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April 9, 2010

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:

Notwithstanding the uniform consensus of virtually the entire wireless industry and consumer groups, AT&T and Verizon in recent weeks continue to stand alone in their efforts to preclude wireless consumers from enjoying seamless voice and data coverage.

Specifically, these supercarriers ask the Commission to bless their continued discrimination against or outright denial of roaming service to customers of their competitors. Thus, AT&T continues to urge that “changes in existing roaming rules are not needed,” hiding behind the by now demonstrably untrue assertion that “elimination of the ‘home market’ roaming exception would frustrate facilities-based competition and dis-incent buildout.”¹ Verizon similarly argues that “mandatory in-market roaming would discourage facilities-based competition and eliminate incentives to construct facilities in high cost areas,” and that “there is no record basis to alter . . . the Commission’s policy for in-market roaming.”²

Of course, at this point, such shibboleths are belied not only by the voluminous record in these proceedings,³ but also by findings in the Commission’s recently-adopted National Broadband Plan.⁴ Specifically, the NBP acknowledges:

¹ Letters to Marlene Dortch, Secretary, FCC, from Jeanine Poltronieri, AT&T (April 6, 2010).

² Letter to Marlene Dortch, Secretary, FCC, from Tamara Preiss, Verizon (Mar. 4, 2010) (“Verizon Letter”).

³ *See, e.g.*, Letter to Marlene Dortch, Secretary, FCC from James H. Barker, Counsel for Leap Wireless and Cricket Communications (December 11, 2009) (noting that history,

- That “new competitors such as Leap Wireless have emerged” to compete with AT&T and Verizon “along many dimensions including coverage, device selection, roaming and services,” and that wireless service providers generally are focused “on network upgrades to 3G service”⁵;
- That notwithstanding such efforts, due to “the economies of scale, scope and density that characterize telecommunications networks,” “it is neither economically nor practically feasible “for competitors to build facilities in all geographic areas,” creating a need for “well functioning wholesale markets” and specifically with respect to “wireless roaming policies”⁶;
- That a failure to ensure wholesale market competition “limits the ability of smaller carriers . . . to gain access to the necessary inputs to compete”⁷; and
- That roaming arrangements are necessary to ensure that customers “stay connected when traveling beyond the reach of their provider’s network, and that data roaming in particular is “important to entry and competition for mobile broadband services.”⁸

In short, there now remains little dispute that just and reasonable voice and data roaming obligations remain critical to the continued growth of competitive wireless voice, broadband and other services. Roaming was critical to the facilities-based growth of AT&T and Verizon before each of these carriers was permitted to consolidate to a scale that made it strategically possible for them to “pull up” the roaming ladder for competitors. Roaming can and will continue to complement facilities-based competitive growth, *provided* that the Commission acts to ensure that large numbers of consumers are not arbitrarily and needlessly discriminated against or denied service altogether as they travel around the country.

The Commission must also police backdoor efforts to undercut roaming obligations. For example, understanding that its arguments have faded in the light of sound public policy, Verizon now seeks to dilute the strength of a roaming obligation by falling back to a set of factors that “would be relevant to a determination of whether a request for in-market roaming is

empirical data - including buildout histories of Leap and MetroPCS vs. the national carriers - and economic analysis support the need for automatic roaming and the removal of the in-market exception).

⁴ Federal Communications Commission, Connecting America: The National Broadband Plan (March 2010) (“NBP”). Leap hereby incorporates the NBP into the record of these proceedings by reference, and requests that the underlying record in connection therewith also be incorporated by reference.

⁵ *Id.*, 40.

⁶ *Id.*, 47.

⁷ *Id.*

⁸ *Id.*, 49.

just and reasonable and not unreasonably discriminatory.”⁹ The factors Verizon cites, not surprisingly, replicate the same anticompetitive defects as the current in-market exception, and would permit Verizon to deny roaming services to competitive carriers based on their spectrum assets, the extent of construction using such assets, or the degree to which Verizon would derive “roaming or other benefits” from the arrangement similar to those of the requesting carrier.¹⁰ One fallacy of this transparent stratagem is that it seeks to enshrine constraints on competitors to which Verizon and AT&T themselves were never subject. Indeed, *before* Verizon and AT&T were permitted by the Commission and the Department of Justice to merge to a scale where they are now each net sellers of roaming minutes, these carriers derived great benefit from roaming arrangements, and enjoyed the accompanying flexibility to manage their own spectrum acquisition and construction decisions without linkage to a risk that roaming service costs would be arbitrarily inflated or that service would be denied outright. Now, having outgrown market discipline, Verizon persists in attempts to lay the groundwork for future justifications of anticompetitive conduct.

In the context of eliminating the in-market exception, the Commission should strongly admonish all carriers to provide roaming services on a just, reasonable and non-discriminatory basis. In terms of “reasonableness” inquiries under Sections 201 and 202 of the Act, the Commission should not pre-judge any particular complaint proceeding by enumerating factors that in effect could become harmful presumptions that shield anticompetitive conduct.¹¹ The test of reasonableness should include all applicable factors brought in the context of a specific complaint (which could include, for example, the public interest benefits provided by the requesting carrier). The Commission should guard against any test, standard or presumption proposed by Verizon or AT&T that essentially would serve as a pretext for these carriers to engage in the same discriminatory and anticompetitive conduct that engendered the need for a roaming obligation in the first instance.

In the same vein, while the Commission should not enshrine specific factors into its 201-202 reasonableness inquiry, it should provide a specific pronouncement decrying Verizon’s final gambit. Verizon asks the Commission to “make clear that ‘just and reasonable’ charges and practices for in-market roaming under section 201(b) may differ from those for out-of-market roaming, and that it may be reasonable under section 202(a) in some circumstances to discriminate among roaming partners requesting in-market roaming.”¹² In effect, Verizon asks

⁹ Verizon Letter, 2

¹⁰ *Id.*

¹¹ Indeed, if anything, the agency should emphasize that it will enforce roaming obligations *without* regard to spectrum holdings, licensed geography, or the degree of reciprocal benefit between carriers. The Commission has other avenues to police spectrum warehousing, if such becomes a problem, and it is plain that the nation’s largest carriers have already achieved great benefit from roaming arrangements that they should not now be permitted to deny others.

¹² Verizon Letter, 2.

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the Commission to endorse an explicit starting point that would invite Verizon to charge wildly disparate rates for in-market vs. out-of-market roaming, and/or continue to deny service altogether to some parties but not others in the provision of in-market roaming service. By seeking a Commission imprimatur that these conditions should be identified in advance as permissible or characterized in advance as not *per se* problems, Verizon can continue in effect to block many consumers' access to roaming services for years to come while it litigates the reasonableness of its conduct.

Verizon's brazen request for the Commission to restore in-market discrimination out of the gate would gut the effectiveness of an automatic roaming rule. There may well be a need for further complaint proceedings to discipline the large carriers' discrimination in the provision of roaming services. But the Commission should signal to Verizon in the strongest terms that it stands ready to police anticompetitive conduct, and that it would *not* look kindly upon the type of continuing in-market discrimination that Verizon would have the agency endorse. To this end, Leap suggests that the Commission clarify (i) that a complete refusal to offer a requesting carrier's customers access to in- or out-of-market roaming services would not survive scrutiny under the "just and reasonable" standard, and (ii) that the Commission will not countenance attempts to discriminate based on in- or out-of-market service provision. Consumers are entitled to seamless and reliable wireless service, and should not be held hostage to the market dominance of Verizon and AT&T.

Very truly yours,

- /s/ -

James H. Barker

Counsel for Leap Wireless International, Inc.

cc: Bruce Gottlieb, Office of Chairman Genachowski
David Goldman, Office of Chairman Genachowski
John Giusti, Office of Commissioner Copps
Angela Giancarlo, Office of Commissioner McDowell
Louis Peraertz, Office of Commissioner Clyburn
Charles Mathias, Office of Commissioner Baker
Ruth Milkman, Chief, WTB