

555 Eleventh Street, N.W., Suite 1000  
Washington, D.C. 20004-1304  
Tel: +1.202.637.2200 Fax: +1.202.637.2201  
www.lw.com

# LATHAM & WATKINS LLP

## FIRM / AFFILIATE OFFICES

Abu Dhabi	Munich
Barcelona	New Jersey
Brussels	New York
Chicago	Orange County
Doha	Paris
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
London	Silicon Valley
Los Angeles	Singapore
Madrid	Tokyo
Milan	Washington, D.C.
Moscow	

December 11, 2009

## VIA ELECTRONIC FILING

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

*Re: WT Docket No. 05-265; WT Docket No. 08-95; EX PARTE*

Dear Ms. Dortch:

As the Commission may be nearing action with respect to several important roaming issues, Leap Wireless International, Inc. and Cricket Communications, Inc. (together, "Leap") wish to reiterate several points regarding the subject of in-market (or "home") roaming.

First, the voluminous record in this proceeding reflects that automatic roaming, including in-market automatic roaming, benefits consumers. There is no wireless carrier in the United States that has constructed facilities in every corner of its licensed service areas. Automatic roaming agreements thus have been and remain a fact of life in the wireless industry, and for good reason: roaming agreements provide the safety net of seamless coverage that consumers expect and require as they travel within and out of their home service markets.

Second, there is no persuasive record evidence that in-market automatic roaming will diminish buildout incentives. Indeed, the evidence is to the contrary, as shown by:

*History.* Automatic roaming agreements have never discouraged or impeded facilities-based competition. The buildout histories of the nation's largest carriers demonstrate the point—the heavy reliance by these companies on roaming agreements as they grew did not deter them from constructing and expanding (via acquisition or organic growth) their own networks. For example, as Leap and many others have pointed out in this proceeding, Verizon still had considerable gaps in its own network as recently as last year until it acquired ALLTEL—even though Verizon and its predecessors had 25 years to build out their networks. In fact, the gaps in Verizon's network were significantly greater before 2008, when it purchased one of its largest roaming partners, Rural Cellular Corporation ("RCC"). Like all other carriers, Verizon had to rely on automatic roaming agreements with ALLTEL, RCC, and others to provide its subscribers

LATHAM & WATKINS LLP

with “nationwide” coverage even as it continued to expand its network.<sup>1</sup> The analysis is no different for carriers trying to grow and compete with the national carriers today.

*Empirical Data.* In recent years, mid-sized regional wireless carriers have been investing, on a relative basis, far more capital into the construction of facilities and the expansion of their networks than the national carriers. Cricket has a proven track record of rapidly building out facilities well in advance of the Commission’s existing construction requirements, and its network now covers more than 90 million Americans. To emphasize the degree to which the large carrier buildout arguments are misplaced vis-à-vis roaming, Leap includes as Exhibit A hereto comparative charts of the capital spending of Leap and MetroPCS, two of the leading mid-sized wireless competitors, relative to the capital expenditures of the nation’s four largest carriers since 2005. As these graphs illustrate, both Leap and MetroPCS have far exceeded these carriers in terms of capital expenditures, in most cases by *more than double*, over the past four years. The notion that automatic roaming agreements that include in-market roaming for subscribers somehow chill construction incentives is simply belied by such facts.

*Economic Analysis.* The point is demonstrated by economic analysis, as well. For example, T-Mobile USA recently submitted a White Paper by Stanford economics professor Dr. Andrzej Skrzypacz that considered the express policy issue surrounding the Commission’s current in-market restriction: “whether firms should be encouraged to offer roaming to a third party even if the third party has a license to operate a network in a given area but did not build out that network with as wide coverage.”<sup>2</sup> Dr. Skrzypacz’s analysis concludes that “in such cases roaming is still going to improve the efficiency of market outcomes and ultimately benefit consumers.”<sup>3</sup>

The Commission should ensure that all of the nation’s carriers, including the very largest carriers, fulfill their common-carrier obligations to provide automatic roaming in *all* geographic areas on just, reasonable, and nondiscriminatory terms. In this regard, it is significant that apart from the two very largest carriers, *every major participant in the entire wireless industry*—national carriers, mid-size carriers, small and rural carriers, and new entrants—has recommended repeal of the Commission’s current in-market exclusion.<sup>4</sup> Consumer groups<sup>5</sup> and prominent members of Congress<sup>6</sup> have called for such repeal, as well.

---

<sup>1</sup> See, e.g., Reply Comments of Verizon Wireless, GN Docket Nos. 09-157, 09-51 (Nov. 5, 2009), at 9 (heralding the degree to which “there has been and continues to be an incredible amount of innovation and investment in wireless network capabilities”).

<sup>2</sup> Dr. A. Skrzypacz, *Economic Analysis of the Provision of Roaming Services in the Wireless Service Industry* (November 2009), at 8 (*ex parte* submitted by T-Mobile USA, Inc. (Nov. 25, 2009).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Ex Parte* Letter from Coral Wireless d/b/a MobiPCS, Corr Wireless Communications, LLC, Leap Wireless International, Inc., MetroPCS Communications,

LATHAM & WATKINS LLP

Leap supports complete elimination of the in-market exception for the reasons articulated by all of these parties. And as described above, Leap believes that the suggestion that home market roaming diminishes buildout incentives is without merit. Nonetheless, to the extent that the Commission retains residual concerns about such incentives, Leap could support an enhanced construction “backstop” to automatic home market roaming, as set forth in the proposal attached as Exhibit B (presented as a modification to the Commission’s existing automatic roaming rule). The policy underpinning the proposal is to promote the Commission’s goal of encouraging further facilities-based buildout in carriers’ home markets by sunseting the home market automatic roaming obligation unless the home market carrier has met heightened population-based construction benchmarks, which in most instances are significantly more stringent than the basic buildout requirements for various CMRS services.

Specifically, host carriers would be required to provide automatic roaming to any technologically compatible home carrier on reasonable and nondiscriminatory terms and conditions within the requesting carrier’s home market until four years from the effective date of an order on reconsideration in this proceeding, in the case of existing Cellular Market Area (CMA) Basic Trading Area (BTA), Major Trading Area (MTA) and Economic Area (EA) licenses, or, in the case of newly assigned licenses in future spectrum auctions, four years from the date of the grant of such licenses. Because REAG license areas cover significantly larger geographic areas (*e.g.*, in most cases, one-sixth of the United States), home market roaming would be provided until six years from the effective date of the reconsideration order, or in the case of newly assigned REAG licenses in future spectrum auctions, six years from the date of the grant of such licenses.

After these dates, a host carrier would be obligated to continue to provide in-market automatic roaming within a requesting carrier’s home market only if the requesting carrier demonstrated signal coverage of at least forty (40) percent of the population of its licensed service area—an enhanced construction benchmark that is far more stringent than the construction benchmarks in most wireless services. For example, a 10 or 15 MHz PCS licensee holding MTA or BTA licenses is obligated under Commission buildout rules to cover twenty-

---

Inc., NTCA, NTELOS Inc., OPASTCO, Revol Wireless, Rural Cellular Association, Rural Telecommunications Group, Inc., and Southern Communications Services, Inc., d/b/a SouthernLINC Wireless, to Chairman Julius Genachowski, WT Docket No. 05-265 (filed July 28, 2009); Sprint Nextel Petition for Reconsideration, WT Docket No. 05-265 (filed Oct. 1, 2007); T-Mobile USA, Inc. Petition for Reconsideration, WT Docket No. 05-265 (filed Oct. 1, 2007).

<sup>5</sup> See, *e.g.*, *Ex Parte* Letter from Ad Hoc Public Interest Spectrum Coalition to Marlene H. Dortch (filed Aug. 13, 2008) (Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, Public Knowledge, and U.S. PIRG).

<sup>6</sup> See, *e.g.*, Letter to the Hon. Christine Varney and Hon. Julius Genachowski from Senator Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights (July 6, 2009), at 2.

LATHAM & WATKINS LLP

five percent of its licensed service area.<sup>7</sup> Under the modification described here, in order to maintain automatic home market roaming for its subscribers after the 4-year or 6-year mandatory period, a home market PCS licensee would need to have almost doubled the Commission's preexisting required coverage of the licensed area. Similarly, AWS licensees are not obligated to meet any construction requirements other than a showing of "substantial service" at the end of their 15-year license terms,<sup>8</sup> and the mobile services "safe harbor" for satisfying this standard is the demonstration of coverage to twenty percent of the population of a provider's licensed service area.<sup>9</sup> The proposed modification would provide an incentive to carriers building out AWS licenses to do so within far faster time frames – in the case of an AWS EA or CMA licenses, by 2/3 the time frame ordinarily required to build out the license under FCC rules—and again, *doubles* the coverage required under the substantial service requirement.<sup>10</sup>

Leap reiterates its view that the Commission's carveout of home market roaming from the general common carrier automatic roaming obligation was a policy mistake. Leap would prefer that this mistake be fixed with an outright repeal of the home market restriction, and Leap does not believe that any construction backstop is necessary to support elimination of this restriction. Furthermore, under the proposal outlined above, in many instances, carriers will be forced to bear significant additional capital expense to retain the right to home market roaming. But because roaming service is so critical to wireless consumers today, Leap for its part would be willing to trade off such additional expenditure to ensure its customers' seamless receipt of service, with no dropped calls in any area of the country in which they travel.

That should be the Commission's overarching policy objective in this proceeding.

Very truly yours,

- /s/ -

James H. Barker

Counsel for Leap Wireless International, Inc.

---

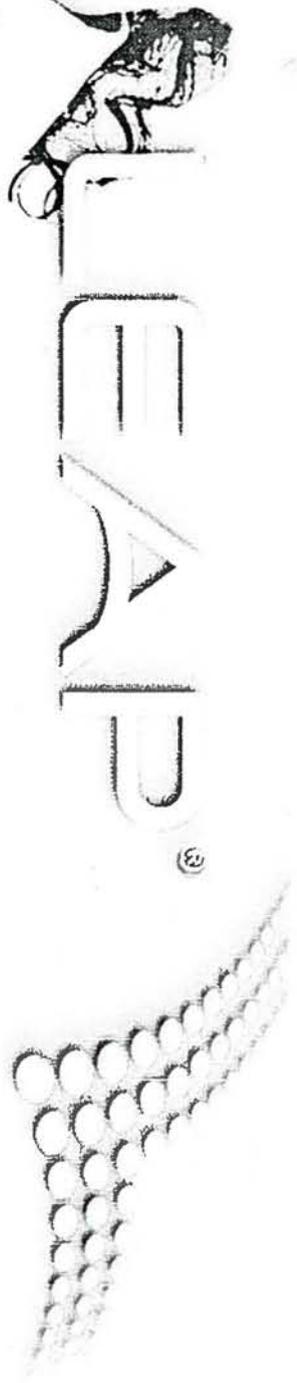
<sup>7</sup> See 47 C.F.R. § 24.203(b).

<sup>8</sup> 47 C.F.R. § 27.14(a).

<sup>9</sup> See, e.g., *Part 27 Report and Order*, 12 FCC Rcd 10785, 10843, ¶112.

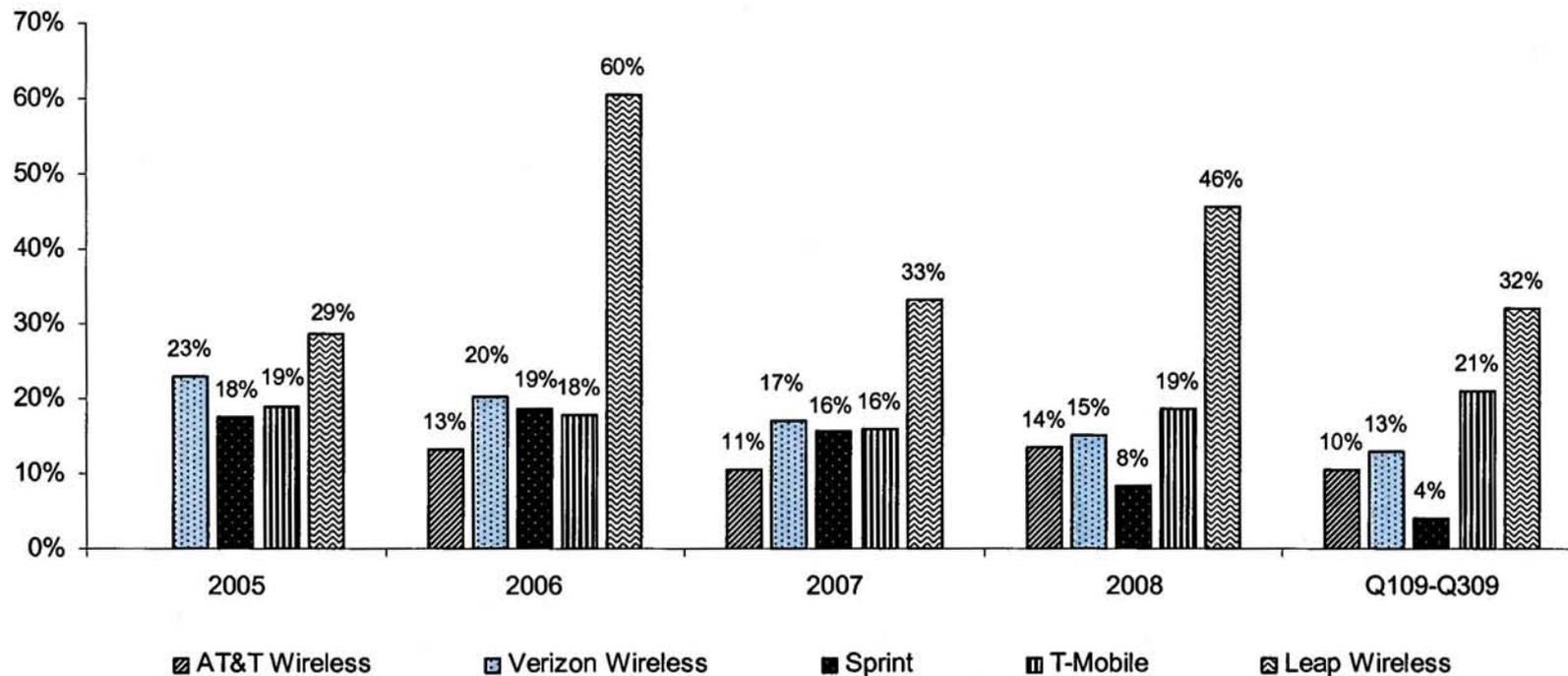
<sup>10</sup> Because certain AWS licenses were auctioned subject to the need to clear the spectrum of incumbent U.S. government operations, the four- and six year periods described would not be triggered until spectrum covered by the AWS license in question has been cleared of incumbent operations of U.S. government licensees.

# **EXHIBIT A**



**Wireless Capex**  
**December 11<sup>th</sup>, 2009**

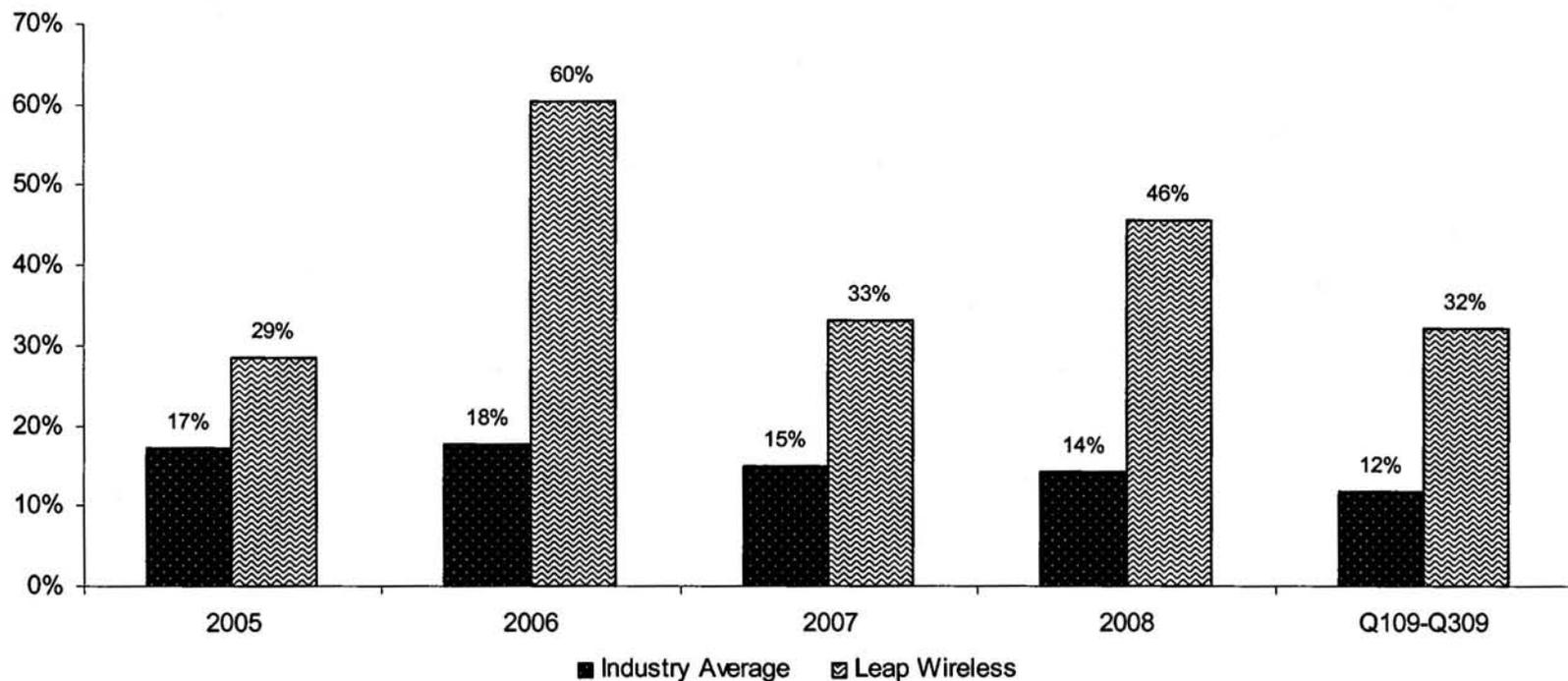
# Capital Investment (capex spend / service revenue)



- Leap CAPEX expenditures reflect investment in network and on-going upgrade activity & network growth
  - Auction 58 market build-out
  - Auction 66 market build-out
  - Expansion of existing markets
  - Total network upgrade to EVDO technology

Source: SEC Filings (10K) & company websites

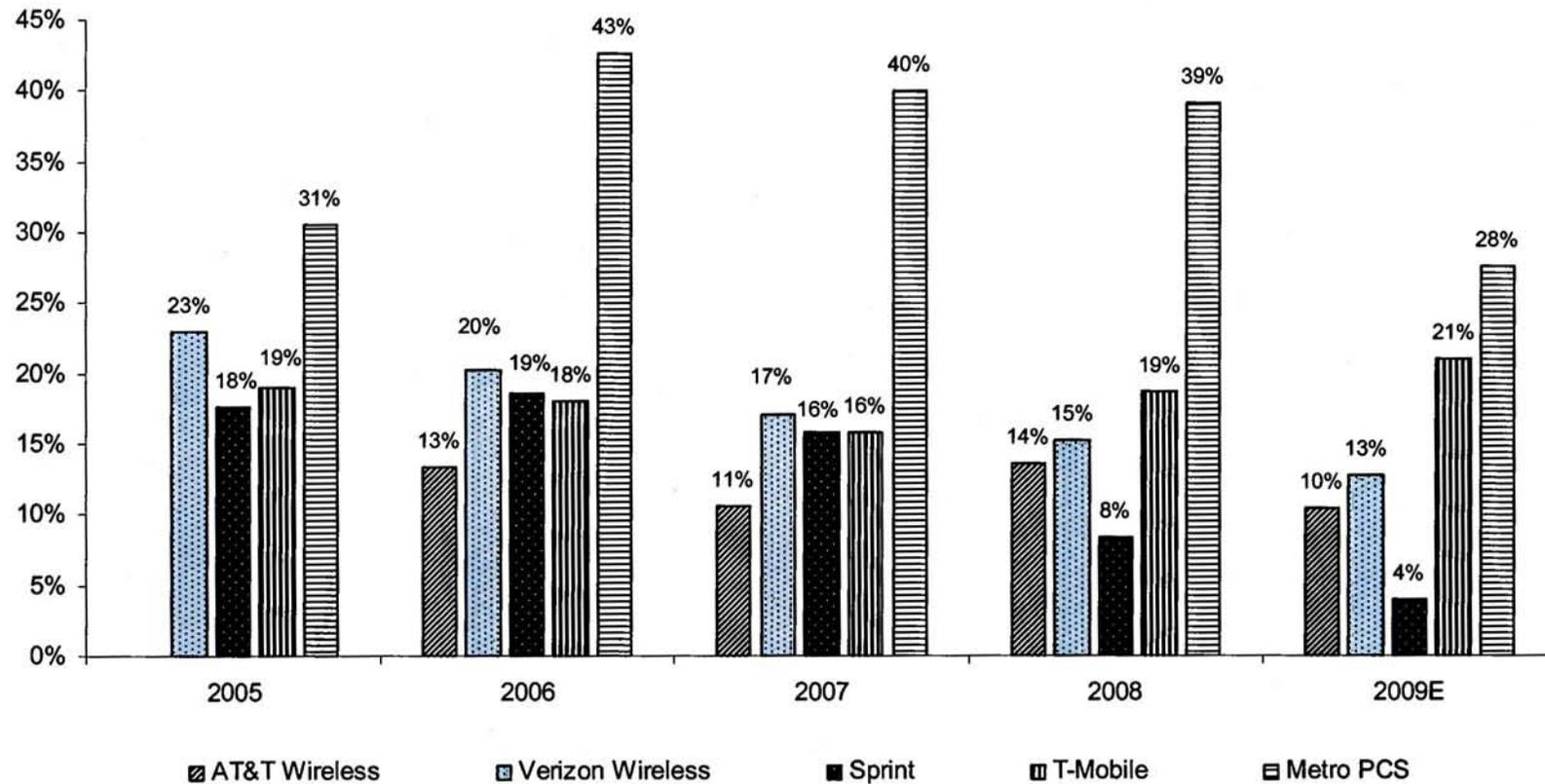
# Leap Capex Investment vs. Industry



➤ Industry average consists of data from Verizon Wireless, Sprint, AT&T Wireless & T-Mobile

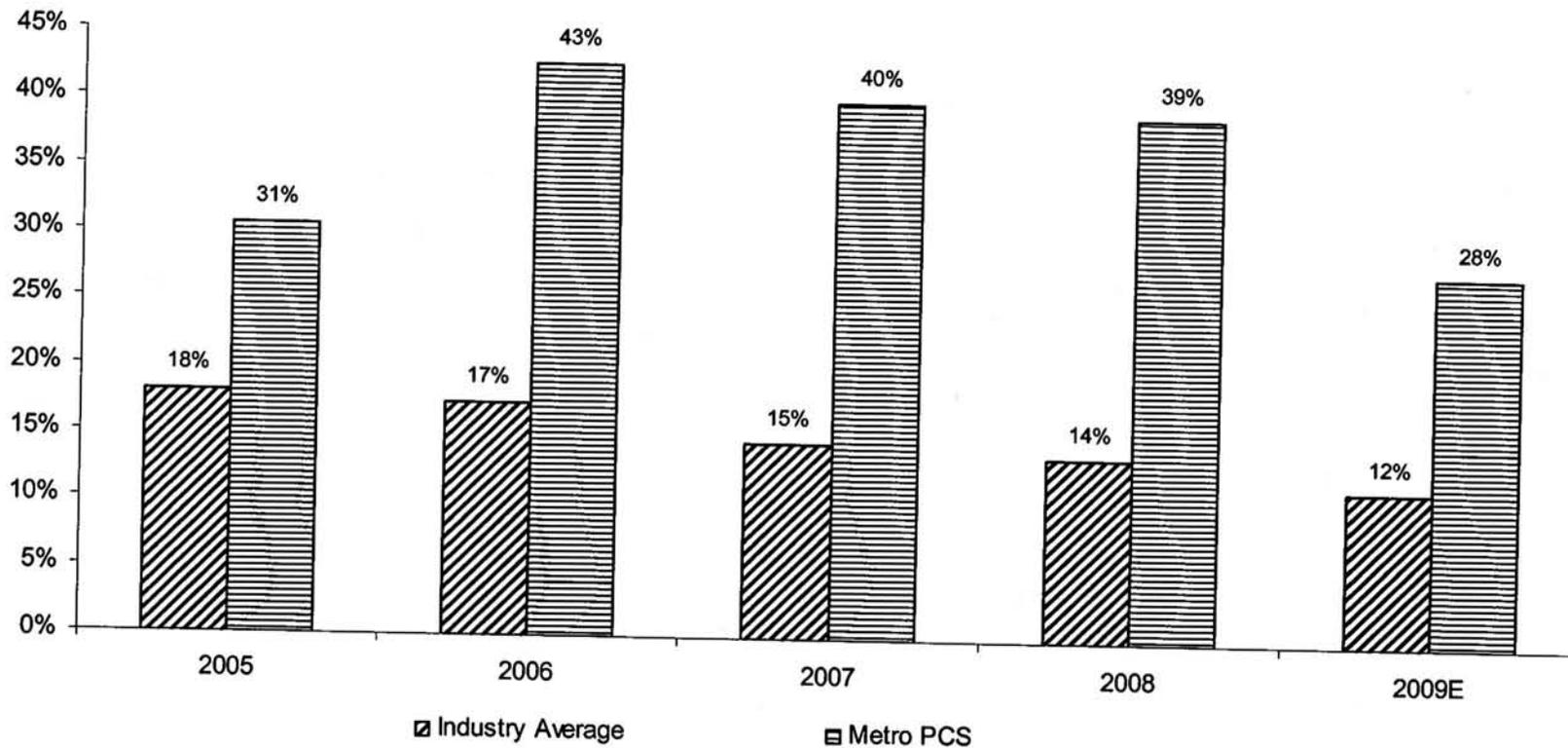
Source: SEC Filings (10K) & company websites

# Capital Investment (capex spend / service revenue)



Source: SEC Filings (10K) & company websites

# Metro PCS Capex Investment vs. Industry



➤ Industry average consists of data from Verizon Wireless, Sprint, AT&T Wireless & T-Mobile

Source: SEC Filings (10K) & company websites

# **EXHIBIT B**

## **POSSIBLE MODIFICATION TO ROAMING RULE, 47 C.F.R. § 20.12**

(d) *Automatic Roaming.* (1) Upon a reasonable request, it shall be the duty of each host carrier subject to paragraph (a)(2) of this section to provide automatic roaming to any technologically compatible home carrier, outside of the requesting carrier's home market, on reasonable and nondiscriminatory terms and conditions.

(2) Upon a reasonable request, it shall be the duty of each host carrier subject to paragraph (a)(2) of this section to provide automatic roaming to any technologically compatible home carrier on reasonable and nondiscriminatory terms and conditions within the requesting carrier's home market until (a) four years from [insert effective date of reconsideration order] in the case of existing Cellular Market Area (CMA) Basic Trading Area (BTA), Major Trading Area (MTA) and Economic Area (EA) licenses, or, in the case of newly assigned licenses, four years from the date of the grant of such licenses, and (b) until six years from [effective date of reconsideration order] in the case of Regional Economic Area Group (REAG) licenses, or in the case of newly assigned licenses, six years from the date of the grant of such licenses.\*

(3) After the dates set forth in paragraph (d)(2) above, a host carrier must provide automatic roaming within a requesting carrier's home market if the requesting carrier provides signal coverage of at least forty (40) percent of the population of its licensed service area.\*\*

(e) *Special Rule for AWS Licensees.* The four- and six year periods described above will not be triggered until any spectrum covered by AWS licenses has been cleared of incumbent operations of U.S. government licensees.\*\*\*

### **POLICY JUSTIFICATIONS:**

\*A longer sunset period is warranted for REAG licenses, given their very large size.

\*\*The proposed rule change promotes the Commission's goal of encouraging facilities-based buildout in carriers' home markets by sunseting the home market automatic roaming obligation unless the home market carrier has met heightened population-based construction benchmarks that in most instances are significantly more stringent than the basic buildout requirements for each service.

For example, a 10 or 15 MHz PCS licensee holding MTA or BTA licenses is obligated under FCC build-out rules to cover 25 percent of its licensed service area. *See* 47 C.F.R. § 24.203(b). Under the proposed modification, in order to maintain automatic roaming for its subscribers after the 4- or 6-year mandatory period, a home market PCS licensee would need to nearly double its coverage of the licensed area. Similarly, AWS licensees are not obligated to meet any construction requirements other than a showing of "substantial service at the end of their 15-year license terms, *see* 47 C.F.R. § 27.14(a). The mobile services "safe harbor" for satisfying this standard is the demonstration of coverage to twenty percent of the population of a provider's licensed service area. *See, e.g., Part 27 Report and Order*, 12 FCC Rcd 10785, 10843, ¶ 112.

Thus, the proposed modification would provide an incentive to carriers building out AWS licenses to do so within far faster time frames – in the case of an AWS EA or CMA licenses, by 2/3 the time frame ordinarily required to build out the license under FCC rules. Furthermore, such construction would double the coverage required under the substantial service requirement.

\*\*\*AWS licensees should not be penalized by the delay in facilities build-out that may be caused by the need to transition incumbent government operations from the AWS spectrum bands.