration of Harold W. Furchtgott-Roth (filed Jan. 30, 2008).

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- The end result of the in-market exception in any form is that many consumers will be forced to pay too much or be left without service altogether. And this burden is likely to hit under-served areas the hardest. Many of Leap's subscribers are unable to afford traditional wireless plans offered by the nationwide carriers—they deserve seamless, nationwide coverage at just and reasonable rates just as much as anyone else. Rural customers will also experience higher rates and lower quality service. The needs of these under-served consumers are completely overlooked by the nationwide carriers.
- In light of marketplace developments, these problems are only likely to get worse. The nationwide carriers' power in the wholesale and retail markets continues to grow, making it increasingly more difficult for other carriers to compete.

THE IN-MARKET EXCEPTION UPSETS THE SETTLED EXPECTATIONS OF VIRTUALLY THE ENTIRE CMRS INDUSTRY

- PCS and other CMRS carriers relied on (i) a set of build-out obligations set forth in FCC rules in planning and constructing their networks, and (ii) the expectation and understanding, based on Commission precedent, that roaming is a common carrier service subject to §§ 201 and 202 of the Communications act.
- Without warning, the Commission completely altered the landscape by adopting the in-market exception, which effectively changed the build-out rules that carriers relied upon in acquiring and building out spectrum. New entrants, along with small rural and regional carriers, are penalized by this dramatic and unanticipated change, which benefits only the dominant carriers in the marketplace. In fact, AT&T and Verizon stand alone in support of the existing rule. The nearly uniform opposition of the entire industry apart from the two super-carriers speaks volumes about who benefits most and suffers most as a result of this exception.

For the foregoing reasons, Leap urges the Commission to eliminate its newly crafted “in-market” exception and return all carriers to a level playing field by applying the fundamental common carrier protections set forth in the Communications Act.

Please contact me if you have any questions.

Very truly yours,

- /s/ -

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