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

March 6, 2014

Re: Notice of Oral 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,

On Wednesday March 5 Drs. Alan Pearce and Martyn Roetter of Information Age Economics (IAE) conducted a telephone conference call with FCC staff to discuss IAE's filing of February 28[1] that proposed six *ex ante* conditions for approval to be attached to this transaction in the event it is not denied. FCC staff who participated in this call included Hillary Burchuk of the Office of General Counsel, and Susan Singer, Judith Dempsey, Nese Guendelsberger, and Paroma Sanyal of the Wireless Telecommunications Bureau.

We reviewed the value of conditions that are enforced *ex ante* in contrast to the ineffectiveness of *ex post* conditions, which AT&T might agree to, as it has in the past.

We pointed out that President Reagan's warning "Trust but Verify" is in urgent need of modification for application to AT&T and should be restated as, "Enforce, then Verify", and subsequently "Trust and Modify", if and when necessary. This approach is justified since:

1. IAE has clearly and unequivocally demonstrated that this proposed deal will have major harmful anti-competitive, anti-consumer consequences, while the Applicants assert, despite unchallenged evidence to the contrary that they have been unable to rebut, that the consequences of this merger will be beneficial, with no adverse effects. The Applicants' claims are false, and they have failed to verify or justify them, despite ample opportunities to do so since the end of September 2013 when IAE first presented evidence of their fallaciousness.
2. The conditions proposed by IAE will yield public interest and competitive benefits. They will immediately increase competition in the wireless sector by opening up roaming opportunities to small competitive operators, and dramatically reducing unreasonably high -- some say extortionate -- wholesale roaming costs. The

[1] http://apps.fcc.gov/ecfs/document/view?id=7521084407

conditions will also facilitate the productive exploitation of the 700 MHz Lower Band Block A licenses. The time for encouraging this exploitation is particularly propitious, given the: (a) Announcement of T-Mobile's acquisition of Verizon's Block A licenses (that cover almost 50% of the U.S. population), as well as (b) Results of the recent Canadian auction of 700 MHz licenses in which A Block licenses were acquired by the three largest Canadian operators (including Rogers, AT&T's main roaming partner in Canada) that together account for about 25 million subscribers. Thus the potential economies of scale of LTE deployments in the A Block are finally becoming solidly established despite the obstacles placed in their way by the non-interoperability across paired frequencies in the 700 MHz Lower Band introduced unilaterally by AT&T without authorization by the Commission. These benefits will offset, and may even outweigh, the harm generated by the removal of Leap Wireless as a stand-alone and/or independent competitor and roaming partner. Furthermore, anti-competitive harm will also be mitigated by the required divestiture of some of Leap's assets to another operator.

3. The outcome of this transaction also offers the FCC a great opportunity for the agency to reaffirm and re-establish basic regulatory principles that have been eroded, e.g., non-discrimination and interoperability, through the imposition of pro-competitive and pro-consumer conditions that can subsequently be used as revitalized precedents in future and ongoing proceedings.

We discussed how and why *ex post* conditions will in contrast prove to be ineffective in generating the benefits they are designed to deliver and in mitigating or avoiding the harm they are designed to prevent. Several factors that have been observed in the past and remain in force today support this finding, notably:

1. AT&T employs and hires many ingenious, well paid people who find extreme interpretations of conditions it accepts on paper so their intent can be frustrated on some legal or linguistic technicality, or on some alleged technological or operational obstacle that makes a condition supposedly infeasible to implement. For example, in the case of the FCC's Data Roaming Order, AT&T has interpreted the term "commercially reasonable" to apply across a range of wholesale roaming rates it charges in which the highest rate is 50 times or more greater than the lowest.

2. If the potential penalties for violating a condition are minor in comparison to the financial benefits gained by the violation, AT&T will then take the business decision to ignore the condition, and in the worst case incur the penalty. The FCC's capability to penalize an operator for violations of a condition it agrees to is limited by law. The practice of imposing fines of around $1 million or so does not deter a company the size of AT&T from deciding to disregard a condition, when it can calculate that its benefit from this violation vastly exceeds this amount.

3. The small operators who would typically benefit from implementation of conditions agreed to by AT&T can be overwhelmed by the costs they would incur in pursuing

AT&T for failing to live up to them. They may abandon the effort because their legal costs become large enough to reduce their financial ability to invest in their networks and business operations. Ironically the risk of reduced investments is one of the arguments AT&T has used in the past in order to object to a roaming mandate on the grounds that small operators will prefer to use allegedly attractive roaming services rather than invest in their own facilities. Yet it is AT&T's actions that tend to reduce the investment capacity of small operators.

Therefore, we reiterated our conclusion that AT&T must be obliged to take actions before this transaction can be consummated, i.e. to implement *ex ante* conditions. The transaction should not be approved on the basis of an agreement by AT&T to accept conditions whose effects will only be felt, if at all, after this consummation. AT&T will be able, as it has in the past, to ignore *ex post* conditions in practice, or delay their implementation for so long that the benefits these conditions are supposed to generate are never realized, and/or the harm they are supposed to mitigate, or avoid, is not only not prevented but becomes irreversible. For small operators with limited resources who suffer unfairly from the depredations of a huge corporation, such as AT&T, the adage "justice delayed is justice denied" applies.

We also discussed in response to a question from FCC staff why there have been very few complaints about unreasonable wholesale roaming terms offered by AT&T in the almost three years since the Data Roaming Order was enacted in April 2011. We explained that small operators hesitate to challenge and oppose AT&T's behavior and actions not only because of the costs involved and the strain this expenditure (of money and management time) would put on their limited resources, but also because they are intimidated and fear reprisals from AT&T. Small operators inevitably have significant (compared to their total size and scale) business relationships with AT&T. AT&T is therefore in a powerful position to take actions (or not to act) so as to substantially harm the business of a small operator, while behaving more favorably toward those operators that are less apt to challenge its anti-competitive proclivities.

Yours sincerely,

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