



August 18, 2008

Via Electronic Filing

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

Re: **Notice of Oral Ex Parte Presentation by T-Mobile USA, Inc.** - Reexamination of
Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No.
05-265

Dear Ms. Dortch:

On August 15, 2008, Tom Sugrue, Kathleen O'Brien Ham, and Sara Leibman of T-Mobile USA, Inc. ("T-Mobile") participated in a conference call with Commissioner Deborah Taylor Tate and her special advisor, Wayne Leighton, regarding T-Mobile's concerns about certain issues raised in the above-referenced docket. In particular, the conference call participants discussed the "home market exclusion" to the automatic roaming requirement adopted in the *Roaming Order*,¹ and the changes to the exclusion that the Commission reportedly is considering. The discussion, which was requested by Commissioner Tate, is described below.

Proposal in Petition for Reconsideration: T-Mobile continues to urge the Commission to repeal the home market exclusion or to modify the exclusion so that it applies only in areas where the requesting carrier (*i.e.*, the roaming carrier or "home carrier" as defined in the *Roaming Order*) has an operating network in place that can be used to provide commercial mobile radio service ("CMRS").² This modification would benefit consumers and promote competition. T-Mobile's proposal would allow all wireless customers to continue to receive wireless service when they travel outside of their home carrier's coverage area.

¹ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817 (2007) ("*Roaming Order*").

² See *Petition for Partial Reconsideration of T-Mobile USA, Inc.*, WT Docket No. 05-265 (Oct. 1, 2007); *Reply of T-Mobile USA, Inc.*, WT Docket No. 05-265 (Nov. 16, 2007). All short-cited petitions and pleadings herein refer to this proceeding.

Infirmities of Present Exclusion: T-Mobile and others have demonstrated that the current home market exclusion harms regulatory parity and encourages anticompetitive conduct. And, as the Public Interest Spectrum Coalition points out, the exclusion is especially harmful to consumers.³

First, the rule as crafted, even with the changes reportedly being considered, could help recreate the wireless duopoly that Congress and the Commission have strived so hard over the past 15 years to eliminate. AT&T and Verizon Wireless, respectively, own the largest GSM and CDMA networks in the United States and, in recent years, they have acquired many of the facilities-based regional and rural carriers with which T-Mobile and other carriers had mutually-beneficial roaming arrangements. Indeed, in the last twelve months, AT&T and Verizon Wireless acquired Dobson (in AT&T's case) and RCC (in Verizon Wireless's case), and there is at least one other major transaction pending today (Verizon Wireless-ALLTEL) involving a key T-Mobile roaming partner.⁴ This series of consolidations increases the incentive and ability of AT&T and Verizon Wireless to deny roaming to others, and the home market exclusion in its present form allows them to do so in large areas nationwide even when denial is unjust or unreasonable. This competitive disparity is evident in the makeup of the commenters in this docket – with the notable exception of AT&T and Verizon Wireless, all national, regional, and rural wireless providers who submitted filings registered their strong opposition to the home market exclusion in its present form.

Second, the home market exclusion will hamper the continuing development of the wireless marketplace and interrupt seamless coverage for all consumers, contrary to the Commission's stated purpose in adopting the automatic roaming rule.⁵ As noted in T-Mobile's petition and by other parties, because of the costs of roaming and the inability to sell their services to consumers in roaming areas, wireless carriers already have significant incentives to construct their own networks.⁶ Providing facilities-based services in some areas, however, simply is not feasible

³ See Letter from Gigi Sohn, on behalf of the Public Interest Spectrum Coalition, to Marlene H. Dortch, FCC, WT Docket No. 05-265 (Aug. 13, 2008) (demonstrating the consumer harms caused by the home market exclusion).

⁴ See, e.g., *AT&T Inc. and Dobson Communications Corp.*, 22 FCC Rcd 20295 (2007); *Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corp.*, FCC 08-181, WT Docket No. 07-208 (rel. Aug. 1, 2008); FCC Public Notice, *Verizon Wireless and Atlantis Holdings LLC Seek FCC Consent to Transfer Licenses, Spectrum Manager and De Facto Transfer Leasing Arrangements, and Authorizations, and Request a Declaratory Ruling on Foreign Ownership*, 23 FCC Rcd 10004 (WTB 2008).

⁵ See *Roaming Order*, 22 FCC Rcd at 15819, 15828-29.

⁶ See, e.g., T-Mobile Petition at 6; MetroPCS Petition at 10-12; SpectrumCo Petition at 10-13; Leap Wireless Petition at 11-14; US Cellular Comments at 5-7 (filed Oct. 29, 2007).

Furthermore, modifying the home market exclusion as T-Mobile suggests will not impose a resale requirement on host carriers. As the *Roaming Order* explained, "CMRS resale entails 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." *Roaming Order*, 22 FCC

from an economic, technical, legal, or practical perspective.⁷ This is especially true for the carriers who won PCS spectrum in the mid-to-late 1990s and entered the marketplace in the last seven to ten years to compete with the then dominant cellular duopoly. For example, while almost all markets, even very rural ones, are served by at least two wireless carriers, some markets are simply not populous enough to economically support a third, fourth, or fifth entrant. And the costs of serving such markets can be particularly problematic for carriers who rely principally, if not exclusively, on PCS spectrum since the propagation characteristics at 1900 MHz (the PCS band) require in rural areas the build out of as many as four to five towers for every tower required for operations at 850 MHz (the cellular band). Effectively (even if indirectly) mandating entry into such markets for all carriers would only increase costs for the entire industry, leading to higher prices and less innovation for all consumers. Moreover, such fundamental steps as tower siting and obtaining the necessary approvals from local governments are getting increasingly difficult and can take years for each site.⁸ As noted above, T-Mobile previously had a variety of roaming partners in many of these markets that depended upon roaming revenues from T-Mobile's customers as well as the use of T-Mobile's more extensive network when their own subscribers traveled. With the recent AT&T and Verizon Wireless acquisitions and absorption of the smaller networks, T-Mobile's ability to enter into mutually-beneficial roaming arrangements has been compromised and there is a danger that T-Mobile's customers will be left without the coverage they previously enjoyed.

Third, the current exclusion effectively adds to, and *de facto* amends, the Commission's well established build-out requirements for CMRS licenses.⁹ Wireless carriers took into account the Commission's *existing* performance requirements and their opportunities for roaming at the time they made their spectrum acquisition decisions (in auctions or on the secondary market). Because wireless carriers now are expected to satisfy a *100 percent geographic build-out* requirement or forgo roaming on reasonable rates, terms and conditions, the exclusion disregards licensees' legitimate business expectations. The Commission's presumption in the roaming docket that every carrier will construct every square inch of its license area also is at odds with the agency's focus in its proceeding to reform the universal service fund ("USF") support

Rcd at 15836 (citations omitted). Roaming, by contrast, allows a home carrier's customers to obtain service *when they are visiting outside their carrier's coverage area*.

⁷ See, e.g., T-Mobile Petition at 6-7; MetroPCS Petition at 7-9; Leap Wireless Petition at 8-11; RTG and OPASTCO Comments at 7-8.

⁸ The Commission recently asked for comment on a petition submitted by CTIA – The Wireless Association that pointed out the multiple difficulties associated with tower siting and that asked for federal regulatory assistance in speeding the process. See FCC Public Notice, *Wireless Telecommunications Bureau Seeks Comment On Petition For Declaratory Ruling By CTIA – The Wireless Association To Clarify Provisions Of Section 332(C)(7)(B) To Ensure Timely Siting Review And To Preempt Under Section 253 State And Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, WT Docket No. 08-165, DA 08-1913 (rel. Aug. 14, 2008).

⁹ See T-Mobile Petition at 7.

mechanism where it adopted an interim cap on high cost USF support for competitive eligible telecommunications carriers (“CETCs”).¹⁰ In one proceeding, the Commission has cut back on the amount of support available for wireless network deployments that may not be economically justified, and in the other, it essentially has required third, fourth, and fifth wireless competitors to build facilities in all parts of all rural markets.¹¹

Relief Requested: If the Commission does not eliminate or modify the home market exclusion as T-Mobile has proposed, it should confirm that voice roaming arrangements within a carrier’s “home market” (as defined in the *Roaming Order*) are subject to Sections 201, 202, and 208 of the Communications Act even if they are not subject to the codified automatic roaming rule. With this clarification, carriers would be able to rely on the forum of the Section 208 complaint process in the event they encounter unjust or unreasonable terms or conditions in roaming agreements or negotiations between carriers, regardless of the carriers’ spectrum holdings.

The status of automatic roaming as a common carrier service provided by a *host* carrier logically cannot change depending on whether a *roaming* carrier has spectrum usage rights or licenses in a geographic area. A roaming carrier’s right to the basic statutory protections set forth in Sections 201 and 202 should not be cut off simply because it holds a spectrum license or lease.

Accordingly, the Commission should confirm that these statutory common carrier protections, and the right to bring a complaint under Section 208 to enforce them, should apply to all carriers’ roaming arrangements regardless of the particular licenses held by either party.

The Commission therefore should clarify that all carriers must undertake to negotiate and provide roaming arrangements at just and reasonable rates, terms, and conditions consistent with Sections 201 and 202. If a host carrier refuses to enter a roaming agreement, a would-be roaming carrier should have access to the Section 208 complaint process to resolve the dispute and, during the pendency of the proceeding, the automatic roaming agreement would remain in place. In a complaint proceeding, the burden should be on the host carrier to justify why its refusal to negotiate or its position on rates, terms, or conditions is just and reasonable. T-Mobile would not oppose consideration of the roaming carrier’s spectrum holdings as one of many factors to be weighed in a Section 208 complaint proceeding. But other factors should be considered and may be more significant, including, but not limited to:

- Are there more than two competing carriers with compatible technology (*e.g.*, GSM) in the area of interest?

¹⁰ See *High Cost Universal Service Support*, 23 FCC Rcd 8834 (2008). T-Mobile affiliates have been designated as CETCs in Tennessee, North Carolina, Virginia, and Puerto Rico.

¹¹ Indeed, MetroPCS notes that the home market exclusion will have a devastating impact on regional, local and rural carriers. See Letter from Michael Lazarus, counsel to MetroPCS, to Marlene H. Dortch, FCC, WT Docket No. 05-265, Attachment at 2 (Aug. 13, 2008).

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- If the roaming carrier has spectrum holdings in the area of interest, has it satisfied its build-out requirements under the Commission's service rules? Is the roaming carrier in the process of clearing the spectrum of incumbent operations?
- Does either carrier have roaming agreements with partners in areas with similar geographic and population characteristics? What is different about the area of interest from those areas?
- Has there been recent consolidation of potential roaming partners for the home carrier? Has the host carrier recently acquired other carriers in the area of interest?

Pursuant to Section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed with the office of the Secretary. If you have any questions regarding this filing, please contact the undersigned.

Very truly yours,

/s/ Kathleen O'Brien Ham

Kathleen O'Brien Ham
Vice President, Federal Regulatory Affairs

cc: Hon. Deborah Taylor Tate
Wayne Leighton