Written Testimony of

Robert J. Irving, Jr.

Senior Vice President and General Counsel

Leap Wireless International, Inc. and Cricket Communications, Inc.

Before the

U.S. House of Representatives Subcommittee on

Communications, Technology and the Internet

Committee on Energy and Commerce

On

Thursday, May 7, 2009

Chairman Boucher and Members of the Subcommittee, thank you for the opportunity to testify before you on behalf of Leap Wireless International, Inc., and its wholly owned subsidiary, Cricket Communications, Inc. (collectively, "Cricket"). Cricket is a mid-sized wireless provider striving to offer innovative and affordable wireless service to customers that have long been under-served by other wireless telecommunications providers. Cricket is pleased today to offer its perspective on the importance of automatic voice and data roaming to ensure effective competition in the wireless industry. In my testimony today, I will explain why automatic roaming is such an important issue for competition in the wireless industry and will briefly discuss three pending proceedings in which the federal government will have an opportunity to advance wireless competition and ensure that all consumers have access to affordable, ubiquitous wireless coverage.

I. OVERVIEW OF CRICKET'S SERVICES AND SUBSCRIBERS

I would first like to note for the Subcommittee where our company fits within the ecosystem of U.S. wireless carriers and explain briefly why we are unique. Leap is a mid-sized carrier that offers digital wireless service under the Cricket brand. Along with our joint venture partners, we have built a network covering almost 84 million individuals in 32 states, and we are steadily expanding into new markets where the telecommunications needs of the community are not being met by existing providers.

Cricket offers customers unlimited voice and data wireless services for a flat monthly rate without requiring a fixed-term contract, credit check or early termination fees. These services are specifically tailored to bring the benefits of wireless telecommunications to consumers left behind by other providers. And Cricket's unique and diverse customer base reflects the company's commitment to reach the underserved. Hispanics, African-Americans, and other minorities comprise the majority (56 percent) of Cricket's customers, compared with just 29

percent of other wireless carriers' customers. Additionally, 74 percent of Cricket's customers have annual household incomes of less than $50,000 and 62 percent have annual incomes of less than $35,000. In contrast, just 32 percent of other wireless carriers' customers have annual household incomes of less than $50,000. Cricket's customers are also relatively young—50 percent of them are younger than 35 years of age.

The usage patterns of Cricket's customers also differ from other wireless consumers. Company surveys indicate that Cricket's customers use almost twice as many minutes per month as the industry average. Approximately 70 percent of Cricket's customers have "cut the cord" and live in a household without traditional landline phone service, compared to the industry average of 15 percent. And nearly 50 percent of customers subscribing to Cricket's flat-rate wireless broadband service have never had Internet access at home—not even dial-up.

Cricket has demonstrated its commitment to bring the advances of wireless technology to all individuals in other ways besides offering innovative and affordable services. For instance, Cricket recently partnered with the non-profit group One Economy to provide 100 low-income families in Portland, Oregon with computers, modems, and free Cricket wireless broadband service for two years. We have found Cricket wireless phone users receptive to using our wireless broadband service—even though many of these individuals had no previous experience with the Internet—because they have come to know and trust our company and its services. This pilot program has been tremendously successful, not only in promoting broadband access but also in increasing the digital literacy of those participating in the program. For example, one participant reported that he enrolled in an online English course; another said that for the first time she interacted with prospective employers by email; and a 13-year-old girl stated that she was able to learn more online about her kidney disease than her local doctors could teach her.

Cricket hopes to expand this program to reach many more households across the nation that could also benefit from broadband service.

II. AUTOMATIC ROAMING IS ESSENTIAL TO PROMOTE COMPETITION AND PROTECT CONSUMERS

A. Background

Cricket's growth and its commitment to a diverse customer base illustrate the sort of competition that Congress and the FCC have tried to promote, and Cricket's success demonstrates the pro-consumer benefits that small and mid-sized carriers bring to the wireless marketplace. Cricket disciplines prices in every market that it enters, and indeed, our presence spurs other carriers to offer a wider range of choices, including flat-rate pricing plans along the lines that Cricket offers.

Nonetheless, we have been concerned in recent years with the ever-increasing consolidation of spectrum and market share into the hands of the nation's largest carriers, and the consequence that this trend portends for small and mid-sized carriers—and, most important, for consumers. Since 2001, the nation's largest carriers have systematically absorbed dozens of smaller competitors and also acquired the lion's share of spectrum that the FCC auctioned in recent years. Two firms—AT&T and Verizon—now have a majority of market share, both in terms of revenue and subscribers, and four firms account for more than 90% of revenue and subscribers.[1]

Historically, competition flourished in the retail wireless industry during the 1990s and early into this century, driving market participants to reduce prices and explore innovations in

---

[1] *See, e.g.*, *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993*, Thirteenth Report, WT Docket No. 08-27 (rel. Jan. 16, 2009) at Table A-4; P. Cramton, A. Skrzypacz, and R. Wilson, "The 700 MHz Spectrum Auction: An Opportunity to Protect Competition in a Consolidating Industry" (Nov. 13, 2007), at 2.

technology and service. Today, however, the nation's largest carriers now have both the incentive and the ability to foreclose competitors from entering new markets. Cricket and other small, regional, and rural carriers have increasingly encountered abusive and anti-competitive business practices, such as the largest carriers' refusal to provide wholesale automatic roaming at just, reasonable, and non-discriminatory rates, terms and conditions.

Automatic roaming agreements play a critical role in the wireless industry, plugging coverage holes that exist in *every* carrier's network so that consumers can obtain seamless coverage wherever they travel. Reliable service is not simply a marketing tool. Without an automatic roaming obligation, for example, there is no guarantee that consumers traveling outside their provider's network will receive emergency alerts sent via SMS text message. Whether seeking help with car trouble—or even contacting family and receiving critical information in the wake of a hurricane or terrorist attack[2]—consumers "should [not] have to see the words 'No Service' on their wireless device" in a time of need.[3] Consumers simply should not be stranded when they travel away from home.

There is no procompetitive justification to explain the largest carriers' refusal to provide automatic roaming to other carriers on just, reasonable, and nondiscriminatory rates, terms and conditions. They clearly have adopted these practices in an effort to weaken the service offerings of their competitors—in spite of the fact that they have relied on such agreements to expand their own networks. These anti-competitive practices harm all consumers, but they

---

[2] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 15817, 15888 (2007) ("*Roaming Order*"), Statement of Commissioner Deborah Taylor Tate (observing that roaming can benefit "public safety, or even homeland security").

[3] *Id.*, Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Concurring in Part.

disproportionately burden disadvantaged and rural populations, many of whom cannot afford or qualify for the wireless services provided by the nation's largest carriers.

There are several proceedings pending before the FCC in which the agency has an opportunity to reevaluate its current policies regarding automatic roaming, which I will briefly describe. We urge Congress to monitor these proceedings closely, encourage the agency to adopt a pro-competitive approach to roaming, and, if necessary, consider legislative solutions in order to promote the long-term competitive goals for the wireless industry and ensure that all consumers have access to affordable, ubiquitous wireless coverage.

B. 2007 Roaming Order

In 2007, the FCC clarified that automatic roaming is a common carrier service that must be provided on just, reasonable, and non-discriminatory terms and conditions, and found that roaming benefits all wireless subscribers by promoting nationwide, seamless coverage.[4] That clarification was an important victory for consumers and a reaffirmation of the competitive principles that have driven the wireless industry's progress. In the same ruling, however, the FCC limited that determination in two critical respects, both of which seriously undercut the application of the traditional common carrier rule.

First, the FCC crafted an "in-market" exception that allows a carrier to refuse roaming service in any area where the requesting carrier holds a wireless license or spectrum usage rights. This loophole is extremely broad—we lawyers would say that the "exception swallows the rule." More colorfully, the exception is large enough to drive a truck through. No matter how it is described, the exception effectively guts the rule and defeats many of the public interest benefits that the FCC sought to promote in the first place. Several carriers, including Cricket, have filed

---

[4] *See Roaming Order*, 22 FCC Rcd at 15827–28 ¶ 26

petitions asking the FCC to reconsider this in-market exception, and those petitions are still pending.

Second, the FCC limited its ruling to apply only to real-time, two-way switched voice or data services that are interconnected with the PSTN, along with push-to-talk and SMS services. The agency has thus far declined to impose any automatic roaming obligation for non-interconnected services, such as data roaming for wireless broadband Internet services. In 2007 the FCC sought comments as to whether the agency should mandate data roaming, but since that time it has not given any indication whether a data roaming rule is on the horizon.

With respect to the first limitation, the in-market exception runs counter to the FCC's stated goals of "encouraging facilities-based service and supporting consumer expectations of seamless coverage when traveling outside the home area."[5] It is simply infeasible for a carrier to build and maintain facilities that provide service to 100% of its licensed area—particularly where a carrier holds licenses that cover very large regions, such as the Economic Area ("EA") licenses and Regional Economic Area Grouping ("REAG") licenses sold in Auction 66. Even the largest carriers, including Verizon and AT&T, are nowhere close to building out facilities to cover all of their licensed service areas and must therefore rely on roaming to fill holes in coverage. Furthermore, some spectrum licenses remain encumbered by federal government use, and carriers must work with government entities to clear this spectrum before using it to provide retail service.

Nearly all carriers—large and small, rural and urban, incumbent and competitive—have agreed in connection with pending petitions for reconsideration of the *Roaming Order* that the

---

[5] *Id.*, 22 FCC Rcd at 15835 ¶ 49.

FCC should close the in-market loophole.[6] Only Verizon and AT&T support affirmance of the current rule, which is hardly surprising: They clearly have much to gain by protecting their market power, and the in-market exception allows them to extract above-market prices from other carriers at the expense of consumer welfare, or even to deny roaming outright to the customers of competing carriers.

Verizon and AT&T argue that an automatic roaming obligation without any geographic restrictions would encourage smaller carriers to "free-ride" on carriers that have already invested in facilities construction.[7] But this argument is belied by the facts. Cricket, for example, has a demonstrated history of aggressively building out its licenses, despite the fact that it has limited resources and capital in comparison to the nation's largest carriers. Moreover, it is self-serving for these two carriers to argue that Cricket and other small and mid-sized carriers must build facilities reaching every corner of their licensed areas when they themselves still have not built out significant portions of their own networks—and despite that they have had more than 20 years to do so and received their original licenses for free. Other national carriers recognize that automatic roaming is necessary to fill in coverage gaps and agree that the in-market exception does not make sense.[8] Even with an automatic roaming obligation, carriers still have the incentive to expand their own network while using roaming agreements to supplement service in the interim, just as the largest carriers have historically done.

---

[6] Carriers and organizations supporting elimination of the in-market exception include Leap, MetroPCS, Sprint, T-Mobile, United States Cellular Corporation, SpectrumCo (a joint venture that includes cable operators Comcast, Time Warner, and Cox), SouthernLINC, the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASCO"), and the Rural Telecommunications Group.

[7] *Id.* at ¶ 49.

[8] *See, e.g.*, Sprint Nextel Corp. Petition for Reconsideration (Oct 1, 2007) at 9–10; T-Mobile USA, Inc., Petition for Partial Reconsideration (Oct. 1, 2007) at 2–3.

It is important to stress that Cricket and other carriers are not asking the FCC to adopt regulations that would prevent carriers from charging competitive rates and reaping a profit from their investments. Instead, Cricket and others merely urge the FCC to revaluate an ill-considered loophole that effectively allows the largest carriers to adopt anti-competitive practices and stymie the efforts of small, regional, and rural carriers to expand their network and offer consumers a competitive alternative. In the end, the in-market exception forces consumers—particularly low-income and underserved consumers—to pay more for less coverage, or in some cases to lose coverage altogether.

The same of course is true for data roaming. A roaming obligation for data services will enhance the ability of small, regional, and rural carriers to enter the data services market and effectively compete against the largest carriers. Such a rule would also promote facilities investment and improve the provision of data services to poor and rural communities caught on the wrong side of the digital divide. Automatic roaming for data services—again, with no "in-market" exceptions—is integral to future wireless competition.

C. Verizon-Alltel Merger

In addition to the FCC's 2007 Roaming Order, which requires further tailoring, and a data roaming proceeding, which needs to move forward, I would like to discuss briefly the roaming conditions that the FCC created at the time it approved the Verizon-Alltel merger in 2008. The FCC subjected its approval to several roaming conditions, which Verizon itself proposed, in order to ensure that the merger would not lead to anti-competitive harms.[9] Among other things, the FCC conditioned approval of the transaction on Verizon's commitment to give roaming partners the option of selecting either the Verizon or Alltel agreement to govern all

roaming traffic with the merged company, and to keep the rates provided in those agreements frozen for at least four years after the consummation of the merger.[10]

Since the merger, Verizon has attempted to circumvent the limited conditions that the FCC imposed in order to free itself of any restraints on the exercise of its market power. Specifically, Verizon has advanced a reading of those merger conditions that would render meaningless its commitment to honor rates for four years, because Verizon argues it can terminate existing roaming agreements within that time frame and then demand whatever non-rate conditions it chooses.

Cricket has asked the FCC to clarify that the four-year commitment applies to all terms of existing roaming agreements—not just the rates. This understanding is consistent with a plain and ordinary reading of the merger conditions and Verizon's own statements in filings with the FCC, and indeed it is confirmed by the statements of three Commissioners who voted to approve the merger.[11] Verizon has offered no legitimate policy or other justification to support its reading of the conditions—because there is none. The FCC adopted these conditions to protect consumers from potential abuses of market power and they should be strictly enforced.

I raise the Verizon-Alltel merger proceeding because it demonstrates the importance of adopting regulatory safeguards to prevent the nation's largest carriers from abusing market power. This transaction is one of many over the past several years that have consolidated the nation's scarce spectrum assets into the hands of a few, and as a result, these carriers have even

---

[9] Atlantis Holdings LLC and Cellco Partnership d/b/a Verizon Wireless, Memorandum Opinion and Order, 23 FCC Rcd 17444, 17525 ¶ 178 (2008) ("*Verizon-ALLTEL Order*").

[10] *Id.*

[11] *Id.*, Statement of Commissioner Deborah Taylor Tate; *id.*, Statement of Commissioner Michael J. Copps, Concurring in Part, Dissenting in Part; *id.*, Statement of Commissioner Jonathan S. Adelstein, Concurring in Part, Dissenting in Part.

greater incentive and ability to adopt anti-competitive practices, including the denial of automatic roaming, which will harm consumers in the long run. It is critically important that Congress and the FCC remain vigilant to ensure that the wireless industry is competitive and that all consumers have access to wireless service at just, reasonable, and non-discriminatory rates.

D. Broadband Stimulus

Finally, with regard to broadband deployment, Congress recently appropriated $4.7 billion to establish a Broadband Technology Opportunities Program ("BTOP") for awards to eligible entities to develop and expand broadband services to unserved and unserved areas and improve access to broadband by public safety agencies. Cricket enthusiastically supports these goals. Because of its long-term focus on offering innovative and affordable wireless service to customers that have long been under-served by other wireless telecommunications providers, Cricket is well-situated to help expand broadband access to low-income individuals and other disadvantaged groups and is looking forward to working with the NTIA and the FCC in implementing this program.

The NTIA (in consultation with the FCC) is currently determining the rules for participating in the Broadband Technology Opportunities Program, and Cricket has encouraged these agencies to take into account whether households have the ability to pay for services that may otherwise be available in their area when defining "underserved." Limited financial resources currently prevent millions of Americans from enjoying the myriad benefits that broadband service has to offer.

Cricket also believes that the NTIA should refrain from imposing unnecessary restrictions relating to transmission speeds that would only stymie broadband adoption and prevent innovative companies who are ideally situated to carry out the objectives of the BTOP from participating in this critically important program. Furthermore, for policy reasons

discussed above, Cricket agrees with those parties who have urged the NTIA to impose an automatic roaming obligation for both voice and data services as a condition to receiving funds under the program.

* * * *

Chairman Boucher, I thank you and the Subcommittee again for allowing me to express the views of Leap and Cricket on these important topics.

Committee on Energy and Commerce
U.S. House of Representatives

Witness Disclosure Requirement - "Truth in Testimony"
Required by House Rule XI, Clause 2(g)

Your Name: ROBERT J. IRVING, JR.

	Yes	No
1. **Are you testifying on behalf of a Federal, State, or local Government entity?**		X
2. **Are you testifying on behalf of an entity that is not a Government entity?**	X	

3. **Please list any Federal grants or contracts (including subgrants or subcontracts) that <u>you personally have received</u> on or after October 1, 2006:**

N/A

4. **Other than yourself, please list which entity or entities you are representing:**
CRICKET COMMUNICATIONS, INC.
LEAP WIRELESS INTERNATIONAL, INC.

5. **If your answer to the question in item 2 in this form is 'yes,' please list any offices or elected positions held or briefly describe your representational capacity with the entities disclosed in the question in item 4:**

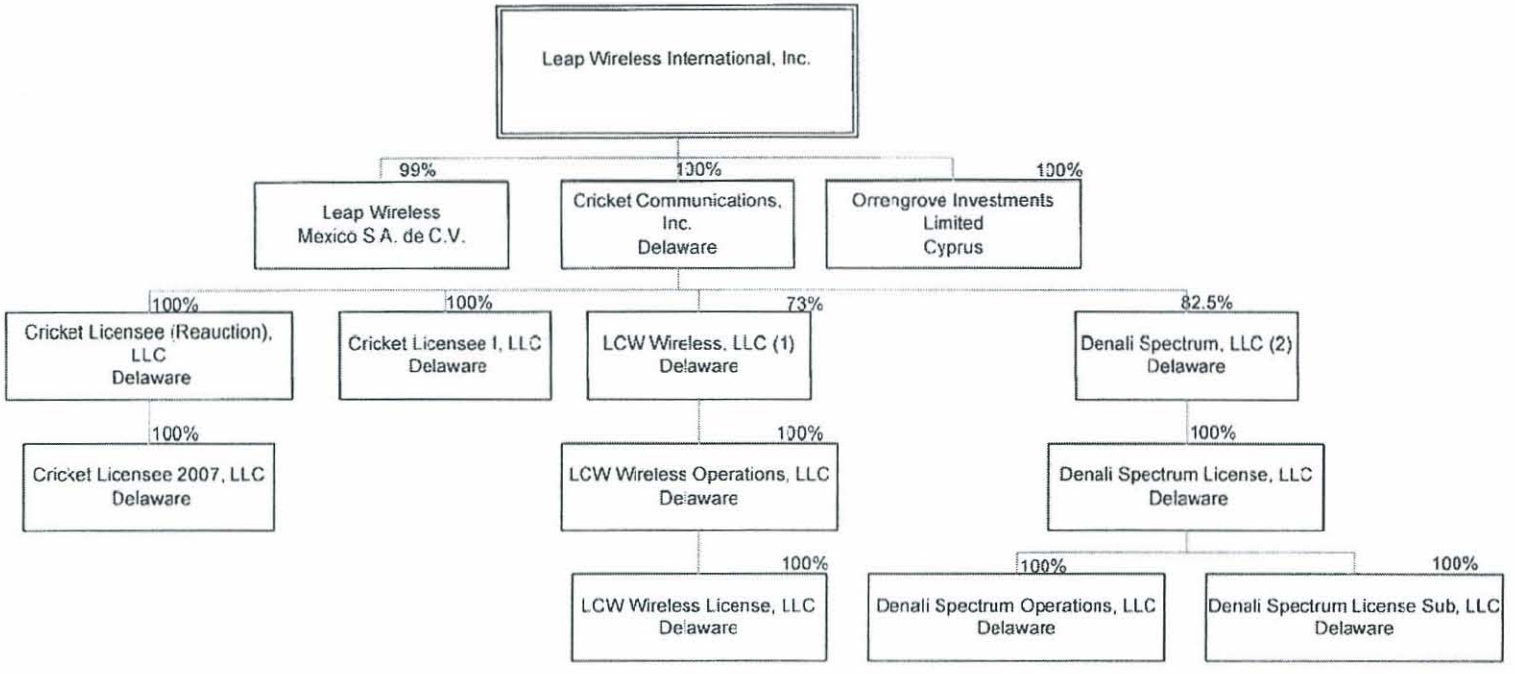
SENIOR VICE PRESIDENT, GENERAL COUNSEL & SECRETARY

	Yes	No
6. **If your answer to the question in item 2 is 'yes,' do any of the entities disclosed in item 4 have parent organizations, subsidiaries, or partnerships that you are not representing in your testimony?** SEE ATTACHED ORGANIZATION CHART	X	

7. **If the answer to the question in item 2 is 'yes,' please list any Federal grants or contracts (including subgrants or subcontracts) that were received by the entities listed under the question in item 4 on or after October 1, 2006, that exceed 10 percent of the revenue of the entities in the year received, including the source and amount of each grant or contract to be listed:**

N/A

Signature: Robert J. Irving Jr. **Date:** May 4, 2009



December 31, 2008

Robert J. Irving, Jr.
Senior Vice President and General Counsel
Leap Wireless International, Inc.

As Senior Vice President, General Counsel and Secretary of Leap Wireless International, Inc., Mr. Irving is responsible for the supervision of the company's legal and government affairs matters. Mr. Irving joined Leap in 1998 and was appointed Senior Vice President, General Counsel and Secretary in 2003.

Prior to joining Leap, Mr. Irving was an attorney for Rohr, Inc., an aerospace corporation, headquartered in Chula Vista, CA (now Goodrich Corporation). Previously, he was vice president, general counsel and secretary for IRT Corporation, a company that designed and manufactured x-ray inspection equipment, also headquartered in San Diego, CA. Before joining IRT, Mr. Irving was an attorney at Gibson, Dunn & Crutcher, based in their San Diego, CA office.

Mr. Irving received a Bachelors degree from Stanford University, a Masters in Public Policy from Harvard's Kennedy School of Government and a Juris Doctor from Harvard Law School, where he graduated *cum laude*. Mr. Irving was admitted to the California Bar Association in 1982.