



Information Age Economics
4530 Dexter Street, N.W.
Washington, D.C. 20007

Via Electronic Filing

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

February 28, 2014

Re: Notice of Ex Parte Presentation: WT Docket 13-193: Applications of Cricket License Company, LLC, et al., Leap Wireless International, Inc., and AT&T Inc. for Consent To Transfer Control of Authorizations

Dear Ms. Dortch,

This filing presents a rebuttal of two recent filings by AT&T and Leap in the above referenced Docket¹. Both filings ignore the considerable evidence and amply documented explanations of the substantial anti-competitive harm that the acquisition of Leap Wireless by AT&T will cause to the wireless sector of the telecommunications-information-entertainment (T-I-E) industry, as well as to significant segments of U.S. customers. Both AT&T and Leap completely disregard the evidence that IAE (and others) have presented with respect to the contradictions between the Applicants' assertions and their own public statements and documents, as well as their inconsistencies with the data and other material that they have produced at the request of the Federal Communications Commission (FCC).

For example, the Applicants and the consultant commissioned by AT&T (Dr. Mark Israel of Compass Lexecon) have argued and asserted that there is no significant competitive overlap between AT&T and Leap Wireless. Therefore, they wrongly conclude that the proposed transaction would have no competitive consequences. We have clearly and unequivocally demonstrated that this assertion is completely unfounded and cannot be verified by AT&T and Leap. In fact, their claim is demonstrably false on the basis of well-known circumstances and established trends in the U.S. mobile sector that we have identified to the Commission, as well as to AT&T and Leap. The claim is convincingly refuted by evidence produced by the Applicants themselves, including their misinterpretations of the data that they use, e.g., on inter-operator churn, in an effort to support this false assertion.² Applicants

¹ <http://apps.fcc.gov/ecfs/document/view?id=7521073954>;
<http://apps.fcc.gov/ecfs/document/view?id=7521073303>

² This evidence is clearly presented in, for example, IAE's Reply Comments and Additions to Reply Comments (see respectively the Attachment to <http://apps.fcc.gov/ecfs/document/view?id=7520954475>, and <http://apps.fcc.gov/ecfs/document/view?id=7521065001>)



state that Leap Wireless does not compete against the leading national wireless operators, even though this position flies in the face of Leap's own sales and marketing materials and initiatives over many years.

We have also provided evidence of the consistent and persistent anti-competitive behavior of AT&T to frustrate attempts by other operators to obtain "commercially reasonable" roaming rates from AT&T, as they are entitled to receive, according to the Data Roaming Order enacted by the Commission almost three years ago. The validity of this Order has been upheld in litigation. AT&T's anti-competitive attitude and behavior toward providing reasonable cost-based roaming rates to other operators will have an even greater anti-competitive negative impact with the acquisition of Leap, if approved.

Other evidence demonstrating the harmful consequences of this proposed transaction has delineated its considerable specific damage to competition in South Texas and its adverse impact on current Leap subscribers, including Lifeline customers. It has also underlined the further reduction in roaming opportunities for small CDMA operators that would result from the rapid migration of Leap's frequencies to LTE that is planned by AT&T.

Furthermore, we have pointed out the lack of credibility of the statements made by Leap Wireless about the 700 MHz Lower Band Block A license, acquired from Verizon, with respect to its value, both in terms of the arbitrary level of the price assigned to it by Leap in its spectrum swap with Verizon in 2012, and its alleged current "temporarily depressed" valuation. One remark in Leap's filing already referred to, namely that *"Cricket looked forward to working with the Commission to free up more critically-needed wireless capacity for LTE operations in the densely populated market of Chicago, while also readily coexisting with Channel 51 terrestrial broadcast operations in that market and causing no harmful interference to such operations,"* adds to the peculiarity of Leap's position that it only became aware of factors that influence and depress the value of this license AFTER acquiring it in the second half of 2012. In fact, there was an extensive public record, well known by 2012, that had been built up by Block A licensees over the past few years addressing and evaluating solutions to this specific problem.

Substantial, persuasive, fact-based, and data-rich material has been submitted to the Commission that demonstrates the substantial harm that the proposed AT&T/Leap Wireless transaction would wreak on competition in the wireless market and on significant numbers of U.S. consumers. Nevertheless, the Applicants apparently believe that all they have to do in response to this evidence is to ignore the gaping holes, inconsistencies and lack of credibility in their own submissions and simply repeat their initial unsubstantiated claims to the Commission, without ever offering any corrections, modifications, or new evidence in support of their assertions that no harm will occur as a result of this proposed deal.



In summary, the statements, claims and assertions of the Applicants are riddled with misrepresentation, and are not supported by solid evidence. They are contradicted by multiple verifiable facts derived from diverse independent sources. The benefits of the transaction presented by the Applicants are not credible, nor is their characterization of it as harm-free. The Applicants have provided no justification for the FCC to approve this proposed transaction.

In the event that this proposed deal is approved, there must be pro-competitive conditions, imposed by the FCC, in order to alleviate some of the anti-competitive harm.

These conditions should require AT&T to take specific pro-competitive actions *ex ante*, not with conditions that merely require agreement by AT&T to implement them *ex post*.

Experience has demonstrated that a large operator like AT&T has opportunities and the ability to effectively frustrate the intent of FCC-imposed conditions that are agreed to in principle and on paper when it is in its (and this case AT&T's) interest, and is strongly motivated to do so. As we have noted, AT&T has successfully frustrated the intent of the Data Roaming Order for almost three years. Only actions undertaken by AT&T prior to consummation of a transaction involving its acquisition of any part of Leap Wireless' assets will be sufficient to ensure that it will, in practice, respect any conditions that it agrees to on paper. In other words conditions that will only be fulfilled after an acquisition by AT&T is consummated (i.e., *ex post*) are extremely unlikely to have any practical effect in mitigating the harmful consequences of the transaction. The only realistic solution is to impose *ex ante* conditions that must be fulfilled before a transaction involving AT&T, such as its acquisition of Leap Wireless' assets, is allowed to proceed.

In order to protect and preserve the public interest, we present below a list of possible proposed *ex ante* conditions for approval of an AT&T/Leap transaction that would involve the acquisition of any of Leap's assets by AT&T:

Critical Condition 1. AT&T must provide the Commission with its existing roaming agreements with U.S. and Canadian operators under conditions of commercial confidentiality, so that the Commission can determine whether they conform to standards of "commercial reasonableness." The agreements with Canadian operators are relevant to the domestic U.S. roaming market since they include roaming terms and conditions offered to Canadian operators to provide roaming services to Canadian mobile subscribers when in the U.S. Mobile networks in Canada are closer to those in the U.S. than are networks in any other country, since they have been developed within a common planning and operating framework for these two countries. The costs involved in handling Canadian roamers should not differ



significantly if at all from those involved in purely domestic inter-operator roaming³.

Condition 2. AT&T must be obliged to publish a Reference Wholesale Roaming offer, including rates that cover LTE and its 2G and 3G technologies. This Offer must be approved by the Commission, in light of the terms and conditions of AT&T's existing roaming arrangements as furnished under Condition #1.

Condition 3. Roaming agreements based on this Reference offer (Condition #2) must be signed between AT&T and at least two small operators, and one or both of these must include LTE roaming.

Condition 4. AT&T must agree that its wholesale roaming rates will follow a path that parallels the evolution of its retail rates, subject to review at least once a year.

Condition 5. AT&T must reach agreement on the transfer of Leap Wireless' assets in South Texas to another qualified organization.

Condition 6. Furthermore, AT&T must commit not to oppose T-Mobile's proposed acquisition of Verizon's 700 MHz Lower Block A licenses, and the terms of its agreement with Leap Wireless must be modified to ensure the transfer of the latter's Chicago A Block license to T-Mobile, or to another Lower A Block licensee as an outcome of negotiations to be initiated immediately (the proceeds from this transfer can still go to Leap shareholders, but the transfer agreement cannot be subject to delay on the grounds of the license's alleged "temporarily depressed value"). There is at last a realistic prospect for the creation of a national footprint of 700 MHz Lower Block A licenses by operators committed to their exploitation for the benefit of U.S. customers, as IAE has already outlined⁴. The Chicago area is an important market in the U.S. economy. An operator committed to building this footprint should therefore acquire this license in order to maximize the value it will generate. Both AT&T and Leap Wireless have made it clear that they are not interested in this scenario. Furthermore, unauthorized unilateral actions by AT&T have been the major obstacle preventing productive exploitation of Block A licenses even now, six years after they were awarded. Fulfillment of this condition will facilitate the creation of a national 700 MHz Lower Band Block A footprint to support the competitiveness of small operators that acquired licenses at this frequency, but have been hampered in their operational and commercial exploitation of this spectrum asset by the non-interoperability in this Band that was introduced unilaterally by AT&T, without Commission authorization.

³ The Canadian regulator the CRTC (Canadian Radio-television and Telecommunications Commission) considers cross-border U.S.-Canada roaming agreements to be relevant to its investigation of wholesale roaming services in Canada – see Notice of Public Consultation at <http://www.crtc.gc.ca/eng/archive/2013/2013-685.htm>

⁴ IAE, Addition to Reply Comments, *ibid*.



The combination of these conditions will serve two main purposes, namely to ensure that any acquisition of Leap's assets by AT&T will:

- 1) Mitigate and ideally eliminate the obvious harm that would ensue from a complete absorption of Leap Wireless by AT&T and deliver benefits wherever possible,
- (2) Contribute to improving the situation for inter-operator roaming services and competition in the rapidly developing LTE environment in the U.S. mobile broadband market.

Yours sincerely,

Martyn Roetter
mroetter@gmail.com
617 216 1988

Alan Pearce
iaepearce@aol.com
202 466 2654