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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

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

Dear Ms. Dortch:

On July 31, 2008, the undersigned and Adam Krinsky, Wilkinson Barker Knauer, LLP, met with Jim Schlichting, Acting Chief, Wireless Telecommunications Bureau (“WTB”), and Nese Guendelsberger, Acting Chief, Spectrum & Competition Policy Division, WTB, with regard to the above-captioned proceeding. The parties discussed the points raised below.

Last summer, the Commission adopted a CMRS automatic roaming requirement but refrained from extending the rule to markets where the requesting carrier holds spectrum rights and thus is expected to build a network to compete directly with the would-be host carrier. The Commission appropriately concluded that an automatic roaming mandate in overlap markets would undermine competition to the detriment of consumers, “negatively affect[ing] build-out in these markets, [and] thus, adversely impacting network quality, reliability and coverage.”¹

Verizon Wireless hereby responds to two recent *ex parte* letters seeking to suspend or eliminate this “home roaming exception” to the automatic roaming rule. SpectrumCo asks the FCC to put the home roaming exception on hold for the remainder of its 15-year license term, and only then would a host carrier be allowed to ask the Commission to reinstate the rule.² Leap argues that the Commission should eliminate the rule and instead extend automatic roaming rights to all CMRS providers – including those with long-held cellular and PCS licenses – within their

¹ Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817, 15834 ¶ 49 (2007) (“*Roaming Order*”).

² *Ex Parte* Notification Letter from Philip L. Verveer, Counsel for SpectrumCo LLC, to Marlene H. Dortch, FCC (dated July 21, 2008) (“*SpectrumCo Letter*”).

licensed areas of service.³ Both filings fail to show why the Commission's action was unwise and, in fact, underscore why the home roaming exception benefits consumers.

A Return to Resale? As an initial matter, opposition to the home roaming exception should be seen for what it is: a campaign to establish a CMRS resale right in markets where companies hold spectrum rights and are expected to build out and compete.

Roaming within a market where the requesting carrier holds spectrum rights is fundamentally different than roaming outside that carrier's licensed area of service – despite Leap's efforts to conflate the two⁴ – and is far more akin to resale. The Commission adopted the automatic roaming rule because wireless customers “expect to roam automatically on other carriers' networks *when they are out of their home service area.*”⁵ In contrast, home roaming enables a licensee with spectrum rights in a given area to offer service in that area using its competitor's spectrum and network rather than its own. Indeed, in a market where a requesting carrier holds spectrum rights but has yet to build out and initiate service, the requesting carrier is seeking resale, not home roaming. The *Roaming Order* draws this obvious linkage to resale,⁶ and makes clear that the “mandatory resale rule was sunset in 2002, and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”⁷ It rightly concludes that such an arrangement “could harm facilities-based competition . . . adversely impacting network quality, reliability and coverage.”⁸ A home roaming or resale right necessarily affects incentives to build out and curtails the consumer benefits of more and better competition.

The Home Roaming Exception Spurs Network Buildout and Spectrum Use. As part of the *Roaming Order*, the Commission thoroughly analyzed the implications of home roaming and concluded that an automatic roaming mandate in overlap markets would undercut the goal of facilities-based competition, “negatively affect[ing] build-out in these markets.”⁹ As the Commission explained:

³ *Ex Parte* Letter from James H. Barker *et al.*, Counsel for Leap, to Marlene H. Dortch, FCC (dated July 23, 2008) (“Leap Letter”).

⁴ Leap argues, for example, that the home roaming exception “effectively swallows any common carrier obligation to provide automatic roaming on just and reasonable terms.” *Id.* at 1.

⁵ *Roaming Order*, 22 FCC Rcd at 15828 ¶ 27 (emphasis added).

⁶ The order's resale definition is in effect home roaming: “a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider.” *Id.* at 15836 ¶ 51.

⁷ *Id.* (internal citations omitted). The Commission sunset the resale mandate in 2002 based on the strong level of competition in the wireless market. Network coverage has continued to expand and competition is even more intense today. According the most recent CMRS Competition Report, more than 95% of the U.S. population is served by at least three wireless carriers, and more than half of the U.S. population is served by five or more operators. See Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, WT Docket No. 07-71, *Twelfth Report*, 23 FCC Rcd 2241, 2245 ¶ 2 (2008) (“*Twelfth CMRS Competition Report*”).

⁸ *Roaming Order*, 22 FCC Rcd at 15835 ¶ 49.

⁹ *Id.*

[I]f a carrier is allowed to “piggy-back” on the network coverage of a competing carrier in the same market, then both carriers lose the incentive to build-out into high cost areas in order to achieve superior network coverage. If there is no competitive advantage associated with building out its network and expanding coverage into certain high cost areas, a carrier will not likely do so.¹⁰

SpectrumCo simply ignores this analysis and inexplicably asserts that the Commission can eliminate the home roaming exception “without any damage to licensee incentives to construct facilities.”¹¹ The claim is absurd – under SpectrumCo’s proposal, any AWS-1 licensee could acquire and serve customers in its licensed territories for years and years, using a network paid for and built by another carrier, without the need to construct even a single site.¹² The only imaginable way its proposal would, as SpectrumCo suggests, have no effect on build out is if a licensee does not intend to build out their spectrum – interestingly, trade press articles on AWS-1 spectrum indicate that “SpectrumCo has yet to do anything with those assets.”¹³ The filing starkly demonstrates SpectrumCo’s interest: it seeks a regulatory right to initiate service and acquire customers without any commitment to invest in a network or put its spectrum into use, in contrast with the Commission’s twin goals of facilities-based competition and efficient spectrum use.

Similarly, Leap’s argument that the home roaming exception will actually deter build out cannot be taken seriously. First, it is axiomatic that carriers with a right to acquire and serve customers using a competitor’s superior network will face less competitive pressure to build their own networks. Leap provides no compelling reason for the Commission to rethink its analysis. Second, the facts do not support its claim that the rule will limit investment in new licenses.¹⁴ In the absence of home roaming rights, there were over 100 winning bidders in the AWS-1 auction (Auction 66 resulted in \$13.7 billion in net winning bids for 1087 licenses) and over 100 winning bidders in the 700 MHz auction (Auction 73 resulted in \$18.9 billion in net winning bids for 1090 licenses). Notably, in the AWS-1 auction, Leap (through its interests in Cricket and Denali) was willing to expend over \$1 billion to acquire 100 licenses and SpectrumCo spent over \$2.3 billion for 137 licenses. All parties made these acquisitions with full knowledge that there were no home roaming rights.

Leap also suggests that the nationwide carriers will have “little or no incentive to build out new licenses or upgrade services”¹⁵ if the home roaming exception is left intact. This claim is belied by the facts. Again, in the absence of a home roaming rule, Verizon Wireless has invested heavily – over \$6 billion annually in each of the past three years – to upgrade and extend its service in the intensely competitive wireless marketplace. There is no rational basis to presume

¹⁰ *Id.* (internal citation omitted).

¹¹ SpectrumCo Letter at 1.

¹² Under the “substantial service” performance requirement, licensees are driven to build out their networks in order to compete for subscribers – a result that would be undercut by the SpectrumCo and Leap proposals.

¹³ Kevin Fithcard, “Breaking Down NextWave’s Licenses,” *Telephony*, at 3 (May 5, 2008).

¹⁴ Leap Letter at 2

¹⁵ *Id.*

that such investment will dry up if the Commission continues its long-held policy against a home roaming right.

The Home Roaming Exception Benefits Consumers. In the *Roaming Order*, the Commission rightly concluded that, if the automatic roaming rule were applied to home roaming, consumers would be “disadvantaged by a lack of product differentiation, lower network quality, reliability and coverage.”¹⁶

The Commission has never before imposed a home roaming obligation, and this hands-off regulatory approach has served consumers well, as evidenced by wireless network buildout and market performance. Indeed, consumers everywhere enjoy more service options and features at lower rates than ever before – including in rural areas. Leap’s unsupported claims that continuation of the home roaming exception will lead to higher rates and lower quality of service in rural areas defy reason and marketplace reality.¹⁷

A home roaming rule would disrupt the incentives to build out and differentiate service. The most recent *CMRS Competition Report* confirmed that wireless providers seek to “differentiate their brand from rival offerings based on dimensions of service quality such as superior network coverage, reliability, and voice quality.”¹⁸ As noted above, Verizon Wireless invests billions of dollars each year to extend and upgrade its network. Mandated home roaming would eliminate the ability to differentiate based on coverage or service quality, thereby undermining competition in the wireless marketplace – to the detriment of consumers.

A home roaming mandate could adversely affect network quality and service in other ways as well. For example, trade press reported that in the aftermath of this week’s earthquake in Los Angeles, unprecedented call volumes resulted in network congestion.¹⁹ If wireless licensees – and their customers – rely on home roaming for service, such congestion will only be exacerbated. Further, in the event cell sites or network infrastructure are damaged, multiple networks offer redundancy for continuity of communications.

The Home Roaming Exception Does Not Eliminate an Existing Right, as Leap Claims. Verizon Wireless is compelled to respond to Leap’s false and misleading argument that the rule somehow takes away a pre-existing right to home roaming.²⁰ Until adoption of the *Roaming Order*, there was no automatic roaming requirement whatsoever, much less an automatic home

¹⁶ *Roaming Order*, 22 FCC Rcd at 15835 ¶ 49.

¹⁷ Verizon Wireless is perplexed by Leap’s incorrect argument that Verizon Wireless “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.” Leap Letter at 2. Putting aside the fact that Verizon Wireless spends billions of dollars annually to build out its network, Leap and other spectrum holders should be building out their own systems rather than waiting for another carrier to build so they can exercise home roaming rights.

¹⁸ *Twelfth CMRS Competition Report*, 23 FCC Rcd at 2310 ¶ 166.

¹⁹ Rhonda Wickham, “Network Congestion Follows L.A. Quake,” *WirelessWeek* (July 30, 2008) available at <http://www.wirelessweek.com/Network-Congestion-Follows-Quake.aspx>.

²⁰ Leap Letter at 3.

roaming obligation.²¹ As a result, the home roaming exception merely retains the status quo – wireless carriers have not been entitled to home roaming service since the inception of the cellular industry 25 years ago.

At Most, the Commission Should Provide Limited Relief in Circumstances Involving Encumbered Spectrum. Recent trade press reports suggest that the Commission may be considering a carve-out to the home roaming rule for AWS-1 and perhaps 700 MHz licensees. Any relief must be limited so as not to disrupt the build out and spectrum use incentives identified above. Under no circumstances is relief warranted for any carrier with “encumbered” spectrum that also holds cellular, PCS, or ESMR spectrum in the given market.

For a number of reasons, Verizon Wireless does not support any exceptions to the home roaming rule as adopted in the *Roaming Order*. AWS and 700 MHz licensees acquired their licenses with full knowledge that there was no entitlement to home roaming, and they had a complete understanding of the timeline that would govern their access to unencumbered spectrum. In essence, parties are asking the FCC to mandate that they can enter the business earlier using a direct competitor’s network. AWS licensees are beginning the process of launching service,²² and the Commission should take no actions that could deter further investment.

That said, if the Commission considers creating an exception to the home roaming rule for AWS and 700 MHz licensees that hold encumbered spectrum, it should be limited as follows:

- Any relief should apply to licensees that *only* hold encumbered AWS-1 or 700 MHz spectrum.
 - AWS-1. The FCC should identify AWS-1 frequencies and markets where Federal operations continue, and those licenses would be deemed encumbered. Non-government incumbents subject to relocation are within the licensee’s control and thus should not trigger relief.
 - 700 MHz. Relief would be available because the spectrum is encumbered until February 17, 2009.
 - At most, the FCC should extend relief up to one year after the encumbrance is lifted.
- No relief should apply to carriers if they hold cellular, PCS, ESMR or other CMRS spectrum in the market.
 - Carriers with other CMRS spectrum have had ample time to build out networks and serve customers. If home roaming is mandated, their incentives to extend their

²¹ *Roaming Order*, 22 FCC Rcd at 15827 ¶ 24 (noting that, prior to adoption of the *Roaming Order*, the FCC “has not adopted an automatic roaming rule” – so no licensee could have had the expectation of a home market automatic roaming rule).

²² In contrast to SpectrumCo, several AWS-1 licensees are building. T-Mobile is building in New York and has announced that it will add 20 more markets by year end. MetroPCS is building in Philadelphia and Las Vegas, and will launch in Boston by early 2009, and New York by mid-2009. Leap is building in Las Vegas, Oklahoma City and southern Texas.

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networks beyond current coverage areas will be sharply reduced if not eliminated, to the detriment of consumers.

- The FCC should make clear that no relief is extended for a carrier with encumbered spectrum if it also holds other, non-encumbered CMRS spectrum in the same market.

* * *

For the reasons discussed above, we urge the Commission to maintain the appropriate incentives to facilitate facilities-based competition and reject the claims to suspend or eliminate the home roaming exception. In the event the Commission pursues some relief, it should be limited as described above.

Respectfully submitted,

/s/ _____
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