

August 13, 2008

BY ELECTRONIC FILING

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

RE: Notice of Ex Parte Filing
WT Docket No. 05-265, *Reexamination of Roaming Obligations of Commercial
Mobile Radio Service Providers*

Dear Secretary Dortch:

Public Knowledge, on behalf of the Ad Hoc Public Interest Spectrum Coalition (PISC)¹, submits this *ex parte* filing to urge the Commission to eliminate the in-market or home exception to its mobile roaming rules so that wireless consumers may receive uninterrupted mobile service when they are outside their provider's coverage area, regardless of the spectrum band on which their wireless provider operates.² If the Commission insists on terminating the roaming rights of wireless providers at some point in the future, we urge the Commission to protect the roaming rights of wireless providers until the host provider seeking to deny roaming to another carrier's subscribers can meet the burden of demonstrating that eliminating roaming rights will not harm wireless consumers.

I. Consumers Have a Strong Interest in Wireless Roaming.

Wireless telecommunications services play an increasingly important role in the lives of American consumers. CTIA estimates that there are 263 million wireless subscribers in the U.S. today, a number that is significantly higher than the number of landline

¹ For purposes of this filing, the PISC includes the Consumer Federation of America, Consumers Union, Free Press, Media Access Project, New America Foundation, Public Knowledge, and U.S. PIRG.

² PISC has also raised the issues of roaming in its Joint Petition to Deny the proposed merger of Verizon Wireless and AllTel. See, Comments of the Public Interest Spectrum Coalition (PISC) on August 11, 2008 in Docket No WT Docket No. 08-95, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.* PISC urges the FCC to remove the in-market roaming exception in this rulemaking proceeding so that it applies industry-wide to all wireless providers, including Verizon and Alltel.

telephone subscribers. The percentage of wireless-only households has increased from 5% to almost 16% in the past four years, and the percentage of consumers who receive all or almost all of their calls on their wireless phone has also increased dramatically.³

Furthermore, the PEW Project on Internet and the American Life has found that young people and African American and Hispanic consumers are among the heaviest users of mobile wireless services. It also found that consumers would find it more difficult to do without their mobile phone than any other communications device.⁴

For these reasons, the Commission's upcoming decision on mobile roaming will have an enormous impact on American consumers.⁵ Unless the Commission amends its current roaming policy, many, if not all American consumers will be unable to make or receive telephone calls in certain areas of their "home" market.

Last year, the Commission took a positive step in clarifying that facilities-based wireless providers must agree to enter into roaming agreements at just and reasonable rates with wireless providers who do not have their own facilities in a market. As a result of that Order, wireless carriers have an obligation to provide automatic roaming service in response to a reasonable request and on non-discriminatory terms and conditions.⁶

However, that order took two steps that disadvantaged mobile consumers. First, while the *Roaming Order* required providers to engage in roaming agreements to other wireless providers outside their service territories, it provided an exception to this roaming policy in areas where the provider seeking the roaming agreement has a license to offer service

³ "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2007;" available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200805.htm>.

⁴ "When asked how hard it would be to give up a specific technology, respondents are now most likely to say the cell phone would be most difficult to do without, followed by the internet, TV, and landline telephone. This represents a sharp reversal in how people viewed these technologies in 2002." See, "Info on the Go: Mobile Access to Data and Information," March 5, 2008, available at <http://pewresearch.org/pubs/753/mobile-access-data-information>.

⁵ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15839 (2007) ("*Roaming Order*" and "*Roaming FNPRM*," respectively); WT Docket No. 05-265.

⁶ Report and Order and Further Notice of Proposed Rulemaking, released on August 16, 2007; published in the Federal Register on August 30, 2007.

in that region.⁷ This exception, called the “home roaming” exception or “in-market roaming” exception, effectively means that providers who own a license in a market may not offer their customers service in geographic regions where they have not yet built out their network. And the “home market” is not limited to areas where the requesting carrier actually provides facilities-based service, but includes “any geographic location where the home carrier has a wireless license or spectrum usage rights that could be used to provide CMRS.”⁸

Second, in creating this “home market” exception, the order effectively removed the traditional Title II protections from roaming in significant portions of the United States. Until last year, CMRS providers that refused to enter into roaming agreements could be subject to enforcement action under Section 208 of the Communications Act -- period. That policy, grounded in the fundamental common carrier obligations of the Communications Act and in effect prior to the *Roaming Order*, provided strong incentives to wireless providers to reach roaming agreements both inside and outside their home markets, and most providers did so. The *Roaming Order*, however, found that roaming for home carriers would no longer be subject to Title II in areas where the home carrier merely holds spectrum usage rights, regardless of the status of the home carrier’s actual network build-out, and removed the threat of enforcement action.

This new policy gives the very largest existing facilities-based network operators – principally AT&T among GSM carriers and Verizon among CDMA carriers – a broad right to deny roaming to competitors with smaller networks simply because the competitor has a license that covers a particular area. If a host carrier fails to provide automatic roaming to a home carrier in those non-home-market areas, the provider requesting roaming can no longer file a complaint against the home carrier because of the decision to remove roaming from Title II.

⁷ See, 47 C.F.R. § 20.12(d) (“It shall be the duty of each host carrier ... to provide automatic roaming to each technologically compatible home carrier, outside of the requesting carrier’s home market, on reasonable and nondiscriminatory terms and conditions.”)

⁸ 47 C.F.R. § 20.3

II. The In-Market or Home Roaming Exception Harms Consumers.

The two changes made in the *Roaming Order* described above could cause great harm to wireless consumers and the wireless marketplace. For example:

- The in-market or home roaming exception means that consumers who subscribe to a competitive wireless provider will be unable to make or receive telephone calls in some areas of a city or town *in which they reside and purchase service*. Consumers who travel outside their “home” region may receive better service (through the Commission’s mandatory roaming policy) than they receive inside their home region (where no roaming is required).
- Consumer confusion would be widespread. Consumers have no idea where one provider’s boundary area begins and ends, particularly because spectrum licenses suitable for the provision of wireless services have a variety of different geographic license boundaries. The reality is that consumers may receive service from their home but not from their place of work; consumers who use their phone while travelling around town (such as salespeople, plumbers, electricians, etc.) may have their calls disconnected while moving from one place to another.
- Elimination of in-market or home roaming also jeopardizes consumers’ access to emergency alerts, which the Commission has identified as one of its highest priorities.⁹ Congress has enacted and the Commission has recently implemented rules governing the provision of emergency alerts. Unless the in-market roaming exception is eliminated, consumers have no guarantee they will receive such alerts when they are travelling. They could receive those

⁹ See, In the Matter of The Commercial Mobile Alert System, Third Report and Order, PS Docket No. 07-287, released August 7, 2008, para 3. (“By adopting these rules, we take another significant step towards achieving one of our highest priorities – to ensure that all Americans have the capability to receive timely and accurate alerts, warnings and critical information regarding disasters and other emergencies *irrespective of what communications technologies they use.*”) [emphasis added]

alerts hours or even days after they were sent when they return to their home carrier's coverage area.

- The in-market roaming exception will also skew the marketplace even more heavily in favor of the two largest providers of wireless services, who also happen to have a head-start in building their networks. AT&T and Verizon have been allowed to aggregate spectrum, licenses and networks through mergers and acquisitions that are too numerous to detail here. PISC recently submitted evidence that these two providers today serve approximately 54% of all wireless providers (59% if the Verizon/Alltel merger is approved).¹⁰ Stated differently, retaining the in-market exception could exacerbate the difficulty that new entrants have in acquiring funding to build out their networks. Continuing the in-market exception will drive consumers to subscribe to one of these two dominant service providers at the expense of new entrants, thereby moving the market in the direction of the wireless duopoly that policy-makers have been trying to move away from for the past 20 years.
- The net result of retaining the in-market or home roaming exception will be higher prices for consumers. The two largest providers also tend to be the providers that charge the highest rates. For instance, a quick check of the “Letstalk.com” web site shows that 8 of the 9 packages priced under \$49.99 per month (not including the data only services) are offered by Sprint or T-Mobile. In contrast, the large majority of price plans offered at \$99 or more are offered by Verizon and AT&T.¹¹

¹⁰ See, Comments of the Public Interest Spectrum Coalition (PISC) on August 11, 2008 in Docket No WT Docket No. 08-95, File Nos. 0003463892, *et al.*, ITC-T/C-20080613-00270, *et al.*, Attachment B.

¹¹ See, <http://www.letstalk.com/plans/shop.htm> (last accessed on August 11, 2008)

III. The In-Market or Home Roaming Exception Cannot Be Justified as a Tool to Promote Build-out.

Incumbent providers incorrectly maintain that eliminating the in-market or home roaming exception would allow new wireless carriers to ride unfairly on their coattails rather than build their own networks. There are several reasons why this argument is unconvincing. First, it ignores that new entrants must pay reasonable charges for roaming and interconnection; the incumbent carrier will be fully compensated for providing this service. To our knowledge, the incumbent carriers have not submitted any evidence to demonstrate that the rates they are paid under current roaming agreements or rules are below their costs.

Second, licensees have strong incentives to build out their own networks even if they are permitted to activate their roaming rights on the network of the host provider. That is because every licensee would much prefer to tailor its own network to its customers' needs and design its own unique service offerings rather than be dependent on the network of its competitor. Just as MCI and Sprint built their own long distance networks despite being allowed to resell the long distance facilities of AT&T, competitive wireless providers will have strong incentives to build their own networks even if permitted to roam on others' networks.¹² In fact, permitting in-market roaming is likely to give them greater resources (i.e., customers and thus revenue) that will make it easier to build their own networks.¹³

¹² Ironically, Verizon itself has acknowledged the point in the context of resisting further conditions to its recently-approved merger with Rural Cellular Corporation. Verizon argued there that enhanced build-out obligations were unnecessary because "coverage is an important source of a mobile telephony provider's competitive advantage," and a carrier has "every incentive" to "expand coverage in its markets." *Verizon-RCC Order*, WT Docket No. 07-208 (rel. Aug. 1, 2008), at ¶ 66. The same logic obviously applies to Verizon's competitors seeking access to roaming capability for their subscribers as a backstop while they continue to expand their own networks.

¹³ In fact, it is possible that the reason certain incumbents are opposed to in-market roaming is that they realize that roaming will speed the day when competitive providers are able to build their own networks and provide greater competition to them. In other words, if the incumbents truly believed that in-market roaming would delay their competitors' build-out, the incumbents would *support* in-market roaming to try to keep them from building their own networks.

Third, even a carrier that has built out its network may need roaming to offer services for a variety of reasons. These include: a) the unavailability of tower sitings, creating holes in coverage; b) the lack of adequate spectrum below 1 GHz, likewise creating coverage issues; c) the lack of enough spectrum in the home market region to provide competitive services or to accommodate increased demand. The existing blanket rule creates problems even for carriers that have already built out their networks.

Fourth, it should be recognized that many license territories can cover huge geographic territories. For instance, the REAG license areas can cover several states and vast amounts of rural territories.¹⁴ To deny service to wireless consumers in these large service areas, such as in the Western states, simply because they happen to be in large license areas is unfair and unnecessary.

The very idea of using the in-market or home exception to prod spectrum licensees to build out is fundamentally flawed. If licensees are “hoarding” spectrum, this problem should be resolved through the license renewal process and widespread adoption of “keep what you use” and other penalties. Roaming, on the other hand, is a powerful pro-competitive tool, one that has become even more necessary in the face of consolidation and absorption of rural carriers (such as Dobson and Rural Cellular Corp.) by dominant providers. If a potentially competitive carrier needs roaming to cover its area while it builds out its network, it would be foolish to cut off access to roaming (and thus prevent the competing carrier from earning revenue) on the grounds that it must build out and incur all the expenses of build out first.

Even though the largest wireless providers argue for maintaining the in-market or home exception, it should be recognized that eliminating the in-market or home roaming exception would benefit *all* consumers, including the consumers of AT&T and Verizon. No wireless carrier operating in the United States has a nationwide footprint using solely its own facilities; *all* mobile carriers rely on roaming agreements to one degree or another to ensure that their customers are served. In some cases, new entrants have built and will

¹⁴ See, <http://wireless.fcc.gov/auctions/data/maps/reag.pdf>.

build networks in areas that the incumbent carriers have not; AT&T and Verizon's consumers should be able to take advantage of the same in-market roaming capability as newcomers.

Furthermore, a transparent and equitable roaming policy will increase the general popularity of mobile phones, reducing customer confusion and easing transaction costs. Universal roaming will thus increase the size the entire wireless market, which will benefit all providers and consumers.

We appreciate the Commission's desire to encourage licensees to build out their networks as quickly as possible. The best route to encourage such build-out, however, is to enforce the existing build-out requirements as written (including the reclamation of licenses from those who fail to meet the build-out requirements). Enforcement of the existing build-out requirements is far better than trying to shoe-horn a second, and more stringent, build-out mandate (through the in-market exception) on new entrants, particularly when it is consumers who will bear the brunt of the harm.

IV. Eliminating the In-Market Roaming Exception is the Simplest and Most Effective Policy for Consumers.

Verizon Wireless has proposed an unusual and counterproductive idea that different roaming requirements could apply to different types of spectrum. According to one press account, the FCC may be considering allowing in-market roaming for some spectrum but not for others, or would require roaming for different amounts of time for different spectrum bands.¹⁵ Differentiating roaming policies based on the spectrum could be extremely perplexing for consumers. When consumers purchase a wireless phone, they generally have no knowledge of the particular spectrum band that the handset uses. The increasing prevalence of dual-mode, or tri-mode, phones makes the spectrum band even less relevant to the consumer's purchasing decision. The in-market exception to the roaming rules is complicated enough; altering the rules depending on the frequency band would make the problem even worse. It is far easier simply to eliminate the in-market

¹⁵ "Just AWS?" Communications Daily, July 17, 2008.

exception altogether. Only then will consumers be able to enjoy the benefits of seamless wireless service.

Furthermore, allowing roaming for a short period of time – such as one year – reflects a complete disregard of the consumer impact. While not having certain service in some locations is difficult, it would be even more frustrating to have service one day and have it taken away the next. To yank away the roaming rights of new entrants after an arbitrary one year period, a time period that provides the new entrant with no realistic opportunity to build its own network, would be extremely arbitrary and cause consumers to feel that they are the victims of a “bait-and-switch” tactic.¹⁶

V. Any Host Wireless Provider Seeking to Eliminate Roaming Should Bear the Burden of Demonstrating No Harm to Consumers.

Nevertheless, should the Commission feel the need to sunset in-market or home roaming at some point in the future, we suggest mandating roaming in-market for a certain number of years (such as five) and establishing a presumption that in-market roaming should be required beyond that date unless the host facilities-based provider can demonstrate that eliminating in-market roaming will not harm consumers. For instance, the Commission could allow the wireless providers to petition for removal of the in-market roaming obligation once there are several facilities-based wireless providers in a market compatible with a particular digital modulation scheme (e.g, CDMA or GSM). If multiple CDMA wireless networks have been built in that market, for example, it is reasonable to assume that a CDMA-based wireless provider is either able to carry calls over its own network, or negotiate a roaming agreement with one of several providers if it has not yet built its own network. In this situation, however, the burden should be on the party seeking to eliminate the roaming rights to demonstrate the existence of multiple

¹⁶ One could argue that terminating in-market roaming after only one year could cause even greater hardship to consumers than the termination of analog television signals, given that there are between 14 million and 20 million households that still receive over-the-air signals but there are some 263 million wireless subscribers that could be harmed by the lack of in-market roaming.

providers and that consumers will not lose service. Such a showing could be made on a market-by-by-market basis, or perhaps could be made on a state-by-state basis.¹⁷

There are several precedents for this type of application process. Section 271 of the Communications Act placed the burden on the Regional Bell Operating Company (RBOC) applying for entry into the long distance market to prove that it met the Act's requirements. Similarly, cable operators bear the burden of overcoming a presumption that there is no effective competition and must show, on a market-by-market basis, that effective competition is present. See 47 CFR § 76.907. A similar process could be implemented here.

VI. Conclusion

We appreciate the Commission's willingness to consider changes to the in-market or home roaming exception. While several ideas are being offered and considered, there is considerable concern that these proposals could jeopardize the consumers' need for seamless wireless service. None of these proposals can match the simplicity and effectiveness of simply eliminating altogether the in-market or home roaming exception. If the Commission nevertheless prefers to adopt a process for "sunsetting" in-market roaming, we suggest that roaming should be required for a minimum number of years (such as five) and that after that point, the presumption should remain in favor of in-market or home roaming unless the provider satisfies its burden of proving that withdrawing in-market roaming will not harm wireless consumers.

Respectfully Submitted,



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¹⁷ The Commission should avoid, however, making this determination on a nationwide basis, since the existence of competitive facilities is likely to vary considerably from market to market.