

**PUBLIC VERSION**

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of )  
 )  
WORLDCALL INTERCONNECT, INC. )  
a/k/a EVOLVE BROADBAND, )  
Complainant. )  
 )  
v. )  
 )  
AT&T MOBILITY LLC )  
Defendant )

File No. EB-14-MD-011

**WCX REPLY LEGAL ANALYSIS**

MATTHEW A. HENRY  
[henry@dotlaw.biz](mailto:henry@dotlaw.biz)  
W. SCOTT McCOLLOUGH  
[wsmc@dotlaw.biz](mailto:wsmc@dotlaw.biz)  
McCOLLOUGH|HENRY PC  
1250 S. Capital of Texas Hwy Bldg 2-235  
West Lake Hills TX 78746  
512.888.1112 (V)  
512.692.2522 (FAX)  
Counsel for Complainant

To: The Commission

## WCX REPLY LEGAL ANALYSIS

Worldcall Interconnect, Inc. a/k/a Evolve Broadband (“WCX”) submits this Reply Legal Analysis as required by rule 1.726(c). For reference purposes and ease of use WCX started with its original Legal Analysis and then edited and updated so it constitutes a single comprehensive document that incorporates reply points to AT&T’s legal contentions.

### **I. Introduction.**

In order to avoid substantial repetition WCX incorporates its proposed Reply Conclusions of Law, and relies on its proposed Reply Findings of Fact. Further, this Reply Legal Analysis is limited to *legal issues*. The parties have significant disagreements over policy, economics and some technical facts and conclusions. WCX presents its perspective on these matters in its Second Amended Complaint, and associated Declarations and now its Reply and Reply Declarations, along with its proposed Reply Findings of Fact. Non-legal issues will not be addressed in this Reply Legal Analysis unless they directly relate to a legal question. When this is so WCX will simply state its ultimate factual position and then show the legal result that must flow as a consequence of this factual or policy position, and why.

Although there are a host of disputed issues, the current *legal* issues are relatively few as far as WCX can determine, although some have subparts.

### **II. Summary of AT&T’s Legal Arguments Addressed in this Reply**

Although AT&T pretends WCX has not provided sufficient documentation it does not seriously contest the proposition that WCX does or will provide “interconnected voice and data” or interconnected messaging. Nonetheless, AT&T claims it has no obligation to provide

“automatic roaming” (defined in rule 20.12(a)(2) and mandated by 20.12(d)).<sup>1</sup> AT&T’s focus and argument in the merits entirely pertain to “data roaming” under 20.12(e).

AT&T contends that it has “numerous” other agreements with “similar” terms, and the existence of these “arms-length” agreements provide conclusive evidence that the terms it has proposed to WCX are reasonable.<sup>2</sup> Indeed, AT&T argues that these other agreements render its proposed terms to WCX “presumptively commercially reasonable.”<sup>3</sup> AT&T also asserts that WCX has many alternative potential sources of supply for roaming and therefore AT&T in fact has no obligation to provide roaming at all.<sup>4</sup>

AT&T also claims that WCX’s opposition to AT&T’s usage limits and restrictions reflects an effort to illicitly obtain “back-door resale” and/or “*de facto* resale”<sup>5</sup> In addition, AT&T levels an *in personam* attack on Mr. Feldman as an excuse to justify its hard-nosed negotiating position and its desire for vague but punitive audit and suspension terms.<sup>6</sup>

AT&T has not directly responded to WCX’s concerns about AT&T’s network management, content inspection and application identification practices, or what AT&T’s proposed contract says or implicitly authorizes. WCX continues to contend that while AT&T has the right to protect its network from harm and manage congestion, its express and implied terms would allow it to inspect content, engage in application identification and priority decisions and perform other acts in the name of network management that are unrelated to legitimate network security and congestion control.

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<sup>1</sup> AT&T Legal Analysis pp. 41-43.

<sup>2</sup> AT&T Legal Analysis pp. 3-4 provides one of the many places where AT&T makes this argument.

<sup>3</sup> Id.

<sup>4</sup> AT&T Legal Analysis pp. 14-15.

<sup>5</sup> “Back-door resale” appears more than 52 times in AT&T’s Public Answering submission, and more are in the Confidential. “Piggy-backing” and “*de facto* resale” also warrant citation as “*passim*.”

<sup>6</sup> AT&T Answer pp. 3, 18; AT&T Legal Analysis pp. 4-5; Meadors Decl. ¶54.

WCX already dealt with many of these subjects as part of the Second Amended Complaint and Legal Analysis. Now that we have AT&T's position the prior presentation will be supplemented and honed to rebut AT&T's claims in its Answer package.

### III. Legal Issue 1: What is the *legal* test for “commercially reasonable”?

AT&T argues on Legal Analysis p. 22 that “the only question in this case is whether AT&T's proposal is commercially reasonable.” (emphasis in original). They are incorrect at several levels. First, since WCX offers interconnected services AT&T has automatic roaming obligations as well, and those are subject to a higher standard. WCX addresses that point below. Second, AT&T cannot so easily dismiss WCX's terms out of hand. The roaming rules contemplate that each side will propose terms, and the question is which of those should be used or whether other terms should be imposed instead. This was so under the regime established in the *Voice Roaming Reconsideration Order* (¶¶37-40); indeed under the automatic roaming rules the Commission established the presumption that the requesting carrier's request is reasonable.<sup>7</sup> But the complaint rules for data roaming also contemplate that both parties would have proposals or offers, and the Commission could select between them or take other action. *Data Roaming Order* ¶¶79, 80.

AT&T, however, really misses the mark when it says that the “only issue” is AT&T's proposed terms. The question is whether AT&T has *violated the roaming rules*. The remedy is promulgation of prescribed terms or resolution of the disputed issue after application of the appropriate standard and consideration of the relevant factors. *See Data Roaming Order* ¶79.<sup>8</sup>

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<sup>7</sup> Rule 20.12(d) incorporates the presumption.

<sup>8</sup> “For example, if negotiations fail to produce a mutually acceptable set of terms and conditions, including rates, the Commission staff may require parties to submit on a confidential basis their final offers, including price, in the form of a proposed data roaming contract. These submissions would enable Commission staff, if it so chose, to resolve a particular roaming dispute *in which a violation of our rules is found* by ordering the parties to enter into a data roaming agreement pursuant to the terms of the complainant's commercially reasonable final offer or to otherwise

That is why WCX detailed its claimed violations ¶¶41(A)-(E) in the Second Amended Complaint. In this case there is no doubt AT&T has violated the roaming rules in several ways. But one violation is profound and another is *prima facie* evident. AT&T has not offered automatic roaming to support WCX's interconnected services on AT&T's LTE network, and AT&T refused to accept WCX's presumptively reasonable request for automatic roaming to support WCX's interconnected services on AT&T's LTE network. Second Amended Complaint ¶41(B) and (D). WCX, of course, contends there were a host of other violations as well.

There has been a violation. The "only question" is what terms should be prescribed. Staff has the full range of alternatives described in the *Voice Roaming Reconsideration Order* and the *Data Roaming Order*.

The *Data Roaming Order*<sup>9</sup> listed 17 factors that would guide the determination of reasonableness. Several of these factors facially address a refusal to offer roaming arrangements rather than how to assess a specific term in a roaming agreement in the context of a complaint involving two carriers that have not ever had a roaming agreement and could not successfully negotiate one. Still, one can discern some guiding substance. The Commission is presently proposing to use the "commercially reasonable" paradigm in a related context, and in similar ways.<sup>10</sup> But as far as WCX can determine it has not ever explicated an actual legal definition of commercial reasonableness and what that means in the context of two disputing parties with no prior terms and no mutually assented terms. AT&T admits the Commission has not been

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rely on the submitted offers in determining an appropriate remedy. *In cases where no violation of our rules is found*, the complainant would be free, but not obligated, to enter into a roaming agreement on the proffered terms of the would-be host." (emphasis added, footnote omitted)

<sup>9</sup> *Data Roaming Order*, 26 FCC Rcd at 5452-53, ¶ 86.

<sup>10</sup> The recent *Open Internet NPRM* sought comment on "whether there are sources of law or practice the Commission should rely upon in explaining the meaning and application of [the commercially reasonable] standard." In re Protecting & Promoting the Open Internet, 29 FCC Rcd 5561, 5603, ¶119 (2014). The Commission also proposed to promulgate a series of appropriate "factors" that would guide case by case adjudication, and cited to the *Data Roaming Order* as precedent for this approach. *Id.* at 5604-5608, ¶¶1224-34.

presented with any data roaming complaints under rule 20.12(e), so the parties are in agreement there is no decisional precedent beyond the *Data Roaming Order*. Nonetheless, AT&T claims that the seventeen factors “clearly define the commercially reasonable standard.”<sup>11</sup> Yes, we have seventeen factors, but they are not exclusive. But more important there was no overarching statement or definition. The only remaining guideposts are what AT&T calls “the core policy goals of widespread availability of data roaming and the need to encourage facilities-based investment.” That characterization, as usual, is a bit off. The Commission articulated the core policy goals a bit differently in *Data Roaming Order* ¶9: “Specifically, we sought to ensure that consumers have access to seamless coverage nationwide, to provide the incentives for new entrants and incumbent providers to invest and innovate by using available spectrum and constructing wireless network facilities on a widespread basis, and to promote competition for commercial mobile broadband business by multiple providers.”

AT&T’s entire presentation puts several thumbs on the “investment” side of the balance to the point that it tips. AT&T’s terms (and its preferred “balance”) entirely frustrate the other core goals: (1) seamless coverage nationwide, (2) seeking new entrants, (3) innovation, and (4) promoting competition by multiple providers. WCX will address all of the factors that apply, and all of the core goals.

AT&T correctly recognizes that many of the seventeen factors in *Data Roaming Order* ¶86 are not in play in this complaint. AT&T Legal Analysis p. 18. Although the parties do take a fair number of swipes at each other, AT&T is correct that negotiating conduct is not (or should not be) an issue in this proceeding. Nor is technological compatibility in dispute. That leaves the factors dealing with what AT&T calls “marketplace considerations.”<sup>12</sup> WCX disputes AT&T’s

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<sup>11</sup> AT&T Legal Analysis p. 15.

<sup>12</sup> AT&T Legal Analysis p. 18.

effort to favorably spin the remaining factors through that characterization, but it appears that the parties now agree that the applicable factors for assessing the respective proposed terms, or any contemplated terms that will be imposed, are:

- whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement;
- whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements;
- whether the providers involved have had previous data roaming arrangements with similar terms;
- the level of competitive harm in a given market and the benefits to consumers;
- the extent and nature of providers' build-out;
- significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages;
- whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service;
- the impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality;
- whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available;
- events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage; and,
- other special or extenuating circumstances.

WCX will summarize its position on each of these.

- whether the terms and conditions offered by the host provider are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement;

WCX has shown that it can not provide a viable service and earn a reasonable margin that could be used to reinvest under AT&T's terms. The contract lacks mutuality. Indeed, if WCX were to execute that document it might more fairly be said to have signed a suicide pact. WCX would have considerable difficulty supporting its customers' anticipated roaming use of old-style, traditional mobile voice and messaging service, and could not provide wireless broadband Internet service given the prices and restrictions. And WCX certainly could not be on the cutting edge of innovative, new features, capabilities and functions. The AT&T terms are in fact so unreasonable as to WCX that they are tantamount to a refusal to offer roaming.

- whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements;

The evidence is uncontested that WCX and AT&T had not had any prior roaming arrangements between them at all. This factor does not provide any assistance.

- whether the providers involved have had previous data roaming arrangements with similar terms;

WCX and AT&T had not had any prior roaming arrangements between them at all, much less any with similar terms. AT&T claims it has similar agreements with other carriers, and makes a host of representations about those other agreements. But it has to date not provided any of them. Neither WCX nor the Commission can assess AT&T's representations to independently determine whether what the AT&T declarants claim is valid.

- the level of competitive harm in a given market and the benefits to consumers;

WCX's terms impose no competitive harm and would benefit consumers by affording them the ability to have seamless nationwide connectivity, and access to innovative, cutting edge services. AT&T's terms impose significant harm; indeed they impose restraints of trade. AT&T's terms would result in a lack of seamless nationwide connectivity to WCX's customers because they are not viable. WCX's customers do not have that today, and would not have it tomorrow.

- the extent and nature of providers' build-out;

WCX has presented evidence that it has built-out approximately 35% of its licensed area, and is committed to further expanding its network. AT&T questions whether this is so, but presents absolutely no evidence of its own that WCX has not, in fact, met the Commission's build-out requirements. The Commission has already accepted that WCX has built out the areas it claims to have constructed since it has included those areas in the National Broadband Map and designated them as being served by WCX.

- significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages;

AT&T, of course, claims WCX should just go out and build another nationwide network. That is obviously economically infeasible and unrealistic. AT&T has the head-start advantage in the licensed areas where WCX is seeking roaming.

- whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service;

WCX seeks roaming for areas outside of its licensed area. WCX is not seeking roaming inside its home area.

- the impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality;

WCX has shown that unless it secures roaming on reasonable terms it will be hindered in its ability to finish financing the rest of its home area build-out. The Commission

recognized that lack of out-of-home-area roaming could have this effect in *Data Roaming Order*. On the other hand, if WCX does secure reasonable roaming terms then it will have a viable product to seek to its home area customers. It will receive revenues and attract capital funds that can be used to complete its build-out.

- whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available;

AT&T claims there are a host of readily available present alternative host providers and a plethora of fully functional devices that work on any and all networks. This is flatly wrong for a number of reasons.

- events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage; and,

There are circumstances outside of WCX's control that to impact its need for roaming, and in particular roaming from AT&T. Despite AT&T's denial, there are no present alternative suppliers for out-of-home-area roaming, and while some may ultimately come around they are on the distant horizon. There are no other compatible networks, and there are few, if any, multi-band devices WCX can obtain so its users could roam using other frequencies or bands.

- other special or extenuating circumstances.

WCX's has one licensed area in the middle of Texas. The area is rural. The population is sparse (which reduces scale opportunities), but the inhabitants are very mobile. A large percentage commutes to Austin, Houston or San Antonio (all places where AT&T has compatible licenses) every day, or for school, medical care or for shopping. They will use WCX service while away from the home area in significant measure, far beyond the paltry amount AT&T offers to allow. The combination of a small rural footprint with higher than average movement out of that footprint constitutes "special and extenuating circumstances."

The Commission emphasized that the foregoing factors are not exclusive. It appears that AT&T and WCX concur that another useful perspective is an assessment whether the agreement can be said to meet *both* parties' needs, considering their own notions of self-interest. At least that is what Orszag Declaration ¶48 (p.18) says when he admits that "commercial reasonableness" is met by an agreement that both parties can say is in their "mutual self-interest." AT&T's Legal Analysis, however, seems to take issue with this "economic" criterion on page 19, when it argues with WCX's similar expression (albeit stated more legalistically) that a "commercially reasonable" contract provision "must be fair to both sides and serve the overall public interest. It cannot unduly prejudice either one or the other." WCX will let AT&T resolve

its own internal disputes, but the fact is that if one applies Orszag's test then AT&T's proposed terms miserably fail. Roetter Reply Declaration pp. 5-6. Those terms certainly advance AT&T's own narrow interests, but they do not in any way do anything favorable for WCX or the public interest, nor do they meet the actual goals the Commission articulated. To the contrary, they are specifically designed to frustrate all of them.

AT&T's notion of self-interest has always been the elimination of roaming. The Commission overruled AT&T's objection to the automatic roaming rules and then the similar objection to the data roaming rules. AT&T has now turned its efforts to nullifying them through the operation of its so-called "commercially reasonable" terms.

AT&T repeatedly touts all of its extant agreements (which AT&T characterizes, purports to describe, and extols – but never produces for inspection). AT&T repeatedly contends that its "numerous" other agreements with "similar" terms, are evidence of "arms-length" negotiations and therefore its allegedly similar offer to WCX must be reasonable. Indeed, AT&T argues that these other agreements render its proposed terms to WCX "presumptively commercially reasonable."<sup>13</sup> But that is not correct. The "presumption" only applies to the signatories of a specific agreement and applies when one party is seeking to have a challenged provision overturned or not enforced. The challenging party has the burden of showing why the challenged provision is not reasonable. This presumption was created to "discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement." (*Data Roaming Order* ¶81, emphasis added) There is no presumption that terms accepted by Carrier A are presumptively reasonable as against Carrier B in a complaint proceeding brought by Carrier B. While Carrier B likely should be ready to explain why those terms are problematic – either in

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<sup>13</sup> AT&T Legal Analysis pp. 3-4 provides one of the many places where AT&T makes these arguments.

general or given Carrier B's particular circumstances – there is no “presumption” that Carrier B must overcome. The rules provide that this case will be decided “on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case.”<sup>14</sup>

AT&T has not, in any event, proven that its other agreements actually contain the same or similar terms. The AT&T witnesses say they do, but the actual text of the other agreements has not been supplied and AT&T has objected to supplying copies of them. Neither WCX nor the Commission can simply rely on the bald assertion that its other agreements say what is claimed, or that the context is sufficiently comparable. AT&T has most certainly made no effort to prove that its proposed terms in particular meet WCX's particular needs or (using the Orszag test) somehow in WCX's “self-interest” or that of the residents in WCX's licensed area.

Further, AT&T's witnesses uniformly give the impression that all of the wireless carriers with these roaming agreements are giddy with joy over the terms they obtained, and are enjoying extraordinary success using them.<sup>15</sup> Reality, however, does not support this impression. AT&T's “happy campers” are in fact irate and almost uniformly support Commission intervention.

T-Mobile is so dissatisfied it filed a request for declaratory ruling seeking Commission intervention.<sup>16</sup> Many wireless carriers have joined in the T-Mobile's request for relief, and several have expressed other concerns as well. Blooston Rural Carriers Reply Comments in Docket 05-265 state that “The data roaming market has not developed as the Commission intended when it adopted its Data Roaming Order in 2011, and a lack of access to data roaming services on commercially reasonable terms and conditions is hampering the ability for small,

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<sup>14</sup> This identical sentence appears in both rule 20.12(d) (automatic roaming) and 20.12(e) (data roaming).

<sup>15</sup> AT&T Answer Introduction p. 3, AT&T Legal Analysis pp. 8, 9, Orszag Decl. ¶89.

<sup>16</sup> The Declarations accompanying T-Mobile's Petition for Declaratory Ruling and Reply Comments were included in Second Amended Complaint pp. 89-158.

mid-tier and regional carriers to compete in the marketplace as the FCC intended.”<sup>17</sup> They further opine that “A persistent inequity in bargaining power has left small and regional wireless carriers with little hope of securing data roaming agreements, much less reasonable data roaming terms and conditions. In those instances where small and regional carriers have been successful in securing data roaming rights, the likelihood that most carriers have been forced to accept data roaming terms and conditions on a “take it or leave it” basis rather than true arms-length negotiation means that existing agreements cannot be used as a basis for what is commercially reasonable in future agreements. That only preserves the status quo, and overwhelming competitive advantages enjoyed by the Big Two. For this reason, the Blooston Rural Carriers also agree with T-Mobile and commenters who believe that the terms of existing data roaming agreements cannot and should not be viewed as a benchmark for what is deemed commercially reasonable in future roaming negotiations.”<sup>18</sup>

The Competitive Carriers Association Reply Comments in Docket 05-265 present a similar perspective: “The growing disparity in negotiating leverage between the largest carriers and all other carriers has allowed the largest carriers to exploit the ambiguity in the “commercially reasonable” standard for data roaming. ... AT&T and Verizon are conspicuously alone in opposing T-Mobile’s proposed guidance. They endeavor to paint a rosy picture of the data roaming marketplace. However, AT&T and Verizon’s arguments and claims do not withstand empirical scrutiny.”<sup>19</sup> “[I] industry experience demonstrates that the standard adopted is not working as intended. All commenters, aside from AT&T and Verizon, denounce the wholesale roaming market as uncompetitive. Several commenters describe the challenges they

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<sup>17</sup> Blooston Rural Carriers 05-265 Reply Comments, p. 2. (Doc. 91).

<sup>18</sup> *Id.* p. 3.

<sup>19</sup> Competitive Carriers Association Docket 05-265 Reply Comments, p. 2. (Doc.92).

face in obtaining data roaming in regions where it is most needed, which suggests that AT&T and Verizon have used the ambiguity in the “commercially reasonable” standard to impede negotiations and to preclude roaming arrangements. In other instances, AT&T and Verizon have used their dominant positions as providers of nationwide roaming capabilities to strong-arm small carriers into executing data roaming arrangements containing commercially *unreasonable* terms. Competitive carriers also have suffered the same experience that T-Mobile describes in the Petition of being forced in certain cases to limit or cap roaming because of the exorbitant rates charged by the home carrier.”<sup>20</sup> “[T]he imbalance between the two largest carriers and all other carriers has been exacerbated by increased consolidation in the industry. As a result, AT&T and Verizon continue to have little incentive to negotiate fair or reasonable roaming rates. Several commenters cite the harm that this vast disparity in the marketplace ultimately has on competition and consumer choice, and ask the Commission to restore a more balanced dynamic to data roaming negotiations among parties that otherwise have disparate market power.”<sup>21</sup> “AT&T and Verizon each claim that the fact that no complaints have been filed regarding data roaming is indicative of the absence of any issues for the Commission to address. This picture painted by the two dominant players in the market, however, is far removed from the reality that other carriers have experienced.”<sup>22</sup> “More critically, the record demonstrates that smaller carriers have had no choice but to accept unfavorable data roaming terms from these “must-have” roaming partners in order to offer a competitive service to customers. The fact remains that carriers with a modest facilities-based footprint must rely on roaming partners for broader coverage. And with consumers’ expectation that wireless services must be available on a

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<sup>20</sup> Competitive Carriers Association Docket 05-265 Reply Comments, pp. 4-5 (emphasis in original, notes omitted). (Doc. 92).

<sup>21</sup> *Id.* pp. 5-6.

<sup>22</sup> *Id.* p. 7.

nationwide basis, AT&T and Verizon have become essential roaming partners for virtually all competitive carriers.”<sup>23</sup>

The foregoing is not the reception one would expect from a group of happy campers enjoying wild success using agreements they happily, freely and willingly signed “at arms length.” None of the companies complaining about the situation in Docket 05-265 came close to confirming Orszag’s unsupported assertion (Orszag Decl. ¶89) that they are all doing just fine and are overjoyed with the whole thing. They present an entirely different picture: uniform resentment and dissatisfaction by small companies who had no choice but to capitulate to adhesion contracts containing excessive prices and stultifying, restrictive terms.

AT&T’s test for “commercial reasonableness” and its legal contentions conflict. On the one hand AT&T says WCX should be forced to accept the same or similar terms that other carriers have. AT&T says the existence of these agreements gives rise to a presumption of reasonableness, and so the terms are by definition commercially reasonable and thus must be imposed on WCX in uniformity with all the others. But on the other hand AT&T says that the “commercially reasonable” test is expressly not common carrier in nature, and “unlike common carrier regulation” there is “substantial room for individualized bargaining and discrimination in terms.”<sup>24</sup> How can the commercially reasonable test command uniformity but require individuality? If the agreements are supposed to be individualized, then why does AT&T insist WCX should have taken the same agreement all others supposedly have?

AT&T’s extant agreements do not deserve any real consideration, much less a presumption of reasonableness. That is why AT&T, ultimately, seeks to entirely avoid the entire topic in both Docket 05-265 and this proceeding through procedural tactics. It tells the

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<sup>23</sup> *Id.* p. 9 (notes omitted).

<sup>24</sup> AT&T Legal Analysis p. 16.

Commission that T-Mobile's declaratory ruling petition should be dismissed because it should be a complaint handled by the Bureau,<sup>25</sup> but simultaneously tells the Bureau that WCX's complaint should be dismissed because it should be a rulemaking before the full Commission.<sup>26</sup>

Black's Law Dictionary defines "commercially reasonable" as meaning "conducted in good faith and in accordance with commonly accepted commercial practice."<sup>27</sup> Commercial contracts often resort to the term but sometimes do not provide a definition. Courts have construed what "commercially reasonable" was intended to mean in those contracts. They have looked to the Black's definition, and sometimes the Uniform Commercial Code. The general consensus is that "commercially reasonable" (1) has both objective and subjective components; (2) requires a case-by-case and fact-specific inquiry; (3) contracts that require undefined "commercially reasonable" conduct "industry standards" are not automatically and exclusively incorporated without further factual evaluation of the parties' circumstances and the

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<sup>25</sup> AT&T Docket 05-261 Opposition, pp. 5-6 ("But even if it were the case that a single GSM carrier is T-Mobile's only "fallback" option in a given area, the Commission's rules already permit T-Mobile to file a complaint and make its case if it has difficulty securing what it contends are commercially reasonable terms."; pp. 9-10 ("The rules thus rely primarily on marketplace negotiations, with a complaint process as a backstop, which allows the Commission to use the adversary process to resolve concrete disputes in a context where it can assess case specific facts and where both parties can bring to the Commission's attention all of the circumstances and factors that they believe are relevant."), p. 19 ("T-Mobile has not placed the terms or facts concerning any specific agreement before the Commission; its claims of market power are entirely in the abstract. Any assessment of market power in the data roaming marketplace, however, would require an analysis of numerous agreements across the industry, including an understanding of the factual context in which each individual agreement was negotiated, and none of that is in the record here. Accordingly, the Commission could not suddenly declare existing agreements not to be presumptively reasonable in future complaint proceedings on T-Mobile's sweeping and unsupported blanket premise that existing agreements do not reflect competitive conditions.... Equally important, the Commission's rules already adequately account for T-Mobile's concerns. If a provider is unable to obtain an agreement with commercially reasonable terms, the rules provide a remedy: it may file a complaint with the Commission."); AT&T Docket 05-261 Reply Comments, p. 6 ("None of these parties has provided any evidence that today's roaming rates retard effective competition or that the Commission's existing standards and complaint procedures would be inadequate to address a genuine issue if it arose.")

<sup>26</sup> AT&T Summary, pp. 4, 23 ("WCX's position here is in actuality an attempt to rewrite the data roaming rules in ways that the Commission expressly rejected in the *Data Roaming Order*, and its complaint is not an appropriate vehicle for such changes to the rules.")

<sup>27</sup> Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., available at <http://thelawdictionary.org/commercially-reasonable/>.

consequences of compliance with those standards;<sup>28</sup> and (4) whether something is or is not “commercially reasonable” is ultimately a question of fact.<sup>29</sup>

AT&T criticizes WCX’s proposed analytical tools, saying they come from “thin air.”<sup>30</sup> Judicial opinions and the seminal legal dictionary can hardly be so likened. AT&T also disparages them because they came from judicial opinions interpreting contracts after a dispute. But the very purpose of this proceeding is to “find” the appropriate contract terms, when the parties cannot mutually reach a voluntary agreement, and we are using the process selected by the Commission for that eventuality. Besides, AT&T proffers all those as-yet unseen “arms-length” contracts, says they have similar terms and wants the Commission to bless them *in absentia* and then impose them on an unwilling party based entirely on AT&T’s vigorous assertion that they are commercially reasonable. Ultimately, AT&T’s position boils down to “commercially reasonable means exactly what AT&T says it means, no more, no less.”<sup>31</sup> Or, perhaps, “commercially reasonable means shut up and sign.” WCX respectfully disagrees.

A “commercially reasonable” contract provision must be fair to both sides and serve the overall public interest. It cannot unduly prejudice either one or the other. In our context, WCX and its customers must be able to actually use roaming, and the terms cannot unreasonably prevent WCX from competing in the market. AT&T of course should be fairly compensated and the arrangement cannot prejudice AT&T’s ability to provide retail service to its own customers.

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<sup>28</sup> The *Open Internet NPRM* correctly asked about the impact industry standards and practices should have on the determination of commercial reasonableness. 29 F.C.C. Rcd 5608, ¶34 (“How, if at all, should the fact that conduct is an industry practice impact the application of the ‘commercially reasonable’ rule? What should be treated as an ‘industry practice’?”).

<sup>29</sup> *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 763-766 (7th Cir. 2010); *L. W. Matteson, Inc. v. Severson Envtl. Servs.*, 831 F. Supp. 2d 608, 616-617 (W.D.N.Y. 2011); *Microboard Processing, Inc. v. Crestron Elec., Inc.*, 2011 U.S. Dist. LEXIS 33000 (D. Conn. Mar. 29, 2011), adopting *Microboard Processing, Inc. v. Crestron Elecs., Inc.*, 2011 U.S. Dist. LEXIS 33109, \*18-\*23 (D. Conn. Jan. 11, 2011); *LeMond Cycling, Inc. v. PTI Holding, Inc.*, 66 Fed. R. Evid. Serv. (Callaghan) 305, 2005 U.S. Dist. LEXIS 742 \*14-15 (D. Minn. Jan. 14, 2005).

<sup>30</sup> AT&T Legal Analysis p. 19.

<sup>31</sup> Apologies to Lewis Carrol.

The ultimate goal should be a net benefit to society and the entire user base. The overarching policy should protect *competition* not individual *competitors*, and ensure that it serves the ultimate goals espoused in §151 of the Act: “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communications.”

WCX submits that its terms best meet the above test. WCX also submits that AT&T’s proposed terms manifestly do not.

**IV. Legal Issue 2: Does AT&T’s duty to provide automatic roaming under Title II apply to this case?**

The second major legal issue to be decided is which parts of rule 20.12 apply. The parties agree that rule 20.12(e) applies but have disagreements over the proper application of the “commercial reasonableness” standard, and whether their respective proposals meet that standard.<sup>32</sup> But WCX contends – and AT&T denies – that this case also involves rule 20.12(a)(2) and (d) “automatic roaming.” WCX asserts that since it is a “technologically compatible, facilities-based CMRS carrier,” and since WCX offers interconnected voice and data and text-messaging then AT&T is required to provide “automatic roaming” “on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202.” WCX therefore further asserts that since WCX is technologically compatible “the Commission shall presume that [WCX’s] request ... for

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<sup>32</sup> AT&T has not indicated that there are or may be any disputed issues under rule 20.12(e)(ii)-(v). WCX and AT&T are technologically compatible and there are no generational differences. To date there do not appear to be technical feasibility issues.

automatic roaming is reasonable pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202.” AT&T has the burden of rebutting this presumption as part of this adjudication.

That means WCX’s proposals are presumed reasonable, and AT&T has the burden of showing they are not. Further, it means AT&T has the burden of showing that its proposed terms are reasonable under §§ 201 and 202 – at least insofar as they relate to WCX roaming for interconnected voice and data or text-messaging, “taking into consideration the totality of the circumstances presented in each case.”

Even though AT&T’s proposed terms have provisions that are obviously designed to implement rule 20.12(a)(2) and (d) automatic roaming, AT&T, as expected, vigorously challenges the proposition that it has any automatic roaming obligations with regard to its LTE network. AT&T contends that its “LTE data” terms can and must only be evaluated under the “commercially reasonable” standard.

As a factual matter, AT&T does not truly dispute (at least it provides no controverting evidence) that WCX currently provides “interconnected” voice and data and text-messaging. The voice and data services operate in real-time, are two-way switched, are interconnected with the public switched network, and they utilize an in-network switching facility that enables WCX to reuse frequencies and accomplish seamless hand-offs of subscriber calls. The services are interconnected because WCX’s subscribers have the capability to communicate to or receive communication from all other users on the public switched network. They have regular phone numbers, and can call and be called from all other subscribers on the public switched network.<sup>33</sup> WCX seeks to obtain roaming from AT&T so that WCX’s customers can use their

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<sup>33</sup> Feldman Reply Declaration p. 6, n. 3, p. 25 n. 17, pp. 59, 81; Roetter Reply Declaration p. 13.

interconnected voice, data and text-messaging services when they are away from WCX's home area, and do so by roaming on AT&T's LTE data network. Under the plain terms of rule 20.12(a)(2) and (d) WCX is entitled to "automatic roaming."

AT&T contends that WCX completely misreads the rules. AT&T says it will only be providing data roaming, and only 20.12(e) will apply, even when a WCX customer receives a regular phone call while roaming on AT&T's network. That cannot be. AT&T accomplishes this neat trick by focusing on the nature of its network, not the nature of the service and what AT&T will be doing rather than the WCX service being received by the customer. But that is not what the rules contemplate or say, either in the definitions or the two substantive rules imposing duties on AT&T.

This is best exemplified by taking recourse to the definition of "automatic roaming" itself, found in 20.3 and then described in 20.12(a)(2):

[20.3] Automatic Roaming. With automatic roaming, under a pre-existing contractual agreement between a subscriber's home carrier and a host carrier, a roaming subscriber is able to originate or terminate a call in the host carrier's service area without taking any special actions.

[20.12(a)](2) Scope of automatic roaming. Paragraph (d) of this section is applicable to CMRS carriers if such carriers offer real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls. Paragraph (d) of this section is also applicable to the provision of push-to-talk and text-messaging service by CMRS carriers.

"Automatic roaming" means that after the home carrier (WCX) and the host carrier (AT&T)<sup>34</sup> have an agreement WCX's "roaming subscriber" will be "able to originate or terminate a call in the host carrier's service area without taking any special actions." This is plain English stuff, but it obviously refutes AT&T's claim that a WCX customer who makes or

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<sup>34</sup> WCX will always be the home carrier and AT&T will always be the host carrier. AT&T has made clear that it will never roam on WCX's network.

receives a regular phone call while roaming on AT&T's LTE network will somehow be using "data roaming." Plainly incorrect; it will be "automatic roaming" instead.

AT&T never disputes that – regardless of the air interface it may be using – it is, in fact, a "CMRS carrier," at least in part. While it is certainly true that AT&T has non-interconnected retail products, primarily wireless broadband Internet access, AT&T also does not deny that it also and separately "offer[s] real-time, two-way switched voice or data service that is interconnected with the public switched network<sup>35</sup> and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls." AT&T clearly also provides retail text-messaging. Since it indisputably offers interconnected service voice and data and text messaging, AT&T clearly falls within the "scope" of 20.12(a)(2) "automatic roaming" and has been since the Commission promulgated that rule over AT&T's strenuous objection.<sup>36</sup>

Let us now turn to the substance in 20.12(d)"

[20.12](d) Automatic roaming. Upon a reasonable request, it shall be the duty of each host carrier subject to paragraph (a)(2) of this section to provide automatic roaming to any technologically compatible, facilities-based CMRS carrier on reasonable and not unreasonably discriminatory terms and conditions, pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. The Commission shall presume that a request by a technologically compatible CMRS carrier for automatic roaming is reasonable pursuant to Sections 201 and 202 of the Communications Act, 47 U.S.C. 201 and 202. This presumption may be rebutted on a case by case basis. The Commission will resolve automatic roaming disputes on a case-by-case basis, taking into consideration the totality of the circumstances presented in each case.

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<sup>35</sup> Rule 20.3 defines "Public switched network" as [a]ny common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services." The unambiguous qualifying criterion is use of regular telephone numbers for addressing and routing purposes, resulting in the ability to send calls to or receive calls from, the rest of the NANPA addressable universe.

<sup>36</sup> One must wonder why AT&T so opposed promulgation if AT&T really thought it was always exempt from the scope of 20.12(a)(2).

AT&T is “subject to paragraph (a)(2).” Thus, it must “provide automatic roaming to any technologically compatible, facilities-based CMRS carrier.” The parties agree WCX is technologically compatible, facilities-based and a CMRS carrier. AT&T, as a matter of law, must provide automatic roaming to WCX.

AT&T must provide automatic roaming to WCX, and is obliged to do so on a common carrier basis. *Voice Roaming Order* ¶1 directly and specifically held that “automatic roaming is a common carrier obligation for commercial mobile radio service (CMRS) carriers.” Indeed, automatic roaming is itself a CMRS service because roaming meets the statutory definition. Note 19 to ¶8 reminded that this was some new discovery that occurred in 2007. As far back as 1996 “[t]he Commission noted that roaming meets all the statutory elements of commercial mobile radio service, and therefore, of common carriage: “roaming satisfies the statutory elements of CMRS, and is thus a common carrier service, because it is (1) an interconnected mobile service (2) offered for profit (3) in such a manner as to be available to a substantial portion of the public.” *Citing Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9469 ¶ 10 n. 30 (1996) (“*Interconnection and Resale Obligations Second Report and Order*”) and §332(d)(1). *Voice Roaming Order* ¶ 23 could not be any more specific: “We clarify that automatic roaming is a common carrier service, subject to the protections outlined in Sections 201 and 202 of the Communications Act.” AT&T is misreading a fundamental aspect of the precedent: automatic roaming, in and of itself and standing alone, is a common carrier, CMRS “service” that AT&T has the duty and obligation to provide “to any technologically compatible, facilities-based CMRS carrier” – here, WCX.

It is true that AT&T's automatic roaming duty extends only to certain things. But once again, AT&T misapprehends what those things are. According to AT&T the trigger is what AT&T does and how it does it. Not true. Once AT&T falls within the "scope" its duty depends on what the *compatible carrier* offers. Specifically, if WCX is seeking roaming in order to support a *WCX customer's use of a WCX-provided interconnected service* – voice, data or messaging – then AT&T must provide "automatic roaming." *Voice Roaming Order* ¶28 illustrates this point: "... in order to enable its subscribers to receive service seamlessly, [WCX] may make an automatic roaming request on behalf of its subscribers."

The key to the obligation is the nature of the service received by the end users – the ones on whose behalf WCX makes the automatic roaming request, and whose expectations for seamless nationwide service underlay the Commission's promulgation of the automatic roaming obligation to begin with. If the end user is receiving "real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls" then it is a "automatic roaming covered" service.

WCX's voice service should be noncontroversial, as should messaging. Yet AT&T denies that even those are not 20.12(d) "automatic roaming" and are instead somehow 20.12(e) "data roaming" merely because AT&T will be using its LTE network. The use of an LTE air interface, and the fact that it allows for "broadband," however still does not remove the fundamental aspect and question. The end user will still be employing and receiving "real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls."

WCX suspects that AT&T ultimately knows where this is leading, and the real reason AT&T so steadfastly denies an automatic roaming obligation. Their opposition is not driven by some opposition to automatic roaming for WCX's VoLTE-based voice service or even messaging. Setting aside the price dispute, AT&T would likely accept that these fall within the automatic roaming obligation. It is that other, remaining interconnected service: interconnected WCX's data and specifically the M2M offerings WCX is planning to roll out. AT&T is well aware that, as Feldman Reply Declaration p. 6, n. 3, p. 25 n. 17, pp. 59, 81 and Roetter Reply Declaration p. 13 explain, the standards for LTE-based M2M devices expressly provide that the addressing and routing mechanism will squarely meet the test. They will have a regular telephone number. They can "call" any other device on the public switched network and "be called" by any other device on the public switched network. Thus, they will be supported through an "interconnected" service. *See* 20.3 Definitions of "Interconnected"<sup>37</sup> and "Interconnected service."<sup>38</sup> Further, they fall comfortably within the 20.12(a)(2) "Scope of automatic roaming" because they are part of a "real-time, two-way switched voice or data service that is interconnected with the public switched network and utilizes an in-network switching facility that enables the carrier to re-use frequencies and accomplish seamless hand-offs of subscriber calls." The information exchanged between the M2M device and the other

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<sup>37</sup> "Interconnection or Interconnected. Direct or indirect connection through automatic or manual means (by wire, microwave, or other technologies such as store and forward) to permit the transmission or reception of messages or signals to or from points in the public switched network."

<sup>38</sup> Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from all other users on the public switched network; or

(b) For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B).

A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.

end-point will be exchanged in real time; information will flow both ways; the communication can be initiated from either end (by “dialing” a traditional phone number). The underlying wireless transmission network will be “cellular” in that it uses and re-uses shared frequencies, and the “calls” can be “handed off” from one tower/transceiver to another as the device moves out of the range of one tower and into the range of another, what is known as “in-network switching.”

AT&T will pretend to be struck dumb with astonishment by the proposition that “data” devices and services can be supported by anything other than “data roaming.” But this is no wild idea, and it is very old indeed. “Data roaming” is for “commercial mobile data service” as defined in 20.3.<sup>39</sup> Something is a “commercial mobile data service” only if it is *not interconnected with the public switched network*. The classic example is wireless broadband Internet access.<sup>40</sup> Long before the Commission classified wireless broadband Internet access as “not CMRS because not interconnected” and many years prior to the 2011 promulgation of the 20.12(e) “data roaming” obligation, the Commission and industry comfortably understood that there were “data services” that *are* CMRS because they *are* interconnected. Every CMRS Competition Report talks about “data” services, and speaks to both interconnected and non-

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<sup>39</sup> [20.3] Commercial mobile data service.

- (1) Any mobile data service that is not interconnected with the public switched network and is:
  - (i) Provided for profit; and
  - (ii) Available to the public or to such classes of eligible users as to be effectively available to the public.
- (2) Commercial mobile data service includes services provided by Mobile Satellite Services and Ancillary Terrestrial Component providers to the extent the services provided meet this definition.

<sup>40</sup> See *Data Roaming Order* ¶¶6-7. The Commission placed great weight on the fact that wireless broadband Internet access was not “interconnected” in *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, 5916, ¶41 (2007) (“*Wireless Broadband Internet Access Classification Order*”). (“41. As discussed below, we find that mobile wireless broadband Internet access service is not a ‘commercial mobile radio service’ as that term is defined in the Act and implemented in the Commission’s rules. We find first that mobile wireless broadband Internet access service does not fit within the definition of ‘commercial mobile service’ because it is not an ‘interconnected service’ within the meaning of section 332 of the Act and the Commission’s ‘commercial mobile radio service’ rules.”) (emphasis added)

interconnected. At first the roaming rules “covered” only “voice, but in 2000 the Commission decided extended the application of its roaming rules to “interconnected data” services.<sup>41</sup> Any astonishment by AT&T would be either feigned or the product of short memory. When Cingular and AT&T sought merger approval in 2004 the Applicants claimed that mobile “data” was a separate market from mobile “voice.”<sup>42</sup>

AT&T is purposefully confusing things to avoid proper classification under the rules. It is true – as WCX explained in the complaint – that WCX’s “interconnected” services are provided entirely through IP-based mechanisms. The voice offer is VoLTE, and the text/data services take the form of applications, which is not how other carriers have traditionally offered text-messaging. But that makes no difference. Users employed wireless data service as the underlying physical layer mechanism for a host of applications and services, many of which have included some Internet Protocol, for quite some time. But that did not make it not interconnected, not CMRS and not eligible for roaming. It is also true that the Commission has not squarely addressed whether LTE-based interconnected, real-time services (like VoLTE) are subject to the 20.12(a)(2) and (d) “automatic roaming” rule or the 20.12(e) “data roaming” rule. But words have meaning, and none of the definitions exclude any otherwise interconnected service based merely on protocol and bandwidth differences. LTE and IP are not blessed with some magic pixie dust that causes any exemption from any rule, or requires placement in another rule that by

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<sup>41</sup> Third Report and Order and Memorandum Opinion and Order on Reconsideration, *In the Matter of Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 15 FCC Rcd 15975, 15981, ¶18 (2000).

<sup>42</sup> Memorandum Opinion and Order, *In the matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21557-21558, ¶72 (2004) (“the Applicants argue that there are two relevant product markets that should be used to evaluate this transaction: interconnected mobile voice services and stand-alone mobile wireless data services. According to the Applicants, the markets for interconnected mobile voice services and stand-alone wireless data services are separate product markets because consumers are unlikely to substitute wireless voice services for wireless data services in response to a small but significant and non-transitory price increase for stand-alone wireless data services.”)

its own terms cannot apply. Interconnected services cannot be force-fit into a rule which applies only to non-interconnected service.

WCX's interconnected services squarely meet the requirements in the applicable definitions for rule 20.12(a)(2) and (c). When WCX users roam on AT&T's network they will be using LTE, but WCX's voice/data and text-messaging services will be real-time, two-way switched, and interconnected with the public switched network. AT&T cannot credibly deny that LTE utilizes an in-network switching facility that enables frequency re-use, or that its LTE network accomplishes seamless hand-off. WCX users roaming on AT&T's LTE network will still be "interconnected" because they will have the capability to communicate to or receive communication from all other users on the public switched network. They will still have and use their regular phone numbers, and will be able to call and be called from all other subscribers on the public switched network. Rules 20.12(a)(2) and (c) squarely apply.

Nor does it matter that AT&T will not know that an interconnected service is being used rather than a non-interconnected service, that the communications will look like non-interconnected related communications, that AT&T will not perform many of the same functions it has historically undertaken with regular roaming voice calls or text-messages or that AT&T will not see or do anything differently than when WCX's customer is surfing the web or receiving an e-mail. It matters not what AT&T knows; what matters is the classification. If WCX is providing and the user is employing an automatic roaming "covered" service, then AT&T is providing, and must provide, automatic roaming.

AT&T has taken the position that regardless of what WCX's user is doing AT&T is still providing a "roaming arrangement for commercial mobile data services." WCX disagrees, and contends that the scope of AT&T's duties, and the applicable legal standard, are determined from

an end-user perspective, not from the perspective of the wireless provider supplying roaming-based network connectivity. AT&T may *want* to say it is not supporting seamless connectivity for an interconnected service, but it cannot escape the fact that LTE roaming will be used as an input to interconnected service. If a WCX user device is roaming on AT&T's LTE network and makes or receives a "call" addressed using a regular telephone number, then AT&T is providing "automatic roaming" not "commercial mobile data service roaming." This is so even if AT&T never knows that it occurred.

AT&T also takes issue with WCX regarding exactly what it will be providing to WCX and the WCX customer. AT&T is not going to be providing "commercial mobile data service" to either WCX or WCX's customer.<sup>43</sup> AT&T will not be providing "mobile broadband Internet access" to either WCX or WCX's customer.<sup>44</sup> AT&T will be providing *roaming* – a separate product from the retail product – which will take the form of raw transmission between AT&T and WCX so that WCX can then provide services to its customer when the WCX customer is not in WCX's home area.<sup>45</sup> To be blunt, regardless of whether WCX's customer is using an interconnected service or a non-interconnected service, AT&T's role is relatively simple: it will

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<sup>43</sup> Rule 20.12(e) by its own terms makes this clear. AT&T is a "facilities-based provider of commercial mobile data services." That is why it is "required to offer roaming arrangements to other such providers." The rule obviously contemplates that AT&T will be providing a "roaming arrangement" – not "commercial mobile data service" – to another provider of commercial mobile data service, WCX in this case.

<sup>44</sup> "Broadband Internet access service" is defined in rule 8.11(a) and "Mobile broadband Internet access service" is defined in rule 8.11(c). AT&T will not be providing anything at "retail." AT&T's roaming input by itself will not provide the "capability to transmit data to and receive data from all or substantially all Internet endpoints."

<sup>45</sup> This is so because of the actual functions that will be performed. AT&T will authenticate the user's device on the network and then route all of the digital information directly to an interconnection point with WCX. AT&T will not be providing the voice functionality. WCX will. AT&T will not be responsible for getting the call to a tandem or the entity that terminates the call. WCX will. AT&T will not do any call database lookups (*e.g.* LERG or LNP). WCX will. AT&T will not have any responsibilities for text-messaging functionality. WCX handles all of that. AT&T will not be providing Internet access or performing DNS, and will not be responsible for getting the user's communications to or from the "Internet." WCX will.

be providing “telecommunications”<sup>46</sup> to WCX. The only legitimate question is whether the telecommunications must be provided on a common carrier basis. If so, then AT&T will also be providing a telecommunications service.

Wireless providers must offer automatic roaming on a common carrier basis. Automatic “roaming is a common carrier service because roaming capability gives end users access to a foreign network in order to communicate messages of their own choosing.”<sup>47</sup> Thus, AT&T will be providing a telecommunications service to WCX. Its terms must be “reasonable and not unreasonably discriminatory.”

It is true that “automatic roaming, as a common carrier obligation, does not extend to services that are classified as information services or to other wireless services that are not CMRS.”<sup>48</sup> If WCX offered only wireless broadband Internet access or other wireless services that are not CMRS, then AT&T would have to provide “data roaming” but it would have no common carrier obligations and only rule 20.12(e) would apply. But WCX *does* offer interconnected CMRS services, and they are telecommunications services, not non-interconnected information services. Rule 20.12(a)(2) and (d) therefore do apply.

[REDACTED]

[REDACTED]

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<sup>46</sup> AT&T will be doing nothing more than providing “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” See 47 U.S.C. § 153(50). WCX will be the “user” in this context. WCX will take the telecommunications, perhaps along with telecommunications supplied by others, and glue them together with self-supplied inputs. Then WCX will provide finished services to its users. Some will be telecommunications services, and some will not.

<sup>47</sup> *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd. 15817, ¶1 (2007), citing *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9468-69 ¶ 10 (1996).

<sup>48</sup> *Id.* ¶60, citing to Wireless Broadband Internet Access Declaratory Ruling, 22 FCC Rcd at 5906 ¶¶ 11-12.

[REDACTED]

When a WCX roamer makes a or receives a call or sends or receives a text AT&T will be doing exactly the same things in exactly the same way as it does when a WCX roamer uses a mobile browser to surf the web. There will be no different economic cost, no different functionality, no greater or lesser burden, and no technical difference as far as AT&T is concerned. It will not know and has no reason to know. The legal standards will be different, but everything else will be the same. This is an interesting turn of events, but it cannot change the rules themselves.

WCX's proposal solves this by treating them the same for pricing and operational purposes. AT&T will charge a per MB or GB price, because all it will be doing is hauling bytes. There are not separate "interconnected" and "non-interconnected" prices. That does not change the fact, however, that all of AT&T's proposals must still be viewed from a Title II lens and it is under a higher legal burden because WCX users will be using interconnected CMRS services while they roam. The tests are stricter. They must be "more reasonable" and there is a nondiscrimination obligation. WCX submits that AT&T's terms, as shown below, are not commercially reasonable, but they spectacularly fail the Title II test. Only WCX's terms can pass

[REDACTED]

muster under Title II. Since they meet the higher standard WCX's terms necessarily also meet the lower commercially reasonable standard.

**V. Legal Issue 3: AT&T cannot inspect the content of WCX users' communications, or engage in network management practices beyond application-neutral congestion management.**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] AT&T purposefully mischaracterizes WCX's position on surveillance, security and network management. WCX has expressly recognized that AT&T has a legitimate interest in protecting the security of its network, and has acknowledged AT&T's legitimate need to manage during times when congestion exists. WCX's concern is that AT&T's apparent but as-yet-undisclosed intentions, manifested by purposeful omission of terms the Commission said should be expressly included,<sup>51</sup> reveal that unless the contract has specific terms AT&T will engage in "management" to achieve purposes wholly unrelated to legitimate security protections or congestion control. AT&T rejects any notion that WCX users have a right to privacy or retain one of the fundamental property rights (the right to exclude others) if they roam on AT&T's network. AT&T apparently believes it can and should be free to extensively surveil the content of WCX users' communications or engage in application detection (AT&T Legal Analysis p. 40, n. 224) based on the AT&T *retail* privacy policy that applies to AT&T's

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<sup>50</sup> "To the extent AT&T's proposal addresses possible network overload, outages, and similar issues, such a provision is necessary to allow AT&T to protect its network from congestion or harm."

<sup>51</sup> *Data Roaming Order* ¶¶8, 23, 35, 39, 40, 52-55, 68, 78, 85. Paragraph 85 in particular says "We expect providers to include any material practices regarding provisioning of roaming in the agreement (e.g., any practice to manage roaming traffic in times of congestion) because many disputes arising out of provisioning of roaming will be subject to the roaming contract provisions and generally applicable laws."

end users. AT&T wants to be able to freely change its privacy policy – that AT&T is attempting to impose on both WCX and its users – without notice and completely outside of the contract.

Why does AT&T so fervently want to be this kind of busy-body? AT&T has not said content inspection is necessary for network security, so that cannot be the issue. AT&T won't publicly state whether it engages in application control and priority, and impose its preferences over that of its retail users or other carriers' roaming users even when there is *not* congestion, but the implication is clear. WCX asks: would AT&T's proposed terms have allowed it to insert an insidious "super-cookie"<sup>52</sup> on roaming WCX user devices so it could track them and monetize the information it gleaned if that agreement was in place while AT&T was employing that tactic? Does AT&T intend to reserve the right to start inserting super cookies on roamer devices again, and rely on contract silence to claim they can do so?

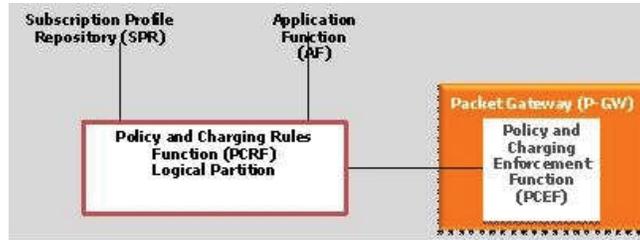
AT&T has published a public document that provides a small amount of insight with regard to the capabilities it has,<sup>53</sup> but this material does not state the network management policies AT&T intends to use. According to this AT&T document:

LTE supports policy and charging control mechanisms initially introduced in Release 7. This functionality enables traffic prioritization within the LTE Gateways. The Policy and Charging Control (PCC) architecture has two major functional elements, the Policy and Charging Rules Function (PCRF) and the Policy and Charging Enforcement Function (PCEF). The PCRF maintains the rules for network operations and filters the resource requests against policy rules and makes decisions about network performance. These rules and decisions are based on subscriber profiles. PCEF enforces the policy decisions by prioritizing service data flow.

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<sup>52</sup> See *AT&T Quietly Backs Away From Its Use of Sneaky Super Cookies* | *Techdirt*, available at <https://www.techdirt.com/blog/wireless/articles/20141117/13043829173/att-quietly-backs-away-its-use-sneaky-super-cookies.shtml> (viewed and printed November 20, 2014). (Doc. 123)

<sup>53</sup> See *Long-Term Evolution (LTE)* | AT&T Developer, available at <http://developer.att.com/technical-library/network-technologies/long-term-evolution>. (attached to Second Amended Complaint at pp. 1015-1019).



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

It is clear, however, that AT&T does intend to be engaging in some form of prioritization, which means that AT&T will be able to either speed up or slow down WCX user traffic using unknown criteria and policies and it may do so independent of security or congestion concerns. WCX has a legitimate belief that AT&T will apply unknown and undisclosed policies or practices that would negatively impact WCX users' service, or competitively harm WCX.

WCX recognizes – as did the Commission in the *Data Roaming Order* – that mobile providers can and must employ *congestion* management measures, and of course all concerned must protect against network harm.<sup>54</sup> The *Data Roaming Order* said that these issues would be dealt with in roaming agreements and any disputes would be resolved using the complaint

<sup>54</sup> *Data Roaming Order* ¶¶8, 23, 35, 39, 40, 52-55, 68, 78, 85. Paragraph 85 in particular says “We expect providers to include any material practices regarding provisioning of roaming in the agreement (e.g., any practice to manage roaming traffic in times of congestion) because many disputes arising out of provisioning of roaming will be subject to the roaming contract provisions and generally applicable laws.”

process.<sup>55</sup> [REDACTED]

[REDACTED]

[REDACTED]

AT&T's Policy and Charging Control (PCC) architecture and its two functional elements (the Policy and Charging Rules Function (PCRF) and the Policy and Charging Enforcement Function (PCEF)) control far more than congestion. They determine what is allowed or not allowed anytime and all the time, not just when there is imminent, incipient or significant congestion. They control what packets get through, and at what speed, and their priority relative to other packets anytime and all the time, not just when there is imminent, incipient or significant congestion. WCX believes that the roaming terms must contain some protective and guiding terms that govern network management and reasonably limit AT&T's ability to block or degrade WCX user traffic to only such times as AT&T is experiencing congestion.

Some network management practices can invade user privacy, particularly when the network provider is not in privity with the user, as will be the case when a WCX user is roaming on AT&T's network. WCX asserts that AT&T should not subject WCX user traffic to deep packet inspection of the content of the users' communication. AT&T has no right, and no need, to appropriate WCX users' property<sup>56</sup> and invade their privacy. [REDACTED]

[REDACTED] the AT&T terms are not reasonable. AT&T's apparent position that it can appropriate other people's property, monetize it and freely disclose it to whomever it chooses, and can freely and

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<sup>55</sup> *Id.*

<sup>56</sup> The information content users send and receive is *their private property*. It belongs to them. AT&T has no right to interfere with users' exclusive dominion over their property, or to take away users' right to exclude others from having, viewing or benefitting from that property absent the user's knowing and voluntary consent. AT&T is supposed to haul, not steal.

purposefully violate WCX users' privacy is not commercially reasonable. With regard to WCX's interconnected services it is unjust and unreasonable.

WCX's terms address and properly resolve the network management issues addressed in and contemplated by the *Data Roaming Order*.<sup>57</sup>

#### **VI. Legal Issue 4: WCX wants roaming and is not seeking "resale."**

AT&T contends that any significant amount of out-of-home area roaming is "back-door resale" and must be tightly limited in order to provide incentives to invest. AT&T – just as it did before in the *Voice Roaming*, *Voice Roving Reconsideration*, and *Data Roaming* procedures – opposes all but a very limited use, if it allows use at all. Each time the Commission rejected AT&T's arguments that roaming is "really" resale. Each time the Commission held that its rules were roaming rules, and did not constitute "back-door" or "*de facto*" to "resale." AT&T remains undeterred, and is once again singing the same tired song.

AT&T's Answer Package is replete with references to "back-door" resale. That term appears more than 52 times in the Public version, and more are in the Confidential. But AT&T is not content with using that word burdened with all possible negative connotations, because it also repeatedly says WCX wants "*de facto*" resale too. When those two terms get completely worn out AT&T starts accusing WCX of wanting to ride "piggy-back." The repeated vigorous assertion of AT&T's *ipse dixit* favorites gets beyond tiresome.

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<sup>57</sup> See RWA agreement section 5. Services:

The Parties further acknowledge and agree that, unless an amendment allowing and providing for Service Aware Roaming is mutually entered into between them, the Serving Carrier shall not engage in or apply any type of Service Awareness restrictions while Authorized Users are engaged in Data Roaming. Furthermore, the Serving Carrier shall not conduct or apply any manner of packet inspection, blocking, throttling, or manipulation of an Authorized User's Data Service traffic while Data Roaming. The Serving Carrier may engage only in Application Agnostic reasonable network management practices during times where cell site locations are congested, and in a manner that does not disfavor Data Roaming use when compared to network management practices applied to the Serving Carrier's own subscribers or end users. The Serving Carrier's roaming-related pricing and practices shall not vary depending on the specific application, service, or device being employed, or the Data Service sent-to or received-by either the Home Carrier or the Authorized Users of Home Carrier.

Only a few of AT&T's references quote the actual words used by the Commission.

AT&T justifies its usage restrictions on the "back-door" or "*de facto*" statements made by the Commission when discussing roaming in different contexts. For example in *Data Roaming Order* ¶88 the actual words were

...we are concerned that construing the rule we adopt as allowing a roaming provider to engage in unauthorized use of a competitor's brand name recognition and/or service quality reputation as a means of differentiating the roaming provider's own service may indeed encourage the use of roaming as *de facto* resale. The Commission has previously stated with regard to automatic roaming for voice and data services for CMRS providers that "automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks." (notes omitted).

Put in context, the Commission was saying that a roaming carrier should not improperly take advantage of or publicly leverage the host carrier's brand name recognition or service quality reputation. That statement had nothing to do with the *volume* of roaming use.

*Voice Roaming Reconsideration Order* ¶35 said

[w]e also disagree with AT&T's contention that elimination of the home roaming exclusion would create *de facto* mandatory resale obligations. The automatic roaming obligation imposed in the *2007 Roaming Order* under Sections 201 and 202, and that we expand here with the elimination of the home roaming exclusion, is not intended to resurrect CMRS resale obligations. The Commission's mandatory resale rule was sunset in 2002, and, as the Commission previously stated, the automatic roaming obligations cannot be used as a backdoor way to create *de facto* mandatory resale or virtual reseller networks. We find that our actions herein in eliminating the home roaming exclusion will not effectively change the Commission's policy on CMRS resale obligations. While resale obligations are intended to offer carriers the opportunity to market a competitive retail service without facilities development, such a resale product would not serve our goals of promoting facilities-based competition, the development of spectrum resources, and the availability of ubiquitous coverage." (notes omitted).

That discussion reveals that the Commission understands that "resale" involves sale of a finished product without the use of the retail carrier's own facilities. WCX is, of course, a facilities-based provider.

The *Voice Roaming Order* ¶51 said:

Finally, we also determine that the automatic roaming obligation under Sections 201 and 202 and the home roaming exclusion are not intended to resurrect CMRS resale obligations. CMRS resale entails a reseller's purchase of CMRS service provided by a facilities-based CMRS carrier in order to provide resold service within the same geographic market as the facilities-based CMRS provider. We note that the Commission's mandatory resale rule was sunset in 2002, and automatic roaming obligations can not be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks." (notes omitted).

The context there related to selling service to customers that do not reside, conduct business or have a physical presence in the carrier's home area. The Commission in each instance was in fact distinguishing "resale" from roaming by a home carrier's own customers who have a connection to the home area and use the service in the home area but also travel.<sup>58</sup> In none of these paragraphs did the Commission say or even hint that it intended to allow a limit on the amount of roaming by customers of a home carrier, or the amount of roaming use a home carrier is to be allowed.

AT&T believes that providers should be required to go out and begin constructing extensive nationwide access networks even when they cannot feasibly obtain the necessary but costly licenses that are required by law. AT&T contends that providers should obtain *roaming* by executing resale agreements. But, as the Commission repeatedly told AT&T, roaming is not the same as resale. Significant roaming does not transmute the arrangement into a resale arrangement. A carrier should not have to execute a resale agreement in order to obtain *roaming*.<sup>59</sup>

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<sup>58</sup> Feldman Reply Declaration pp. 3, 6, 14, 24, 31, 33, 37, 45, 49.

<sup>59</sup> AT&T has repeatedly reminded all of us, "resale" is no longer required under the rules. AT&T's problem is that roaming is required. So AT&T naturally tries to convince the Commission it should make WCX secure an unprotected resale agreement as an "alternative" to protected roaming. If WCX obtains a "resale" agreement in order to obtain "roaming" then the whole arrangement can be canceled, for so long as it is called "resale" rather than roaming. On the other hand, if the Commission holds this is roaming then the right cannot be taken away. Feldman Reply Declaration p. 43.

AT&T persistently conflates the policies the Commission is trying to balance, and then pushes mightily on only one side of the scale with every thumb it can muster. On the one hand, there is a clear need and expectation that mobile users who purchase service from a home carrier can travel about and still have seamless connectivity. Roaming is good policy. But on the other hand, the Commission also wants to instill and maintain facilities investment incentives. That too is good policy. But the “investment” policy can only incent investment for those who have a license to construct facilities, or has the capital access to obtain one. In this case WCX has a license in one CMA. The right “investment incentive” is one that encourages WCX to build out in the area covered by its single CMA. A roaming restriction applicable to out-of-home-area usage does not provide any incentive to invest inside the home area; to the contrary it actually disincentivizes by limiting customer growth and revenue. That is why the Commission found that facilitating out-of-area roaming would in fact encourage and lead to expanded in-home-area investment.<sup>60</sup>

The Commission correctly prefers that providers not “rely on roaming arrangements in place of network deployment as the primary source of their service”<sup>61</sup> but it also most certainly understands that not everyone can afford or build a nationwide network. Small rural carriers must have non-home area roaming in order to compete and provide the service that users expect. Rural users quite often commute to urban areas to shop, secure medical care and education and to get to and from their place of work. They want and need to use their service when doing so. Their consumption while on the road or in town will likely be significant. There is nothing wrong with that and it should be encouraged, not prohibited. When this occurs their significant consumption does not constitute the “primary” source of their service.

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<sup>60</sup> *Voice Roaming Order* ¶¶30-35; *Data Roaming Order* ¶¶13-22.

<sup>61</sup> *Data Roaming Order* ¶21 (emphasis added). See also *Cellco P’ship v. FCC*, 700 F.3d 534, 551 (D.C. Cir. 2012).

AT&T claims that roaming should be limited [REDACTED]  
[REDACTED] AT&T claims that more than *de minimis* roaming usage turns roaming into “back-door” “*de facto*” “resale.” Although AT&T much likes the “piggy back” reference in *Data Roaming Order* ¶21, it never confronts the disconnect between its [REDACTED] and the various carriers’ percentages for “excessive roaming” used in the retail wireless contracts discussed in note 78 that accompanies that part. T-Mobile’s terms provided that “more than 50%” was too much. MetroPCS prohibited “predominate” roaming. Those figures match up exactly with WCX’s “majority” provision. AT&T’s retail “excessive” was 20% [REDACTED]  
[REDACTED] the amount it wants to allow here.

AT&T’s proposed terms make clear they construe anything more than the allowed volumes to be beyond incidental and somehow automatically “the primary source of service” even when the roaming usage is less than the in-home usage. This is a fundamental misconstruction. It is inconsistent with the legal definition of “incidental”: “depending upon or appertaining to something else as primary.”<sup>62</sup> It changes the meaning of “primary” which has long been a term of art in the radio services. The “primary” service is the specific service allowed by the spectrum license itself, in the area where the license authorizes operations. The Commission decided many years ago to allow licensees to engage in flexible offerings, beyond just those specified in the license itself. Licensees were given the express power to provide not only “primary” or “co-primary” services, but also “ancillary” or “incidental” services.<sup>63</sup> Indeed, there was an “incidental service” rule for several years, but it was repealed in 2002. The

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<sup>62</sup> Black’s Law Dictionary, 4th Ed., p. 904.

<sup>63</sup> For a single example of the approach taken in the mid-1990s see First Report and Order and Further Notice of Proposed Rule Making, *In the Matter of Amendment of the Commission’s Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965 (1996).

Commission reiterated, however, that licensees could still provide “incidental” services and they would still be CMRS.<sup>64</sup> The original “incidental” service rule (former rule 22.323) did not limit the relative volume, percentage, scope or even revenues that could be generated from incidental service.<sup>65</sup> As applied here, roaming is “incidental” to the primary home service.<sup>66</sup>

In the case at bar, all roaming would be incidental to the “primary” contracted home-based service between WCX and its user, because a WCX user cannot “roam” on AT&T’s network unless the user has a contract with WCX. Roaming is appurtenant to WCX’s service. “Significant” roaming is still “incidental” in the legal sense, and is not “primary.” The primary service is home-based because the customer resides or has some significant connection to the home area, and the contract is between the home area carrier and the local customer. WCX’s proposal to limit roaming to no more than 50% guarantees that the home service will always be primary, and roaming will always be incidental. It means that WCX’s roaming offer to its customers, as contemplated by the *Data Roaming Order* (but also the *Voice Roaming Order* and *Voice Roaming Reconsideration Order*), will not be the “primary source” of WCX’s customers’ service.” Yes, it might be significant, but it will always be incidental and not primary.

The term “incidental” does not appear in the *Data Roaming Order* but the Commission has in the past used “incidental” in the broader legal sense rather than AT&T’s cramped meaning when addressing CMRS service. For example as noted above fixed wireless service was an

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<sup>64</sup> Report and Order, *In the Matter of Year 2000 Biennial Regulatory Review--Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and other Commercial Mobile Radio Services*, 17 FCC Rcd 18401, 18433-18435, ¶¶64-69 (2002).

<sup>65</sup> The only qualifications were that “(1) the costs and charges of subscribers not wishing to use incidental services are not increased as a result of the carrier’s provision of incidental services to other subscribers; (2) the quality and availability of primary public mobile service does not materially deteriorate; and (3) provision of such incidental services is not inconsistent with the Communications Act of 1934 or the Commission’s rules and policies.” *Id.* ¶64. But those limitations were deemed unnecessary in this proceeding, and the rule was therefore repealed.

<sup>66</sup> Licensees are allowed to provide common carrier services and private mobile services on a co-primary basis. Thus, AT&T’s wireless broadband Internet access service is not incidental but is instead co-primary. On the other hand, when an AT&T retail user roams on another carrier’s network AT&T is providing an incidental service. The host carrier is providing roaming, not commercial mobile data service.

authorized “incidental service” – and thus still CMRS – when it was “auxiliary” or “ancillary” to the “primary” mobile service.<sup>67</sup>

A large portion of the population in WCX’s home area commutes from within WCX’s licensed area to locations inside AT&T’s licensed area in order to go to schools and businesses, to work, learn, shop or to perform important tasks like obtaining medical care. AT&T admits that the 2010 U.S. Census data shows that the base population of Bastrop County for 2010 was 77,783. Approximately 21.5% of them (over 15,000) spend the day in locations outside the county, and 59.3% of the “workers” in Bastrop County do a daily commute. AT&T denies this is so, but if one assumes that WCX’s user base is representative of the population base AT&T’s proposed terms would immediately put WCX in breach, both in terms of total percentage of devices and total percent of use. That cannot be reasonable.

There are 24 hours in a day, 7 days in the week and the average month is 4.3 weeks. That sums to 722 hours a month. If you assume an 8 hour work day, a 5 day work week and 1 hour commute each way, then the average worker in Bastrop is out of the WCX area for 215 hours. Simple math tells us that 21.5% of WCX’s customers will have a “29.7% roaming factor” as will 59.3% of the WCX users that are “workers.” AT&T seeks to limit WCX to only [REDACTED]

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<sup>67</sup> *In the Matter of Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Second Report and Order and Order on Reconsideration, 15 FCC Rcd 14682, 14684, ¶9 (2000); *In the Matter of Amendment of the Commission’s Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, First Report and Order and Memorandum Opinion and Order, 11 FCC Rcd at 8968-8969, ¶¶5-7 (1996); *In the Matter of Amendment of Parts 2 and 22 of the Commission’s Rules to Permit Liberalization of Technology and Auxiliary Service Offerings in the Domestic Public Cellular Radio Telecommunications Service*, Report and Order, 3 FCC Rcd at 7041, 7059, ¶66 (1988) (incidental services may include fixed services); *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd at 1424, ¶36 (1994) (all auxiliary and ancillary services provided by mobile service licensees are included within the definition of mobile services); *In the Matter of Amendment of Subpart K, Part 22 of the Commission’s Rules, to facilitate the development of cellular radio telecommunications service in the rural areas of the country*, Memorandum Opinion and Order, 102 FCC 2d 470, 472-73, ¶5, 475, ¶10 (1985).

[REDACTED]

WCX would have to find ways to limit its customers use so that [REDACTED]

[REDACTED]

[REDACTED] The problems are multiple.

First, the market no longer allows retail-based additional charges when customers are roaming. Users get annoyed if their speeds or throughput is throttled or their usage is capped, so those options are unavailable as well. Further, WCX would have to carefully select who could get an Account since it would likely be in breach under a commonplace family plan where members of a family live in different areas.

AT&T's terms provide that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is extraordinarily and unreasonably limiting. It would force WCX to abandon any hope of participating in the emerging M2M market, offering family plans, or working with MVNO partners. WCX will not be able support Internet of Things applications.

For example, assume there is an Account that has four Authorized Roamers (e.g., one billing account, with four users or devices), say an entire family. If a family member uses the device during a vacation, or while in the hospital, or while attending college, AT&T could deem WCX to be in material breach and could cancel the roaming agreement, because [REDACTED]

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<sup>68</sup> [REDACTED]

[REDACTED]

AT&T's terms would require WCX to contractually mandate that the Account owner confiscate all devices from any employee or family member if the employee or family member goes on the road for a month. An employer would not buy WCX's service for employees if they travel for extended periods. An oil servicing company based in Bastrop with employees working on-site throughout the Eagle Ford Shale could not buy WCX's service if more than 5% of the employees stay on site for the entire month. A parent would not buy WCX's service for use by college-bound family members,<sup>69</sup> or spouses that commute. AT&T's restrictions wholly destroy the entire reason to have mobile service by eliminating mobility as a truly useable option. These restrictions are unreasonable in the extreme.

AT&T's answer to the foregoing illustrations does not actually defend its terms, or even challenge whether WCX is correct in what it says. Instead, AT&T now claims that it was willing to negotiate more flexible terms. But AT&T never exhibited flexibility during the parties' discussions, and never advised WCX that it might be willing to be more flexible.<sup>70</sup>

WCX has built-out its home area network, and is seeking roaming for out-of-area purposes. AT&T's role will largely be confined to transmission, since WCX's network resources

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<sup>69</sup> AT&T would likely contend that the college student (or his/her "device") "resides" in the University of Texas at Austin college dorm room rather than the familial home in Bastrop. If that is so then [REDACTED] if the Bastrop residing parent continues a WCX "family plan" arrangement that includes the college student family member.]

<sup>70</sup> Feldman Reply Declaration p. 24.

will be involved in every communication. When WCX sells service to a customer that resides in the WCX area or has legitimate connections to that area, then none of the concerns expressed by the Commission about using roaming as a back-door way to secure “resale” apply. Roaming is not resale. WCX’s proposals do not represent an effort to resell AT&T’s retail services. WCX is – as the D.C. Circuit recognized – not seeking to “rely on roaming arrangements in place of network deployment as the primary source of [WCX’s] service provision” and WCX’s “roaming will not displace network development as the ‘primary’ means of serving subscribers.” WCX will sell service to customers with a significant connection to the WCX home area, and home area service will be the primary service. WCX will be using its network in every instance. Users will not be able to roam unless they have purchased the home area service. WCX’s roaming will be supplemental and appurtenant, regardless of relative usage.<sup>71</sup>

AT&T also confuses the resale of AT&T’s service with WCX allowing the resale of WCX’s service. Those two things are not equivalent. WCX allowing the resale of its service does not turn roaming on AT&T’s network into resale of AT&T’s service. [REDACTED]

[REDACTED]

[REDACTED] The discussion at the bottom of AT&T Legal Analysis p. 28 and continuing to the middle of page 29 is completely off-point from the Commission’s “resale” discussion.

AT&T repeatedly implies that WCX seeks “roaming” in order to serve customers that have no relationship to the WCX home area, as if WCX would go to some far-flung state and market service to residential or regular business customers “with little or no connection to

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<sup>71</sup> *Cellco P’ship v. FCC*, 700 F.3d 534, 551 (D.C. Cir. 2012).

WCX's service territory."<sup>72</sup> This is not the intent and is not what would result. WCX will provide "home-area" service to customers that reside, have a business connection, or a physical presence. If the device is in the home area, WCX will be providing the facilities-based home-area service. If the customer needs seamless connectivity because the device is not in the home area, then roaming will be required. With regard to the M2M applications, WCX will have a customer that has a physical presence in the home area by virtue of residency or the placement of equipment. WCX will host the server and application in its core, which is in the home area.<sup>73</sup> Thus, contrary to AT&T's insinuations, there will always be a legitimate connection of some sort to a customer in the home area, and service within the home area. That is not "back-door resale" even as AT&T has defined it in AT&T Legal Analysis pp. 29 and 31-32.<sup>74</sup>

The ultimate answer is that WCX's proposal does not constitute a request for "resale" or "back-door resale" or "*de facto* resale." WCX will not be "providing services that are primarily"<sup>75</sup> designed to operate on the other party's network (i.e., resale)" or "market[ing] services to customers located outside of its licensed area."<sup>76</sup> The customer's service will always be managed by WCX's core. WCX is not purchasing air time, or minutes. WCX is not buying and then re-packaging AT&T's retail service. AT&T will authenticate the device and then engage in raw transmission to and from the place where the two parties' network connect. AT&T will not be

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<sup>72</sup> AT&T Legal Analysis p. 29 (AT&T's definition of "back-door resale" as "use of a roaming agreement to sell services to customers residing outside of its network area."), pp. 31-31 ("business to subscribers with little or no connection to WCX's service territory..."), p. 34 ("attract customers from across the country...")

<sup>73</sup> Feldman Reply Declaration pp. 3, 6, 24, 31, 33, 37, 45, 49.

<sup>74</sup> AT&T also confuses the resale of AT&T's service with WCX allowing the resale of WCX's service. Those two things are not equivalent. WCX allowing the resale of its service does not turn roaming on AT&T's network into resale of AT&T's service. [REDACTED]

<sup>75</sup> To AT&T any thing more than [REDACTED] becomes "primary." As explained elsewhere that construction is irrational and not consistent with either the normal understanding or the legal definition of "primary."

<sup>76</sup> AT&T Legal Analysis pp. 29-30, citing Orszag Decl. ¶60 and Meadors Decl. ¶53.

providing any special features or functions. WCX's customer will always reside, conduct business in, or have a significant connection to WCX's home area. None of this will change regardless of volume or relative proportions.

**VII. Legal Issue 5: The Commission can and should set the price equal to the prevailing retail data rate.**

After receiving and considering the specific evidence in this case, the Commission can and should use the prevailing retail rate as the benchmark for the roaming price. It can and should do so under both of the legal standards that apply.

AT&T contends that WCX's price benchmarking proposal is inconsistent with the Commission's roaming decisions, wherein the Commission decided to not establish a rate or benchmark. WCX notes that, for automatic roaming, the Commission refused to set a benchmark based largely on the fact that the record did not demonstrate "any harm to consumers in the absence of affirmative regulation in this regard."<sup>77</sup> WCX has, in this case, showed that there is harm. Consumers will inevitably be harmed if a small carrier such as WCX has to pay very high roaming rates for interconnected services, because WCX will no longer be able to offer competitively priced retail services with national coverage or it will have to impose severe constraints on roaming usage to limit the losses it incurs as a result of AT&T's punitive prices. This effectively and substantially reduces the value WCX's customers can derive from the interconnected services they wish to access. That is harm.

AT&T also says (though misquotation) that the Commission expressly held that data roaming should be "much higher than retail rates" in order to "counterbalance the incentive" to "rely[] on another provider's network" and ensure that the roaming carrier adequately invests in

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<sup>77</sup> *Voice Roaming Order* ¶28.

its own network. AT&T misconstrues the authority, and misstates the Commission's holdings and policy. AT&T's proposed price will directly lead to customer harm in WCX's service area.

AT&T's cherry-picks words from the roaming orders applies them out of context. To begin with, ¶¶30-32 of the *Voice Roaming Reconsideration Order* are not authority for the proposition that carrier to carrier agreements for out-of-home area roaming can and should be "much higher than retail rates." The Commission was discussing the price for home roaming rates (after reversing course from the 2007 "*Voice Roaming Order*"<sup>78</sup>) and mandating that carriers support home roaming for interconnected voice and data). It was not addressing out-of-home-area roaming prices. Similarly, any claim that the Commission blessed roaming rates "much higher than retail rates" would also be out of context. Again, that discussion pertained to home roaming. The Commission correctly wants licensees to build out their own home networks, and has consistently recognized that different considerations apply to "in-home" roaming than pertain to roaming in areas where a provider completely lacks access to spectrum.<sup>79</sup>

The Commission explained its reasoning for deciding why it would not directly regulate out-of-area automatic roaming rates in *Voice Roaming Order* ¶¶37-40. There is no "much higher than" language there. After reaffirming that automatic roaming prices were still subject to the "reasonable and nondiscriminatory" test (¶37) the Commission found there was not record evidence of consumer harm in the absence of rate regulation (¶38). Then it moved to the "economic grounds" in ¶¶39-40.

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<sup>78</sup> Citation to the 2007 "*Voice Roaming Order*" would be unavailing. The Commission held in ¶38 that there was not enough evidence to find "that the existing level and structure of roaming rates harm consumers, regulation of rates for automatic roaming service" and thus rate regulation was "not warranted." "Because we are not persuaded that the existing level and structure of roaming rates negotiated between carriers harm consumers of mobile telephony services, we do not need to address the argument that the state of competition in the intermediate product market is such as to warrant rate regulation." WCX is presenting clear evidence in this proceeding that consumers are being harmed, and in particular those served by small rural providers with limited geographic licensed coverage.

<sup>79</sup> *Voice Roaming Reconsideration Order* ¶89 ("On the other hand, requiring a provider to offer a data service on its home network would appear to be an essential element of a request for roaming coverage as opposed to resale.").

Paragraph 39 expressed the concern that rate regulation has the potential to distort carriers' incentives and behavior with regard to pricing and investment in network buildout because "capping roaming rates by tying them to a benchmark based on larger carriers' retail rates may diminish larger carriers' incentives to lower retail prices paid by their customers, and perhaps even give them an incentive to raise retail rates." WCX doubts AT&T will press this argument, since AT&T could obviously maintain higher retail rates only if it has market power or colludes. If one accepts AT&T's usual meme that the retail market is fully and robustly competitive then no carrier – even AT&T – would be able to increase retail rates because it would lose customers to its rivals.

Paragraph 39 then proceeds to express the concern that if there was a set benchmark rate smaller regional carriers "might have an incentive to reduce, or even eliminate, the discounts they offer on regional calling plans, thereby driving up the prices regional subscribers pay for calls within their plan's calling area." This concern is moot. The market for mobile services is national. Rural carriers will not be able to raise their retail prices higher than the levels charged in urban areas regardless of the roaming rates they have to pay, whether benchmarked or capped or not. A lower roaming price will not lead to a retail price increase. There are no "regional" calling plans. The wireless market has forced all carriers to move to all distance flat rate plans.<sup>80</sup>

Finally, in ¶40 the Commission expressed the concern that retail-benchmarked roaming rates might have "the potential to deter investment in network deployment by impairing buildout incentives facing both small and large carriers. By enabling smaller regional carriers to offer their customers national roaming coverage at more favorable rates without having to build a nationwide network, rate regulation would tend to diminish smaller carriers' incentives to

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<sup>80</sup> Second Amended Complaint Feldman Supplemental Declaration ¶6; Feldman Reply Declaration p. 6; Roetter Reply Declaration p. 3.

expand the geographic coverage of their networks. In addition, by reducing or eliminating any competitive advantage gained as a result of building out nationwide or large regional networks, rate regulation would impair larger carriers' incentives to expand, maintain, and upgrade their existing networks." This is AT&T's main argument. While WCX understands the desire to incent carriers to build nationwide networks, the fact is that carriers cannot just wish they had the money and then spend that wish money to build a nationwide network. The capital demands are beyond the reach of a carrier like WCX, and spectrum is scarce and expensive. The goal is impossible. WCX cannot be denied roaming at a reasonable price solely because it cannot perform an impossible act. With regard to incentives for larger carriers, that argument has some force, but it only goes so far and it does not get AT&T where AT&T wants to be. AT&T, as usual, says that it must receive a price that will earn it supranormal profits or else it will not be "incented" to continue expanding. The Commission must at some point recognize this for what it is: hostage-taking.

The bottom line is that there must be some limiting principle, and some price point above which a price is no longer "just and reasonable" (automatic roaming) or "commercially reasonable" (data roaming). If prevailing retail rate is not the benchmark for that price point, then there is some other one. It cannot be that "what AT&T wants and demands, no matter how high" is reasonable under either standard, merely because AT&T wants and demands it.

There is no risk of a decrease to WCX's incentive to invest if the roaming price is less than that proposed by AT&T. WCX has invested and will continue to do so within its home area if it secures reasonable roaming terms. A provider without spectrum licenses in any given area has no opportunity to invest in that area. But eroding the viability of a business plan through very high roaming rates will make it harder if not impossible for WCX to attract the investments it

seeks to improve its network and services within its home area. That is why the Commission has realized that roaming – both within the home area and out-of-area – is an important part of a viable service suite that will allow the carrier to gain customers, receive revenues, attract capital and therefore *be able to invest*.<sup>81</sup>

To the extent the legal standard is “commercially reasonable” then AT&T’s extraordinarily high price terms do not meet that standard. They are not fair to *both sides* and they do not serve the overall public interest. This is not fair dealing. WCX would be functionally precluded from offering roaming, so AT&T is trying to impose a severe prejudice on both WCX and its customers because WCX users would not be able to actually use roaming. AT&T may privately prefer to never talk to WCX, but it certainly has users that want to talk to WCX’s users. AT&T’s terms actually harm AT&T’s own users because they will not be able to communicate with WCX users when they are outside of the WCX home area.

Using retail rates as a benchmark provides a convenient and eminently justifiable measure of commercial reasonableness. It supplies useful information for both the objective and subjective tests. The retail rate is the amount AT&T receives for usage from its own customers, so we know that is a “fair” price for both AT&T and its customers. If that is commercially reasonable in the retail context then it cannot be commercially unreasonable in the roaming context, where WCX would be the customer and be obtaining fewer functionalities while imposing lower costs than does the retail user. AT&T will in fact earn more margin from roaming than it does at retail. On the other hand, since WCX will be constrained by national market prices at retail, it will not be earning significant or excessive profits when it offers roaming as a supplement to its primary home-based services. Its incremental roaming usage cost

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<sup>81</sup> *Voice Roaming Order* ¶¶30-35; *Data Roaming Order* ¶¶13-22.

will be approximately equal to its incremental roaming usage revenue. All of the goals articulated by the Commission will be met, and none of the countervailing concerns will arise.

AT&T does not want to provide roaming at all, and its proposed prices are not in any manner reflective of what would obtain in a truly free market where you have a seller that actually wants to sell and a buyer that has alternatives. For that reason alone AT&T's proposed prices cannot be deemed commercially reasonable.

AT&T is also wrong when it claims that any Commission action to set the price when the parties cannot agree is prohibited when it comes to data roaming because rate-setting would constitute a common carrier action, or "cost-based ratemaking."<sup>82</sup> What AT&T is really saying is that the Commission cannot hear complaints over data roaming. It is also implicitly claiming the Commission cannot prescribe the price that will be contained in the agreement.<sup>83</sup> But that was resolved against AT&T in 2011. The Commission said that if the parties could not agree then the complaint process was an available backstop, and it said that price was one of the potential issues, and indeed one of the seventeen factors because it is clearly comprehended within factor 9.<sup>84</sup> But AT&T's denial of Commission authority is only one sided: although it says the FCC cannot prescribe any price other than the one it has proposed, it is perfectly comfortable with a "prescription" of its proposed price. AT&T's hubris is showing. The Commission's power does not source only from AT&T's will and command.

Using retail rates as a benchmark is not common carrier regulation or cost-based ratemaking. The benchmark is a tool for assessing reasonableness. AT&T likes the prices contained in its extant agreements, but AT&T is merely benchmarking as well when it references

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<sup>82</sup> AT&T Legal Analysis pp. 16, 20.

<sup>83</sup> AT&T Legal Analysis p. 27 ("any such prescription would be unlawful...")

<sup>84</sup> "the impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality." AT&T cannot now claim that this factor cannot comprehend pricing issues; after all, its main justification for his "relatively high" price is expressly tied to its investment incentive arguments.

them. WCX has a different comparison tool and AT&T just does not like it. Dr. Roetter's observation that AT&T will earn a reasonable profit given its lower expenses was not some effort to set a cost-based rate. Instead he was providing another way to look at reasonableness. AT&T will earn nice profits under this price, and that means it cannot be unreasonable. AT&T, on the other hand, would receive much higher, indeed above supranormal profits under its proposal. That provides an indication its process *are* unreasonable in the commercial sense – for all participants other than AT&T itself.

The Title II just and reasonable test applicable to WCX's interconnected services also compels a finding in WCX's favor. If the retail rate is \$10 per GB, then AT&T's retail costs are well under \$3.50 per GB. Since AT&T incurs lower incremental costs to supply a "roaming" GB than it does to supply a "retail" GB, it will earn higher margins from roaming than retail if the price is the same. AT&T would have to show that its costs are higher for roaming.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The AT&T proposal is punitive and strategically designed to ensure there is no roaming. Even commercial reasonableness has its limits; it is not a concept with a very high floor and no ceiling. With all due respect to AT&T that cannot be just or reasonable.

**VIII. Legal Issue 6: AT&T's audit terms are vague and unnecessary; its suspension terms are not consistent with those contemplated by the roaming orders.**

WCX notes that AT&T agreed with WCX that actual negotiation of this particular topic would not be fruitful unless and until determinations by the Commission on the principal issues

of dispute. See AT&T Response ¶39. On the merits WCX continues to believe auditing provisions are not necessary if the RWA Model Agreement is used.

But if usage restrictions are allowed beyond the simple “majority of usage on own network” criterion and if there are going to be audit provisions then WCX contends that it must be informed in advance – through specific contract terms – regarding the information it must maintain and be ready to produce in the event of an audit. WCX’s concern is that AT&T will reject the information WCX has maintained and produced and contend other information should have been maintained. AT&T defends its audit terms by contending they are a necessary enforcement tool. But it does not ever discuss the provisions that are not there. What records must be maintained? What will be the required proof for the “residency” AT&T requires? What are the usage metrics?

AT&T actually spends most of the ink on this issue engaging in a personal attack on Mr. Feldman. This is improper and done for misdirection and to inject bias, or perhaps even fear. For example AT&T’s dredging of what should be ancient history concerning Mr. Feldman’s activities when he was a staff Economist at the Texas PUC is an effort to plant hidden suggestions. AT&T is implicitly arguing that any regulatory staff members who make independent recommendations AT&T does not like should suffer negative consequences by other regulators in the future. AT&T is effectively saying a past regulatory staffer can legitimately be targeted for constant special adverse treatment by AT&T after he or she moves into the private realm. The Commission staff should recognize this veiled threat against them and all other regulatory staff for what it is.

With regard to the UTEX matter, that too is relevant, but for a different reason than AT&T suggests. That experience proves only that WCX is properly seeking advance

Commission determinations before it risks more capital executing its innovative plans. When definitive rulings and contract terms result from this case there will be no further litigation – unless AT&T chooses continue its own litigious and contumacious ways.<sup>85</sup>

One particular manifestation of how AT&T may continue to be contumacious is through exercise of its proposed suspension terms. Suspension of service was one of the topics addressed by the *Data Roaming* commentors. They are summarized in notes 146<sup>86</sup> and 147<sup>87</sup> to ¶52, which was itself concerned with congestion. Several agreed that suspension might be appropriate for *security* or *congestion* problems, but they also expressed concern that suspension might be used for untoward purposes as well. The Commission did note “with approval” (as AT&T contends) the suspension terms described in note 146, but those suspension terms related to “overload, outage, or other operational or technical issues.” WCX’s proposed terms would allow such action. RWA Model Agreement ¶12. AT&T’s on the other hand, go farther, to the point that they would authorize suspension that has “the intent or effect of undermining or frustrating its obligation to provide roaming on just and reasonable terms and conditions” and to facilitate “anticompetitive conduct” – precisely what T-Mobile and Sprint cautioned against in their

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<sup>85</sup> Feldman Reply Declaration pp. 53-55, 85, 94-96.

<sup>86</sup> 146. The record indicates that providers already commonly include in their negotiated roaming agreements terms that give a host provider the ability to suspend roaming service if roaming becomes impractical for reasons such as overload, outage, or other operational or technical issues. *See* Letter from Kathleen O’Brien Ham, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Dec. 20, 2010, at 4.

<sup>87</sup> 147. *See* AT&T Comments at 61-63; NTCH Comments at 6; Clearwire Reply Comments at 14-15; Letter from Erin Boone, Clearwire, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Oct. 29, 2010 (Clearwire Oct. 29, 2010 *Ex Parte*) (stating that “mobile data roaming arrangements must be carefully negotiated and managed to prevent unexpected congestion across a carrier’s network”); Letter from Howard J. Symons, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 2, 2010 (T-Mobile Nov. 2, 2010 *Ex Parte*) (a host carrier should be able to take reasonable management practices to address congestion attributable to roaming traffic, and also argues that the Commission must “make clear that the host carrier may not insist on suspension or management rights that have the intent or effect of undermining or frustrating its obligation to provide roaming on just and reasonable terms and conditions.”); Letter from Charles W. McKee, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 05-265, filed Nov. 22, 2010 (Sprint Nov. 22, 2010 *Ex Parte*) (stating that network management practices should not conceal anticompetitive conduct). *Cf.* RCA Comments to *Further Notice* at 5 (supporting suspension or denial of service to roamer that causes congestion. (emphasis added))

comments summarized in note 147. WCX trusts that the Commission “noted” those comments “with agreement” as well. The “suspension” terms summarized in note 78 to ¶21 that AT&T also claims the Commission “noted with approval” were contained in retail user contracts, not roaming contracts.

The real disagreement between the parties relates to whether AT&T can unilaterally suspend while a matter is in dispute resolution. AT&T’s terms appear to allow it to cut off WCX’s legs during the pendency of a dispute, with no provision for the dispute resolution forum to require AT&T to maintain service or restore service. Recall that AT&T wants mandatory binding commercial arbitration. That forum does not typically have injunctive power unless the voluntary contract committing to arbitration expressly provides for that power. Unsurprisingly AT&T failed to include that power in its arbitration terms. Nor do AT&T’s terms provide for any damages in the event AT&T suspends and is later found to have been in the wrong. WCX wants the ability to seek Commission or judicial intervention so it can prevent irreparable injury in the appropriate circumstances.

**IX. Legal Issue 7: The Commission cannot impose binding commercial arbitration on an unwilling party.**

*Data Roaming Order* ¶81<sup>88</sup> indicates that the Commission intended that parties to an already-executed roaming agreement would be able to address disputes over the agreement using

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<sup>88</sup> 81. After the parties have entered into a data roaming agreement, the terms of the agreement generally will govern the data roaming rights and obligations of the parties, and disputes relating to performance, validity, or interpretation of the agreement will be subject to review in court under the relevant contract law, with certain exceptions. For instance, parties may bring before the Commission a claim that a host provider’s conduct during negotiations violated the federal duty to offer a data roaming arrangement with commercially reasonable terms and conditions. In addition, the requesting provider may show that a host provider engaged in undue delay, or negotiated without any intent to perform. Further, we provide that a requesting provider could file a complaint or petition for declaratory ruling regarding the commercial reasonableness of the agreed terms and conditions to the extent such claims are based on new information that the requesting provider reasonably did not know prior to signing the agreement. Because the standard of commercial reasonableness is one that we expect to accommodate a variety of terms and conditions in data roaming, and to discourage frivolous claims regarding the reasonableness of the terms and conditions in a signed agreement, we will presume in such cases that the terms of a signed agreement meet the

the §208 complaint process. If the Commission had assumed all disputes would be subject to binding commercial arbitration it would not have addressed post-agreement disputes or felt the need to create a presumption as a means to deter frivolous filings.

AT&T contends that a Commission-imposed contract term can force a party to waive the right to seek Commission relief or judicial intervention, in order to prevent irreparable harm or if a party claims the other party has violated the contract, the Act or a Commission rule. In other words AT&T claims that a party can be compelled against its will to agree to contract terms providing for compulsory commercial arbitration as the exclusive means of dispute resolution by an administrative agency. AT&T wants this Commission to order WCX to waive its right to invoke the Commission's jurisdiction and WCX's constitutional right<sup>89</sup> to a jury trial under the Seventh Amendment of the Constitution. WCX disagrees.

WCX of course concurs that parties can voluntarily waive these rights and agree to binding arbitration, as part of a consensual contract. WCX agrees that the two parties could have mutually agreed to a compulsory arbitration provision or any other provisions waiving rights. But the contested terms arising from this proceeding will not be voluntary or consensual; they will be imposed by the Commission over the objection of one side or the other. "Binding commercial arbitration is a matter of consent, not coercion."<sup>90</sup>

In the §252 interconnection agreement "arbitration" context the courts have approved state commission imposed terms allowing optional commercial arbitration, but mandatory binding arbitration cannot be compelled on an objecting party. *Compare, MCI Telcoms. Corp. v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556 \*97-\*98 (N.D. Cal. Sept. 29, 1998) (binding

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reasonableness standard and will require a party challenging the reasonableness of any term in the agreement to rebut that presumption. (emphasis added)

<sup>89</sup> One can only imagine AT&T's hue and cry if one of Commission's prescribed terms in this case provided that AT&T "consents" to a waiver of the right to appeal when it has not in fact done so.

<sup>90</sup> *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

commercial arbitration optional, not mandatory, and thus acceptable) *with Verizon N.Y., Inc. v. Covad Communs. Co.*, 2006 U.S. Dist. LEXIS 7414 \*12-21 (N.D.N.Y Feb. 3, 2006) (binding commercial arbitration mandatory and inconsistent with federal law). The Commission has broad and sweeping powers and a considerable amount of discretion, to be sure. But it does not have the authority to coercively eliminate a party's statutory rights to administrative and judicial review of any future disputes, or completely delegate the Commission's statutory jurisdiction to a private body of alternative dispute resolution professionals.

AT&T is anxious to avoid disputes before the one venue that is likely to see through its word-games and blame-shifting. AT&T wants to not be subject to forfeitures or fines if there is a dispute over an AT&T violation. *Data Roaming Order* ¶80. WCX, on the other hand, merely wishes to preserve the right to seek Commission relief.

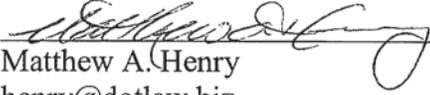
The Commission cannot and should not force WCX to "consent" to always litigate any disputes before private commercial arbitrators. *Data Roaming Order* ¶83 says the Commission will not mandate binding commercial arbitration, yet AT&T is before the FCC in this case asking that it to that very thing.

## **Conclusion**

The law supports WCX's position and proposals, and disfavors AT&T's offers. WCX's proposed terms should be adopted and used as the contract for roaming between WCX and AT&T.

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Respectfully submitted,

  
Matthew A. Henry  
[henry@dotlaw.biz](mailto:henry@dotlaw.biz)  
W. Scott McCollough  
[wsmc@dotlaw.biz](mailto:wsmc@dotlaw.biz)  
McCollough|Henry PC  
1250 S. Capital of Texas Hwy, Bldg 2-235  
West Lake Hills, TX 78746  
Tel: 512.888.1114  
Fax: 512.692.2522

*Counsel for Worldcall Interconnect, Inc.*